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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0150

In re the Marriage of:

Laura Diane Hermer, petitioner,
Respondent,

vs.

Lawrence James Cisek, Jr.,
Appellant.

Filed December 17, 2018
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-FA-14-1364

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

James J. Vedder, Brittney M. Miller, Moss & Barnett, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

SMITH, TRACY M., Judge

Appellant-husband challenges the district court's order denying his motion to terminate spousal maintenance and granting respondent-wife's motion to increase spousal

maintenance. Because appellant fails to demonstrate that the district court abused its discretion in determining the need for and amount of spousal maintenance, we affirm.

FACTS

Although this case involves only one party's appeal from the district court's order deciding the parties' respective motions to modify spousal maintenance, the case has a somewhat complicated history, consideration of which is necessary to the analysis.

Appellant Lawrence Cisek (husband) and respondent Laura Hermer (wife) were married in 1999, separated in 2014, and divorced in 2015. Their dissolution case was tried over four days across several months in early 2015.

Husband is a physician, and wife is a law professor. Until moving to Minnesota in 2012, the parties lived in Texas. At trial, the parties agreed that husband's salary at the time was $420,000 per year but disputed what husband's salary would be for the remainder of 2015 and into the future. On the final day of trial, husband introduced evidence that his salary would decrease to $300,000 per year, effective July 1, 2015. The district court found that husband's salary would, in fact, decrease to $300,000. The parties did not dispute that wife's then-current salary was $96,898 per year.

Both parties introduced budgets at trial in an effort to prove the marital standard of living. Wife claimed $9,342 in monthly living expenses, of which $1,691 was for the parties' minor child. Husband claimed $19,496 in monthly living expenses, of which $2,251—an amount that included the cost of the child's private-school tuition—was for the minor child.

In its order for judgment and decree (the initial order), the district court adjusted both parties' budgets in order to determine what their reasonable monthly living expenses were. Significantly, the district court explained most of its adjustments to wife's budget, and some of its adjustments to husband's budget, by referencing "the parties' financial circumstances." The district court found wife's reasonable monthly living expenses to be $7,950, to which the court added the cost of the child's private-school education, for a total of $10,050 per month. It found that husband had reasonable monthly living expenses of $12,356. After awarding wife child-support of $1,077 per month, the district court found that wife had a net monthly income of $7,262 and that husband had a net monthly income of $13,101. The district court awarded wife permanent spousal maintenance of $3,375, an amount that was premised on the inclusion of the child's educational costs in wife's budget.

Following the initial order, the parties filed cross-motions for amended findings. The district court granted in part and denied in part those motions, in an amended order. The amended order did not change the award of either child support or spousal maintenance. Husband appealed. In March 2017, this court reversed the district court's award of spousal maintenance, holding that ordering maintenance to pay for the child's educational expenses was improper.

On August 1, 2017, following remand, the district court filed two separate orders: one concerning the parties' postremand motions that were not related to the appeal, and a second amended order for judgment and decree (the second amended order) dealing with spousal maintenance and child support in accordance with this court's opinion. The district court did not, at that time, accept new evidence relating to the parties' financial

circumstances, so the second amended order was based on the evidence that had been presented at trial. The district court awarded wife $1,000 per month in maintenance and $1,210 per month in child support and separately ordered the parties to divide the cost of the child's private-school tuition between them.

In the meantime, husband had moved back to Texas, where his income had immediately increased to $620,000 per year. Wife's salary had also increased, although less dramatically; as of July 2017 she was paid $110,243 per year. In August and September 2017, immediately after issuance of the district court's second amended order, the parties moved for modification of the award of spousal maintenance based on changed circumstances, with husband requesting that maintenance be terminated and wife requesting that it be increased to $2,979 per month.

In December 2017, the district court filed its order on both motions (the modification order). The district court found that husband's gross monthly salary was $51,667 and that wife's gross monthly salary was $9,187, excluding child support. The court did not make any findings as to the parties' net salaries after taxes or other unbudgeted expenses. The court found that its prior reduction of wife's budget had been based on husband's decreased salary in 2015, that the reduction had brought wife below the marital standard of living, and that wife's unadjusted budget from the trial reflected the marital standard of living. It also found that wife's increased salary was "anticipated or necessary" and so did not justify a reduction in maintenance. Finally, the court found that the parties had experienced a substantial change in circumstances and that wife should no longer be required to live below the marital standard of living. The district court increased the award

of maintenance to $2,000 per month. The district court also increased husband's child-support obligation to $1,359 per month, which husband does not challenge.

Husband appeals the modification order, challenging both the district court's refusal to terminate his maintenance obligation and its decision to increase the amount of that maintenance.

D E C I S I O N

An appellate court reviews a district court's decision regarding whether to modify an existing maintenance award for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (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. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). Legal questions are reviewed de novo. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

Modification of spousal maintenance is governed by Minn. Stat. § 518A.39 (2018). A party seeking to modify spousal maintenance bears "a dual burden." *Hecker*, 568 N.W.2d at 709 (discussing Minn. Stat. § 518.64 (1996), since renumbered to Minn. Stat. § 518A.39 and amended in ways that are not relevant here). The party must show, first, "a substantial change in one or more of the circumstances identified in the statute" and, second, that the change makes the initial award "unreasonable and unfair." *Id.* Only one statutorily identified circumstance is present in this case: "substantially increased . . . gross income of

an obligor or obligee." Minn. Stat. § 518A.39, subd. 2(a)(1). Each party argues that the income of the other has substantially increased.

When considering whether to modify, the district court is instructed to "apply, in addition to all other relevant factors, the factors for an award of maintenance under section 518.552 that exist at the time of the motion." Minn. Stat. § 518A.39, subd. 2(e). Though the statute itself is not clear on this point, caselaw suggests that these factors are relevant to the determination of whether an award is unreasonable or unfair. *See Peterka v. Peterka*, 675 N.W.2d 353, 359 (Minn. App. 2004) (recognizing that an initial award may be unfair if the obligee cannot meet the marital standard of living—one factor in Minn. Stat. § 518.552); *Cisek v. Cisek*, 409 N.W.2d 233, 236 (Minn. App. 1987) (instructing that, when considering whether to modify maintenance, the court must consider the factors for an award of maintenance), *review denied* (Minn. Sept. 18, 1987). Two of the factors from section 518.552 are critical for the purposes of this appeal: first, "the financial resources of the party seeking maintenance . . . and the party's ability to meet needs independently," and, second, "the standard of living established during the marriage." Minn. Stat. § 518.552, subd. 2(a), (c) (2018). We therefore consider whether, in light of the marital standard of living, wife's financial resources, and her ability to meet her needs, the district court abused its discretion in determining that the existing award was rendered unreasonable and unfair by husband's increased income.

I. The district court did not abuse its discretion by granting wife's motion for increased spousal maintenance.

Husband raises three arguments in contending that the district court abused its discretion by granting wife's motion for increased spousal maintenance. We do not presume that the district court has erred; the party asserting error has the burden of showing it. *Horodenski v. Lyndale Green Townhome Ass'n*, 804 N.W.2d 366, 372 (Minn. App. 2011) (citing *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 237 N.W.2d 76, 78 (1975)). Thus, we will not reverse unless husband can affirmatively establish the asserted errors. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (1944).

A. Husband has not shown that the district court failed to consider wife's receipt of child-support payments when calculating her need.

First, husband argues that it was error for the district court, in determining how much wife needed to maintain the marital standard of living, to rely on a budget that included expenses related to their minor child without accounting for the fact that wife was receiving child support. Husband argues that the district court should have either: (a) "determined what amount of spousal maintenance Wife would need to meet only her expenses," or (b) "determined what amount of spousal maintenance *and child support* Wife would need to meet her expenses *and the minor child's expenses*." (Emphasis added.)

However, husband has failed to demonstrate that the district court did not do exactly what he says it should have done in (b). The district court found that, between the second amended order and the modification order, wife's gross monthly income had increased by 14%. Although the district court did not state whether it was taking into account her receipt

of child support or not, two factors indicate that child support was likely accounted for in determining wife's need.

First, the court described the increase as being to wife's income, not wife's salary. In the second amended order, the court was careful with its language: it used "salary" when it meant salary, and it used "income" to refer to salary plus other forms of income, such as child support. Husband does not provide argument as to why it should be different in the modification order. And, while it is true that wife's gross salary increased by 14% between the second amended order and the modification order, her gross salary plus child support also increased by 14%. Thus, the court's mention of the 14% increase does not necessarily mean that it was referring to salary when it said income.

Second, the parties' submissions to the district court supporting their respective motions to increase and to terminate spousal maintenance always included both child-support payments as income and child-related expenses as budget items. It seems unlikely that the district court would, on its own, exclude from its calculations something that had consistently been included by both parties and not say that it had done so. Further, husband provides no argument as to why it would have.

Because husband has not shown that the district court actually failed to include child-support payments as income to wife when calculating what she needed to meet her and the child's expenses, husband has failed to meet his burden under *Horodenski*, 804 N.W.2d at 372. We therefore reject husband's argument.

B. Husband has not shown that the district court erred in interpreting its own findings regarding the marital standard of living.

Husband's next argument is that the district court clearly erred by finding that wife's unadjusted budget—rather than the adjusted budget—represents the parties' marital standard of living. *See* Minn. Stat. § 518.552, subd. 2(c). He contends that the real reason for the district court's downward adjustments of wife's trial budget was that her trial budget overstated the marital standard of living. He argues that, by relying on the unadjusted budget in ruling on the motions to modify, the district court improperly improved upon the marital standard of living.

A district court's order is ambiguous if reasonable minds can differ about what it means. *Suleski v. Rupe*, 855, N.W.2d 330, 339 (Minn. App. 2014). The meaning of an ambiguous provision in an order is a fact question, so a district court's interpretation of an ambiguous provision is reviewed for clear error. *Id.* A district court's construction of its own decree receives "great weight" on appeal. *Johnson v. Johnson*, 627 N.W.2d 359, 363 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). This is true even if the judge who is interpreting the order is not the same judge who wrote the order. *Id.*

Husband points to several passages in the second amended order as proof that the dissolution court's adjustments to wife's budget were made to bring it closer to the marital standard of living. The district court explained most of its adjustments to wife's budget by referring to "the parties' current financial circumstances." It found that, following those adjustments, the budget reflected "petitioner's reasonable monthly living expenses." When adjusting husband's budget, the court said that one of his expenses "appears to be

overstated," a comment that was not made about any of wife's budget items. The district court did not state whether wife's adjusted or unadjusted budget actually reflected the marital standard of living. Thus, reasonable minds could differ about whether the phrase "reasonable monthly living expenses," in context, meant that wife's adjusted budget reflected the marital standard of living or rather some sustainable level below the marital standard of living. Either interpretation is plausible, and the second amended order's finding as to the marital standard of living is therefore ambiguous.

Because the second amended order's finding as to the marital standard of living is ambiguous, its meaning is a question of fact, and the district court's factual finding as to its meaning is given great weight. *See Johnson*, 627 N.W.2d at 363. Husband raises two arguments for why we should hold that the district court erred in its interpretation of the second amended order. First, he contends that other language in the second amended order proves that the parties' marital standard of living was best reflected by the adjusted budget, and, second, he argues that a combined income of $400,000 per year best reflects the parties' marital standard of living.

Husband's first argument relies on a single sentence from the second amended order. He contends that, because the district court found that "[t]he parties' combined claimed living expenses far exceed even their combined net monthly incomes," wife's budget must have overstated the marital standard of living. This argument ignores the fact that the second amended order reduced wife's budget by roughly $1,400 per month while reducing husband's budget by over $7,000 per month. Simply put, most of the excess claimed expenses were in husband's budget, and the sentence he points to does not clarify

whether the overstated expenses were husband's, or wife's, or both. Further, the sentence in question does not identify whether the expenses were "overstated" because they exaggerated the marital standard of living or because they exceeded the parties' reduced ability to pay the expenses, or both. The sentence thus provides little support for his argument that wife's trial budget overstated the marital standard of living.

Husband's second argument is also unpersuasive. He contends that, if the district court based the parties' marital standard of living on his having income in excess of $330,000 per year, that finding was error. He argues that, as a matter of law, the marital standard of living must be based only on the parties' income at the moment of divorce or on the average income over the whole of their marriage. Since husband's income at the time of the divorce was $300,000 per year, and his average income over the whole of the marriage was $330,000 per year, he contends that basing the marital standard of living on anything more than $330,000 in income for him would be error. This argument appears to challenge findings in the second amended order, from which the time for appeal has passed. However, we will interpret husband's argument as contending that it was clear error for the district court to interpret its second amended order as making a finding that was contrary to law.

The law does not support husband's argument that the marital standard of living must be based on some particular time period during the marriage. This court has affirmed district courts' determinations both that a recent financial reversal lowered the parties' standard of living, and that a recent increase in the standard of living would be disregarded when the rest of the marriage was characterized by a "modest" standard of living. *Compare*

Robert v. Zygmunt, 652 N.W.2d 537, 545 (Minn. App. 2002), *review denied* (Minn. Dec. 30. 2002), *with Katter v. Katter*, 457 N.W.2d 750, 754 (Minn. App. 1990). In another case, this court approved of a district court's findings when they focused on the three years prior to separation. *See Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009). Importantly here, we have held that "a sub-marital-standard-of-living maintenance award may be initially equitable" and that a subsequent modification of maintenance bringing the obligee spouse up to the marital standard of living may also be appropriate if later changes in circumstances support such a modification. *See Peterka*, 675 N.W.2d at 359. Together, these cases indicate that there is no hard-and-fast timeframe for calculation of the marital standard of living—rather, determination of the relevant timeframe is left to the district court's discretion. *Cf. In re Custody of M.J.H.*, 913 N.W.2d 437, 443 (Minn. 2018) (rejecting a bright-line rule for determining whether a request to change parenting time was actually a motion to modify custody in part because it conflicted "with the governing principle that a district court has broad discretion in determining custody and parenting time matters"); *Curtis v. Curtis*, 887 N.W.2d 249, 254 (Minn. 2016) (declining to adopt a bright-line rule for how to calculate potential investment income from distributed marital property when evaluating a spouse's ability to provide adequate self-support because such a rule would be "inconsistent with a district court's broad discretion").

Here, the district court heard testimony from the parties as to their expenses and standard of living. Wife's testimony was that her trial budget reflected the marital standard of living. This evidence is sufficient to support the district court's finding, particularly in light of the district court's opportunity to evaluate the credibility of the parties. *See LaPoint*

v. Family Orthodontics, P.A., 892 N.W.2d 506, 515 (Minn. 2017). We cannot say that the district court abused its discretion in determining, in its second amended order, that wife's unadjusted budget reflects the marital standard of living. Because the district court's interpretation of the second amended order does not make that order contrary to law, we reject husband's second argument.

C. Husband has not shown that the increased spousal maintenance exceeds wife's need.

Husband's third argument is that, even if wife's unadjusted budget is deemed to properly reflect her reasonable expenses at the marital standard of living, the modified amount exceeds her need. To reiterate, husband's burden as the appellant is to show this court, based on the record, where the district court's error lies. *See Horodenski*, 804 N.W.2d at 372. Husband's brief presents several calculations in support of his argument; all purport to show that wife can meet her needs with either no spousal maintenance or with the maintenance awarded in the second amended order.

In one version of these calculations, husband points to three facts. First, between the trial and the modification at issue here, wife's salary increased from $96,898 per year to $110,243 per year. This works out to an increase of $1,112 per month. Including the change to child support in the modification order, wife's gross monthly income increased by about $1,261 per month. Second, the difference between wife's budget in the second amended order, $7,950 per month, and her budget in the modification order, $9,262 per month, is $1,312. Third, the second amended order states that wife could meet her budget with her salary, $1,000 per month in maintenance, and $1,210 in child support. Husband argues that,

because the increases in wife's income cover all but $50 of the increase between her reasonable expenses in the second amended order and the reasonable expenses in the modification order, it was error for the district court to increase the maintenance payment by $1,000. The problem with this calculation, however, is that it does not account for any tax on the increase to wife's income and instead assumes that the entire increase in gross income becomes take-home pay.[1]

In another calculation, husband points to wife's cash-flow calculations, submitted in support of her motion for modification of the spousal maintenance awarded in second amended order. Wife's calculations use the parties' incomes as of 2017, use their unadjusted trial budgets, include $1,000 in maintenance and $1,210 in child support, and also include a substantially increased retirement contribution for both parties. Husband disputes some of these assumptions and creates his own calculation. He adjusts wife's income by adding the retirement contribution and subtracting her child support award, then he adjusts her budget by removing nonincurred expenses and child-related expenses while adding a smaller retirement contribution. Based on this calculation, he concludes that wife's income exceeds her reasonable expenses at the marital standard of living by $376 per month.

[1] At oral argument, counsel for husband contended that the effect of taxes on this income would be low, because wife's "blended" tax rate—that is, the average tax on each dollar she earns, accounting for credits, deductions, and progressive taxation—was relatively low. This ignores the fact that increased income does not change the value of those credits and deductions, and that each dollar in increased income is taxed at the last-dollar rate, not the blended rate. Wife's blended tax rate would need to be recalculated including the new income, and re-applied to every other dollar, in order for it to accurately reflect the tax effects of wife's increased income.

This calculation, too, is flawed. Husband removes all child-related expenses from wife's budget and all child-support payments from wife's income. Husband had previously argued that it was equally acceptable to include both child-related expenses and child-support payments. But wife's child-related expenses exceed her child-support income by $400. Thus, by preferring one equally-acceptable-to-husband method of calculation over the other, husband's calculation appears to reduce wife's need by $400. Relatedly, husband subtracts from wife's unadjusted budget both the full amount of the minor child's expenses and $80 that are no longer incurred. But $60 of that $80 amount was for childcare, so that amount is double-counted. Husband reduces wife's retirement contribution from $1,500 per month to $202. Two-hundred-two dollars was equal to 2.5% of her salary at the time of trial, but not 2.5% of her salary at the time of the modification hearing, resulting in a difference of $37. Husband's calculation also does not account for the tax effects of reducing the retirement contribution—while the $1,500 per month were deducted tax-free in wife's budget, husband's calculation assumes that all $1,500 will be spendable by wife and simply subtracts $202 after taxes to show the effect of wife's retirement contribution.

Wife points out many of these problems but does not present a complete cash-flow or tax calculation based on what she claims are the correct assumptions. She admits that the district court denied her request for $1,500 per month in retirement contributions, but she does not identify any record evidence of how removal of that contribution affects her taxes. The closest that she comes is a paragraph laying out her argument for how the court's ordered maintenance and child support give her either $289 in excess of her budget or a $200 shortfall, depending on how certain costs are counted. Beyond the fact that it

expresses some expenses as annual figures and others as monthly figures, the most significant problem with the analysis is that it does not clearly explain how its tax costs are calculated. Instead of showing the math on how to arrive at what she argues is the correct amount, wife simply argues that this court can take judicial notice of the tax tables and determine her spendable income as a matter of law. Even if this court were to take judicial notice of the tax tables, actually calculating wife's tax obligation requires assumptions about inclusions and deductions, not all of which have been found by the trial court or agreed upon by the parties. Because making such assumptions would amount to fact-finding, we decline to do so. *See Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015) ("[T]he court of appeals is not a trier of fact.").

Wife, however, need not convince this court that the district court correctly calculated her need; husband must persuade us that it erred. *See Horodenski*, 804 N.W.2d at 372. Husband's arguments fail to account for several factors when calculating wife's need, particularly the effect of taxes on income that husband attributes to wife. As a result, we are unpersuaded that the district court erred in determining that wife needed $2,000 per month in maintenance in order to meet the marital standard of living.

II. The district court did not abuse its discretion in denying husband's motion to terminate spousal maintenance to wife.

Husband contends that the district court abused its discretion in denying his motion to terminate spousal maintenance. Since it was not error for the district court to conclude that wife was entitled to an increase in maintenance of $1,000 per month, it is readily apparent that the district court did not err in refusing to terminate maintenance. Husband's

contention that wife no longer has a need for spousal maintenance turns on his assertion that the district court's order modifying maintenance did not restore wife's budget to the marital standard of living but instead erroneously improved upon the marital standard of living. Because we hold that the district court did not err in determining that wife's unadjusted budget reflected the marital standard of living, we affirm the district court's ruling that husband's maintenance obligation should not be terminated.

Affirmed.