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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0179

In re the Marriage of:
Deann Kay Wells, petitioner,
Appellant,

vs.

Joseph Daniel Wells, III,
Respondent.

Filed December 10, 2018
Affirmed in part and reversed in part
Worke, Judge

Sherburne County District Court
File No. 71-FA-08-592

M. Sue Wilson, James R. Todd, M. Sue Wilson Law Offices, P.A., Minneapolis, Minnesota (for appellant)

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

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Klaphake, Judge.[*]

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[*] 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

WORKE, Judge

Appellant-wife argues that the district court abused its discretion by modifying her spousal-maintenance award and by denying her request for need-based attorney fees. We reverse the district court's modification of spousal maintenance, but affirm its denial of attorney fees.

FACTS

In 2010, the parties dissolved their 24-year marriage. At the time, appellant-wife Deann Kay Wells was 46 years old and had not worked outside of the home for 20 years. Respondent-husband Joseph Daniel Wells, III was earning an average gross income of $450,038 per year. The district court found that wife's reasonable monthly expenses were $7,572. The district court found that, although wife had "no plans to find employment," she was able to secure employment because she earned a business degree in 1998 and had "some computer skills." The district court concluded that wife was entitled to permanent spousal maintenance, but could not expect husband to provide the "exact marital standard of living." The district court ordered wife's maintenance to decrease over time to eventually "supplement [her] income to approximate the marital standard of living."

The district court ordered husband to pay wife $8,000 per month for 24 months, to allow her time to obtain employment. Husband was then ordered to pay wife $6,000 per month for 36 months, to allow her time to increase her earnings to at least $40,000. Thereafter, husband was ordered to pay wife $4,500 per month in permanent spousal maintenance.

Wife moved for amended findings, arguing, among other things, that the district court failed to consider tax consequences of the spousal-maintenance award. The district court issued an amended judgment and decree considering the tax-rate schedules and determining that wife was subject to a 25% tax liability. The district court modified wife's spousal-maintenance award to $10,667 per month for 24 months, $8,000 per month for 36 months, and thereafter $6,000 per month in permanent spousal maintenance.

In August 2016, husband moved to modify his spousal-maintenance obligation, claiming that, although he had the ability to pay, wife was no longer in need because she was cohabitating with her significant other and was able to obtain employment. Wife countered that husband failed to show a substantial change in circumstances that rendered the original award unfair and unreasonable. She submitted a register of her monthly expenses, which showed that they decreased from $7,572 at the time of the judgment and decree to $6,503. Wife also requested need-based attorney fees.

In July 2017, the district court granted husband's motion to modify spousal maintenance. Although the district court found that "cohabitation has been established," it concluded that cohabitation did not support modification. Rather, the district court modified spousal maintenance due to wife's reduced expenses. The district court concluded that wife opted to remain unemployed and live on maintenance by reducing her expenses. The district court noted that maintenance was intended to be "supplemental to the $40,000 of imputed income," and that if wife had sought employment, she would have

been able to afford her expenses. The district court found that a 14%[1] decrease in expenses was a substantial change in circumstances and concluded that it was "unreasonable and unfair" for husband to continue to pay $6,000 per month.

In determining the amount of the modified maintenance award, the district court considered the relevant statutory factors, including the marital standard of living. The district court found that the marital standard of living envisioned $3,155 for monthly home expenses, but wife's current monthly home expenses were $3,414. The district court found that wife's monthly home expenses should be reduced to match the marital standard of living. The district court also determined that husband's obligation should be reduced by $205, the amount that wife's significant other contributed to her monthly expenses.

The district court reduced husband's maintenance obligation by 14% to coincide with the percentage decrease in wife's expenses and by an additional $464[2] due to home expenses that exceeded the marital standard of living and the monthly contribution from wife's significant other. The district court ordered husband to pay wife $4,696[3] per month in permanent spousal maintenance. The district court denied wife's motion for attorney fees.

Wife moved for amended findings, arguing that the district court (1) erred in finding that a 14% reduction in expenses was a substantial change in circumstances, (2) erred by

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[1] $7,572 (marital standard of living expenses) - $6,503 (current expenses) = $1,069/$7,572 = .1411 x 100 = 14.11%.
[2] $3,414 (current home expenses) - $3,155 (marital standard of living home expenses) = $259 + $205 (contribution from significant other) = $464.
[3] $6,000 x 14% = $840. $6,000 - $840 - $464 = $4,696.

reducing maintenance by a percentage and dollar-for-dollar, (3) abused its discretion by failing to consider tax consequences, and (4) abused its discretion by denying her attorney fees.

In November 2017, the district court issued an order granting in part wife's motion for amended findings. Wife argued that Minn. Stat. § 518A.39 (2016), presumes that a 20% change, not a 14% change, is a substantial change in circumstances. The district court determined that section 518A.39 applies to gross income, not expenses. The district court further stated that the 14% reduction did not include reductions made by the court. The district court concluded that wife's expenses were reduced by 21%[4] after including the $259 reduction for home expenses and the $205 contribution from wife's significant other.

The district court concluded that wife was correct that spousal maintenance should have been reduced only by the percentage decrease, stating that the "dollar-for-dollar reductions were intended to be taken from [wife]'s claimed expenses prior to applying a percentage decrease. Therefore, the [permanent] spousal maintenance award should be $4,740."[5] The district court determined that it did not err in failing to consider tax consequences because wife failed to provide information indicating her anticipated tax liability, and that it appropriately denied wife's request for attorney fees. This appeal followed.

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[4] $6,503 (current expenses) - $464 (reductions made by the court) = $6,039. $7,572 (marital standard of living expenses) - $6,039 = $1,533/$7,572 x 100 = 20.24%

[5] $6,000 x 21% = $1,260. $6,000 - $1,260 = $4,740.

D E C I S I O N

Modification of spousal maintenance

Wife argues that the district court abused its discretion by modifying her spousal-maintenance award. This court reviews decisions concerning modifications of spousal maintenance for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997). "Such discretionary power is to be exercised with great caution and only upon clear proof of facts showing that the circumstances of the parties are markedly different from those in which they were when the decree was rendered." *Rubenstein v. Rubenstein*, 202 N.W.2d 662, 664 (Minn. 1972). A district court abuses its discretion 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 (Minn. 1997). "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). "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotations omitted).

Spousal maintenance may be modified based on a substantial change in circumstances if the change makes the existing award unfair and unreasonable. Minn. Stat. § 518A.39, subd. 2(a), (b). A substantial change in circumstances may be the decreased need of the obligee. *Id.*, subd. 2(a)(2). The party moving to modify a spousal-maintenance award bears the burden of demonstrating a substantial change in circumstances that renders the existing award unfair and unreasonable. *Hecker*, 568 N.W.2d at 709. "Unreasonable

and unfair are strong terms which place upon the claimant a burden of proof more than cursory." *Kielley v. Kielley*, 674 N.W.2d 770, 779 (Minn. App. 2004) (quotations omitted).

Here, the district court found that wife "opted to forego the additional money [from employment] and decreased her expenses commensurate with that decision. The fourteen percent [or 21% found in the amended findings] decrease in expenses constitutes a substantial change in circumstances." The district court found that "[i]t is unreasonable and unfair for [husband] to continue paying $6,000 per month when [wife]'s current expenses are substantially lower than the time at which the maintenance award was set."

Wife's decreased expenses, however, do not constitute a substantial change in circumstances because wife reduced her expenses in accord with the final step-down amount of the permanent maintenance award. *See* Minn. Stat. § 518A.39, subd. 2(a)(2). Therefore, we conclude that the district court abused its discretion by modifying the spousal-maintenance award because the record does not include "facts showing that the circumstances of the parties are markedly different from those in which they were when the decree was rendered." *See Rubenstein*, 202 N.W.2d at 664. We reach this conclusion for several reasons.

First, husband's ability to pay wife $6,000 per month in permanent maintenance is not at issue. Second, the step-down amounts in the judgment and decree served as an incentive for wife to secure employment. But wife was not ordered to find employment; indeed, the original judgment and decree found that wife had "no plans to find employment." The district court found that when husband began paying wife $6,000 per month she would be able to earn $40,000, "to approximate the marital standard of living."

Wife reduced her expenses to coincide with the spousal-maintenance award, in order to live on the spousal-maintenance award rather than at the marital standard of living. Wife received $6,000 in spousal maintenance and her monthly expenses are $6,503. She did not reduce her expenses significantly below the amount she was receiving; thus, there is not a significant decrease in need.

Third, wife persuasively argues that if husband's obligation is reduced based on her reducing expenses to live on the amount she receives each month, he will continue to move to modify maintenance based on her continuing to reduce her expenses. To illustrate, wife reduced her monthly expenses of $7,572 to $6,503 to more efficiently live on the $6,000 she received from husband. Husband's modified obligation is $4,740. Wife, if remaining unemployed, will have to reduce her monthly expenses to approximately $4,740. If wife reduces her expenses, and this is deemed to be a basis for modification, husband could move the district court to again modify his spousal-maintenance obligation. Because the judgment and decree reduced husband's spousal-maintenance obligation, and wife reduced her expenses accordingly, husband has failed to show a substantial change in circumstances that renders the existing order unfair and unreasonable.

Fourth, we consider the district court's reductions in wife's expenses. Wife's marital-standard-of-living expenses were $7,572. Wife's current expenses are $6,503. The district court determined that this 14% reduction was substantial. Wife asserted that a presumption arises that a change is substantial when the change is 20%. *See* Minn. Stat. § 518A.39, subd. 2(b)(5) (stating that it is presumed that there has been a substantial change in circumstances if gross income has decreased by at least 20 percent). The district court

determined that the presumption did not apply in this case, but even if it did, wife's expenses reduced by 21% after including the district court's reductions.

Wife's marital-standard-of-living home expenses were $3,155. The district court determined that wife's current home expenses increased to $3,414 because she had two homes. Although concluding that multiple homes were within the marital standard of living, the district court determined that wife's current home expenses should be reduced by $259, the amount that they exceeded the marital standard of living.

The district court further reduced wife's expenses by the $205 monthly contribution from wife's significant other. The district court found that this contribution was allocated to utility expenses and noted that wife's $3,414 home expenses included "both home expenses and utilities." The district court's reduction of this $205 contribution for utility expenses should have been taken from wife's current home expenses.

By reducing wife's current home expenses, which are $3,414, first by $259—the difference between the marital-standard-of-living home expenses and wife's current home expenses, and then by the $205 utility contribution—wife's current home expenses would be $2,950, which is below the marital-standard-of-living home expenses of $3,155. The district court's reductions in wife's expenses are not in accord with the judgment and decree's design to have maintenance "approximate" the marital standard of living.

Finally, a spousal-maintenance recipient has some leeway in allocating monthly funds. In reality, not every monthly expense is stagnant and going to match up identically after six years. If an unforeseen expense occurred in one year, wife would have to reduce her expenses in other areas. A district court acts beyond its discretion by reducing line

items in a budget when the budget as a whole is less than the marital standard of living and within the monthly spousal-maintenance award. *See Rubenstein*, 202 N.W.2d at 664 (stating that a district court must exercise its discretion with "great caution" and only when facts show "markedly different" circumstances from when the decree was rendered).

Based on this record, the judgment and decree reduced husband's spousal-maintenance obligation, wife reduced her expenses accordingly, and husband has the ability to pay wife the original spousal-maintenance award. Therefore, we conclude that the district court abused its discretion by modifying spousal maintenance because the record does not support a conclusion that husband met his burden to show a substantial change in circumstances that rendered the original order unfair and unreasonable.[6]

Attorney fees

Wife argues that the district court abused its discretion by declining to award her need-based attorney fees. *See Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001) (stating that a district court's award of attorney fees will not be reversed absent an abuse of discretion), *review denied* (Minn. Feb. 21, 2001). A district court must award attorney fees to enable a party to contest a proceeding if it finds that "the fees are necessary for the good faith assertion of the party's rights . . . and will not contribute unnecessarily to the length and expense of the proceeding; . . . the party from whom fees . . . are sought has the means to pay them;" and the party seeking fees does not have the means to pay them. Minn.

[6] Wife argues that, even if the district court correctly modified spousal maintenance, it erred by failing to consider tax consequences. Because the district court abused its discretion by modifying spousal maintenance, and we are reversing and reinstating the original spousal-maintenance award, we do not reach this issue.

Stat. § 518.14, subd. 1 (2016). This court "will rarely reverse" the district court's decision to deny attorney fees. *Rosenberg v. Rosenberg*, 379 N.W.2d 580, 587 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986).

The district court determined that the retention of legal counsel was necessary for the good-faith assertion of wife's rights. However, the district court found that wife failed to provide evidence establishing that the number of attorneys working on the matter or the large volume of fees were necessary, especially with no evidence indicating that the case was unusual or overly complicated. The district court also found that the fees were not adequately explained because several entries were redacted or included vague references. Wife asserts that, if the district court determined that the fees were too high, it should have awarded her less than the amount she requested. And we would agree, but for the fact that the district court also determined that wife has the ability to pay her own fees.

The district court found that wife has approximately $28,100 in savings; has $521,437 in a retirement account; owns properties with a net value of $47,000; and saves $1,100 monthly. Wife claims that much of her savings is earmarked and that she should not have to dip into her nonliquid assets. But wife has forgone the opportunity to work and earn income. Wife chooses to remain unemployed, and she indicates that she understands that she has to modify her expenses to do so. She must similarly understand that, if she chooses to rely solely on her spousal-maintenance award for income, some circumstances may require her to dip into her nonliquid marital assets. We conclude that the district court did not abuse its discretion by denying wife's request for attorney fees.

Affirmed in part and reversed in part.