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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0164**

In re the Marriage of:
David Scott Pederson, petitioner,
Respondent,

vs.

Elizabeth Joan Nephew Pederson,
Appellant.

**Filed November 13, 2017
Affirmed
Jesson, Judge**

St. Louis County District Court
File No. 69DU-FA-14-123

David R. Oberstar, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for respondent)

David C. Gapen, Gapen, Larson & Johnson, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Elizabeth Pederson was awarded temporary spousal maintenance in her dissolution proceedings. She appealed to this court, arguing that the trial judge failed to make certain findings required by law. We agreed and remanded the case with instructions

to make additional findings and recalculate the award. The district court complied, but on remand Elizabeth argued for more than just a recalculation of her spousal maintenance award; she requested a permanent award. The district court denied her request and Elizabeth appealed again. We conclude that Elizabeth forfeited her claim for a permanent maintenance award because she failed to raise it during her first appeal. As a result, we affirm.

FACTS

In 2014, after nearly thirty years of marriage, the respondent, David Pederson, petitioned for dissolution. Following a two-day trial, the district court (in addition to determining contested issues of child custody, marital property and marital debt) ordered David to pay appellant, Elizabeth Pederson, \$1,000 per month in spousal maintenance. This maintenance award was temporary, lasting four years.¹

After this decision, Elizabeth moved the district court for a new trial. In her motion, she asked that her temporary maintenance award be converted into a permanent award. The district court denied her request, although it did increase her temporary award from \$1,000 to \$1,600 per month. Elizabeth appealed, challenging many parts of the district court's trial findings.

In her first appeal to this court, one of Elizabeth's arguments was that the district court neglected to make findings on a handful of statutory factors when it calculated her

¹ A more complete description of the facts and background in this case is found in our previous opinion. *See Pederson v. Pederson*, No. A15-1845, 2016 WL 4263005 (Minn. App. Aug. 15, 2016).

maintenance award. We agreed and remanded the case to the district court for additional findings and for a recalculation of the spousal maintenance award. We specifically instructed the district court to reexamine and recalculate the award after examining three factors: (1) Elizabeth's reasonable monthly expenses, (2) the marital standard of living, and (3) whether the spousal maintenance award would adequately provide for Elizabeth's reasonable monthly needs. *Pederson*, 2016 WL 4263005, at *9.

Back in the district court on remand, Elizabeth again argued for a permanent award. The court again denied her request, reasoning that, in this court's remand instructions, we did not comment on whether the maintenance award should be temporary or permanent. According to the district court, our lack of comment meant that the duration issue was now frozen under the law-of-the-case doctrine.

The district court heeded the remand instructions and examined the missing statutory factors. After making appropriate findings, it recalculated Elizabeth's temporary maintenance award to be \$1,900 per month and applied it retroactively to August 1, 2015. Elizabeth appeals.

D E C I S I O N

Elizabeth argues that the district court incorrectly denied her permanent spousal maintenance. But before we can address this argument, we must first decide if Elizabeth forfeited her claim by not raising it during her first appeal to this court.

Minnesota's appellate courts have a long-standing rule that failing to brief and argue an issue on appeal results in that issue being forfeited. *See Grinnell Mut. Reinsurance Co.*

v. Ehmke, 664 N.W.2d 409, 411 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003).²

This includes situations where a party fails to brief an issue during a previous appeal in the same case; that issue is considered lost and forfeited for any subsequent appeals. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990). Whether an issue is forfeited poses a legal question, which we review de novo. *See Smigla v. Schnell*, 547 N.W.2d 102, 103 (Minn. App. 1996) (applying de novo review to construction of procedural and general practice rules).

In her first appeal, Elizabeth did not specifically address the duration of her maintenance award, just its amount. Her brief in that first appeal argued that the district court neglected to consider certain statutory factors that would affect the *amount* of the award, writing, “[T]he district court made findings regarding [David]’s income and expenses and [Elizabeth]’s potential earning capacity, but failed to make findings regarding [Elizabeth]’s expenses and did not explain how the maintenance award was considered to meet [her] expenses.” And Elizabeth concluded her argument by taking aim only at the amount, writing, “[H]ere, the district court failed to make specific findings regarding [Elizabeth]’s expenses and failed to explain how it arrived at the \$1,000 award.”

² The actual quote from *Ehmke* refers to an issue not briefed or argued on appeal as being *waived*. *Id.* (emphasis added). But the Minnesota Supreme Court recently clarified the subtle line separating *forfeiting* a right from *waiving* it. Generally, a right is *forfeited* when a party does not assert it in time. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015). On the other hand, *waiver* is when a party voluntarily gives up the right. *Id.* at 284. In this context, it is correct to frame the issue as whether Elizabeth forfeited—not waived—the issue of permanent spousal maintenance.

In fact, in her brief during the first appeal, Elizabeth’s only reference to the award’s duration appears at the beginning of her maintenance award argument where she wrote, “[H]ere, [Elizabeth] sought permanent spousal maintenance after a thirty-year marriage in which she was a stay at home mother.” But a reference to her initial request in the district court is not sufficient to appeal the district court’s denial of that request. As the Minnesota Supreme Court has noted, issues merely alluded to in briefs are forfeited on appeal. *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998).

Our conclusion is further supported by the language in our prior opinion. There, we determined that the district court neglected to consider three important statutory factors to calculate Elizabeth’s award. To correct this oversight, we remanded the case to the district court for additional findings and for a “recalculation of spousal maintenance.”³ Although Elizabeth believes this instruction implies a remand for additional findings on amount and duration, and *then* a recalculation of both, we disagree. Elizabeth did not adequately brief the issue of duration in her first appeal, so we did not consider it. We cannot issue instructions on what is not before us.

Because Elizabeth failed to clearly argue and brief her claim for permanent spousal maintenance in her first appeal to this court, we conclude that she forfeited her argument

³ After remand, the district court denied Elizabeth’s request for permanent maintenance because it believed our previous opinion had settled the issue under the law-of-the-case doctrine. *See State v. Dahlin*, 753 N.W.2d 300, 305 n.7 (Minn. 2008) (defining the law-of-the-case doctrine as “a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case”). But this was incorrect. The district court mistook our silence on the issue of duration as tacit approval. Actually, Elizabeth did not raise the issue for our consideration, so we did not make any determination one way or the other.

for permanent spousal maintenance. Because she forfeited this claim, we decline to address the merits of her arguments for permanent spousal maintenance and affirm the district court.⁴

Affirmed.

⁴ Our decision is narrow. We only examine whether Elizabeth forfeited her claim for permanent maintenance on appeal. Nothing in this decision prevents Elizabeth from attempting in the future to reopen her spousal maintenance award under Minn. Stat. § 518.145, subd. 2 (2016), or attempting to modify her award under Minn. Stat. § 518A.39 (2016).