STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2276

In re the Marriage of:
Mary Patricia Myhre, petitioner,
Respondent,

vs.

Steven Kenneth Myhre,
Appellant.

Filed November 12, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Dakota County District Court
File No. 19AV-FA-11-2029

Merlyn L. Meinerts, Meinerts Law Office, Burnsville, Minnesota; and

John D. Hagen, Jr., Minneapolis, Minnesota (for respondent)

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

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

BJORKMAN, Judge

Appellant challenges the dissolution judgment, arguing that the district court (1) abused its discretion by rejecting the parties' stipulation as to respondent's income in

awarding spousal maintenance, (2) erred in calculating child support, (3) erred in valuing appellant's business, and (4) abused its discretion by awarding respondent need-based attorney fees. We affirm the district court's valuation of appellant's business. But the district court abused its discretion by rejecting the parties' income stipulation after trial and making insufficient findings as to respondent's income on the record. We therefore reverse the awards of spousal maintenance, child support, and attorney fees, and remand for a new trial on those issues.

FACTS

Appellant Steven Myhre (father) and respondent Mary Myhre (mother) were married in February 1998 and have three joint children, currently ages 10, 14, and 17. The district court dissolved the marriage pursuant to the parties' stipulation in February 2012, awarding the parties joint legal and physical custody of their children and reserving all financial issues for trial. The parties subsequently reached several additional agreements. They stipulated that father's gross annual income is $150,000 and mother's potential gross annual income is $50,000 for purposes of spousal maintenance and child support, but they disputed the amount of spousal maintenance and child support. And they stipulated that father would be awarded his telecommunications business, Nortec Communications, Inc., and mother would be awarded her real-estate business, but they did not agree upon the value of either business.

After a three-day trial, the district court awarded mother $2,760 in permanent monthly spousal maintenance, $915 in monthly child support, and $6,000 in need-based

attorney fees. And the district court valued Nortec at $295,000. Father moved for amended findings or a new trial, which the district court denied.[1] This appeal follows.

D E C I S I O N

I. The district court abused its discretion in awarding spousal maintenance without regard to the parties' income stipulation and without making specific findings as to mother's income.

We review a district court's spousal-maintenance award under an abuse-of-discretion standard. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). 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); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court also abuses its discretion if its factual findings are not sufficiently detailed. *Stevens v. Stevens*, 501 N.W.2d 634, 637 (Minn. App. 1993).

Father argues that the district court abused its discretion in determining spousal maintenance because it disregarded the parties' stipulation as to mother's income. Mother argues that the district court accepted the stipulation because it did not expressly reject it. We disagree with mother. The district court permitted mother to present evidence as to her actual earnings and stated in its order that the parties' stipulation "is a puzzler" and "does not override the Court's obligation to accurately address the statutory criteria in determining the maintenance award." It then found that mother "has not ever earned gross annual income of $50,000.00" and was unlikely to earn that level of income in 2012. And the district court awarded mother monthly maintenance of $2,760, which

[1] The district court amended one finding not at issue in this appeal.

far exceeds the amount necessary to meet her reasonable monthly expenses of $5,000 if she is credited with the stipulated income. On this record, we conclude the district court rejected the parties' stipulation as to mother's income. We therefore turn to father's argument that it did so improperly.

A district court is not bound by the parties' stipulation. *Karon v. Karon*, 435 N.W.2d 501, 503 (Minn. 1989). To ensure that a stipulation is fair and reasonable to all, the court has the authority to refuse to accept its terms "in part or *in toto*." *Id.* But just as neither party may withdraw from a stipulation absent the other's consent or leave of the court for good cause, "to the extent that the district court does not accept the stipulation, the parties should not, absent unusual circumstances, be precluded from litigating their claims." *Toughill v. Toughill*, 609 N.W.2d 634, 638 & n.1 (Minn. App. 2000). The district court did not provide father notice before or during trial that it intended to consider evidence beyond the stipulation in determining mother's ability to support herself and did not permit him an opportunity to present evidence and argument on that issue. *See* Minn. Stat. § 518.552, subd. 2 (2012) (providing that the amount and duration of spousal maintenance depends on numerous factors, including the ability of the party seeking maintenance to meet needs independently). We conclude the district court abused its discretion by rejecting the parties' stipulation as to mother's income without giving both parties notice and an opportunity to litigate the issue.

Moreover, the district court's findings do not reflect that it thoroughly considered the relevant statutory criteria in setting the amount of maintenance. A court may award maintenance based on a showing that the party seeking maintenance lacks sufficient

property or income to be self-supporting. Minn. Stat. § 518.552, subd. 1 (2012). But the amount of maintenance depends on a host of factors, including how much the party seeking maintenance needs to cover reasonable expenses. *See id.*, subd. 2. To determine a party's level of need, the district court must consider all of the resources available to that party, including actual or reasonably anticipated income. *See* Minn. Stat. § 518.552, subd. 2(a)-(b); *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000) (stating that a maintenance recipient's "needs are often determined by considering her income and available resources versus her reasonable monthly expenses"); *see also Passolt v. Passolt*, 804 N.W.2d 18, 22 (Minn. App. 2011) (holding that need may be determined based on prospective income), *review denied* (Minn. Nov. 15, 2011). Here, the district court found that mother's income is insufficient to meet her reasonable expenses[2] and rejected the parties' income stipulation without making a finding as to mother's actual or reasonably anticipated income. This omission not only means there is no baseline in the event that either party seeks to modify the maintenance award, *see Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005) (stating that if an order setting support does not recite the parties' then-existing circumstances, there is no "baseline" for determining whether a future change in circumstances will allow modification), but it also reflects a failure to consider the principal factor in establishing the amount of maintenance. We conclude the district court abused its discretion by awarding maintenance without first determining mother's income.

[2] We observe that this threshold determination that mother requires maintenance is essentially undisputed, whether she is deemed to earn $50,000 annually, as the parties stipulated, or something less than that amount.

We reverse the district court's maintenance award and remand for proceedings in which the parties must have the opportunity to stipulate to or litigate the issue of mother's need for maintenance, including her income.

II. The district court abused its discretion in awarding child support based on clearly erroneous and inconsistent findings as to mother's income.

A district court has broad discretion to provide for the support of the parties' children. *Rutten*, 347 N.W.2d at 50. But a court abuses its discretion when it sets support in a manner that is against logic and the facts on record or it misapplies the law. *See id.* (addressing the setting of support in manner that is against logic and facts on record); *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998) (addressing an improper application of law). A district court's findings as to the parties' income will not be overturned unless clearly erroneous. *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009).

Parental income is the principal factor in determining child support. *See* Minn. Stat. § 518A.34(b)(1) (2012) (identifying "the gross income of each parent" as the first factor to consider in determining child support); *see also* Minn. Stat. § 518A.28 (2012) (requiring parents to provide income information). Income includes salaries, wages, commissions, self-employment income, and "spousal maintenance received under a previous order or the current proceeding." Minn. Stat. § 518A.29(a) (2012).

Father argues that the district court erred in determining mother's income for child-support purposes because it failed to credit her with receipt of spousal maintenance. We agree. The district court did not make express findings as to child support but

completed a child-support guidelines worksheet in which it used the stipulated annual income figures—$150,000 for father and $50,000 for mother. It then deducted the $2,760 spousal maintenance award from father's monthly income, but it did not credit mother with the same. We conclude that the district court erred by failing to include the maintenance award in mother's income in calculating child support. We also note that the district court calculated child support based on the income stipulation that it rejected in determining spousal maintenance. The district court has the discretion to accept a stipulation in whole or in part, *Karon*, 435 N.W.2d at 503, but it does not have discretion to selectively use the stipulation without explanation. On this record, we conclude that the district court erred by calculating child support based on an income level that it expressly found mother does not earn. We reverse the district court's child-support award and remand for reconsideration in light of the income and maintenance issues.

III. The district court did not clearly err in valuing father's business.

A district court's findings of fact regarding valuation of an asset will not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). A finding of fact is clearly erroneous if it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006) (quotation omitted). We defer to the district court's credibility determinations, *Rutz v. Rutz*, 644 N.W.2d 489, 493 (Minn. App. 2002), *review denied* (Minn. July 16, 2002), and will not reverse the district court's acceptance of a credible opinion as to value. *See Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975).

To establish the value of Nortec, the parties jointly retained business appraiser Patrick Schmidt as a neutral expert. Schmidt prepared a comprehensive valuation report considering Nortec's performance between 2007 and 2011 and opined that Nortec's value as of June 30, 2011 was $290,000. Father disagreed and subsequently retained business appraiser Richard Berning as a second neutral expert.[3] Berning prepared a less-comprehensive valuation report, using the same methodology and data as Schmidt, and opined that Nortec's value as of June 30, 2011, was $205,000. Both experts testified at trial, revising their valuations upward to $295,000 and $215,000, respectively, based on data through the end of 2011. Father also testified about Nortec and the telecommunications industry. The district court accepted Schmidt's $295,000 end-of-2011 valuation.

Father argues that the district court erred by accepting Schmidt's valuation because Schmidt (1) included the year 2010 in his calculations, while Berning believed it appropriate to exclude that year as aberrant, and (2) Schmidt attributed a growth rate to the business that is not supported by the record. We disagree.

Both experts agreed that Nortec's 2010 income was significantly higher than in any of the previous years under consideration because of aggressive marketing measures taken to address the decline and eventual bankruptcy of one of the company's significant

[3] Father challenges the district court's finding that father separately retained Berning, emphasizing that both experts were hired as neutrals. But the record indicates that while Berning was retained as and considered himself a neutral, he was retained at father's request. Moreover, the district court did not find that Berning was biased because he was retained by father, so the finding father challenges has no bearing on the validity of the district court's valuation.

business partners, Nortel Network. Berning omitted 2010 from his calculations, attributing that year's profitability to the situation with Nortel, which would not recur. Schmidt did consider the 2010 profitability, concluding the results were not as aberrant as Berning believed them to be in light of Nortec's profitability in 2011. Schmidt also opined that omitting the 2010 results would skew the data, and that the fluctuation was better accounted for by including 2010 as one of a number of volatile years to be averaged together and by adjusting the company's capitalization rate accordingly.

Regarding the growth rate, both experts explained that growth and capitalization are related—anticipated growth means a lower capitalization rate. Both experts initially used a 26% capitalization rate, but Berning testified that he later increased the capitalization rate to 29% because he anticipated less growth. Berning essentially credited father's explanation that the industry had changed significantly and would affect business. But Schmidt opined the effects of market changes in 2010 ultimately would normalize and that Nortec's profitability in 2011, combined with father's demonstrated good business practices and adaptability, indicated good prospects for ongoing growth, despite father's dire predictions. Schmidt also testified that a capitalization rate of 26% is already high, accounting for significant risk or volatility in the industry.

Because both experts gave reasoned explanations for their valuations, including with respect to the two factors father highlights, the district court acted well within its discretion by crediting Schmidt's testimony and accepting his valuation. And because the record supports the district court's finding that Nortec is worth $295,000, we discern no clear error.

IV. The district court abused its discretion by awarding mother need-based attorney fees without making findings as to her income.

A district court "shall" award need-based attorney fees if it finds that (1) the fees are necessary for a good-faith assertion of the recipient's rights and will not contribute unnecessarily to the length or expense of the proceeding, (2) the payor has the ability to pay the fees, and (3) the recipient lacks the ability to pay the fees. Minn. Stat. § 518.14, subd. 1 (2012). We review a district court's ruling on a request for need-based attorney fees for abuse of discretion. *Lee*, 775 N.W.2d at 643.

Father argues that the record does not show that mother lacks the ability to pay her attorney fees. But the extent of mother's financial resources remains uncertain, both with respect to earned income and the amounts she will receive in spousal maintenance and child support. We therefore remand the attorney-fee issue for reconsideration along with those issues.

Affirmed in part, reversed in part, and remanded.