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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0150**

Ralph F. Swenby, petitioner,
Appellant,

vs.

Peggy R. Swenby,
Respondent.

**Filed September 8, 2009
Reversed and remanded
Stauber, Judge**

Hennepin County District Court
File No. 27FA000126087

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55125 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal in this spousal maintenance dispute, appellant-husband argues that the
district court abused its discretion in denying his motion to terminate his spousal
maintenance obligation by erroneously considering his current wife's financial

circumstances. Because the district court improperly considered appellant's current wife's financial circumstances in denying appellant's motion, we reverse and remand.

FACTS

On July 9, 1987, the marriage between appellant Ralph Swenby and respondent Peggy Swenby was dissolved. At the time of the dissolution, appellant was employed full-time as a solo practicing dentist earning a net monthly income of \$3,050. The judgment and decree equally divided the marital assets and ordered appellant to pay permanent spousal maintenance in the amount of \$1,400 per month.

In June 2008, at age 73, appellant moved to terminate his maintenance obligation. To support his motion, appellant claimed that he retired on December 31, 2001, at the age of 67 because he developed a medical condition known as "essential tremor." According to appellant, this condition caused his hands to shake and tremble, preventing him from continuing his practice as a dentist. Appellant claimed that since his retirement, his sole source of income consists of his social security benefits of approximately \$1,560 per month. Thus, appellant argued that there had been a substantial change in circumstances rendering his existing support obligation unreasonable and unfair.

After a hearing on appellant's motion, the district court wrote a letter to appellant's counsel requesting information about appellant's assets and the assets and income of appellant's current wife. The court also requested information pertaining to respondent who is presently a resident at an assisted-living center. Specifically, the court requested "[c]onfirmation [from appellant] that Respondent will not be removed from her assisted living center should maintenance payments cease."

In November 2008, appellant submitted a second supplemental affidavit complying with the district court's request. The affidavit detailed the parties' assets and appellant's current wife's bi-weekly gross income of \$7,870. After receiving this information, the district court issued its order denying appellant's motion. In denying the motion, the district court noted appellant's assets, as well as the assets and income of appellant's present wife. Therefore, although the court found that appellant did not retire in bad faith, the court found that appellant "has failed to show that continuing to pay his agreed upon maintenance obligation would be unfair or unreasonable." This appeal followed.

D E C I S I O N

A district court has broad discretion in deciding whether to modify a party's maintenance obligation. *Kielley v. Kielley*, 674 N.W.2d 770, 775 (Minn. App. 2004). This court will not disturb the district court's decision concerning maintenance absent an abuse of that discretion. *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). A district court abuses its discretion if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997).

An order for maintenance may be modified upon a showing of, among other things, substantially increased or decreased gross income or substantially increased or decreased need of a party. Minn. Stat. § 518A.39, subd. 2(a) (2008). A party seeking modification must show not only a substantial change in circumstances, but also that the

“change has the effect of rendering the original maintenance award both unreasonable and unfair.” *Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn. 1997).

Appellant argues that the district court abused its discretion in denying his motion to terminate his maintenance obligation because the court erroneously considered the financial circumstances of his current wife. We agree. Minnesota law provides that “[o]n a motion for modification of maintenance . . . the court: . . . shall not consider the financial circumstances of each party’s spouse, if any.” Minn. Stat. § 518A.39, subd. 2(d)(1) (2008). Here, in the order denying appellant’s motion, the district court made specific findings regarding appellant’s current wife’s substantial income and assets. The court found that appellant “has demonstrated through income from his personal assets and his wife’s income, as well as his reported monthly expense statement that his standard of living has not and will not suffer. [Appellant] has failed to show that continuing to pay his agreed upon maintenance obligation would be unfair or unreasonable.” The court’s conclusion is in direct conflict with the language of Minn. Stat. § 518A.39, subd. 2(d)(1), that prohibits basing a maintenance award on the financial circumstances of the spouse of an obligor. Therefore, we reverse the district court’s order and remand the matter for reconsideration of appellant’s motion and a decision that is not based on appellant’s current wife’s income and financial circumstances.

Reversed and remanded.