STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0082

In re the Marriage of:
Rosalyn LaRae Johnson,
f/k/a Rosalyn LaRae Foster, petitioner,
Respondent,

vs.

Larry Dean Foster,
Appellant.

Filed December 24, 2018
Affirmed as modified
Bratvold, Judge

Ramsey County District Court
File No. 62-FA-08-581

Christopher Zewiske, Ormond & Zewiske, Minneapolis, Minnesota (for respondent)

Michael D. Dittberner, Linder, Dittberner & Winter, Ltd., Edina, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Jesson, Judge.

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

BRATVOLD, Judge

Appellant-husband challenges the district court's decision to modify spousal maintenance from temporary to permanent and argues that the district court (1) abused its discretion in finding that respondent-wife made a reasonable effort to rehabilitate; (2) erred

in its findings as to respondent's reasonable monthly expenses; (3) failed to make other findings required by statute; and (4) abused its discretion in awarding respondent need-based attorney fees. Because the district court did not err in (1) determining that respondent made reasonable efforts to rehabilitate; (2) relying on the 2009 decree's determination of respondent's reasonable monthly expresses; and (3) setting the amount and duration of wife's award, we affirm the district court's decision to modify spousal maintenance. We also conclude that the district court did not abuse its discretion in awarding respondent need-based attorney fees, but the district court erroneously included $10,000 of attorney fees from a previous appeal. Thus, we affirm the fee award as modified.

FACTS

Appellant Larry Dean Foster (Foster) and respondent Rosalyn LaRae Johnson (Johnson) married in June 1979. At the time, Foster was 23 years old and Johnson was 21 years old. After they married, Johnson withdrew from college and moved to a new city with Foster so he could attend medical school. On several subsequent occasions, they moved for Foster's career and education. The couple enjoyed a "fairly comfortable" middle-class lifestyle, dining out on occasion, taking family vacations, enjoying the theater, and purchasing "fine furniture, antiques, guns, gold and silver coins, collectibles, and jewelry." Johnson worked at the beginning of their marriage, but from 1983 to 2005, she did not earn any income, and she cared for their four children, who were born between September 1980 and October 1993.

After 28 years of marriage, Foster moved out of the marital home in September 2007. Two children, both minors, continued to live with Johnson. The district court

dissolved the marriage in May 2009 and issued findings of fact, conclusions of law, and an order for judgment and decree (2009 decree).

Some determinations in the 2009 decree are relevant to the issues on appeal. The district court found, for example, that Johnson's expenses were $6,000 and relied on Johnson's credible testimony, the marital standard of living, and monthly bank statements. Johnson had submitted a total budget of $6,745: $4,484 for her expenses, and $2,261 for the children's expenses.

The court awarded Johnson $4,000 a month in spousal maintenance for 72 months from the date of entry of the decree. The court reasoned, in part, that Johnson needed rehabilitation in the form of school or training. The court found that while Johnson had some college education and wished to pursue a master's degree before the marriage, she withdrew from university while Foster went to medical school, worked briefly as a sales associate and a bilingual counselor, but was a stay-at-home-parent for most of the marriage. The court determined it would likely take Johnson "a minimum of five . . . years to complete her education," and she would not be able to work full-time while going to school full-time and raising two teenagers. The court also determined that Johnson had insufficient income to meet her needs and that Foster had the ability to contribute. Additionally, the court found that, at the time of the dissolution, Johnson was voluntarily underemployed because she was working part-time but able to work full-time. Thus, the district court imputed income of $1,702 per month to Johnson.

Foster appealed, but settled during mediation. The settlement agreement from the mediation provided that the 2009 decree included "a temporary and rehabilitative award of

spousal maintenance for six years, and [Johnson] is under an obligation to follow through with her educational and other plans to enhance her earning capacity."[1] Additionally, Foster agreed to dismiss his appeal with prejudice and Johnson agreed not to seek review of the district court's failure to award permanent spousal maintenance and attorney fees. The district court approved the settlement and entered an order modifying some terms of the 2009 decree.

In March 2015, Johnson moved to modify spousal maintenance "both as to duration and amount" and for an award of need-based attorney fees. In August 2015, the district court determined that it lacked jurisdiction to modify the spousal-maintenance award because Foster had made his final maintenance payment before Johnson filed her motion. The district court reasoned that it had "no authority to modify a spousal maintenance obligation that does not exist." Johnson's motion for need-based attorney fees was summarily denied.

Johnson appealed. In July 2016, this court reversed the district court, reasoning that Foster's obligation to pay maintenance ran 72 months from the entry of judgment on the 2009 decree, which was May 12, 2009—not from the date that Foster made the first maintenance payment on April 1, 2009. *Johnson v. Foster*, No. A15-1558, 2016 WL

[1] We note that the 2009 decree contained sporadic references to permanent maintenance. For example, page 23 of the decree states that statutory law mandates "permanent maintenance" in "this long-term traditional marriage." Page 31 refers to "permanent spousal maintenance," but then notes the obligation will end if certain events occur, including when 72 months pass from "entry of the Judgment and Decree." Based on the subsequent district court order following the parties' settlement of Foster's appeal, it is clear that the 2009 decree awarded temporary spousal maintenance.

3884490, *4 (Minn. App. July 18, 2016). Thus, we concluded that the district court had jurisdiction to hear Johnson's motion. *Id*. We remanded for the district court to determine Johnson's modification motion and her request for need-based attorney fees, with discretion to reopen the record. *Id*. at *5.

On remand, the district court conducted a review hearing with both parties present and decided to keep the record closed. After a motion hearing, the court granted Johnson's modification request, finding that she had established a substantial change in circumstances because she failed to rehabilitate as contemplated in the 2009 decree, even though she had made reasonable efforts to become self-supporting. The district court awarded $4,391 per month in permanent spousal maintenance. The district court also awarded need-based attorney fees and permitted supplemental submissions on the amount of reasonable fees. In an amended order, the court ordered that Foster was obligated to pay Johnson $28,340.50 in attorney fees and costs incurred from February 13, 2015, through May 3, 2017.

Foster appeals.

D E C I S I O N

I. The district court did not abuse its discretion in modifying Johnson's spousal maintenance award.

Foster makes three arguments in support of his contention that the district court's decision to modify spousal maintenance was an abuse of discretion. First, Foster argues that Johnson's efforts to rehabilitate were inadequate. Second, Foster argues that the district court erred in its findings regarding Johnson's reasonable monthly expenses. Third, Foster

argues that the district court's other findings were insufficient to support modification. We address each of these arguments in turn.

A. The record and caselaw support the district court's determination that Johnson made reasonable efforts to rehabilitate.

Foster argues that the 2009 decree contemplated that Johnson would take five years to complete her education and enhance her employability. Because Johnson delayed her education, Foster complains that she did not make reasonable efforts to rehabilitate and the district court's decision requires him to "subsidize [Johnson's] choice" to forego other opportunities for employment.

A district court may modify spousal support after determining that (1) a substantial change in circumstances has occurred, (2) which has made the existing support award unreasonable and unfair. [2] Minn. Stat. § 518A.39, subd. 2(a), (b) (2018); *see also Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn. 1997) (separating the analysis for both inquiries). The party seeking modification has the burden of proof. *Id.* at 709. This court will not alter a decision to modify maintenance unless the district court abused its discretion. *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). A district court has broad discretion on whether to modify a spousal-maintenance award. *Id.*

The recipient of a temporary maintenance award generally has a duty to make reasonable efforts to rehabilitate and, when seeking modification, must demonstrate these reasonable efforts. *Id.*; *see also Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987). A

[2] Minnesota law identifies eight changed circumstances that make the original award "unreasonable and unfair." *See* Minn. Stat. § 518A.39, subd. 2(a)(1)-(8) (2018). None of these circumstances are raised by the parties in this case.

district court may determine that a substantial change in circumstances has occurred when a maintenance recipient has failed to rehabilitate despite reasonable efforts to do so. *Youker*, 661 N.W.2d at 269 (citations omitted). Similarly, a district court may determine that a temporary maintenance award is unreasonable and unfair when the maintenance recipient has been unable to become self-supporting, despite reasonable efforts. *See, e.g.*, *Karg v. Karg*, 418 N.W.2d 198, 202 (Minn. App. 1988).

Here, the parties agree that Johnson has not fully rehabilitated, but they dispute whether her efforts to rehabilitate were reasonable. The district court described Johnson's efforts as "laudable" after finding that she completed English as a Second Language (ESL) certification in 2012, her bachelor's degree in 2014, and was working on her master's degree in ESL instruction. The district court additionally determined that the 2009 decree did not contemplate a timeline for Johnson's rehabilitation, rejecting Foster's claim that she should have completed her education earlier. The district court also found that one of the parties' adult children had a serious accident and Johnson provided significant care to that child in 2013. The record supports each of these determinations. Additionally, the record supports Johnson's claim that she made reasonable efforts to be employed and become self-sufficient. She obtained employment at a language school and was promoted in December 2016. Johnson's income rose to $19.50 an hour or $40,560 a year. At the time of the dissolution, she was making $8.85 an hour as a part-time retail sales associate.

Foster argues, in part, that Johnson waited almost four and a half years to complete her education and criticizes the district court for excusing Johnson's delay because "the needs of adult children may not be considered in awarding maintenance." Foster cites two

cases, but these cases actually stand for the proposition that the needs of adult children cannot be considered in determining the "level" or "amount" of maintenance—not whether the "reasonable efforts" analysis takes into account the rehabilitating party's decision to care for an adult child or relative in need. *See Reif v. Reif*, 410 N.W.2d 414, 416 (Minn. App. 1987) (stating that a spouse's contributions to adult children "cannot be considered by a court in determining an appropriate level of maintenance"); *Musielewicz v. Musielewicz*, 400 N.W.2d 100, 103 (Minn. App. 1987) ("The trial court must fairly determine maintenance without considering the needs of the adult children in setting the amount of maintenance."), *review denied* (Minn. Mar. 25, 1987).

We are not persuaded by Foster's view of applicable caselaw. When a court has determined that the party seeking modification of maintenance did not make reasonable efforts, the circumstances generally show a lack of effort that is not evident here. For example, in *Hecker*, the supreme court upheld a decision denying modification of maintenance where the party seeking modification failed to make any effort toward rehabilitation and relied on "the possibility that she would continue to receive spousal maintenance." 568 N.W.2d at 708, 710; *see also Youker*, 661 N.W.2d at 270 (reversing a district court's determination that there was a substantial change in circumstances because a party's rehabilitative efforts consisted of a "mere inquiry into two positions" without submitting an employment application during a three-year temporary maintenance period).

Here, the record supports the district court's finding that Johnson made "laudable" efforts to further her education because she significantly increased her salary and she completed her education, as contemplated in the 2009 decree. We agree with the district

court that the 2009 decree does not contemplate a deadline by which Johnson was to complete her education. In light of Johnson's efforts, it is immaterial that she also cared for an adult child during the rehabilitative period. As stated by the district court, our caselaw does not require "*perfect* efforts toward rehabilitation, merely reasonable efforts." Therefore, the district court did not abuse its discretion in concluding that Johnson made reasonable efforts towards rehabilitation.

B. The district court did not err in relying on the 2009 decree's findings regarding Johnson's reasonable monthly expenses.

Foster argues that the district court erred when it found Johnson's monthly expenses because it relied on Johnson's $6,000 budget from the 2009 decree, as adjusted for inflation. Foster contends that Johnson's 2009 budget included expenses for the then-minor children who were living with Johnson at the time of dissolution. Because the two minor children are now adults, Foster reasons that the district court should have concluded that only $4,484 of Johnson's 2009 budget was relevant to whether the initial maintenance award is unreasonable or unfair. Adjusting this lower number for inflation, Foster contends that a more realistic amount for Johnson's current monthly expenses would be $4,895. Foster claims that even this number includes expenses that have decreased, such as credit cards and cable/internet. In sum, Foster argues that the district court erred in its findings regarding Johnson's reasonable monthly expenses.

The district court analyzed Johnson's reasonable monthly expenses when considering whether the existing award is unreasonable and unfair. Initially, the district court correctly stated that the 2009 decree provided "the baseline circumstances" for

Johnson's motion. *Hecker*, 568 N.W.2d at 709 (holding that findings in a dissolution decree are relevant to a subsequent modification motion because the decree identifies the "baseline circumstances against which claims of substantial change are evaluated"). Then, the district court considered Johnson's current income of $40,560 per year and determined that "she continues to run at a deficit in her COLA[-]adjusted budget of $6,700." In other words, the district court relied on the 2009 decree's determination that Johnson had $6,000 in monthly living expenses, after adjusting the expenses for inflation to $6,700.[3] As a result, the district court set Johnson's award for permanent spousal maintenance at $4,391 per month.

Because Foster failed to raise an alleged decline in Johnson's reasonable monthly expenses during district court proceedings, we conclude that this issue is not properly before us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts review "only those issues that the record shows were presented and considered by the trial court"). While Foster resisted Johnson's initial budget of approximately $8,400, which was submitted with her 2015 motion, Johnson abandoned this position when the case was remanded by this court in 2016. After remand, Foster only argued that Johnson's budget submitted for the 2009 decree was "based entirely on speculation." The record on modification of maintenance was closed, however, and Foster did not seek to reopen.

[3] It is worth noting that COLA-adjustments to the amount of spousal maintenance occur every two years without a motion for modification. *See* Minn. Stat. § 518A.75, subd. 1 (2018); *McClenahan v. Warner*, 461 N.W.2d 509, 511 (Minn. App. 1990).

Therefore, whether Johnson's monthly expenses had declined since the 2009 decree was not raised in the district court and we do not consider the issue on appeal.[4]

C. The district court's other findings sufficiently supported the amount and duration of Johnson's award.

Foster argues that the district court failed to make required findings. When a court modifies a maintenance award, the amount and duration of the extended award "must be supported by the district court's findings." *Youker*, 661 N.W.2d at 269. The district court's findings, in part, must be based on the factors used for determining an initial maintenance award under section 518.552, subdivision 2. *See* Minn. Stat. § 518A.39, subd. 2(e). These factors include (a) the "financial resources of the party seeking maintenance," (b) the time likely necessary to obtain training or education and the probability of the party becoming self-supporting, (c) the parties' standard of living during the marriage, (d) the length of the marriage and whether the party seeking maintenance was absent from employment or education to be a homemaker, (e) lost employment opportunities of the party seeking maintenance, (f) the age and physical/emotional condition of the party seeking maintenance, (g) the ability of the party from whom maintenance is sought to provide

[4] Even assuming that Foster has properly raised an error in the district court's analysis, the mere existence of an error is not grounds for reversal—the complaining party must also show how it was prejudiced by the error. *See* Minn. R. Civ. P. 61. Appellate courts "will not reverse a correct decision simply because it is based on incorrect reasons." *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987). On appeal, Foster argues for a reduced monthly budget of $4,895, but Foster's position implicitly concedes that Johnson is unable to meet her own needs based on her annual income of $40,560. *i.e.*, $4,895 x 12 = $58,740. And because the district court closed the record on remand, it is possible that Johnson's expenses actually *increased*. At a minimum, Johnson's inability to meet her own needs establishes that the initial award is unreasonable and unfair. And it is not clear whether any potential error in setting the budget prejudiced Foster.

maintenance, and (h) the contribution of the parties in acquiring marital property or one advancing the other's employment or business. Minn. Stat. § 518.552, subd. 2 (2018).

Importantly, the district court must make relevant findings related to these factors. *See Santillan v. Martine*, 560 N.W.2d 749, 752 (Minn. App. 1997). In *Santillan*, this court determined that the district court "neglected to make findings on the parties' actual income or needs" and failed to address the probability of the spouse seeking maintenance "finishing her education or otherwise becoming self-supporting." *Id.* We remanded to the district court to make proper findings. *Id.*

Here, the district court's order contains factual findings that correspond to the eight factors, such as that the marriage lasted nearly 30 years and that Johnson was a homemaker during the marriage while her husband worked. The court also took into account "the several decades that [Johnson] had been out of the workforce," that Johnson supported Foster's "successful medical career," that there is a significant "difference in academia, in the workforce, and in the changing needs of immigrant communities" that Johnson works with since Johnson graduated from college in 1979. The district court also found that Johnson had recently increased her income to $40,560. Additionally, the court considered Foster's income of over $200,000 in 2014. Although these findings are not neatly packaged in one section addressing the amount and duration of maintenance, we conclude that the district court made sufficient factual findings on each of the factors as required to determine the amount and duration of maintenance. *Cf.* Minn. R. Civ. P. 52.01 ("It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court . . . or appear in an opinion or memorandum of decision filed by the court or in an

accompanying memorandum."). Therefore, the district court did not abuse its discretion in its findings related to the factors in section 518.552, subdivision 2.

II. The district court's award of need-based attorney fees to Johnson

Foster argues that the district court erred in awarding attorney fees to Johnson. A district court "shall" award need-based attorney fees if three conditions are met: (1) the requesting party is asserting her rights in good faith, (2) the party from whom fees are sought is able to pay, and (3) the requesting party is unable to pay. Minn. Stat. § 518.14, subd. 1 (2018). Appellate courts examine a district court's award of attorney fess under an abuse-of-discretion standard. *See Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (finding no abuse of discretion where district court "made no separate finding" that one party was able to pay the other party's attorney fees but the "court reasonably implie[d]" that it believed the party could pay).

First, Foster argues that the district court made only conclusory findings in support of its fee award and cites to *In re Marriage of Richards*, 472 N.W.2d 162, 166 (Minn. App. 1991). Foster misapplies the cited case. In *Richards*, the district court made "general findings" that "could support an award of fees under the statute" but failed to find facts specifically relating to the statutory factors. 472 N.W.2d at 166. Here, the district court made specific findings related to Johnson's request for need-based attorney fees and included facts corresponding to each of the required statutory factors under section 518.14, subdivision 1. We conclude that the district court's factual findings supporting its fee award were not deficient as conclusory.

Second, Foster claims that the district court erred in awarding fees that Johnson incurred during the 2016 appeal because Johnson failed to seek appellate fees during that appeal and this court "did not direct the district court to address" attorney fees upon remand. Foster is correct that the district court's total award of $28,340.50 included Johnson's attorney fees from the 2016 appeal. During oral argument to this court, Johnson's attorney conceded that the district court erred when it included $10,000 in 2016 appellate attorney fees in its award.

"'A party seeking attorneys' fees on appeal shall submit such a request' to the appropriate appellate court 'by motion under Rule 127.'" *Rooney v. Rooney*, 782 N.W.2d 572, 578 (Minn. App. 2010) (quoting Minn. R. Civ. App. P. 139.06, subd. 1). Unless an appellate court expressly provides for the district court to award appellate attorney fees on remand, "an appellate court is the proper court to determine the propriety of an award of attorney fees on appeal." *Id.* (quotation omitted).

Here, between September 2015 and August 2016, Johnson incurred approximately $10,000 in attorney fees and costs that were directly related to the 2016 appeal. Johnson did not seek an award for appellate fees and costs until after the case was remanded. Thus, Johnson was not entitled to seek appellate attorney fees from the earlier appeal. Consequently, in accordance with caselaw and Johnson's concession during oral argument, this court modifies the judgment of the district court to reduce the total award of attorney fees by $10,000.

In sum, we affirm the district court's decisions modifying Johnson's spousal maintenance and awarding Johnson's need-based attorney fees in the modified amount of $18,340.50.

Affirmed as modified.