STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2084

In re the Marriage of:

Thomas William Pichotta, petitioner,
Appellant,

vs.

Marianne Therese Pichotta,
Respondent.

Filed March 26, 2012
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Hennepin County District Court
File No. 27-FA-09-579

David M. Cox, Myles A. Schneider & Associates, Ltd., Elk River, Minnesota 55330 (for appellant)

Marianne Therese Pichotta, Champlin, Minnesota 55316

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

In this marital-dissolution appeal, appellant Thomas William Pichotta argues that the district court referee abused his discretion by (1) dividing marital property inequitably; (2) ordering that appellant pay permanent spousal maintenance of $630 per

month to respondent Marianne Therese Pichotta; and (3) ordering appellant to obtain a $250,000 life-insurance policy. We affirm the property division but reverse and remand the maintenance award and life insurance requirement.

D E C I S I O N

I.

Appellant contends that the district court referee abused his discretion in dividing the marital estate because the division of marital property is inequitable. We disagree.

We will not overturn a district court's division of property in a marital dissolution absent an abuse of discretion. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). We will affirm the district court's property division if it has "an acceptable basis in fact and principle," even if we might have taken a different approach. *Id.* A district court abuses its discretion in dividing property if it resolves the matter in a manner that is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

"Upon a dissolution of a marriage . . . the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property." Minn. Stat. § 518.58, subd. 1 (2010). The district court must consider "all relevant factors including the length of the marriage, . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." *Id.* The distribution of marital property need not be equal, but it must be just and equitable. *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). Debts are

apportioned as part of the property settlement and are treated in the same manner as the division of assets. *Korf v. Korf*, 553 N.W.2d 706, 712 (Minn. App. 1996).

The parties' assets included three unencumbered vehicles worth $2,130, $2,215, and $4,795, respectively, a retirement annuity in appellant's name, retirement accounts in respondent's name worth $15,500, various personal property and household goods, and several savings bonds. The assets were deemed marital property, except the referee did not make a finding as to whether the retirement accounts in respondent's name were marital, and found that one of the vehicles was owned jointly by appellant and the parties' two emancipated sons. The referee awarded (1) the first two vehicles to respondent, and the third vehicle to appellant; (2) the retirement accounts and savings bonds to respondent; and (3) the personal property and household goods to the party in possession. The referee ordered that appellant make his annuity joint with respondent, divided the monthly annuity amount between appellant and respondent, and ordered appellant to continue listing respondent as a secondary beneficiary. The referee also apportioned the parties' $7,330.99 in marital-credit-card debt to appellant. At the time of trial, the parties' home was in the final stages of foreclosure and they had no equity in the home. The referee awarded appellant the right to redeem the home.

Appellant generally argues that the referee abused his discretion because he awarded "virtually all of the parties' assets" to respondent and "literally all of the debts" to him. In support, he cites *Ziemer v. Ziemer*, 386 N.W.2d 348, 351 (Minn. App. 1986), *review denied* (Minn. July 16, 1986) in which this court held that the district court abused its discretion by failing to award any marital property to the husband other than the

personal property in his possession. But *Ziemer* is distinguishable from this case because the wife in *Ziemer* was awarded the parties' home and a pension worth more than $62,000. *Id.* at 350. Here, appellant was awarded some marital property and the discrepancy between appellant's and respondent's awards is not as great as in *Ziemer*. *C.f. Frederiksen v. Frederiksen*, 368 N.W.2d 769, 775 (Minn. App. 1985) (affirming an award to one party of all of the parties' marital property, plus part of the appellant's nonmarital property).

Appellant specifically contests the referee's award of the $15,500 in retirement funds to respondent. But the referee explained that he awarded the retirement funds to respondent because, prior to trial, appellant unilaterally liquidated over $100,000 from the parties' marital retirement funds. Although the referee concluded that appellant did not improperly dispose of those assets, the referee's award of the remaining funds to respondent was not an abuse of discretion because a party's role in preservation of marital property is a factor on which property division may be based. Minn. Stat. § 518.58, subd. 1.

Appellant also contests the referee's award of personal property, arguing that because most of the personal property was in the parties' home where respondent resided, the referee awarded respondent an unequal share when he awarded each party the personal property in their possession. But the referee explained that because appellant

> unilaterally made the decision to use joint marital funds (liquidated retirement funds) for the purchase of a television and a computer in the amount of $1,100.00, and since the value of the disputed [personal property] items [is] less than $1,100.00, all property currently within the possession of

> each party will be considered an equitable and fair division of property.

In addition, the referee noted that much of the personal property and household goods in respondent's possession belong to or are for the exclusive use of the parties' two minor children, who reside with respondent. Therefore, we conclude that the referee's division of personal property is not against logic or the facts in the record. *Rutten*, 347 N.W.2d at 50. Nor was it an abuse of discretion for the referee to award two vehicles and the savings bonds to respondent, because the record supports a determination that one of the vehicles and the savings bonds were intended for the benefit of the children.

Appellant also contends that the referee's unequal distribution of debt was inequitable. A party may be held liable for marital debts even though the other party receives the benefit of payment. *Lynch*, 411 N.W.2d at 266 (holding that it was not an abuse of discretion for the district court to apportion all the family debts to the husband in the property division). The referee found that appellant was employed full time, in good health, and capable of supporting himself, but that respondent did not work more than 20 hours per week during the marriage and suffered from physical disabilities that made full-time employment "an impossibility." When, as here, one party has greater earning power, it may be equitable to assign all debts to that party. *See Dahlberg v. Dahlberg*, 358 N.W.2d 76, 80 (Minn. App. 1984) (holding that because the husband had greater resources and a stable, high-paying job, and the wife did not have a job, it was not an abuse of discretion for the district court to apportion all the marital debts to the husband).

Additionally, appellant asserts that he incurred $7,383 in income tax liability in 2009, and that the referee should have apportioned this debt as marital property. Appellant states that he incurred the liability cashing out marital retirement accounts in order to pay marital debt. The referee did not mention appellant's 2009 tax liability in the judgment and decree, and therefore did not make a finding as to whether appellant's 2009 tax liability was marital. But even if we assume the tax liability was marital, the referee's implicit apportioning of the debt to appellant was not an abuse of discretion because appellant filed his 2009 taxes individually and unilaterally engaged in the transactions that caused him to incur the liability.

We conclude that the referee did not abuse his discretion in dividing the parties' marital property.

II.

Appellant argues that the referee abused his discretion by ordering spousal maintenance of $630 per month because he: (1) understated respondent's income and (2) overstated respondent's reasonable monthly expenses in determining her need for permanent spousal maintenance, and (3) understated his reasonable monthly expenses in determining his ability to pay permanent spousal maintenance.

We review a 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 its findings of fact are unsupported by the record or if it improperly applies the law. *Id.*; *see Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992) ("Findings of fact concerning spousal maintenance must be upheld unless

they are clearly erroneous."). Findings of fact are clearly erroneous when an appellate court is left with the definite and firm conviction that a mistake has been made. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

The district court may award maintenance if it finds that the recipient spouse lacks sufficient property to provide for the "reasonable needs of the spouse considering the standard of living established during the marriage," or "is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment." Minn. Stat. § 518.552, subd. 1 (2010). In determining the amount and duration of maintenance, the district court is required to consider all relevant factors, including

> the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; . . . the age, and the physical and emotional condition of the spouse seeking maintenance; [and] the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance.

Id., subd. 2 (2010). Therefore, the district court is required to balance the financial needs of the recipient spouse against the financial condition of the obligor spouse. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). Because the award is based on need, the district court's award should conform to the reasonable needs of the recipient spouse. *Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009).

Respondent's monthly income

Appellant contests the referee's finding that respondent's monthly income is $1,695. The referee found that respondent is employed part time with Group Health, Inc., and earns gross wages of $1,695 per month. At trial, appellant alleged that respondent receives income from a second employer, but the referee concluded that appellant did not provide "any credible evidence to substantiate" this claim.

But the record supports appellant's contention that respondent receives income from two different entities. At trial, respondent testified that she holds a position as a union steward, and on certain days she works at the union office rather than at HealthPartners.[1] Respondent testified that she "technically" has one job but is paid by two different entities. In the "[e]mployment benefits" section of her prehearing statement, respondent referenced union-related income. Further, the record includes respondent's 2008 W-2 forms from two sources: Group Health, Inc. and the Office and Professional Employees International Union. The record also includes a child support officer's affidavit that lists income from both HealthPartners and the union throughout 2008 and 2009.

We conclude that the referee's failure to consider respondent's income from all sources was improper. If, as she contends on appeal, respondent's union income is offset by a decrease in her Group Health, Inc. income, the referee should make findings to that effect.

[1] "Group Health, Inc." and "HealthPartners" are used interchangeably in the record to refer to respondent's employer. Appellant does not dispute that the two entity names refer to respondent's primary employer.

Respondent's reasonable monthly expenses

Appellant argues that the referee's determination that respondent's reasonable monthly expenses are $2,591 is erroneous because respondent claimed monthly expenses of only $1,391 in her prehearing statement, and the significant increase is not supported by the evidence. Specifically, appellant contends that the referee's addition of $350 in food costs and $850 in housing costs is speculative.

Respondent's prehearing statement included no expenses for rent or a mortgage. Her statement listed food expenses as $150 and indicated that she receives $415 in food stamps. The referee determined that respondent "failed to take into account a rent or mortgage payment" and stated that "[a] food budget of $100 is not realistic to feed an adult and two children." The referee therefore concluded that it was "appropriate" to increase the monthly budget to $2,591.

The district court has broad discretion to make findings relevant to a maintenance award, including finding the parties' reasonable monthly expenses at the marital standard of living. *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000). The district court is not confined to the expenses listed in the parties' prehearing statements. *See, e.g.*, *Rask v. Rask*, 445 N.W.2d 849, 851 (Minn. App. 1989) (noting that the parties submitted "estimates of their current monthly needs," which the district court considered as evidence of their reasonable monthly expenses).

Here, pursuant to the judgment and decree, respondent is required to vacate the parties' residence. Thus, respondent will be required to obtain housing for which she will necessarily incur expenses. But appellant correctly asserts that a district court abuses its

discretion by including purely speculative costs in a determination of a party's reasonable monthly expenses. *See Rask*, 445 N.W.2d at 854. In *Rask*, this court held the district court erred by including a $610 monthly mortgage payment in the wife's reasonable monthly expenses when the wife testified that she "is not currently paying that amount, had not purchased a home, but merely 'estimated' that a $610 monthly payment would be required to purchase the type of home she wants," and there was no evidence in the record as to when she would begin incurring the mortgage expense. *Id.* Therefore, on remand, respondent should submit evidence and the court should make findings as to respondent's reasonable housing costs.

Regarding the food expenses, appellant argues that the referee failed to consider respondent's receipt of $415 monthly in food stamps and that the referee's addition of $350 to respondent's listed budget is not supported by the evidence. The referee's findings refer to respondent's receipt of food stamps, but it is not clear how the referee determined that respondent's stated food budget was $100, or whether the referee considered respondent's receipt of food stamps in its calculation of her expenses. On remand, the court should clarify the amount respondent reasonably spends on food each month and adjust her reasonable monthly expenses accordingly.

Appellant's reasonable monthly expenses

The referee stated that appellant's prehearing statement listed monthly expenses of $1,610, and concluded that appellant "is able to meet his needs while contributing to the support of [r]espondent." As an initial matter, because the referee failed to set forth appellant's reasonable monthly expenses with specificity, remand is appropriate. *See*

Maschoff v. Leiding, 696 N.W.2d 834, 840 (Minn. App. 2005) (remanding for additional findings regarding child support, noting "unless 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").

Appellant argues that if the referee implicitly accepted appellant's prehearing estimation of $1,610 as his reasonable monthly expenses, this amount is erroneous because it does not account for life-insurance premiums and the debt-reduction payments he is required to make under the judgment and decree. We agree.

Because appellant was ordered to secure life insurance, the referee should consider the cost of life-insurance premiums in its determination of appellant's reasonable monthly expenses. We are mindful that debts apportioned to a party in a property division generally should not also be counted in the determination of monthly income for maintenance purposes. But here, appellant was awarded no liquid assets in the property settlement from which he can satisfy these marital debts. Respondent's need for maintenance must be balanced with appellant's ability to pay maintenance. Thus, the court should include findings regarding the marital-credit-card debt-reduction payments when determining appellant's ability to pay maintenance.

Net income

Appellant argues that the referee erred by failing to find his net monthly income for purposes of calculating his ability to pay maintenance. We agree.

The referee found that appellant's monthly gross income is $4,128 and concluded that his "monthly income for child support and spousal maintenance is $4,160." The referee made no findings as to either party's net income.

Child-support awards are based on gross income. Minn. Stat. § 518A.34(b)(1) (2010). But consistent with the idea that a parties' legitimate tax obligations are a reasonable expense, "the court must determine the spouse's net or take-home income" to properly consider the spouse's financial ability to pay maintenance. *Schreifels v. Schreifels*, 450 N.W.2d 372, 373 (Minn. App. 1990); *see Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985) (holding that a maintenance award based on the husband's pre-tax, post-business-expense income was erroneous, and ordering the district court to make a determination of the husband's net income and award reasonable maintenance based on that net income), *review denied* (Minn. July 26, 1985). We conclude that the court is required to find the parties' net incomes and determine appellant's ability to pay maintenance, and respondent's need for maintenance, based on those net incomes.

In sum, we reverse and remand the maintenance award and direct the court to make findings as to the parties' gross and net incomes and reasonable monthly expenses in such proceedings as the court deems appropriate. In the interests of judicial economy, the court has the discretion to take additional evidence and make findings regarding the parties' current circumstances.

III.

Appellant argues that the referee abused his discretion by ordering him to obtain a $250,000 life-insurance policy to secure his maintenance obligations. The district court "has discretion to determine whether the circumstances justifying an award of maintenance also justify securing it with life insurance." *Maeder v. Maeder*, 480 N.W.2d 677, 680 (Minn. App. 1992) (quotations omitted), *review denied* (Minn. Mar. 19, 1992). "In all cases when maintenance or support 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 (2010).

In his findings of fact, the referee stated:

> Respondent testified that [appellant] is currently without life insurance, noting that in the event of his death, she would lose both child support and spousal maintenance. Since [r]espondent is unable to work full-time, the loss of such income would be debilitating to the family. [Appellant] has the financial ability to secure a term life insurance policy, in the amount of $250,000.00 for the benefit of [r]espondent.

The referee ordered that appellant maintain a life-insurance policy in the amount of $250,000, and required him to name respondent as the beneficiary "to secure his future spousal maintenance obligation."

Appellant argues that the insurance mandate is an abuse of discretion because there were no findings as to appellant's insurability or the cost of premiums. We agree. In *Lee*, the Minnesota Supreme Court addressed a dissolution in which the district court ordered the husband to obtain a life-insurance policy to secure his spousal maintenance obligation but did not make findings as to his insurability or the cost of insurance. 775

N.W.2d at 642-43. The court stated, "Insurability and cost of insurance seem to us to be significant facts in determining both the propriety of an insurance requirement and the impact of the cost of insurance on [the husband]'s monthly expenses. The district court should make factual findings on these issues as well on remand." *Id.*

Here, the referee's factual finding that appellant has the financial ability to secure a term-life-insurance policy is not supported by the evidence because the record indicates that no evidence was presented as to the cost of premiums. Both the cost of premiums and whether appellant has the financial ability to pay the premiums, require factual findings on remand. And as stated in *Lee*, the cost of premiums needs to be considered in determining appellant's reasonable monthly expenses for purposes of spousal maintenance. 775 N.W.2d at 642-43. In addition, findings are necessary to support the order for a policy valued at $250,000, in light of appellant's relatively modest maintenance obligations and the award to respondent of appellant's retirement annuity death benefit.

In conclusion, we reverse the life-insurance mandate, and remand for findings as to the cost of insurance premiums, appellant's insurability, and the justification for a $250,000 policy.

Affirmed in part, reversed in part, and remanded.