STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2354

In re the Marriage of:

Helene Louise Collin, petitioner,
Appellant,

vs.

Jean Marcel Guay,
Respondent.

Filed July 20, 2010
Affirmed in part and reversed in part
Collins, Judge[*]

Hennepin County District Court
File No. 27-FA-06-9095

Carl A. Blondin, Carl A. Blondin, P.A., Maplewood, Minnesota (for appellant)

Melvin Ogurak, Ogurak Family Law & Mediation, P.A., Edina, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Stauber, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

In this appeal from the second amended judgment and decree entered after a remand by this court, appellant Helene Collin challenges the amount of the spousal-maintenance award and the reduction in the amount of future maintenance. By notice of related appeal, respondent Jean Guay challenges the district court's award of permanent maintenance in light of Collin's potential future income. We affirm the initial spousal-maintenance award but because we conclude that the district court abused its discretion in ordering a future decrease in appellant's maintenance award, we reverse that part of the second amended judgment and decree.

FACTS

The background facts essential to this appeal are drawn from our unpublished opinion *Collin v. Guay*, No. A08-0832, 2009 WL 1047650 (Minn. App. Apr. 21, 2009). The parties were married in April 1992. *Id.* at *1. During the course of their marriage, the parties moved several times for Guay's job. *Id*. With the exception of a short time as a part-time retail employee, Collin did not work during the parties' marriage. *Id*. In the fall of 2004, Collin began coursework at a community college, which she continued once the parties moved to Minnesota in 2005. *Id*. at *1 n.2. Collin filed a petition for dissolution on December 29, 2006. *Id*. at *1. Collin discontinued her schooling in the spring of 2007 before attaining a degree. *Id*. at *1 n.2.

In its initial order and judgment on the dissolution, the district court determined that Guay earned a net monthly income of $7,660, which was the family's entire

combined income, and that the parties had combined monthly expenses of $8,967 resulting in a shortfall of approximately $1,300. The district court determined that this shortfall should be shared equally because each party bore equal responsibility for it.

In her submissions to the district court for the purposes of determining spousal maintenance, Collin showed monthly expenses of $6,820. The district court reduced the amount to $6,280 after finding that certain expenses were either Guay's responsibility or did not exist. After deducting Collin's share of the shortfall and the amount of $2,298 that she would receive for child support, the district court set spousal maintenance at $3,331. Guay's submissions to the district court showed monthly expenses of $8,565.[1] The district court found many of his expenses to be unnecessary or excessive, deducted his share of the shortfall, and ultimately determined $2,036 to be Guay's reasonable monthly living expenses.

The district court's spousal-maintenance award provided Collin with only $652 per month until the homestead could be sold, recognizing the value to her of living in the home and Guay's ongoing payments toward the mortgage and upkeep. Following the sale of the homestead, Collin would receive the full amount of $3,331 for spousal maintenance until January 1, 2011. As of that date the district court found it fair and equitable to reduce spousal maintenance to $2,331 because she had been working toward a licensed practical nurse (LPN) degree. The district court found that by then, Collin could complete the degree requirements and begin working part time as an LPN, earning

[1] Guay's expense sheet indicates a "total" of $8,065, but the total amount of the itemized expenses is actually $8,565. This mathematical error was corrected in the second amended order after appeal.

approximately $18,000 per year. The district court further reduced the maintenance award to $1,331 as of January 1, 2013, finding that, by then, Collin could begin working full-time as an LPN, earning approximately $36,000 per year.

Upon the parties' motions, the district court entered an amended judgment, but did not alter child support or spousal maintenance. Guay appealed, arguing that the district court (1) abused its discretion in setting the child-support award above the statutory cap, (2) committed clear error in calculating his net income, and (3) abused its discretion in setting the amount of the spousal-maintenance award. *Collin*, 2009 WL 1047650, at *2-5. Collin did not file a notice of review challenging any other provision of the judgment and decree.

This court affirmed in part, reversed in part, and remanded. *Id*. at *1. We affirmed the district court's calculation of Guay's net income, but reversed both the child-support award and the spousal-maintenance award. *Id*. In reversing the spousal-maintenance award, we concluded that the district court's analysis of the parties' respective monthly expenses resulted in an unfair determination of Guay's expenses as compared to Collin's. *Id*. at *6. We discussed the amount that Collin claimed as reasonable monthly expenses and the district court's ultimate conclusion regarding the appropriate amount of reasonable monthly expenses for the parties. *Id*. at *6-7. This court concluded that the district court abused its discretion in requiring Guay to pay Collin 30% of his bonus after child support ends and after the parties' consumer debt had been retired. *Id*. at *7. We reversed the "spousal-maintenance award and remand[ed] it

for the district court to order a lower award and to recalculate upwards [Guay]'s reasonable monthly living expenses." *Id.*

On remand the district court did not receive any additional submissions from the parties. The district court issued the second amended findings of fact, conclusions of law, order for judgment, and judgment and decree. The district court reduced Collin's monthly expenses, increased Guay's monthly expenses, recalculated how the monthly shortfall should be shared by each party, and removed the requirement that Guay eventually pay Collin 30% of his annual bonus. This second amended judgment and decree awarded Collin spousal maintenance in the amount of $2,198 per month once the parties' homestead was sold. The district court concluded that, effective January 1, 2011, Collin's spousal award should be reduced to $698 per month to reflect the income that she would earn as a part-time LPN. The district court did not provide for a further reduction or elimination of spousal maintenance as of January 1, 2013.

Collin appeals, arguing that the district court abused its discretion in reducing the initial spousal-maintenance award and erred in further reducing the award in anticipation of her future earnings. Guay filed a notice of related appeal, arguing that the district court abused its discretion in continuing spousal maintenance after January 1, 2013.

D E C I S I O N

I.

As a threshold issue, we first address whether Collin may raise certain arguments on appeal. Collin waived any challenge to the district court's first order by failing to raise and brief any challenges in the first appeal. *See Melina v. Chaplin*, 327 N.W.2d 19,

20 (Minn. 1982) (stating that issues not briefed on appeal are waived). Collin's challenge to the second amended order is "limited to issues directly affected by the amended judgment, which were not reviewable on appeal from the original judgment." *Geckler v. Samuelson*, 438 N.W.2d 740, 741 (Minn. App. 1989). Because this is an appeal of a second amended order issued after a remand from this court, Collin cannot now raise issues waived in the first appeal. Nor can she re-raise questions expressly decided in the first appeal. We may reach issues, however, in the interests of justice. Minn. R. Civ. App. P. 103.04.

Guay's Income

Collin argues that the district court clearly erred in calculating Guay's income. In the first appeal this court specifically affirmed the district court's calculation of Guay's income and the district court did not alter its calculation of Guay's income in the second amended order. Because it was affirmed on appeal and because it was not altered in the second amended order, Collin's challenge to the calculation of Guay's income is barred in this appeal.

Guay's Bonuses

Collin argues that the district court should have considered how the parties used Guay's bonuses in their marriage when determining the amount of income she needed to maintain the lifestyle she enjoyed while in her marriage. In reversing the district court's award of 30% of Guay's bonus to Collin, we stated:

> The district court abused its discretion in making its findings related to the spousal-maintenance award, particularly as related to the parties' reasonable monthly expenses and as to

> the final amount awarded. We are left with a firm conviction that a mistake was made in the calculation of the spousal-maintenance award. *The record does not support the inclusion of any amount of money from [Guay]'s annual bonuses in the spousal-maintenance award.*

Collin, 2009 WL 1047650, at *7 (emphasis added). Therefore, Collin's argument that Guay's bonuses should be considered when calculating Guay's maintenance is precluded by our express holding in the first appeal.

II.

Collin challenges the total amount of her spousal-maintenance award in this appeal. This court reviews a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court abuses its discretion regarding maintenance if it makes findings of fact that are unsupported by the record or if it improperly applies the law. *Id.* Findings of fact supporting a spousal-maintenance award, including the district court's determination of the parties' incomes, will not be overturned on appeal unless clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). Questions of law related to maintenance are reviewed de novo. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009). "The 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." *Peterka*, 675 N.W.2d at 358. The criteria for determining the amount and duration of spousal maintenance are set out in Minn. Stat. § 518.552, subd. 2 (2008).

The district court determined Collin and the children's reasonable monthly expenses to be $5,694, and Guay's monthly expenses to be $4,187. Guay's net income was $7,660 and, since Collin had no income, the family's total net income was $7,660. Thus the parties combined monthly shortfall calculated to $2,221. The district court noted that, based on the parties' reasonable monthly expenses, the shortfall should be divided proportionally.[2] Therefore Collin's reasonable monthly living expense total was reduced by 58% of the shortfall, adjusting the amount to $4,406 for Collin and the children. Guay's reasonable monthly living expense total was reduced by 42% of the shortfall, adjusting the amount to $3,255 for Guay. Child support was set at the statutory cap of $2,208. Combined with the award of $2,198 for spousal maintenance, Collin and the children's monthly expenses would be met in full.

Collin argues that the district court abused its discretion in setting this initial spousal-maintenance amount. But much of Collin's argument is based on a challenge to the district court's determination of Guay's net income. As discussed above, the district court's determination of Guay's net income was affirmed in the first appeal, was not modified in the second amended order, and is therefore not properly before us now. Further, while this award may not allow Collin to continue her marital standard of living, the district court found that neither party could continue living at the marital standard due to overspending, and that finding was not clearly erroneous. We have carefully reviewed

[2] This is in direct contrast to the first amended order, which concluded that each party was equally responsible for the shortfall and thus should be divided equally. This issue has not been challenged on appeal. *See* Minn. Stat. § 518.552, subd. 2 (listing factors to be considered when setting the amount of a maintenance award).

the record and conclude that the district court did not abuse its discretion in setting the initial amount of the spousal-maintenance award, supported by the district court's findings regarding the parties' reasonable expenses.

Collin next argues that the spousal-maintenance award should be adjusted upward once Guay's child-support obligation ends. Full child support in the amount of $2,208 will end when the older child reaches age 18 or, if the child is still attending high school, age 20. Child support will continue at 25% of Guay's net income until the younger child reaches age 18 or, if the child is still attending high school, age 20. While the district court concluded that the $2,208 combined with the spousal maintenance award would meet "[Collin] and the children's monthly expenses," we note that child support, in contrast to spousal maintenance, "means an amount for basic support, child care support, and medical support" for the children of the marriage. Minn. Stat. § 518A.26, subd. 20 (2008). The child-support award is properly considered when determining any spousal-maintenance award. Minn. Stat. § 518.552, subd. 2(a) (stating in awarding maintenance the district court must consider "the extent to which a provision for support of a child living with the party includes a sum for that party as custodian"). However, an automatic increase in spousal maintenance upon the termination of child support would be based on speculation. Because the circumstances of the parties at the time that the child support ends are currently unknowable, the district court did not abuse its discretion in failing to grant an automatic increase in spousal maintenance when child support terminates. Collin may petition for a modification of the award under Minn. Stat. § 518A.39, subd. 2

(2008) if, by the time child support ends, the parties' circumstances have substantially changed.

II.

Collin challenges the step reduction of spousal maintenance based on the district court's determination that by January 1, 2011, she should be able to earn $18,000 annually as a part-time LPN. We note that the district court determined in the first amended order that Collin could earn $18,000 annually as a part-time LPN and that issue was not challenged in the first appeal. However, Collin argues that this court should exercise its discretion to address issues as justice requires. *See* Minn. R. Civ. App. P. 103.04. Because reducing a spousal-maintenance award by a specific amount results in a step reduction of Collin's maintenance award, and because the effect of that step reduction was significantly affected by the overall reduction in spousal maintenance in the second amended order, we address Collin's challenge to the step reduction.

Step reductions in maintenance may be appropriate in order to provide employment incentives. *Frederiksen v. Frederiksen*, 368 N.W.2d 769, 776 (Minn. App. 1985). However this court has found step reductions to be inappropriate when the party's future income is too speculative. *Id.* (reversing a district court's future reduction of maintenance by $200 as speculative because obligee's prospects for work were less than promising). When future income is speculative and the party's ability to fill the gap caused by the step reduction in maintenance is uncertain, the spousal-maintenance award should instead be subject to future modification. *Schreifels v. Schreifels*, 450 N.W.2d 372, 374 (Minn. App. 1990). In *Schreifels*, we reasoned that a step reduction makes a

portion of the spousal-maintenance award temporary and that the statutory law mandates that where there is uncertainty as to the need for a permanent award the district courts should grant a permanent award subject to future modification. *Id*. (citing Minn. Stat. § 518.552, subd. 3 (1988)).

In granting Collin spousal maintenance, the district court noted that Collin was the primary parent and homemaker and "has not worked outside the home for the duration of the parties' marriage, with the exception of one minor instance in a very short-term, part-time retail position." Collin began taking nursing courses in 2004. The district court found that if she attended school full-time for one year or part-time for two years, Collin would complete her work toward a nursing degree and licensure. On this premise, the district court concluded that by January 1, 2011, as an LPN, Collin would be able to obtain a part-time job and earn approximately $18,000 annually. The district court thus found it reasonable and equitable to reduce spousal maintenance from $2,198 per month to $698 as of that date.

The step reduction in spousal maintenance beginning January 1, 2011, results in $1,500 per month gap that Collin is expected to make up, assuming (1) a degree and licensure that Collin does not yet hold, for a professional field in which she has never worked, (2) employment that is not assured, and (3) a part-time earnings level of $1,500—all of which is speculative. While we do not doubt Collin's aptitude, we conclude that, on this record, the district court abused its discretion in ordering a step reduction of spousal maintenance commencing January 1, 2011. The award of $2,198 is

permanent, subject to future modification in the event of a substantial change in circumstances. Minn. Stat. § 518.522, subd. 3 (2008).

III.

By notice of related appeal, Guay challenges the district court's award of permanent spousal maintenance in light of the district court's earlier determination that Collin would be able to achieve full-time employment as an LPN by January 1, 2013. As discussed above, Minnesota law ordains that when the need for maintenance to be permanent is uncertain, the award shall be permanent and open to future modification. *Id*.; *Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987). Guay argues that the failure to terminate spousal maintenance as of January 1, 2013 was illogical because the district court concluded that Collin could by then work full-time and double her earnings. Because we have concluded that Collin's future income ability is currently unknowable and, therefore, too speculative to support the step reduction of spousal maintenance, we affirm the district court's decision to make the award permanent.

Affirmed in part and reversed in part.