STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0288

In re the Marriage of: Kimberly Ann Habberstad, petitioner,
Respondent,

vs.

Stephen Douglas Habberstad,
Appellant.

Filed January 21, 2014
Affirmed as modified
Connolly, Judge

Houston County District Court
File No. 28-FA-07-363

Ben M. Henschel, Joani C. Moberg, Henschel Moberg, P.A., Minneapolis, Minnesota (for respondent)

Jill I. Frieders, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Connolly, Judge; and Crippen, 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

CONNOLLY, Judge

In this appeal from a remanded dissolution judgment, both parties argue that the district court abused its discretion in setting spousal maintenance: appellant-obligor argues that the award is unnecessary and respondent-obligee argues that the award should be permanent rather than temporary. Appellant also argues that the district court abused its discretion in a 2009 award of conduct-based attorney fees to respondent. Because we see no abuse of discretion in either the spousal-maintenance award or the attorney-fee award, we affirm. However, in accord with appellant's unopposed requests, we modify the decision to provide that either party may challenge the spousal-maintenance award in the future and that appellant's obligation to secure the spousal-maintenance obligation with insurance be limited to the amount of maintenance remaining to be paid.

FACTS

Appellant Stephen Habberstad and respondent Kimberly Habberstad were married in 1977. Their four children are now adults. Appellant worked in banking; respondent stopped working outside the home in 1984. The family had an affluent lifestyle, funded in part by appellant's annual gross income, which was over $1 million when respondent petitioned for dissolution in 2007. The lifestyle was also funded by stock given to the parties' children that appellant later transferred from them to himself and respondent.

While this action was pending, the parties were sued by their three oldest children, who sought to recover the stock given to them. Appellant recommended attorneys; the children hired an attorney who was also a friend of appellant. The children were granted

summary judgment, which was reversed by this court. *Habberstad v. Habberstad*, No. A12-1243, 2013 WL 3868076 (Minn. App. July 29, 2013), *review denied* (Minn. Oct. 23, 2013).

During the pretrial phase of the litigation in this case, in June 2009, respondent was awarded $150,000 in attorney fees. After an eight-day trial in 2010, the district court issued its amended judgment and decree. It awarded appellant all the parties' marital bank stock ($5,884,368) and awarded respondent an equalization payment of $3,466,100.50 to be paid over 15 years, spousal maintenance of $10,000 monthly for five years, and a further $125,000 in attorney fees.

Both parties appealed. *Habberstad v. Habberstad*, No. A10-2126, 2011 WL 5299645 (Minn. App. Nov. 7, 2011) (*Habberstad I*) noted that, on appeal, the parties agreed to an equal division of the marital bank stock; the decision was remanded for recalculations of respondent's equalization payment and her spousal-maintenance award. Because it could not be determined whether the 2009 and 2010 attorney-fee awards were need-based, conduct-based, or both, those awards were reversed and remanded for additional findings.

Following a hearing, the district court issued an amended remand decision. It awarded respondent temporary spousal maintenance in two phases. First, prior to the equalization payment, she would receive $3,000 monthly before the sale of the homestead, of which appellant paid the expenses, and $5,000 monthly after she began providing her own housing. Second, after the equalization payment, respondent would receive $3,000 monthly for five years. The district court also found that respondent's

reasonable monthly budget would be $7,094.33 before the sale of the homestead and $7,789.33 afterwards; her monthly after-tax cash flow would be $11,529, and her monthly surplus would therefore be $4,434.67. The decision also provided that respondent may request a change in spousal maintenance at any time upon a showing of a change in circumstances, reserved jurisdiction over spousal maintenance, and rejected respondent's argument that she would need permanent spousal maintenance to meet her monthly expenses.

As to attorney fees, the district court found that the 2010 award of $125,000 was need-based and revoked this award because, after the equal division of the marital bank stock, respondent was able to pay her own attorney fees.

The district court found that the 2009 award was based on appellant's conduct, which included (1) pledging bank stock in violation of court orders; (2) redeeming a joint CD and taking interest from it in violation of court orders; (3) giving respondent's incorrect address on a tax form; (4) complicating respondent's access to bank information; and (5) referring the parties' children to an attorney who filed lawsuits against them, which delayed this litigation. The district court also found that appellant had already paid respondent the $150,000 in attorney fees, and that respondent would receive no additional payment.

Again, both parties challenge the spousal-maintenance decision. Appellant argues that the district court abused its discretion in setting the amount of the award, in permitting only respondent to move for modification, and in requiring appellant to maintain a life-insurance policy sufficient to secure the entire amount to be paid in

spousal maintenance although that amount will decline over time. Respondent argues that the district court abused its discretion in setting temporary rather than permanent spousal maintenance. Appellant also challenges the 2009 attorney-fee award, arguing that the evidence and the findings are inadequate to support conduct-based attorney fees in that amount.

D E C I S I O N

I. Spousal-Maintenance Award

This court reviews a spousal-maintenance award under an abuse-of-discretion standard; discretion is abused if findings of fact are unsupported by the record or if the law is improperly applied. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997).

A. The amount of spousal maintenance

In establishing the spousal-maintenance award, the district court relied on *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (reversing an award of spousal maintenance because the obligee's "net income will comfortably exceed her living expenses"). "[One] spouse's ability to pay maintenance does not . . . obviate the statutory mandate that the other spouse's own independent financial resources must be considered too." *Id.* (rejecting obligee's argument that she should share permanently in obligor's earning capacity). The district court noted that here, as in *Lyon*, the parties were in their 50s; the marriage lasted for many years; the children were adults; the wife had been out of the employment market and was minimally employable; the parties agreed to an equal division of the marital bank stock; and the marital estate was around $8 million.

Appellant relies on *Lyon* to argue that, absent a finding that respondent needs maintenance, the district court abused its discretion in awarding her maintenance. But the district court also noted two differences from *Lyon.* First, "[appellant] is unable to equalize the property settlement immediately. The property equalization will occur over a period of five (5) years." Second, "[respondent] will need the entire property settlement in order to satisfy her legal fees relating to this dissolution."

Considering both the similarities to and differences from *Lyon*, the district court concluded that respondent would need $5,000 monthly in spousal maintenance until the property settlement was complete "to allow [her] to meet her needs and continue to have a high standard of living"; this amount was reduced to $3,000 until the homestead was sold because appellant was paying the costs of the homestead in which respondent was living. The district court also awarded respondent $3,000 monthly for five years after the property settlement because she had no retirement account, had little or no ability to generate income, and was minimally employable. The additional five years would "allow [respondent] to establish retirement income" and "some sense of financial stability that will ultimately allow her to maintain a high standard of living."

Appellant argues that he cannot afford to pay spousal maintenance because of his debt burden. The district court found that (1) "[appellant] continues to incur a large amount of debt to maintain his standard of living" as he did during the marriage; (2) appellant "received an equal share of the parties' marital bank stock and also earns a sizable income" and "will earn income from the bank stock for the remainder of his life and will continue to earn employment income until his retirement"; and (3) "his income

and expenses are inflated by his non-marital property." Appellant claims that his budget is only $8,466.15 per month because of his attorney fees, his debt payment, and his payment of respondent's housing costs. But the district court made numerous findings as to appellant's debts and considered them in calculating his expenses. The district court's findings are supported by the record; the spousal-maintenance award is not an abuse of discretion.

B. Ability to modify maintenance

Both the district court's 2010 order and its amended order on remand state that "[respondent] shall have the ability to request a change in spousal maintenance at any time upon a substantial change in circumstances. The issue of spousal maintenance shall remain under the Court's jurisdiction."

> The terms of an order respecting maintenance . . . 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) (2012). Thus, the statute enables both obligors and obligees to request a change in maintenance.

Appellant asks that the decision be modified in accord with the statute to permit either party to seek a modification of maintenance, and respondent does not oppose this request. The district court's opinion shall be modified accordingly.

C. Life insurance policy

A district court "may require sufficient security to be given for the payment of [spousal maintenance] according to the terms of the order." Minn. Stat. § 518A.71 (2012). The district court ordered appellant to maintain a life insurance policy of $300,000 during phase one of spousal maintenance, i.e., prior to the property settlement, and of $180,000 during phase two, i.e., the five years after the property settlement. The total amount of the phase two payments will be $180,000.[1]

Appellant requests that the amount of insurance he is required to provide decrease as the amount of the remaining payments decreases, and respondent does not oppose this request. The opinion will be modified accordingly.

D. Duration of spousal maintenance

Respondent reiterates her argument to the district court that her maintenance award should be permanent rather than temporary. The district court found that respondent "is not in need of permanent spousal maintenance. [She] will receive income from one-half of the parties' marital bank stock for the rest of her life." The district court also noted that respondent "would like the Court to order [appellant] to pay spousal maintenance in an amount that would forever equalize their monthly incomes."

Lyon explicitly rejected respondent's position. "[The obligee] seem[ed] to argue that she should share in [the obligor's] earning capacity. A spouse's ability to pay maintenance does not, however, obviate the statutory mandate that the other spouse's own independent financial resources must be considered too." *Lyon*, 439 N.W.2d at 22.

[1] $3,000 per month for five years is $3,000 x 60, or $180,000.

Like the spouse in *Lyon*, respondent will have financial resources sufficient to supply a fairly high standard of living.

Moreover, the district court found that both parties "will have to adjust to the new normal created by the parties' dissolution and the legal actions that arose as a result"; that "[t]hroughout the parties' marriage, [they] used stock dividends and distributions that belonged to [their] minor children to inflate their standard of living"; and that "while the parties enjoyed a high standard of living, they did so at the expense of incurring large amounts of debt." The parties will still be able to enjoy a high standard of living, but it will inevitably be less than their marital standard of living.

The record supports the district court's findings, and its conclusion that the spousal-maintenance award shall be temporary rather than permanent is not an improper application of the law.

The district court did not abuse its discretion in awarding spousal maintenance.

II. Attorney-Fee Award

A district court may award conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2012). Conduct-based attorney fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see also Sharp v. Bilbro*, 614 N.W.2d 260, 264-65 (Minn. App. 2000) (referring to "the breadth of the district court's discretion in awarding conduct-based attorney fees" and finding no abuse of its "broad discretion"), *review denied* (Minn. Sept. 26, 2000).

On remand, the district court found that the $150,000 award made in June 2009 was conduct-based because appellant had unreasonably contributed to the length and expense of the proceeding. Appellant argues that, while the district court made findings as to the conduct on which the award was based, it made no findings as to how much time was added to the litigation or how much expense was incurred by any specific conduct; he argues further that, when the award was made in June 2009, respondent's attorneys had not submitted the affidavits prescribed by Minn. R. Gen. Pract. 119.02 (requiring affidavits describing all work performed with the date, the amount of time, and the hourly rate charged by the attorney who performed it to be submitted with motions for attorney fees in amounts over $1,000). But a district court may waive the requirements of Rule 119 "[if] the court is familiar with the history of the case and has access to the parties' financial information." *Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999). Here, the district court had been working with the case for two years when it made the award and for six years when it reviewed the award on remand. The issues in this case were primarily financial; thus, the district court was familiar with the parties' financial situations and with the history of their case.[2]

We see no abuse of the district court's broad discretion in either the 2009 award of $150,000 in conduct-based attorney fees or the award of temporary spousal maintenance. However, we modify that award to provide that appellant as well as respondent may

[2] Appellant notes that *Gully* concerned need-based, not conduct-based, attorney fees, but the record here supports its application despite this distinction.

move to modify spousal maintenance and that appellant need not maintain insurance policies in an amount greater than the spousal maintenance owed.

Affirmed as modified.