STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0005

Marcia Rona Fischer, petitioner,
Respondent,

vs.

Gregory Lynn Fischer,
Appellant.

Filed October 6, 2009
Affirmed as modified
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-000288435

Mark E. Mullen, Kelly M. McSweeney, Jensen, Mullen & McSweeney, PLLP, 1350 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431 (for respondent)

John R. Hill, Larkin Hoffman Daly & Lindgren Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant challenges the district court's order dividing certain property, setting his spousal-maintenance and child-support obligations, and requiring him to secure his maintenance obligation with life insurance. We affirm.

FACTS

Appellant Gregory Fischer and respondent Marcia Fischer were married from February 1986 to January 2005. In a dissolution judgment entered in June 2005, the district court ordered appellant to pay respondent permanent spousal maintenance of $950 per month and child support of $1,298 per month. Appellant was required to secure the child-support obligation with life insurance. The judgment also directed a division of the parties' assets, which included several retirement and investment accounts, each valued between $2,000 and $60,000. The judgment did not include any stock that appellant owned in Protient Inc.

Following the involuntary termination of his employment, appellant moved the district court to modify his child-support and maintenance obligations. In an August 2006 order, the district court denied appellant's motion to modify his child-support obligation, but temporarily suspended his spousal-maintenance obligation. The order stated that appellant would accrue arrears during the suspension and that the spousal-maintenance obligation would be immediately reinstated at $950 per month once appellant obtained employment. Appellant sought reconsideration from the district court. In its subsequent order filed August 17, the district court denied the request to reconsider

the ruling regarding maintenance, but temporarily reduced appellant's monthly child-support obligation to $480, beginning October 1, 2006, until appellant obtained employment. At that time, the child-support obligation would revert to $1,298 per month.

Appellant challenged the August 2006 orders in this court. *Fischer v. Fischer*, No. A06-1656, 2007 WL 2107249 (Minn. App. July 24, 2007). We reversed the district court, holding that the district court erred as a matter of law by ruling that maintenance arrearages would accrue during the suspension, because appellant had no obligation to pay spousal maintenance during a suspension. *Id.* at *2. Further, this court held that, while the order to automatically reinstate the obligation to pay spousal maintenance once appellant was reemployed was within the district court's discretion, the district court abused its discretion by automatically reinstating the prior amount of maintenance without consideration of appellant's income upon reemployment. *Id.* This court directed the district court to recalculate the spousal-maintenance and child-support obligations once appellant was employed and his actual income could be determined. *Id.* Appellant notified respondent in November 2006 that he was reemployed. The parties' child emancipated in June 2007.

In March 2008, respondent moved the district court to order appellant to pay permanent spousal maintenance from November 2006 "in an amount no less [than] what was awarded in the original Judgment and Decree" and to pay child support from November 2006 through the child's emancipation "in an amount no less [than] the amount set forth in the original Judgment and Decree." Respondent also asked the

district court to award her the Protient stock that appellant had failed to disclose during the dissolution proceedings.

Following a hearing, the district court ordered appellant to (1) pay respondent $950 per month in permanent spousal maintenance from November 2006 forward; (2) secure the maintenance obligation with a $100,000 life-insurance policy; (3) pay respondent $5,454 for child support for the time frame of November 2006 to June 2007; and (4) pay respondent $13,310.40, which was 60% of the value of the Protient stock marital asset that the district court found appellant had intentionally failed to disclose at the time of the dissolution. Appellant's motion to amend the findings and order was denied by the district court. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion by setting the spousal-maintenance and child-support awards at the same amounts that had been ordered in the dissolution judgment. We review a district court's awards of maintenance and child support for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (maintenance); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (support). A district court abuses its discretion in setting maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin*, 569 N.W.2d at 202 & n.3. Similarly, a district court abuses its discretion by setting child support if it sets child support in a manner that is against logic and the facts on record. *Rutten*, 347 N.W.2d at 50. Determinations of an obligor's income for purposes of

maintenance, as well as child support, are findings of fact and will not be set aside unless clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004) (maintenance); *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002) (support).

A. Spousal maintenance

When determining spousal maintenance, the district court balances the recipient's financial needs and the recipient's ability to meet those needs against the obligor's financial condition. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982). At the time of the dissolution, the district court found that respondent was capable of earning between $25,800 and $31,800 per year and that she had reasonable monthly expenses of $4,305. The district court found that appellant had a gross annual income in excess of $98,000 and reasonable monthly expenses of $3,142–$3,557. Based on these findings, the district court concluded that respondent was entitled to $950 monthly permanent maintenance.

In its July 2008 order, the district court found that appellant voluntarily terminated his employment in February 2008 to start a new business and that appellant was "capable of earning at least $90,000 annually." Appellant argues that the finding of his income is clearly erroneous. We disagree. To the extent that appellant argues that the district court ran afoul of *Walker v. Walker*, 553 N.W.2d 90, 95 n.1 (Minn. App. 1996), and similar caselaw by imputing income to him without finding that he had reduced his income in bad faith, we reject that argument. The order denying appellant's motion for amended findings states that the district court found in its July 2008 order that appellant

"voluntarily terminated his employment while aware of his potential obligation to [respondent]" and that this finding "is tantamount to bad faith." Whether a party acts in good faith is essentially a credibility determination upon which appellate courts defer to the district court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations); *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (stating that whether party acts in good faith is essentially a credibility question); *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 241 (Minn. App. 2003) (applying *Tonka Tours* in a family-law case), *review denied* (Minn. Nov. 25, 2003).[1]

To the extent that appellant otherwise challenges the finding of his income, we note that the finding was significantly affected by his general credibility. A district court "is not required to accept even uncontradicted testimony if the surrounding facts and circumstances afford reasonable grounds for doubting its credibility." *Varner v. Varner*, 400 N.W.2d 117, 121 (Minn. App. 1987). Here, the surrounding circumstances include the district court's finding, consistent with the record, that in 2006, when he was requesting a reduction in his obligation, appellant earned almost $15,000 more than he claimed to be earning at the time of dissolution. In addition, the district court found that appellant intentionally failed to disclose the Protient stock during the dissolution proceeding; appellant did not challenge that finding on appeal. *See Bollenbach v.*

[1] Our deference to the district court's credibility determinations resolves appellant's challenges to the district court's finding of his expenses. He argues that the district court should have considered certain debts because they were associated with his unemployment and his job search. The district court explicitly found these claims to be not credible.

Bollenbach, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970) (stating that a party's failure to "make a full and accurate disclosure" of assets and liabilities "justifies inferences adverse to the party").

To the extent that appellant claims that the source of the $90,000 income imputed to him is unclear, we must also reject that argument. The district court found in the 2005 dissolution judgment that appellant's gross annual income was then $98,143. Appellant's 2006 federal tax return shows that appellant's total income from employment and nonemployment sources was $98,232 after more than $7,000 in deductions. While the district court found that appellant's 2007 income from employment was $72,847, this figure apparently did not include any nonemployment income. Further, because appellant's decision to voluntarily leave employment in February 2008 was tantamount to bad faith, the weight to be given his subsequently reduced income is limited. Even if additional findings by the district court on this point would have been helpful, on this record, we cannot say that the finding of $90,000 in income imputed to appellant is clearly erroneous.

Appellant also argues that the district court failed to make a clear finding of respondent's income. The district court found respondent's annual salary to be approximately $27,000, that she is eligible for commissions, and that she earned $37,659.50 in 2007. More specific findings of respondents' income would undoubtedly have been helpful. *See Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997) (explaining importance of findings of the parties' baseline circumstances); *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005) (stating, in the context of a child-

support order, that "[u]nless a support order provides a baseline for future modification motions by reciting the parties' then-existing circumstances, the litigation of a later motion to modify that order becomes unnecessarily complicated because it requires the parties to litigate not only their circumstances at the time of the motion, but also their circumstances at the time of the order sought to be modified") (citing *Hecker*, 568 N.W.2d at 709). We cannot say, however, that lack of a more specific finding of respondent's income for maintenance purposes is fatal to her maintenance award. The district court found respondent's reasonable monthly expenses to be $5,127.25. Moreover, respondent must pay taxes on her gross income, and the record reflects that respondent's commissions are not guaranteed. On this record, even if the district court had excluded respondent's commission income from the finding of her income for maintenance purposes, that exclusion would have been consistent with caselaw. *See McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989) (stating that dependable bonuses may be included in calculation of future income for maintenance purposes). We therefore conclude that the district court's finding regarding respondent's income is not clearly erroneous.

Finally, appellant challenges the finding of respondent's expenses, arguing both that the district court improperly adopted respondent's claimed monthly expenses with only minor adjustments and that the district court failed to address respondent's alleged cohabitation. Based on our review of the record and the district court's detailed analysis of respondent's expenses, we are satisfied that there was a sufficient basis for the district court to accept respondent's claimed monthly expenses with the adjustments made by the

district court. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that an appellate court need not "discuss and review in detail the evidence for the purpose of demonstrating that it supports the [district] court's findings," and that its "duty is performed when [it] consider[s] all the evidence . . . and determine[s] that it reasonably supports the findings"); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474–75 & n.1 (Minn. App. 2000) (applying *Wilson* in dissolution case). Moreover, while the district court did not use the word cohabitation, it did find that respondent "has consistently paid [her cohabitant] money for expenses during the time she has resided [with him.]" Thus, we conclude that it adequately considered that aspect of her financial circumstances.

Because the factual findings underlying the maintenance award are not clearly erroneous and the district court did not otherwise misapply the law in setting respondent's monthly spousal maintenance award, we conclude that the district court acted within its discretion in awarding respondent $950 per month as of November 2006, when appellant became employed.[2]

[2] Appellant argues that the district court improperly retroactively modified his spousal maintenance obligation by requiring him to pay maintenance starting in November 2006. He also argues that the district court lacked "jurisdiction" to award respondent maintenance for a period before her March 2008 motion for maintenance. The district court's August 10, 2006 order suspending appellant's maintenance obligation states that, upon appellant's reemployment, "his spousal maintenance obligation shall be immediately reinstated[.]" The district court's July 25, 2008 order found that "[appellant] notified [respondent] in November of 2006 that he had become reemployed." Thus, as this court previously recognized, appellant's maintenance obligation was *automatically* reinstated upon his reemployment, and the only question was the amount of the reinstated obligation. *See Fischer*, 2007 WL 2107249, at *2 (stating that "the [district] court acted within its discretion in ordering the temporary suspension of appellant's maintenance obligation and the *automatic* reinstatement of an obligation to pay upon [his] reemployment" but that the district court had abused its discretion by preordaining the

B. Child support

The district court ordered appellant to pay $5,454 in child support for the time frame of November 2006 to the child's June 2007 emancipation. The district court calculated this amount based on appellant's monthly obligation of $1,298, for a total obligation of $10,384. The district court then subtracted $4,930 that it found appellant had already paid respondent for child support. Appellant challenges both the determination of his monthly obligation for this period and the finding of the amount that he paid during the applicable period.

Appellant's monthly child-support obligation of $1,298 was based on his income at the time of the dissolution. As previously discussed, the district court did not abuse its discretion by imputing a similar income to him. But the district court calculated the total obligation without taking into account the fact that the parties' son became emancipated on June 7, 2007. If the district court had used the emancipation date in its calculation, appellant's total obligation would have been $9,389.

In addition, the district court's finding that appellant had paid only $4,930 in child support from November 2006 through June 2007 lacks support in the record. Appellant asserted in an affidavit that he paid $6,025. This assertion was repeated at the June 2008 hearing, and respondent's counsel did not challenge it. In his motion to amend the findings, appellant noted the discrepancy between the $6,025 figure that he claimed and

---

amount of the reinstated obligation (emphasis added)). We note that because this court's prior opinion expressed a similar concern about the district court's "automatically reinstating appellant's original support obligation," a similar analysis addresses appellant's concern that the district court erred by improperly requiring him to pay child support for November and December 2006. *Id.*

the $4,930 figure that the district court used. The district court's order denying the motion to amend does not directly address this issue. Respondent asserts—without citation—that the record supports the $4,930 figure. *See Cole v. Star Tribune*, 581 N.W.2d 364, 371 (Minn. App. 1998) (noting importance of citations to the record); *Hecker v. Hecker*, 543 N.W.2d 678, 681–82 n.2 (Minn. App. 1996) (same), *aff'd*, 568 N.W.2d 705 (Minn. 1997). But we find nothing in the record to support a finding that appellant paid only $4,930 from November 2006 through June 2007. Based on our review of the record, it appears that appellant paid $5,545 from November 2006 to June 2007 and that appellant's $6,025 figure includes two child-support payments that he made in October 2006. When $5,545 is subtracted from the $9,389 total obligation, the balance is $3,844. We therefore modify the district court's order to reflect an outstanding child-support obligation of $3,844 and affirm the order as modified.

II.

Appellant argues the district court improperly divided the marital interest in the Protient stock that he acquired during the marriage and sold after the dissolution. The district court ordered that respondent receive 60% of the value of the stock that appellant sold; he argues that respondent should only receive 60% of the net benefit—after his cost basis and tax obligations are calculated. Appellant does not challenge the district court's conclusion that he committed fraud on the court by failing to disclose the stock during the dissolution proceedings. *See Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989) (defining fraud on the court). Regardless of the presence or absence of fraud on the court, a district court has the authority, after a dissolution judgment is otherwise final, to

divide marital property not addressed in the judgment. *See Neubauer v. Neubauer*, 433 N.W.2d 456, 461 n.1 (Minn. App. 1988) (stating that pension benefits omitted from the property division in otherwise final dissolution judgment could be divided as "omitted property"), *review denied* (Minn. Mar. 17, 1989); *see also Searles v. Searles*, 420 N.W.2d 581, 583 (Minn. 1988) (stating that "where a decree makes no division of any real estate and, indeed, makes no mention of real estate, it would seem the matter of ownership rights remains to be determined" (footnote omitted)); *cf. Brink v. Brink*, 396 N.W.2d 95, 97 (Minn. App. 1986) (stating that "[w]e are aware of no legal theory under which a party to a dissolution who unintentionally omits an asset from a property division is considered to have abandoned his or her rights to that asset").

We apply an abuse-of-discretion standard of review to a district court's property division and its decision regarding whether to consider the tax consequences of a property division. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002) (property division); *Maurer v. Maurer*, 623 N.W.2d 604, 607 (Minn. 2001) (tax consequences). Here, the district court was not only mindful of its obligation to divide property that should have been considered during the dissolution proceedings, but also of its statutory obligation to compensate respondent for the injury she suffered as a result of appellant's concealment of the stock. *See* Minn. Stat. § 518.58, subd. 1a (2008) (stating that parties to a dissolution proceeding owe a fiduciary duty to each other and that if the court finds that, during a dissolution proceeding, a party concealed a marital asset, the court "shall compensate the other party by placing both parties in the same position that they would have been in had the . . . concealment . . . not occurred"). On this record, appellant has

not shown that the district court abused its discretion by dividing the interest in the stock on the basis of its gross sale value. Nor has appellant shown that any inequality in the distribution of the stock proceeds renders the property division inequitable. *See* Minn. Stat. § 518.58, subd. 1 (2008) (requiring an equitable division of marital property); *Justis v. Justis*, 384 N.W.2d 885, 888 (Minn. App. 1986) (stating that a "property division need not be mathematically equal to be just and equitable"), *review denied* (Minn. May 29, 1986).

III.

Finally, without citing any authority, appellant argues that the district court abused its discretion by ordering him to secure his maintenance obligation with a $100,000 life-insurance policy because the security was not ordered in the dissolution judgment and respondent did not request it. We disagree. "In *all* cases when maintenance . . . payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order." Minn. Stat. § 518A.71 (2008) (emphasis added). Whether to require security for a maintenance obligation and how much security to require are within the district court's broad discretion. *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). We therefore conclude that the district court acted within its discretion by ordering appellant to secure his maintenance obligation.

Affirmed as modified.