STATE OF MINNESOTA
IN COURT OF APPEALS
A11-200

In re the Marriage of: Teresa J. Raiter, petitioner,
Respondent,

vs.

Wayne Raiter,
Appellant.

Filed October 24, 2011
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-F4-00-000485

Matthew L. Fling, Edina, Minnesota (for respondent)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant-husband challenges the district court's modification of spousal maintenance retroactively increasing his obligation to respondent-wife. Because we discern no abuse of discretion in the district court's maintenance modification, we affirm.

FACTS

Husband Wayne Raiter and wife Teresa J. Raiter married in 1978. Husband works as a licensed clinical social worker and is the sole shareholder of Executive Care, Inc. Wife suffers from multiple sclerosis and has been unemployed since 1984. On March 25, 2004, the marriage was dissolved pursuant to the district court's partial findings of fact, conclusions of law and judgment and decree.[1] As part of the judgment and decree, the district court incorporated the terms of a settlement agreement between husband and wife. The settlement agreement addressed several issues—including the sale of the marital homestead, the division of husband's retirement accounts, and spousal maintenance—and set husband's spousal-maintenance obligation at $750 per month, with an additional $1,200 per month in child support for their remaining minor child. A trial was later held to address issues not resolved by the initial judgment and decree.

On March 10, 2005, the district court issued its final findings of fact, conclusions of law, order for judgment, and judgment and decree. The district court also addressed wife's request to modify the spousal maintenance from the stipulated amount. The district court determined that, in addition to income from spousal maintenance, wife "anticipated an award of Social Security benefits" related to her disability from multiple sclerosis, but her application for benefits was denied. Finding that wife was unemployed and unable to work due to her affliction with multiple sclerosis, the district court concluded that wife experienced "a substantial increase in her needs" and awarded

[1] The partial judgment and decree did not resolve the division of all personal property, the automobiles, and certain unsecured debts.

increased spousal maintenance up to the level of $1,800 per month, retroactive to November 10, 2003. The district court also ordered wife to appeal the Social Security Administration's denial of benefits, and emphasized that both parties could "reopen" the issue of spousal maintenance should any circumstance impact wife's need for maintenance.

In 2009, both parties sought modification of spousal maintenance. After a hearing, the district court issued an order on January 14, 2010, increasing husband's spousal-maintenance obligation to $4,664 per month, retroactive to August 1, 2009. The district court determined that wife's condition "has deteriorated further," and that wife has "increased needs and lack of sufficient income." The award was "temporary," and the order required wife to provide husband with copies of federal and state tax returns, information about any collateral income sources and inheritances, and apply for health insurance through Minnesota Care, after which the court would review the matter to see if additional calculations were necessary.

Husband appealed the order, but we dismissed the appeal as premature, stating that the order "does not finally determine [wife's] motion for an upward modification of [husband's] maintenance obligation," and that the order established only a "temporary increase" in maintenance. *Raiter v. Raiter*, No. A10-445 (Minn. App. July 7, 2010) (order). We also stated that issues relating to the January 14 order "will be within this court's scope of review on appeal from the final order." On December 3, 2010, the district court determined that "[n]o additional calculation" of husband's maintenance

obligation was required and made the terms of the January 14 order final. This appeal follows.

D E C I S I O N

We review 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); *see also Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981) (stating that "[a]lthough the [district] court is vested with broad discretion to determine the propriety of a modification, we have suggested that [district] courts exercise that discretion carefully"). A district court abuses its discretion regarding a maintenance determination 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). Factual findings will be sustained unless clearly erroneous. Minn. R. Civ. P. 52.01; *Kottke v. Kottke*, 353 N.W.2d 633, 635 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). Factual findings are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

An award of spousal maintenance may be modified upon a showing of a substantial change in circumstances that makes the terms of the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). There is a "dual burden on the party seeking modification—first, to demonstrate that there has occurred a substantial change in one or more of the circumstances identified in the statute and second, to show that the substantial change has the effect of rendering the original award

unreasonable and unfair." *Hecker*, 568 N.W.2d at 709. Some circumstances that may serve as a basis for modification include: a substantially increased or decreased gross income of an obligor or obligee; substantially increased or decreased need of an obligor or obligee; a change in the cost of living for either party; and a change in the availability of appropriate health care coverage, or a substantial increase or decrease in health care coverage costs. Minn. Stat. § 518A.39, subd. 2(a).

A. Substantial change in circumstances

Husband contends that the district court's order constitutes an abuse of discretion because wife "did not meet her dual burden" to demonstrate a change in circumstances that rendered the original maintenance amount unreasonable and unfair. First, husband challenges the district court's determination that wife's medical condition has "deteriorated" since the prior maintenance award in 2005, arguing that the record reveals "no substantial change" in her condition. Wife contends that the district court did not "rel[y] upon her medical condition" to support a substantial change in circumstances, but rather based its determination on an increase in wife's monthly expenses of approximately $1,000. She also argues that, in any case, the district court's findings regarding her medical condition are supported by the record.

We agree with wife's understanding of the district court's order. While the district court did find that wife's condition "deteriorated further," the basis for the modification was wife's "increased needs and lack of sufficient income." The district court determined that the "increase of $1,008.02 over the $3,655.98 in monthly expenses determined at trial" constitutes the "substantial change in circumstances that renders the

original spousal maintenance award unreasonable and unfair." Such an increase in need is an appropriate basis for modification. *See* Minn. Stat. § 518A.39, subd. 2(a)(2). Accordingly, husband's argument that wife failed to demonstrate a substantial change in circumstances based on her medical condition is unavailing.

Moreover, we conclude that the district court's finding related to wife's condition is not clearly erroneous. In challenging this finding, husband argues that wife "is now able to drive," and points to a medical record dated October 20, 2008, in which a treating physician indicated that wife "held her own relatively well over three years without having treatment." But in the same medical record, the physician (who indicates that he "[had] not officially seen Ms. Raiter for approximately three years") details that wife "has continued to suffer from recurrent symptoms related to her multiple sclerosis," including "significant visual change," "change in her language," "incoordination," "trouble walking and near falls," and "chronic neck, mid and low back pain." Even if wife's condition has stabilized or marginally improved, husband did not present evidence that wife's condition has improved to such an extent that she now has the ability to obtain employment. On this record, we decline to alter the district court's factual determinations surrounding wife's ongoing health problems and inability to work.

Second, husband contends that the district court erroneously calculated wife's expenses by "engag[ing] in speculation" and by failing to address "the impact of [having] no child expenses" after the last minor child reached the age of majority. Wife argues that, "[t]o the extent that any of her expenses are projections and not evidenced by actual

expenditures, her ability to expend has been limited by the insufficiency of the support that she has received."

In determining wife's need, the district court considered wife's monthly expenses as she outlined them in a revised affidavit requested by the court. Wife's claimed expenses amounted to $5,553, which she admitted was a "projection" due to "a lack of funds" to cover several of the listed expenses. The district court, acknowledging these projections, found this amount to be "unreasonable" and reduced the expenses by $889, setting wife's monthly expenses at $4,664—an increase of $1,008.02 from the previous expense determination of $3,655.98. This previous expense determination originated in an October 2000 affidavit from husband offering his statement of wife's budget. The district court adopted this amount in a temporary order entered on November 2, 2000.

We conclude that the district court's determination that wife's expenses have increased is not clearly erroneous. The previous budget had not been revised in a decade, and provided minimal allowances for medical expenses, including $60 for doctor co-pay, $68 for chiropractic care, and $60 for medications. Wife's affidavit outlines her increased needs based on her current medical condition, which far exceed the amounts provided in the 2000 budget formulated prior to the onset of her multiple sclerosis. Affidavits may appropriately be considered in determining monthly expenses for the purposes of awarding maintenance. *See Eichenholz v. Eichenholz*, 407 N.W.2d 699, 701-02 (Minn. App. 1987) (reversing and remanding with instructions for the district court to "fully consider" information in obligee's "affidavits about her health, the increasing expense of her health care, her lack of medical insurance, and announced increases in her

rent"), *review denied* (Minn. Aug. 12, 1987). Here, the district court determined wife's reasonable expenses based on those listed in her affidavit, made adjustments to arrive at a "reasonable" amount, and detailed these expenses in its findings. Moreover, the only items solely attributable to childcare in the previous budget included $25 for school supplies and $30 for a child's prescription. The district court determined wife's present reasonable expenses based solely on wife's present needs. Accordingly, on this record, we conclude that the district court's calculation of wife's present monthly expenses is not clearly erroneous, and its determination that the resulting increase of over $1,000 constitutes a substantial change in circumstances rendering the previous monthly award of $1,800 unfair is not an abuse of discretion.

B. Husband's ability to pay

Husband argues that the record does not support the district court's determination that husband "has the ability to pay Spousal Maintenance in an amount that is greater than the $1,800.00 per month" he paid under the previous order. A finding of a maintenance obligor's ability to pay maintenance is required to support an award of maintenance. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). "A district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). And appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Husband contends that his income has "decreased significantly" since the prior calculation, citing economic factors. Husband challenges the district court's income

calculations and its "inclusion of business expenses" related to his ownership and operation of Executive Care to arrive at a net monthly income of $7,475.08. He argues that Executive Care expenses that the district court imputed as income to husband were "ordinary and necessary" and should not be considered in determining any support obligation. Wife argues that the district court reviewed the financial information and determined that it "did not present a true picture" of husband's income, and followed the "same methodology" as was used in the original judgment and decree.

Husband's argument focuses on the district court's determination that certain corporate expenses properly "constituted income to him," most notably, the addition of Executive Care expenses for travel, transportation, and meals and entertainment to his personal income. The district court determined that husband "failed to meet his burden of proving that the aforementioned expenses are ordinary and necessary." *See* Minn. Stat. § 518A.30 (2010) (placing the burden of proving business expenses are ordinary and necessary on the person seeking to deduct an expense for purposes of determining income from self-employment or operation of a business).

In general, businesses in which a party holds an interest are legal entities distinct from the party, and the income or expenses attributable to those businesses "[are] not automatically attributable" to the party. *See Peterka*, 675 N.W.2d at 357. But here, the district court explicitly determined that husband, as the sole shareholder and employee, "treats [Executive Care] as though the income is pass-through income," paying his personal expenses "through the corporation during the year." Accordingly, the district court found that husband's "disposable income is significantly higher" than as reported

on his individual tax returns. *See Fulmer v. Fulmer*, 594 N.W.2d 210, 213 (Minn. App. 1999) ("Trial courts may use earning capacity to measure income if it is either impracticable to determine an obligor's actual income or the obligor's income is unjustifiably self-limited."); *Ferguson v. Ferguson*, 357 N.W.2d 104, 108 (Minn. App. 1984) (acknowledging "the opportunity for a self-employed person to support himself yet report a negligible net income"). Thus, we discern no abuse of discretion by the district court in considering certain Executive Care expenses as husband's income.

Moreover, the district court explicitly determined that husband's claims surrounding his yearly income were "not credible." Indeed, the district court discredited husband's income representations on each occasion the issue has arisen—noting especially in the final judgment and decree that husband's income "leading up to the parties' separation was consistently in excess of $100,000 per year" and dropped by over $100,000 "[o]n cue with the commencement of this proceeding." On this record, we decline to alter the district court's findings regarding husband's income, and we conclude that its determination that husband has the ability to pay the modified maintenance amount is not an abuse of discretion.

C. Factual findings

Husband also challenges portions of the district court's factual findings, contending that the court erred in considering evidence "improperly presented" within wife's proposed findings of fact that amounted to an "improper ex parte

communication."[2] Wife argues that the "materials presented in conjunction with proposed findings had all been either previously provided to [husband's] counsel or had actually been obtained from [husband] in discovery or from his submissions to the court." She emphasizes that the court "directed the parties to produce" these materials, and contends that it was not an abuse of discretion for the court to consider them. We agree. First, as wife argues, most of the documents attached to the proposed findings had already been submitted to the court or were actually produced by husband during discovery. And to the extent any of the documents lacked "foundation," as husband argues, the district court had "broad discretion" to consider evidentiary issues. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted); *see also Swenson v. Swenson*, 257 Minn. 431, 434, 101 N.W.2d 914, 917 (1960) (stating that "where, in a particular case, the interests of justice would be best served by relieving a party from formal compliance with a rule, the [district] court, in its discretion, may suspend or relax its operation"). Accordingly, husband's arguments challenging the district court's consideration of exhibits attached to wife's proposed findings of fact are unavailing.

Beyond challenging the propriety of the district court's consideration of the evidence, husband also contends that two findings are clearly erroneous. "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous."

---

[2] Husband cites unpublished foreign authority for this argument. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (stating dangers of mis-citation and unfairness associated with use of unpublished opinions and that while persuasive, "[t]he legislature has unequivocally provided that unpublished opinions are not precedential").

Gessner v. Gessner, 487 N.W.2d 921, 923 (Minn. App. 1992); *see also* Minn. R. Civ. P. 52.01 (stating that findings of fact "shall not be set aside unless clearly erroneous").

First, husband challenges finding XIV, which states, in part, that husband "failed to produce a copy of [his] mortgage loan application and the closing statement (HUD) for the home that he recently purchased." Husband contends that his "explanation of how he financed his home" is part of the record as contained in an affidavit he submitted, and that the HUD1-Settlement Statement was attached to that affidavit. In the affidavit, husband explains that he "utilized inheritance monies . . . to buy down and guarantee the mortgage," and he includes an HUD1-Settlement Statement as an exhibit. Husband is correct that the district court's findings do not acknowledge the information husband provided. But the record also supports the court's ultimate determination that husband "has failed to disclose how he could qualify for mortgage financing on his allegedly meager income" of $26,000 per year. Where the findings necessary for a legal conclusion are adequately supported, a court's inclusion of other unsupported findings is harmless error. *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979). Accordingly, we conclude that, while finding XIV does not accurately reference the information husband provided, this does not alter the ultimate outcome.

Husband also challenges finding XIII, in which the district court states:

> The Executive [C]are tax returns also indicate interest and dividend income for the corporation. This demonstrates that additional cash assets are available to [husband], which he chooses to invest, rather than have it distributed to him as income. By withholding distribution he effectively minimizes his income. Although statements pertaining to these accounts were requested by [wife], [husband] refused to

> produce the requested documents claiming that they were irrelevant.

Husband primarily argues that this finding is "an abuse of discretion" because it was "adopted verbatim" from wife's proposed findings. This argument is unavailing. A district court's verbatim adoption of proposed findings is not by itself improper if the record supports the findings and shows that the court conscientiously considered all the issues. *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 292 (Minn. App. 1987), *review denied* (Minn. May 5, 1988). *But see In re Children of T.A.A.*, 702 N.W.2d 703, 707 n.2 (Minn. 2005) (indicating "our preference is for a court to independently develop its own findings") (quotation omitted). Here, the record supports the district court's determination that Executive Care had interest income, and while the district court did adopt this particular finding verbatim from wife's proposed findings, the factual findings as a whole reflect its "independent assessment of the evidence." *See id.* And husband admits "object[ing] to providing Executive Care's business records" for interest-bearing accounts requested by wife. Accordingly, we conclude that the district court did not abuse its discretion in adopting portions of wife's proposed findings.

D. Temporary order

Finally, husband contends that the district court's January 14, 2010 order is improper "[a]s a matter of law" because the district court stated the order was "temporary." Husband argues that a temporary award is inappropriate "at that juncture" because the district court ordered wife to submit additional information, and that the district court was obligated to deny wife's motion rather than issue a temporary award.

Wife maintains that the order was proper, and that the district court's retroactive modification was consistent with the requirements of Minn. Stat. § 518A.39, subd. 2(e) (2010) (allowing retroactive maintenance modification "with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party").

Temporary maintenance orders are authorized by Minn. Stat. § 518.131, subd. 1(b) (2010), which provides: "In a proceeding brought for custody, dissolution, or legal separation, or for disposition of property, maintenance, or child support following the dissolution of a marriage, either party may, by motion, request from the court and the court may grant a temporary order pending the final disposition of the proceeding" for "[t]emporary maintenance of either spouse[.]" Husband argues that, under the statute, a temporary order "can only be issued before entry of a final dissolution decree." We disagree.

After a dissolution judgment is entered, a district court may issue a temporary order pending resolution of a motion to modify an obligation in an otherwise final judgment. *See DonCarlos v. DonCarlos*, 535 N.W.2d 819, 821 (Minn. App. 1995) (affirming an award of temporary maintenance under Minn. Stat. § 518.131, subd. 1(b), pending final resolution of a motion to modify maintenance awarded in prior stipulated judgment), *review denied* (Minn. Oct. 18, 1995). Temporary orders "[s]hall not" prejudice resolution of the questions put to the court for decision and "[m]ay be revoked or modified by the court before the final disposition." Minn. Stat. § 518.131, subd. 9 (2010).

Here, the district court explicitly provided that it would review the matter and make "additional calculations" if "necessary," based on wife's required additional submissions. Thus, because the January 14 order was a temporary order, its content did not restrict the district court from addressing maintenance back to the date of the service of the motion generating the prior order. This is further supported by and consistent with this court's order dismissing husband's initial appeal as "taken from a nonfinal order." *See Raiter v. Raiter*, No. A10-445 (Minn. App. July 7, 2010) (order).

Beyond challenging the propriety of the district court's temporary order, husband does not otherwise challenge the court's retroactive application of the modified maintenance award. Accordingly, we conclude that the district court did not abuse its discretion or otherwise act contrary to law in issuing the January 14, 2010 order.

Affirmed.