STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1116

In re the Marriage of:
Russell Clarence Thompson, petitioner,
Appellant,

vs.

Elaine Lois Gerhardt,
f/k/a Elaine Lois Thompson,
Respondent.

Filed April 14, 2009
Affirmed
Hudson, Judge

Aitkin County District Court
File No. 01-F8-02-000002

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402; and

Debra E. Yerigan, Messerli & Kramer, P.A., 1800 Fifth Street Towers, 150 South Fifth Street, Minneapolis, Minnesota 55402 (for appellant)

Lyndsay J. Howard, Howard Family Law, LLC, 190 South River Ridge Circle, Suite 308, Burnsville, Minnesota 55337 (for respondent)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this spousal maintenance dispute, appellant challenges the district court's denial of his motion to modify maintenance and award of respondent's attorney fees. Appellant argues that the district court abused its discretion when it found that respondent's increased income was not a substantial change in circumstances that made the current maintenance payments unreasonable and unfair. Because respondent's increased income does not render the existing award unreasonable or unfair, and because the record supports the district court's findings of fact and award of attorney fees, we affirm.

FACTS

Russell Clarence Thompson (appellant) and Elaine Lois Gerhardt (respondent) were married in July 1988. The marriage was dissolved by order of the district court on October 14, 2002. At the time of the dissolution, the district court found that appellant

> is currently retired and receives Social Security in the amount of $1,233 per month in addition to receiving $949.33 per month from his Cenex Pension Trust, $2,060 per month from his Cenex Annuity, and a monthly draw of $1,700 from his C.N.A. Annuity, for a total monthly income of $5,932.33 at this time. Once [appellant's] C.N.A. Annuity has been fully drawn down, [appellant's] monthly income will be reduced to $4,332.33.

The district court found that while "[r]espondent's future plans are uncertain . . . [i]t is unlikely that even with education or training that [she] could obtain a similar position to which she had earlier in her career. She certainly will not be able to accumulate pension or retirement benefits to enable her to be self-supporting after

retirement." The district court further found that, "neither party will likely be able to maintain a standard of living approaching what they had during the marriage," and, "[a]lthough [r]espondent did earn $13.70 per hour there is no evidence that such a job or equivalent job would exist on a full time basis or could generate for [r]espondent $28,000-plus income per year." And, finally, the district court found that respondent "no longer has access to the income she had been receiving. She lost retirement benefits."

But after detailing both of the parties' ages and health conditions, the district court determined, "as between the parties only the [r]espondent is likely to be able to augment her income through employment." The district court imputed respondent's income at minimum wage and awarded spousal maintenance of $1,000 per month. This award was apparently permanent in nature, since the district court made no mention of "rehabilitative" maintenance and detailed respondent's inability to be self-sufficient.

In reality, respondent was able to make more than minimum wage. From June 2004 until the time of appeal, respondent was employed full-time as a customer service representative. In her answer to interrogatories, respondent stated that her gross monthly income is $3,183.88 (based on $18.37 per hour). She also receives $225.51 per month from her Land O'Lakes pension. After standard payroll, tax, and monthly insurance deductions of $951.00, respondent's *net* monthly income is $2,457.99, more than twice the *gross* monthly income of $1,118.17 imputed to her at the time of the dissolution order.[1] In light of respondent's income, appellant filed a motion in September 2007 to

[1] According to the United States Department of Labor, minimum wage in 2002 (the time of the dissolution order) was $5.15 per hour. According to the district court (at the time

either terminate or modify his maintenance obligation, claiming that a substantial change in circumstances (respondent's income) had made the original award unreasonable and unfair. Respondent filed a motion and counter-motion requesting denial of appellant's motion, a maintenance increase to $1,400 per month, and that appellant be ordered to maintain life insurance as security for his maintenance obligation. Respondent also requested need-based and conduct-based attorney fees.

After a hearing on February 15, 2008, the district court denied both parties' motions to modify spousal maintenance, ordered appellant to maintain life insurance with a death benefit in favor of respondent as security for the maintenance obligation, and awarded respondent attorney fees in the amount of $2,750. The district court based its denial of the motions to modify on the following findings: (1) appellant's decrease in monthly income due to the loss of his C.N.A. annuity was known and considered by the district court at the time of dissolution, and was therefore not a proper basis for modification; (2) at the time of the dissolution "it was known by all that [r]espondent would have to go to work to survive," and thus there was no substantial change in circumstances; (3) appellant was retired at the time of the parties' dissolution and his financial circumstances have not forced him to obtain employment; (4) respondent has minimal retirement assets, lives paycheck to paycheck and "may not be financially able to retire." The district court based its order regarding appellant's obligation to maintain life insurance on the fact that appellant was previously ordered to maintain the policy

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of the motions to modify), this wage combined with respondent's Land O'Lakes pension of $225.51 per month equals $1,118.18 in gross monthly income.

with a death benefit in favor of respondent, but appellant had never paid a premium on the policy. As a result, the premiums had been taken from the cash value of the policy, thus substantially reducing the death benefit. Lastly, the district court awarded respondent need-based attorney fees based on its finding that attorney fees were necessary, respondent did not have the means to pay them, appellant had "essentially made himself cash poor while accumulating substantial non-homestead assets," and "[u]nder the circumstances" payment of a portion of respondent's attorney fees was appropriate. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion when it denied his motion for modification of his maintenance obligation. Appellate courts review a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997); *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989); *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). A district court abuses its discretion if it resolves the matter in a manner "that is against logic and the facts on the record." *Dobrin*, 569 N.W.2d at 202.

Respondent's increased income

Appellant argues that respondent's increased income constitutes a substantial change in circumstances that renders the existing award of maintenance unreasonable and unfair because the increase in respondent's income was not anticipated at the time of dissolution. The relevant statute provides:

> The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee . . . .

Minn. Stat. § 518A.39, subd. 2(a) (Supp. 2008) (formerly Minn. Stat. § 518.64). A district court may modify spousal maintenance if a party (1) shows a substantial change in circumstances, and (2) demonstrates that the change in circumstances renders the existing maintenance amount unreasonable and unfair. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997); *Savoren v. Savoren*, 386 N.W.2d 288, 291 (Minn. App. 1986). "While permanent maintenance does not compel future self-sufficiency by the recipient, it also does not preclude an obligor from subsequently demonstrating that a recipient has, in fact, become self-sufficient." *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000); *see also Poehls v. Poehls*, 502 N.W.2d 217, 218 (Minn. App. 1993) (stating that "permanent maintenance" is a term of art that places a burden on the obligor to demonstrate that a maintenance award should be modified due to changed circumstances). The district court must determine the parties' expenses, as well as income, to determine the need for maintenance and the obligor's ability to pay. *Bliss v. Bliss*, 493 N.W.2d 583, 587 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). When determining whether a substantial change has rendered the terms of the original decree unreasonable and unfair, a stipulation may be relevant if one party claims that this change was not or could not have been anticipated. *Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn. 1997). Likewise, in *Abbott v. Abbott*, the supreme court determined that a

change in circumstances (the emancipation of the husband's adopted son) could *not* be a basis for finding that there had been a substantial change in circumstances because the emancipation was "specifically planned for" in the stipulation. 282 N.W.2d 561, 564 (Minn. 1979).

Though here the original order was not based on a stipulation, the reasoning of *Abbott* and *Beck* are applicable. According to appellant, the change in respondent's circumstances (increased earning capacity) was not anticipated, as evidenced by the fact that the initial award was for permanent maintenance and the district court indicated that it did not expect respondent to enter the workforce and/or achieve some level of self-sufficiency. But the district court disagreed with appellant's characterization of the original order and reasoned that respondent's re-entrance into the workforce *was* anticipated because it was "contemplated by the [c]ourt that [respondent] would be forced to return to work by the financial circumstances she was left in." In support of this finding, the district court observed that at the time of dissolution it imputed respondent's income at minimum wage, thus implying that she would eventually have to be gainfully employed in order to survive. The record supports the district court's findings.

Moreover, on a motion to modify maintenance, the district court must apply the factors for an award of maintenance under Minn. Stat. § 518.552 that exist at the time of the motion, including "the standard of living established during the marriage." Minn. Stat. §§ 518A.39, subd. 2(d) (Supp. 2008), 518.552, subd. 2(c) (2006); *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409–12 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000); *see also Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004)

(stating that "[t]he purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances"). Thus, on a motion to modify maintenance, a district court must also consider: the financial resources of the party seeking maintenance (including marital property apportioned to the party and the party's ability to meet needs independently); the duration of the marriage; the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance; the age, and the physical and emotional condition of the spouse seeking maintenance; the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property. Minn. Stat. §§ 518A.39, subd. 2 (2006), 518.552, subd. 2. A recipient of maintenance is not automatically penalized by the termination of maintenance if employed at the time of dissolution and his or her earnings subsequently increase. *Borchert v. Borchert*, 391 N.W.2d 74, 76 (Minn. App. 1986). No single factor for determining maintenance is dispositive. *Erlandson*, 318 N.W.2d at 39.

In compliance with these statutes, the district court here properly took into account more than just the current income of the parties. While the district court found that respondent had "indeed done well for herself" with an income of $3,183 per month, the district court also considered the parties' health, ages, and the probability that respondent may not be financially able to retire. The district court also took into account appellant's post-dissolution accumulation of debt and purchases of real estate and vehicles. The

district court also examined respondent's current need for support and balanced it against appellant's current financial situation and ability to pay.

While we agree with appellant that the increase in respondent's income was a substantial change in circumstances, we disagree that it rendered the existing award unreasonable or unfair. At the time of the dissolution, the district court anticipated that respondent would have to return to work in order to support herself. And, ultimately, despite appellant's argument to the contrary, the record reflects that respondent is worse off than before dissolution of the marriage. On this record, and because the district court took the required factors under Minn. Stat. § 518.552 into account, the district court did not abuse its discretion when it held that respondent's income from her employment does not render the existing maintenance award unreasonable or unfair.

Appellant's decreased income

Appellant also argues that his own decreased income constitutes a substantial change in circumstances that renders the original award of maintenance unreasonable and unfair. It must be reasonably clear that an obligor has the ability to pay whatever award is made and meet his own reasonable expenses. *See Beckstrom v. Beckstrom*, 385 N.W.2d 402, 403 (Minn. App. 1986) (finding error in the ordering of spousal maintenance where ex-husband lacked ability to pay). But besides the fully drawn-down C.N.A. annuity, appellant has not specified exactly how his income has decreased from the original order. Appellant directs us to his affidavit in support of his motion to modify and his answers to interrogatories to support his contention that his monthly expenses are

greater than his monthly income. But this information addresses a change in appellant's expenses, not income.

In determining a party's reasonable needs, a district court's calculation of estimated living expenses must be supported by the evidence. *Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989). Both appellant and respondent submitted budgets to the district court. Appellant claimed monthly living expenses of $4,845.04 without the maintenance obligation and $6,109.04 with the obligation. Respondent claimed monthly living expenses of $3,592. The district court did not recite either of these figures in its order, yet it determined that appellant had "made himself cash poor while accumulating substantial non-homestead assets." The district court made no findings with respect to respondent's monthly expenses. Appellant claims that he is financially unable to meet a $1,000-per-month maintenance obligation without incurring more debt.

Under Minn. Stat. § 518.552, subd. 2(g) (2006), the district court must take into account "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." Preferably, the district court would have specifically identified and evaluated appellant's reasonable living expenses when determining the amount of income he has available for payment of maintenance. But even though the district court did not explicitly consider the monthly expenses of either party, it did take into account appellant's post-dissolution acquisition of real estate and "non-homestead assets" and the fact that "his financial circumstances have not forced him to obtain employment." *See Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (stating that although findings may not be specific, if they indicate that the relevant

statutory factor has been considered, a remand is not appropriate). Although the district court's findings regarding expenses were not overly in-depth, the entirety of the order indicates that the court considered the relevant factors under Minn. Stat. § 518.552, subd. 2, and thus did not abuse its discretion in denying appellant's motion to modify his spousal maintenance obligation.

II

Appellant argues that the district court abused its discretion when it awarded respondent attorney fees. An award of attorney fees under Minn. Stat. § 518.14, subd. 1 (2008), "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). Minn. Stat. § 518.14, subd. 1, provides:

> [T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:
> (1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

A lack of specific findings on the statutory factors for a need-based fee award under Minn. Stat. § 518.14, subd. 1, is not fatal to an award when review of the order reasonably implies that the district court considered the relevant factors and when the district court was familiar with the history of the case and had access to the parties'

financial records. *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001) (quotation omitted).

Here, the district court's findings regarding the parties' previous litigation and appellant's ability to meet his maintenance arrearages demonstrate the district court's familiarity with the history of the case. Moreover, the district court found that "[t]he cumulative effect of all of [appellant's] post-decree actions is that any spousal maintenance that [r]espondent would have otherwise seen (after taxes) has been eaten up by attorney[ ] fees." This finding indicates that respondent asserted her rights in good faith. Moreover, the fact that the district court found that appellant had the ability to pay over $45,000 in his own attorney fees suggests that appellant has the means to pay for respondent's attorney fees. Thus, the district court did not abuse its discretion by awarding respondent attorney fees.

Appellant further argues that there is nothing in the record to support respondent's claim that she incurred $2,750 in fees and costs by responding to appellant's motion. Appellant contends that, under these circumstances, respondent had an obligation to follow the procedure outlined in Minnesota General Rule of Practice 119, which requires that requests for attorney fees be made by motion and supported by documentation of work completed and the attorney's rates. But appellant's argument is unavailing. First, the affidavit from respondent's attorney in support of respondent's motion and counter-motion makes it clear that the fees were incurred as a result of appellant's motion; respondent would not need to file a motion to *continue* spousal maintenance, unless appellant had filed a motion to *terminate* it. Respondent's attorney's affidavit also

clearly details the amount incurred in attorney fees. Moreover, in *Gully v. Gully* the supreme court recognized that rule 119 is not intended to limit the court's discretion, but is intended to encourage streamlined handling of fee applications and to facilitate filing of appropriate support to permit consideration of this issue. 599 N.W.2d 814, 826 (Minn. 1999) (quotation omitted). Equally important, the *Gully* court held that it was not an abuse of discretion for the district court to waive the rule 119 requirements where the district court is familiar with the case and has access to the parties' financial records. *Id.*

Here, the record amply demonstrates the district court's familiarity with the case, and the district court's findings of fact regarding the attorney's efforts and the financial situation of the parties are likewise sufficiently supported by the record. The district court did not abuse its discretion by awarding respondent need-based attorney fees.

For all of the reasons stated herein, we conclude that the district court did not abuse its discretion when it denied appellant's motion to modify spousal maintenance and awarded respondent need-based attorney fees.

Affirmed.