STATE OF MINNESOTA
IN COURT OF APPEALS
A09-613

In re the Marriage of:
Gail Mary Stone,
Respondent,

vs.

Thomas J. Stone, Jr.,
Appellant.

Filed April 20, 2010
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-FA-07-3160

Gail Mary Stone, Minneapolis, Minnesota (pro se respondent)

Erik F. Hansen, Nathaniel P. Hobbs, Patrick Burns & Associates, Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

KLAPHAKE, Judge

Appellant Thomas J. Stone, Jr., challenges the district court's award of $800 per month in permanent maintenance to respondent Gail Mary Stone in the partially stipulated judgment dissolving their marriage. Appellant argues that the district court

overstated respondent's expenses and his income, understated his expenses without providing a basis for its findings, and improperly awarded respondent permanent spousal maintenance because it found that she would be unlikely to become self-supporting.

Because the findings are supported by the evidence, are not clearly erroneous, and support its decision, we conclude that the district court did not abuse its discretion. We therefore affirm.

D E C I S I O N

Standard of Review

The district court has broad discretion in determining maintenance issues, and its decision will be reversed only for an abuse of discretion. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). The district court abuses its discretion when it improperly applies the law or makes findings unsupported by the evidence. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009). Findings will be set aside only if they are clearly erroneous. *Id.* Determination of income for purposes of setting maintenance is a question of fact. *Id.*

Deductions of Expenses from Respondent's Rental Income

Appellant argues that the district court erred because it deducted respondent's anticipated rental expenses for a fourplex rental property from the rental income she expected to receive. Appellant charges that this was an abuse of discretion because the parties had stipulated that respondent would "be solely responsible for any future renovation, repairs and costs" for the fourplex. Further, the parties adjusted the otherwise equal property division to reflect the risk that respondent assumed in renovating this fire-damaged property.

For purposes of calculating a support order,[1] "gross income" includes any periodic payment to an individual, including "self-employment income." Minn. Stat. § 518A.29 (2008).[2] "Self-employment income" is defined by Minn. Stat. § 518A.30 (2008), and includes "gross receipts" less "ordinary and necessary expenses required for self-employment or business operation." *Id.* Certain expenses may not be deducted, such as accelerated depreciation, investment tax credits, or inappropriate or excessive expenses. *Id.* The party seeking to deduct an expense has the burden of proof. *Id.* Appellant objects to the district court's allowance of a deduction for expenses associated with renting the fourplex.

Appellant has conflated two separate ideas. The parties stipulated that respondent would receive the fourplex as part of the property settlement. The parties stipulated for purposes of the property settlement that the fourplex was worth $325,000 when the insurance proceeds were taken into account. The parties also agreed that respondent assumed the risk of rebuilding the fourplex and would hold appellant harmless for future repairs and renovations. Respondent has not been asked to pay for future repairs or renovations or repair from the fire.

The question of respondent's income for purposes of maintenance is a separate issue from the property settlement. Respondent receives income from the rental of three of the units; under Minn. Stat. § 518A.30, respondent is permitted to deduct reasonable

[1] "Support order" includes an order for maintenance of a spouse or former spouse. Minn. Stat. § 518A.26, subd. 21(3) (2008).

[2] Although on its face this statute applies only to child support, the supreme court has determined that Minn. Stat. § 518A.29 also applies to maintenance calculations. *See Lee*, 775 N.W.2d at 635 n. 5.

and necessary business expenses to arrive at a figure for gross income. Respondent submitted receipts and bills in support of her business expenses, and the district court found these to be reasonable. These findings are not clearly erroneous and are supported by record evidence. *See Melius*, 765 N.W.2d at 414. The district court did not abuse its discretion by deducting these expenses from respondent's rental income in order to determine her income for maintenance purposes.

Appellant's Income

Appellant asserts that the district court abused its discretion in determining his income because its findings were not supported by record evidence. "The district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). We review the record in the light most favorable to the district court's findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

Gross income for purposes of support or maintenance is calculated in accordance with Minn. Stat. § 518A.29. Gross income includes "periodic payments . . . salaries, wages, commissions, self-employment income . . . and potential income under section 518A.32." *Id.* at (a). It also includes "[e]xpense reimbursements or in-kind payments . . . [that] reduce personal living expenses." *Id.* at (c).

The district court may use potential income if it determines that a parent is voluntarily unemployed or underemployed or "if there is no direct evidence of any

income." Minn. Stat. § 518A.32, subd. 1 (2008).[3] The statute sets forth three methods for determining potential income. Here, the first is applicable: "the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." *Id.* at subd. 2 (2008).

The district court used an average of his Schedule C income for years 2002 through 2005 to determine appellant's potential income, but it did not explain why it chose an average of these four years and why it did not include income from 2006, which was also available. The findings show an abrupt drop in reported income beginning in 2005, the year after respondent filed for dissolution. Several findings document why the district court did not accept appellant's assertions as to income: (1) appellant's claim of business expenses for multiple phones and vehicles was high, when he also asserted he had no employees; (2) appellant failed to provide all documentation submitted to the IRS for an audit, despite respondent's request; (3) appellant claimed gross annual income of $7,100 for tax year 2007, with an additional vague assertion of accounts payable not assigned to a tax year; (4) appellant made cash payments to temporary employees; (5) appellant hired temporary employees with skills comparable to his own at the rate of $35 per hour; the district court found that if he registered with a temporary employment agency, appellant could earn $72,000 per year for full-time work; (6) appellant regularly bartered or traded skills for his benefit, including dental work and assistance in building a

[3] Again, although this section refers to support, the rationale of *Lee* implies that this section is also applicable to maintenance. *Lee* explicitly states that Minn. Stat. § 518A.29 refers to both support and maintenance; this section refers to Minn. Stat. § 518A.32.

garage; (7) appellant claimed the poor economy was responsible for the downturn in his income, but he did not offer any proof of that and did not market his business, attempt to expand it, or seek temporary employment, leading the court to conclude that appellant was not making a "good-faith effort to maximize his income and he has done so to avoid support and maintenance obligations"; (8) the "historical spending by this [c]ouple does not comport with the income figures presented by [appellant], who as a self-employed contractor had a great ability to use business income for personal use and to limit his reportable income"; (9) the discrepancy in spending and income led the court to conclude that appellant was underreporting his income by about $10,000 per year; (10) appellant had $9,600 in yearly rental income; (11) appellant's expert, his personal accountant, did not address appellant's income for support purposes, but rather focused on the tax implications of that income; (12) respondent's expert was more credible; and (13) although appellant provided his tax records, he did not conduct a spending audit that would have identified cash income or income from other sources. In short, the court wholly disbelieved appellant's testimony because of the discrepancies between spending and income and the failure to provide documentation.

Under Minn. Stat. § 518A.32, the district court may determine potential income by finding a party's historical earnings, employment potential, occupational qualifications, and earning levels in the community. Here, the district court has done just that. The court's failure to be more precise is a result of appellant's failure to provide requested documentation. Viewing the record in the light most favorable to the findings, the district

court's findings are not clearly erroneous, and its determination of income is not an abuse of discretion.

Appellant's Expenses

Appellant next argues that the district court abused its discretion by reducing the amount of expenses he claimed, thus increasing the amount of money available for maintenance, without providing a basis for the reduction. Calculation of appellant's income and expenses is critical to an award of maintenance because the court must consider both the financial resources of the party seeking maintenance as well as the obligor's ability to pay. Minn. Stat. § 518.552, subd. 2 (2008).

According to the district court's findings, appellant claimed monthly expenses of $4,937. The court found that appellant claimed $570 in health insurance premiums, which included almost $300 for respondent and an emancipated child. The court rejected appellant's two life insurance policy expenses, totaling $283 per month, because the beneficiaries of the policies were unknown. The court rejected appellant's claim of $73 per month for storage units for his business because they were not personal expenses. The court noted that appellant did not reduce his monthly expenses for certain payments made on his behalf by his business, including telephone, gasoline, and groceries. The court also noted that while appellant claimed $300 per month for gasoline, he did not specifically delineate whether the amounts were for personal or business use. Appellant claimed $300 per month for groceries but testified that his significant other purchased 90% of the groceries. Appellant claimed $512 for home and car insurance, but this amount included insurance for respondent's fourplex. Appellant claimed $437 per month

in debt repayment on credit cards; the court considered this to be double counting of other categories because the credit cards were used for food and gasoline purchases, as well as for business supplies. The district court noted that appellant spent "$200 to $300 on hunting trips and hunts 7 to 8 times per year" and found that this was "extravagant" based on the relative lifestyles of the parties.

The district court also found that appellant failed to make any reduction in expenses although he shared his home with an employed adult; to the contrary, appellant paid for her cell phone and provided her with a vehicle. The district court stated that "[i]f [the significant other] contributed to the household expenses, for which she receives significant benefit, [appellant] would not be incurring debt and would have additional funds available to support [respondent] and the parties' minor child."

The district court accepted as credible respondent's expert's testimony that appellant's monthly expenses were $2,250, but it concluded that "a more likely number" was $2,950, although it noted that this did not include any reduction based on expenses paid by appellant's significant other.

Although the district court did not include its calculations, the record contains enough information to support the court's conclusions. *See Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (cautioning that appellate court may not reweigh the evidence and find its own facts; "[a]ppellate review of [maintenance] determinations is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law."). We conclude that the district court did not abuse its discretion in determining appellant's expenses.

Maintenance Factors

Appellant argues that the district court's finding that respondent was unlikely to acquire sufficient training or education to become fully self-supporting is clearly erroneous. Appellant also claims that the court abused its discretion by failing to consider an award of temporary maintenance.

We review the district court's findings of fact concerning spousal maintenance for clear error and its determination as to the amount and duration of spousal maintenance for an abuse of discretion. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). The district court may award maintenance if a party "is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances." Minn. Stat. § 518.552, subd. 1(b) (2008). The court must consider a number of factors in order to determine an amount and duration for a maintenance obligation. Minn. Stat. § 518.552, subd. 2. These factors include (a) the financial resources of the party seeking maintenance; (b) the time necessary to acquire additional training and education and the probability of the party becoming self-supporting, in light of the party's age and experience; (c) the marital standard of living; (d) the duration of the marriage, the length of absence from employment, and whether the party's skills have become outmoded and earning capacity has been permanently reduced; (e) financial opportunities foregone because of the marriage; (f) age and physical and emotional condition of the party seeking maintenance; (g) the obligor spouse's ability to pay maintenance; and (h) the contribution of each party to the financial well-being of the parties. *Id.*

The district court considered all of these factors, and found that "[respondent] will not likely acquire sufficient education or training to enable her to secure increased earnings. It is not probable, given her age and skills, that she will become self-supporting. Her past income has ranged from a low of $0 to a high of $6,090 in 2005." The district court found that respondent was 48 years old and had a bachelor's degree in humanities acquired 20 years ago but had never worked in that field. Virtually her only employment experience was as a massage therapist, but she suffered a permanent thumb injury that precluded that employment. The court described her education as "outmoded" and opined that "her earning capacity has become permanently diminished."

According to appellant's vocational expert, Obie Kipper, respondent has "limited transferrable work skills" and she has "possibilities for employment in entry level job positions that would require minimal to no formal training and/or extensive experience." Each of the seven fields Kipper recommended paid between $12 and $18 per hour, except for that of massage therapist, a field closed to respondent by permanent injury. Other than the limited training required for one or two of the jobs, Kipper did not recommend a course of training or education. The district court found that respondent's potential income would be $14 per hour, within the range of the fields recommended by Kipper. If respondent acquires employment in one of the recommended fields, she will be in the same financial condition as the district court assumed she would be in when it awarded maintenance.

The law does not favor an award of temporary maintenance over the award of permanent maintenance. Minn. Stat. § 518.552, subd. 3 (2008). "Where there is some

uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." *Id.* The district court provided for possible future modification because the order states that permanent maintenance is payable "until further order of the Court."

Based on this record, the district court's findings are not clearly erroneous and the court did not abuse its discretion by ordering permanent maintenance.

Affirmed.