STATE OF MINNESOTA
IN COURT OF APPEALS
A11-373

In re the Marriage of:
Tracy Alan Powell, petitioner,
Respondent,

vs.

Jean Marie Powell,
Appellant.

Filed March 12, 2012
Affirmed
Ross, Judge

Stearns County District Court
File No. 73-FA-09-6759

Denis E. Grande, Susan A. Daudelin, Mackall, Crounse & Moore, PLC, Minneapolis, Minnesota (for respondent)

Lynne M. Ridgway, Gray, Plant, Mooty, Mooty & Bennett, P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Crippen, Judge.*

* 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

ROSS, Judge

After Tracy and Jean Powell dissolved their 21-year marriage in 2010, the district court ordered that Tracy pay Jean spousal maintenance but that the amount reduce substantially after five months, coinciding with the time necessary for Jean to become recertified and employable as a nurse. On appeal, Jean challenges the amount the district court awarded her in spousal maintenance and its automatic step-reduction. She also argues that the district court abused its discretion by refusing to require spousal maintenance to be secured by life insurance, by allocating the debt on the home equity line of credit to her, by failing to reduce Tracy's property award by the amount of life-insurance funds he liquidated and spent without her consent, and by failing to award her need-based attorney fees. Because the district court did not abuse its discretion, we affirm.

FACTS

Tracy and Jean Powell married in April 1989 and had two sons before they separated in 2008 and divorced in 2010. When they divorced, Tracy (a physician) was 49 and Jean (a nurse) was 50. Tracy was employed full time by the Emergency Physicians Professional Association as an emergency room physician at Buffalo Hospital. Jean was a registered nurse and current on her continuing education credits. She earned a three-year registered nurse certificate in 1981 and worked full time as an emergency room nurse until 1988 when she reduced to part time until 1992. She did some part-time work from 1998 to 2002, but she was neither employed nor seeking employment at the time of the

dissolution trial. She explained to the district court that she prefers to remain a homemaker and community volunteer.

The district court found that the couple had an upperclass lifestyle in the last several years of the marriage. They vacationed in western states skiing, traveled to Mexico, attended the theater, ate out, enrolled their sons in a private school and in ski racing, and held a country club membership. Their monthly expenses ranged from $17,000 to $19,500, and they built a $583,000, 7000 square-foot home in St. Cloud in 2002, also purchasing the lot next to the home for about $30,000. Their monthly mortgage payment was roughly $4,000, and they financed a $30,000 home theater with a second mortgage.

In the two or three years before the dissolution, the couples' expenses exceeded Tracy's income. He testified that they had fallen into a pattern of overspending and that their lifestyle had become extravagant. Through the separation, they were spending all of Tracy's regular and extra income to cover expenses. The extra income came from Tracy's overtime work, bonuses, and moonlighting at different hospitals. Tracy earned a total of $401,360 in 2007, $412,843 in 2008, and $369,163 in 2009. In 2008 the parties converted their second mortgage into a home equity line of credit (HELOC). The parties' HELOC debt was $70,000 at the time of their 2008 separation, and it grew to $140,000 by December 2009.

Tracy filed a petition for dissolution on June 10, 2009, and in February 2010 the district court awarded Jean $10,000 monthly in temporary spousal maintenance. After a three-day trial in May 2010, the district court awarded Jean $7,500 per month in spousal

maintenance until February 1, 2011, when the amount would reduce permanently to $5,500. In doing so, the district court found that Jean lacks property to provide for her reasonable needs given the marital lifestyle but that she can be partially self-sufficient because she is employable as a nurse. It rejected her argument that her need to care for the parties' only minor (17-year-old) son constitutes a circumstance in which she should not be required to become employed.

The district court found that Jean has the ability to earn $54,000 yearly as a nurse and that the parties maintained an upper middle-class standard of living during most of their marriage, transitioning to living on debt and extra income after they built their 7000 square-foot home.

The court made several findings regarding Tracy's employment and income. It found that in 2008 and 2009 he earned about 105 percent of his employment contract, totaling about $257,000. It found that he is now limited to 100 percent, with a projected base income for 2010 of $229,734 and $245,006 for 2011. It found that during 2007 through 2009 he earned between $20,000 and $37,000 in overtime pay at Buffalo Hospital, a source of income no longer available to him. The district court also found that Tracy received a $120,888 bonus in 2007, $124,696 in 2008, and $90,153 in 2009. But it also found that these bonuses would be cut by more than 50 percent. In addition to these three sources of income, the district court found that Tracy earned $22,700 in 2007, $26,849 in 2008, and $5,883 in 2009, serving at the emergency room in Hutchinson. But this extra-income opportunity ended in late 2009 when that hospital became fully staffed.

The district court found that the parties' standard of living could not be maintained after the dissolution. It rejected Jean's claimed monthly budget of $11,027, deeming a reasonable budget for her to be $7,968, reduced to $6,840 in June 2011 when the minor child would become 18. When the district court divided the parties' debts, it allocated the HELOC debt to Jean. It declined to treat Tracy's liquidation of a life insurance policy as an advance distribution of his share of the marital assets. The district court also declined to award Jean attorney fees because it found that both parties could pay their own fees.

Jean appeals.

D E C I S I O N

I

Jean argues that the district court abused its discretion by not awarding her more spousal maintenance. She specifically contends that the district court erred by finding that she could earn $4,500 a month, by finding that she had only $7,968 in reasonable expenses, and by imposing a step-reduction. We review a district court's decision to award maintenance for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). The district court abuses its discretion if its findings are unsupported by the evidence or if it improperly applies the law. *Id*. (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). This court relies on the district court's findings of fact unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); Minn. R. Civ. P. 52.01. And we defer to the district court's credibility assessment in its weighing of evidence. *Choa Yang Xiong v. Su Xiong*, 800 N.W.2d 187, 191 (Minn. App. 2011).

The district court *may* award spousal maintenance to either spouse if the spouse seeking maintenance "lacks sufficient property, including martial property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education," or if the spouse

> is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Minn. Stat. § 518.552, subd. 1 (2010). The district court found that although Jean has the ability to be partially self-supporting, a permanent maintenance award is appropriate. Under section 518.552, subdivision 2, the district court determines the amount and duration of spousal maintenance by evaluating eight different factors. Jean challenges the district court's findings on two factors: her financial resources and standard of living.

Financial Resources

Jean argues that the district court erred by finding that she could earn $54,000 annually, or $4,500 monthly, as a nurse within five months of the dissolution. Our recent decision in *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011), is particularly relevant to this case.

The couple in *Passolt* had been married 30 years and each party was 52 years old when they divorced. 804 N.W.2d at 19. The wife had an undergraduate degree in education and had taught for five years at the beginning of the marriage, but she did not

return to work full time after delivering the parties' first child. *Id.* The husband presented evidence that, with additional training, his wife could be relicensed as a teacher within one year with the opportunity to earn $37,000. *Id.* at 20. Like Jean here, the wife in *Passolt* testified that she did not intend to return to full-time employment. *Id.* But unlike the district court here, the district court in *Passolt* did not attribute income to the wife because it believed that it was not permitted to do so without finding that her unemployment or underemployment arose from her bad-faith effort to affect the spousal-maintenance calculation. *Id.* at 21.

On appeal in *Passolt*, this court held that the district court need not find "that a [maintenance] recipient has limited . . . her income in bad faith to set maintenance based on the recipient's ability to meet needs independently post-rehabilitation," and that, under section 518.552, "the district court must consider 'all relevant factors,' including the maintenance recipient's ability to meet needs independently." *Id.* at 22, 25. We remanded, expressly noting "that, based on the district court's findings relating to wife's ability to rehabilitate, a step reduction effective upon expiration of wife's retraining may be appropriate," and observing that "[s]tep reductions may be appropriate to provide employment incentives for a rehabilitating spouse." *Id.* at 25.

Following the holding and reasoning in *Passolt* in this materially identical situation, we hold that the district court did not abuse its discretion by attributing income to Jean based on her anticipated employability. Jean's counsel contended at oral argument that neither *Passolt* nor the statute requires that Jean become employed. The argument does not persuade us. The statute that controls this issue and that this court

applied in *Passolt* implicitly does in some sense require a person seeking spousal maintenance to become employed. It permits the district court to order maintenance for a spouse who cannot provide for herself "through appropriate employment" or who "is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be *required* to seek employment outside the home." Minn. Stat. § 518.552, subd. 1 (emphasis added). The statute therefore carries the implicit requirement of employment by the obligee, with an exception.

That exception certainly did not exist here, despite Jean's claim to the right not to work because she needs to mother the couple's son, who, at the time of trial was working, driving, nearing completion of high school, and preparing to attend college. Applying *Passolt*, if an obligee or person seeking to become an obligee prefers not to work, she bears the consequence of that decision in the form of a reduction in a spousal-maintenance award commensurate with her earning capacity. *See* 804 N.W.2d at 25; *and cf. Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn. 1997) (affirming district court's decision to substantially limit spousal-maintenance award to former wife who failed to act in good faith to attain self-sufficiency, "attribut[ing] to her the income that the unrefuted expert testimony demonstrated could have been produced by reasonable effort"). This is not to say that the statute authorizes a district court to order an obligee to become employed, but it does authorize the district court to qualify the amount of a spousal-maintenance award on an obligee's willingness to become gainfully employed. In other words, although a potential maintenance obligee is free not to work, the

consequences of not working will not be imposed on the obligor; they belong to the obligee.

The record adequately supports the district court's finding that Jean is able to earn more than $54,000 yearly. Obie Kipper, an employment rehabilitation specialist, testified and stated in his vocational evaluation that, despite Jean's being long out of the workforce, she meets entry level qualifications and has employment options. He also testified that she has transferable skills that would allow her to serve in the nursing profession in areas other than those in which she previously worked. He opined that Jean could earn $62,400 annually. Saint Cloud Hospital recruiter Brandon Kime testified after he vocationally evaluated Jean that he would hypothetically consider her for a nursing position earning more than the entry-level salary of $57,408 despite Jean's being unemployed for 20 years. Deferring to the district court's weighing of the evidence, we hold that the finding that Jean can earn $54,000 annually is not clearly erroneous.

Standard of Living

Jean also contends that the district court's finding that her monthly expenses are "extravagant" is not supported by the record and that it erroneously interpreted the statutory term, "standard of living." The district court should consider the standard of living established during the marriage in determining the amount and duration of spousal maintenance. Minn. Stat. § 518.552, subd. 2(c). "The purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances." *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). But a reality of dissolution is that

parties often face a reduction in their standard of living. *See Maiers v. Maiers*, 775 N.W.2d 666, 670 (Minn. App. 2009). And when the parties' standard of living is maintained by debt financing, the parties cannot expect the same lifestyle after their dissolution. *See Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409–10 (Minn. App. 2000) (relying on district court's finding that parties' standard of living reflected a lifestyle beyond their means and its reduction or elimination of claimed expenses).

Jean asserts that the district court erred by finding that her expenses must be based on a lower standard of living than the parties enjoyed during their marriage. The assertion is remarkable: Tracy's employment alone sustained the parties financially during the marriage; Jean asserts a preference not to become employed after the marriage along with a corollary preference to live chiefly on Tracy's continued employment; Tracy's extra sources of income have been eliminated or substantially reduced; and the parties had begun to live in part on increasing debt in the eight years before the dissolution. The district court's findings about Jean's postdissolution standard of living and expenses are well supported by evidence and reflect no clear error.

Step-Reduction

Jean contends that the district court abused its discretion by making a step-reduction in her spousal-maintenance award from $7,500 per month to $5,500, set to occur automatically on February 1, 2011. A district court has broad discretion to impose step-reductions in spousal-maintenance awards. *Schreifels v. Schreifels*, 450 N.W.2d 372, 374 (Minn. App. 1990). As already mentioned, these reductions can provide employment incentives to a rehabilitating spouse. *Passolt*, 804 N.W.2d at 25.

Jean maintains that the step-reduction here was premised on the district court's erroneous conclusion that she is not entitled to the same standard of living she enjoyed during the marriage and its erroneous assumption that she could earn $4,500 monthly. Given that we have rejected both premises to this argument, we also must reject the conclusion. The district court acted within its discretion by ordering an automatic step-reduction in maintenance.

II

Jean also argues that the district court abused its discretion by not requiring security for Tracy's spousal-maintenance obligation. The district court may require sufficient security to be given when maintenance payments are ordered. Minn. Stat. § 518A.71 (2010). The district court has broad discretion to determine whether the circumstances warrant requiring that maintenance be secured with life insurance. *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007). And the factors that justify a district court in awarding security for maintenance are "the obligee's age, education, vocational experience, and employment prospects." *Id.* We are not persuaded by Jean's argument that her age, employment prospects, and marital standard of living required the district court to order Tracy to secure the maintenance award with a life insurance policy. We emphasize that the statute permits, but does not require, the ordering of security, and nothing in the statute or caselaw presumes that a security obligation is generally to be imposed. We accept the district court's finding that Jean can earn at least $54,000 yearly and have no difficulty holding that this case is not one in which the district court came

close to abusing its discretion by not requiring the obligor to secure his maintenance obligation with life insurance.

III

Jean next contends that the district court abused its discretion by allocating the HELOC debt to her and by not attributing the spent, liquidated proceeds of a life insurance policy to Tracy. "A trial court's apportionment of marital debt is treated as a property division." *Berenberg v. Berenberg*, 474 N.W.2d 843, 848 (Minn. App. 1991), *review denied* (Minn. Nov. 13, 1991). District courts have broad discretion when dividing marital property, and we will leave the division undisturbed unless we discover a clear abuse of discretion or a mistake of law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). On that standard, we will affirm the property division unless it stands "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (citation omitted).

Home Equity Line of Credit

Jean asserts that Tracy unilaterally increased the parties' HELOC debt by $70,000. The district court found instead that the debt increased between November 2008 and December 2009 based on expenses such as a pinball machine, a car for the parties' son, a car for Jean, and attorney fees for both Tracy and Jean. And it found that the couple paid for their adult son's trip to Guatemala and that Jean increased the debt by purchasing new furniture. These findings are supported by trial testimony, which Jean does not counter by pointing to compelling contrary evidence. The district court acted within its broad

discretion by allocating the HELOC debt to Jean as part of its overall division of property.

Western Life Insurance Policy

Jean maintains that the district court abused its discretion by not attributing to Tracy the proceeds from his Western Life Insurance policy, asserting that he liquidated the policy and spent the funds without her involvement. Tracy acknowledged at trial that he had cashed out the policy in 2009 without Jean's consent, but he testified that he used the funds to pay the tuition for their sons' private schools. The cash value of the policy was $24,212, and Tracy wrote a check for $7,116 to St. Cloud Cathedral and $16,080 to St. Olaf College, where the boys separately attended school. He testified that he had originally obtained the policy to accumulate cash value for the boys' education.

It is true that, generally, a party to a dissolution proceeding may not, without the consent of the other party, transfer, encumber, conceal or dispose of marital assets, but an exception applies to nonconsensual transfers that occurred "in the usual course of business or for the necessities of life." Minn. Stat. § 518.58, subd. 1a (2010). The district court found that because Tracy liquidated the policy to accomplish an objective that both parties wanted, the funds do not constitute an advance distribution of Tracy's share of marital assets. Jean did not convince the district court, and she does not convince us, that the life-insurance funds spent only to benefit the boys in the form of tuition should be attributed against Tracy's share of marital property. She fails to show that the transfer was outside the usual course of business or for something other than life's necessities. She acknowledged in her testimony that she and Tracy discussed sending the boys to

private school, and Tracy testified that they had agreed that their older son would attend St. Olaf even if he received no financial aid. The district court did not abuse its discretion by not counting the life insurance proceeds as solely Tracy's marital property.

IV

Jean's final argument is that the district court abused its discretion by not ordering Tracy to pay her attorney fees. The district court must award attorney fees if it finds that the fees are necessary for a party to assert her rights, the party who will pay the fees has the resources to pay them, and the party to whom the fees are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2010). The district court has broad discretion to award attorney fees and this court will not reverse its decision unless it clearly abused that discretion. *Schallinger v. Schallinger*, 699 N.W.2d 15, 24 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

The district court denied Jean's request for an award of attorney fees, finding that Tracy and Jean each had paid their respective attorneys at least $15,000 from joint assets, that both have liquid assets that can be applied to their own attorney fees, and that each was responsible for the length and expense of the proceeding. Jean asserts on appeal that she needs $45,000 to pay her attorney, that Tracy has the ability to pay, and that she incurred the fees asserting her legal rights. She also contends that she had no income during the proceeding from which to pay her attorney fees. The district court's findings are supported, so we accept its conclusion that Jean has assets from which to pay her

attorney, including the value of the lot adjacent to the marital home and a classic corvette. The district court did not clearly abuse its discretion by not awarding Jean attorney fees.

Affirmed.