STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0198

In re the Marriage of: Brenda Lee Stifel, petitioner,
Respondent,

vs.

Daniel Charles Stifel,
Appellant.

Filed April 1, 2008
Affirmed as modified
Crippen, Judge[*]

Hennepin County District Court
File No. 27-FA-000298495

Ben M. Henschel, Moss & Barnett, P.A., 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 (for respondent)

Jonathan J. Fogel, Zachary A. Kretchmer, Fogel Law Offices, P.A., 1660 S. Highway 100, #318, Minneapolis, MN 55416 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Challenging the amount of the district court's spousal maintenance and child support determinations, appellant Daniel Stifel contends that the court made erroneous

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

findings on matters relating to his ability to pay and respondent Brenda Stifel's needs. There being no showing of error on this ground or others, we affirm. But because the parties agree that the child-support award could exceed the statutory cap, we reduce appellant's monthly child-support obligation to the statutory guideline amount.

FACTS

When these proceedings began in 2005, both parties were 41 years old and had been married nearly 19 years. The parties have four children who are now 19, 17, 15, and 13. Appellant is currently employed as a printing-services salesman. With the exception of her recent part-time employment, respondent is a homemaker who raised the children during the marriage. Although essentially a one-income household, appellant's substantial annual compensation allowed the parties to have a relatively high standard of living.

Before trial, the parties entered into stipulations granting respondent sole physical custody of the parties' children and partially resolving property issues. The property settlement split between the parties the sale proceeds from the home, appellant's retirement benefits, and appellant's 2006 commission; respondent received an additional amount for educational expenses as well as pre-sale occupancy of the home.

The parties tried the remaining issues, including spousal maintenance, child support, and attorney fees, and a judgment was entered in October 2006, with the district court ratifying a referee's recommendations. The court determined that respondent was in need of maintenance in the amount of $2,900, based on appellant's base salary of $100,000. Additionally, the court ordered that appellant pay "20% of the net of the first

$43,000" of his gross commission income that he receives after subtracting his child-support obligation. If his commission exceeds $43,000, then he must pay maintenance equivalent to 35% of the net commission. The court also ordered appellant to pay monthly child support of $2,059, based on an annual gross income of $100,000, and 39% of his annual commission. Finally, the court awarded respondent conduct-based attorney fees of $5,000.

D E C I S I O N

1. Spousal Maintenance

This court is to review a district court's maintenance award for an abuse of discretion. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). Reversal is inappropriate unless the district court resolves an issue in a manner that is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

To determine the amount of a spousal-maintenance award, the district court must consider statutory factors that bear on the resources and needs of the parties. Minn. Stat. § 518.552, subd. 2 (2006). Although the statute lists eight factors, the essential consideration is "the financial need of the spouse receiving maintenance, and the ability to meet that need balanced against the financial condition of the spouse providing the maintenance." *Novick v. Novick*, 366 N.W.2d 330, 334 (Minn. App. 1985); *see also Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001).

Appellant contends that the district court abused its discretion in calculating spousal maintenance by overstating both his ability to pay and respondent's need and ordering appellant to pay "arbitrary" percentages of his annual commission.

Ability to Pay

Appellant claims that the court did not adequately consider his living expenses. But the court properly reviewed appellant's living expenses in light of the eight factors listed in Minn. Stat. § 518.552, subd. 2, and the record supports the referee's finding that appellant "earn[s] sufficient income to meet his actual current expenses and contribute to [respondent's] reasonable needs."

Appellant submitted a document in which he asserted that his monthly living expenses were approximately $5,500, but the court rejected this listing as not credible. The court found, inter alia, that the list included "a number of speculative expenses that he does not currently pay." *See Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989) (stating that a speculative mortgage expense, when unsupported by other evidence, should not be considered in determining living expenses). Appellant's proposed living expenses also included line items that the district court found to be "duplicative or nonspecific" and which contained "substantial discretionary amounts for liquor, vacations, and furniture replacement." Moreover, the list of expenses did not reflect, the court found, the "significant personal benefit" associated with appellant's meal, travel, and lodging reimbursements from his employer.

Finally, the court noted that appellant's proposed expenses failed to quantify the contributions from appellant's live-in companion. *See Rask*, 445 N.W.2d at 854 ("A [district] court's calculation of living expenses must be supported by the evidence."). The record evidence shows that, to the extent the companion's contributions to appellant's monthly expenses are known, they are not insignificant. Appellant admitted

that his companion pays for his utilities and contributes to grocery, entertainment, and household expenses. The court properly rejected appellant's budget because appellant's budget was not credible in light of his own testimony. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to a district court's credibility determinations).

After rejecting appellant's proposed budget as speculative, duplicative, and not credible, the court found that appellant's monthly expenses were $2,462. This amount is supported by the proposed budget submitted by respondent and by appellant's deposition testimony. For example, appellant testified that he paid only $750 per month to his live-in companion for rent and that he did not pay for utilities. And despite his claim that he "intentionally artificially lowered his monthly living expenses so that the family could remain financially solvent" during the pendency of the dissolution proceedings, he testified that his relationship with his companion may be permanent.

Appellant also claims that, after subtracting his spousal maintenance and child-support obligations from his monthly income, he is left "with a mere $321 at the end of each month to meet his own living expenses." This assertion is incorrect for several reasons. First, although the child-support award appears to be based on appellant's monthly cash flow of $5,280, this cash-flow figure does not include the tax benefit that appellant receives for his spousal-maintenance obligation. And the $5,280 figure does not reflect the court's award to appellant of tax exemptions for three of the parties' four children, which increases appellant's net monthly income even more. His actual net

monthly income, therefore, is higher than $5,280.[1] Also, his assertion on net income does not account for his annual commission, which, when divided on a monthly basis, also increases his monthly net income.

Significantly, the court expressly recognized that neither party would be able to meet their reasonable monthly expenses until the marital home was sold. As a result, the court acknowledged that both parties would "be required to draw on resources, including the 2006 commission check they have divided, to meet their additional expenses." And the court concluded that the "sale of the house shall be deemed a substantial change in circumstances of both parties," at which point appellant could seek a modification of the spousal-maintenance award. At oral argument, the parties acknowledged that the marital homestead had sold, and that further review of appellant's spousal-maintenance obligation by the district court is imminent.[2]

Because the district court properly reviewed appellant's ability to pay spousal maintenance in light of the statutory factors, and because the record supports the court's findings, we will not alter the district court's determination of respondent's ability to pay maintenance.

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[1] Working backwards from the district court's finding that appellant had $1,494 available monthly after subtracting his maintenance and child-support obligations, appellant's monthly net income (not including the commission) is considered nearly $6,500.

[2] We also note that it appears that two of the parties' children will have been emancipated by the time the parties return to district court. Because the judgment provides that child support "shall be modified as each child" emancipates, appellant will have another opportunity to submit a budget that reflects his actual expenses and respondent's expenses may have decreased because of the emancipations and the sale of the marital homestead.

Respondent's Ability to Contribute

Appellant argues next that "it was an abuse of discretion not to find the physically and mentally fit [r]espondent capable of expanding her employment and earning additional income." But the record supports the court's findings.

First, it is undisputed that respondent stayed at home during the marriage to raise the parties' children. The court made findings on this activity and credited respondent with "supporting [appellant] in building his career." As a consequence of this arrangement, respondent "has not attained any level of seniority and her retirement benefits are solely through [appellant]."

Second, appellant's claim is undermined by the fact that the statutory scheme for maintenance requires the district court to address the need of the spouse requesting maintenance to receive training and education. *See* Minn. Stat. § 518.552, subd. 2(b) (requiring the district court to consider the "time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment"). The court considered the educational needs of respondent and the court's findings are supported by the report of a vocational expert, who estimated that respondent's earning potential without additional education as being between $10 and $14 per hour. But if respondent finished coursework for a bachelor's degree, the expert estimated that she could earn $20 per hour or more. The court found that by obtaining an education, respondent "should be able to become full[y] or at least partially self-supporting."

Third, the court rejected as "not realistic" appellant's assertion that respondent should immediately obtain full-time employment. This finding is supported by a detailed

calendar documenting respondent's parental, educational, and employment responsibilities from 7:00 a.m. to 10:00 p.m. daily. Moreover, respondent's inability to contribute more towards meeting her expenses is supported by findings on her care of the children and appellant's inconsistent help with "parental chores." And even if it were realistic for respondent to be employed full time, appellant cannot compel respondent to obtain a low-paying, but full-time, position to increase her monthly income. *See Cisek v. Cisek*, 409 N.W.2d 233, 237 (Minn. App. 1987) (stating that a custodial, stay-at-home parent cannot be forced into full-time employment).

The district court did not abuse its discretion by determining that respondent, a traditional homemaker, who has sole physical custody of the parties' four children, and who is now working part time and taking college courses, should not have contributed more towards meeting her monthly expenses by obtaining a low-paying, full-time position.

Appellant's Commission

In addition to a portion of his monthly income, the court instructed appellant to pay respondent maintenance calculated as a percentage of certain commission receipts. Appellant claims that the provision for this additional payment was "simply arbitrary."

As an initial matter, although this court has determined that such "base-plus-percentage" arrangements for spousal maintenance are disfavored, they are not invalid. *See Doherty v. Doherty*, 388 N.W.2d 1, 2 n.1 (Minn. App. 1986). Given the reliability of appellant's commission for the past seven years, it was not an abuse of discretion for the referee to structure an award based on his annual commission. *See Lynch v. Lynch*, 411

N.W.2d 263, 266 (Minn. App. 1987) (stating that bonuses providing a dependable source of income may be included in an obligor's income), *review denied* (Minn. Oct. 30, 1987).

The record supports the court's award from appellant's annual commission because the court engaged in the proper balancing of appellant's ability to pay and respondent's need for maintenance as contemplated by the statutory scheme on the subject. *See* Minn. Stat. § 518.552, subd. 2. For example, the court found that maintenance based solely on appellant's monthly compensation "does not provide sufficient cash-flow" for respondent to meet her reasonable monthly expenses. And the amount of maintenance awarded by the court based on appellant's commission is less than he had offered to pay based on his commission under each of the scenarios that he proposed to the neutral financial expert. On this record, the court did not abuse its discretion by awarding respondent a percentage of appellant's annual commission, in addition to a monthly maintenance award.

2. Child Support; Modification

A district court has broad discretion to provide for the support of the parties' children. *Rutten*, 347 N.W.2d at 50. The court abuses this discretion when it sets support in a manner that is against logic and the facts in the record or misapplies the law. *Hubbard County Health & Hum. Servs. v. Zacher*, 742 N.W.2d 223, 226 (Minn. App. 2007). Findings of fact regarding an obligor's income for the purpose of calculating child support will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002).

Statutory guidelines set the presumptive amount of child support based on the obligor's monthly net income and the number of children. *See* Minn. Stat. § 518.551, subd. 5(b) (2004).[3] If the court deviates from the guidelines, it "shall make written findings giving the amount of support calculated under the guidelines, the reasons for the deviation, and shall specifically address the criteria in [§ 518.551, subd. 5(c)] and how the deviation serves the best interest of the child." *Id.*, subd. 5(i); *see also Rogers v. Rogers*, 622 N.W.2d 813, 819 (Minn. 2001). Subdivision 5(c) specifies factors bearing on need and ability to pay.

The court ordered child support, in addition to a monthly award from appellant's annual draw, equal to 39% of his annual commission. Appellant does not dispute his monthly support obligation, but he contends, respecting the award from his commission, that the court "abused its discretion by failing to limit [his] child support obligation by the statutory cap" and that the court "made no findings, [or] otherwise indicated that [his] child support obligation would be subject to an upward deviation."

Appellant's argument has merit. At the time of the hearing, the statutory income cap for determining child support was $7,360 per month. Record evidence shows that appellant's annual commission ranged from approximately $19,000 to more than $200,000 during the past eight years. And the court found that appellant's commission in

[3] The legislature amended and renumbered section 518.551, subd. 5(b), as well as other provisions in chapter 518 dealing with child support in 2005. *See* 2005 Minn. Laws ch. 164, § 29, at 1924. In 2006, the legislature provided that the 2005 amendments to the provisions relating to the calculation of child support would apply only to actions or motions filed after January 1, 2007. *See* 2006 Minn. Laws ch. 280, § 44 at 1145. Because this action was filed before the effective date of the 2005 amendments, we review the district court's child-support determination under the 2004 statute.

2006 was $43,000. Although appellant's current net monthly income did not exceed the statutory cap, the addition of the commission portion of the award to his net monthly income could exceed, based on his commission history, the $7,360 monthly income cap for setting a child-support obligation. Because the support award is a fixed percentage of appellant's entire income, it is possible that the award will constitute an upward deviation unsupported by necessary findings.

Because the referee did not make findings to support an upward deviation and because respondent agreed at oral argument that a cap on the monthly income is appropriate, we modify the child-support award to impose a cap at 39% of the maximum monthly income as provided in the guidelines.

3. Conduct-based Attorney Fees

The district court may award attorney fees in a dissolution proceeding if a party "unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2006); *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). An award of conduct-based attorney fees in dissolution cases rests almost entirely within the discretion of the district court and will not be disturbed absent a clear abuse of discretion. *Kirby v. Kirby*, 348 N.W.2d 392, 394 (Minn. App. 1984).

Despite appellant's contention that it was respondent who "acted in bad faith on several occasions throughout the proceedings," the court found that appellant repeatedly failed to provide requested information, thereby forcing respondent's counsel to spend time drafting letters and engaging in "numerous" phone conferences. After describing several examples of appellant's dilatory efforts, the court found that appellant

"unreasonably increased the length and expense of this proceeding." The court's order awarding respondent $5,000 for her attorney fees was not an abuse of discretion. *See Quade v. Quade*, 367 N.W.2d 87, 90 (Minn. App. 1985) (affirming an award of attorney fees under section 518.14 in part because of the opposing party's dilatory tactics, attempts to hide assets, and noncooperation with the court and counsel), *review denied* (Minn. July 11, 1985).

Affirmed as modified.