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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1393**

In re the Marriage of:
Debra Leigh Thomasson Higgins, petitioner,
Respondent,

vs.

Michael James Higgins,
Appellant.

**Filed July 15, 2008
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Carver County District Court
File No. 10-F3-02-001923

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and
Harten, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a spousal-maintenance award, appellant husband argues that the district court (1) abused its discretion by awarding respondent wife maintenance in an amount that exceeds wife's established need and (2) erred by reopening the record to accept affidavits submitted by wife without providing an opportunity for husband to respond. We affirm in part, reverse in part, and remand.

FACTS

The parties separated in 2002 after 20 years of marriage, and their marriage was dissolved by a stipulated judgment and decree in February 2004. The dissolution judgment granted respondent wife sole physical custody of the parties' minor daughter and required appellant husband to pay \$1,688 per month for child support. The dissolution judgment also required husband to pay permanent spousal maintenance in the amount of \$8,352 per month for five months and \$7,565 per month thereafter. The dissolution judgment contained the following findings and conclusion regarding the maintenance award:

[T]he parties have agreed that [husband] will pay to [wife] permanent spousal maintenance as that term is defined under Minnesota law, subject to the de novo review ordered herein. It is anticipated that [wife] will have taken good-faith efforts to become employed and/or educated by the time [daughter] enters 9th grade, which is expected to be September 1, 2006.

....

By the time [daughter] starts ninth grade, which is anticipated to be September 1, 2006, it is anticipated that

[wife] will have taken good-faith efforts to become employed and/or re-educated. The amount of spousal maintenance may be reviewed de novo as of this date.

In May 2006, husband moved to modify spousal maintenance based on changed circumstances and also requested the de novo review provided for in the dissolution judgment. The district court combined the motions for an evidentiary hearing.

Husband changed jobs in 2006, but his income continued at its previous rate. Husband agreed to increase his monthly child-support obligation to \$1,840, which was the maximum guideline amount at that time. Husband did not submit evidence of his monthly expenses. The district court noted that husband was not claiming that he lacked the ability to pay maintenance.

Wife has a high-school education. She has taken some college classes but has not completed a degree or vocational program. Before the parties married, wife worked as an accounts-payable clerk and as a bookkeeper. During the marriage, the parties moved frequently to accommodate husband's career. During the first few years of the marriage, wife held various jobs; she was not employed from the time of daughter's birth until the parties' separation.

In January 2005, wife began working part-time as a show manager, earning a gross annual salary of \$23,500. Although wife did not specify the number of hours that she works, she testified that when preparing for market, she worked roughly from 8:30 a.m. until 2:30 p.m. while daughter was in school. The district court found that wife works about 30 hours per week.

Daughter has ADHD, and wife testified that daughter requires daily help from wife with school work and that it is important for wife to be at home with daughter when daughter is not in school. The district court found that the record did not show that it would be detrimental to daughter for wife to work fulltime. The district court also found that wife had not “acted in bad faith in choosing to limit her employment opportunities” but “had chosen to do so because of the income stream that [husband’s] spousal maintenance and child support has provided.”

Wife claimed \$9,202.13 in monthly expenses for herself and daughter. Among the expenses were \$156.46 for home maintenance and minor repairs and supplies, \$310.07 for home improvements, \$436.94 for vacations, \$650 for payments on an installment loan, and \$686 for attorney fees. Wife testified that the installment loan was for expenses incurred in the initial dissolution proceeding, including attorney fees, and for some old credit card debt. The amount included for attorney fees was for fees incurred in the current proceeding.

The district court adjusted wife’s budget by eliminating \$45.16 for uninsured medical expenses and \$90 for tutoring because these expenses were paid by husband, eliminated \$310 for home improvements because these payments were investments that increased the value of the home and wife had also budgeted \$150 per month for repairs and maintenance, and eliminated \$162.71 for cash and miscellaneous because this expense was not adequately explained. The district court found that wife’s reasonable monthly expenses for herself and daughter were \$8,505 and awarded her \$6,200 per month for maintenance. The district court noted that the maintenance award, together

with wife's employment income and child support, might exceed monthly expenses. The court explained that budgets rarely reflect totally the costs incurred by a family and that the maintenance award would provide for current and future reasonable expenses. The district court declined to award wife attorney fees for the current proceeding and found that she had "the ability to pay her own fees from her current monthly income from all sources."

DECISION

Amount of maintenance

When reviewing maintenance de novo, the district court must consider the factors in Minn. Stat. § 518.552, subd. 2 (2006). *Leroy v. Leroy*, 600 N.W.2d 729, 733 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999). No single statutory factor is dispositive. *Elwell v. Elwell*, 372 N.W.2d 67, 69 (Minn. App. 1985). In considering the statutory factors, "the basic 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." *Krick v. Krick*, 349 N.W.2d 350, 351-52 (Minn. App. 1984). When conducting de novo review, the district court may consider anything that would be appropriate to consider for an initial maintenance award. *Leroy*, 600 N.W.2d at 733. 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).

Husband argues that the district court abused its discretion by awarding wife spousal maintenance in an amount that exceeds wife's reasonable needs. Appellate courts review a district court's maintenance award under an abuse-of-discretion standard. *Dobrin*, 569 N.W.2d at 202. A district court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Id.* "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).

In determining wife's reasonable monthly expenses, the district court allowed the \$650 payment for an installment loan that wife testified was for attorney fees incurred in the initial dissolution proceeding. As husband argues, allowing this expense, which provided a basis for increasing the maintenance award, effectively modified the stipulated dissolution judgment in which both parties agreed to be responsible for their own attorney fees and indebtedness. *See Chamberlain v. Chamberlain*, 615 N.W.2d 405, 414 (Minn. App. 2000) (stating that debts, like assets, are apportionable in the division of marital property), *review denied* (Minn. Oct. 25, 2000) ; *Stevens v. Stevens*, 501 N.W.2d 634, 638 (Minn. App. 1993) (explaining that although district court could consider husband's failure to pay property award in determining maintenance, court lacked jurisdiction to simply relabel property award as maintenance).

Husband also argues that the district court abused its discretion by including in wife's monthly expenses the \$686 that wife pays for attorney fees for the current proceeding. By including this amount in wife's monthly expenses, the district court, in effect, awarded wife attorney fees in the form of additional monthly maintenance without

making the findings required by Minn. Stat. § 518.14, subd. 1 (2006). Also, although wife testified that the current attorney fees would be paid off in about ten months, the maintenance award is permanent, which means that a maintenance amount that is based in part on the current monthly attorney-fees payment, will continue to be paid after the attorney fees are fully paid. Including the monthly payment for attorney fees in wife's reasonable expenses does not reflect the marital standard of living.

Husband argues that the district court erred in declining to impute full-time income to wife. Husband contends that the district court absolved wife of working full time in disregard of the parties' very specific stipulation. But as reflected in the dissolution judgment, the parties' stipulation did not specifically require that wife become employed full time; the judgment states that "it is anticipated that [wife] will have taken good-faith efforts to become employed." Although the district court found that daughter's special needs did not preclude full-time employment for wife, it also found that wife did not act in bad faith in limiting her employment to part time.

Before a district court may impute income to a party for the purpose of making a spousal-maintenance determination, it must find that the party is voluntarily unemployed or underemployed in bad faith. *Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. App. 1997). A showing that wife could be employed full time by choosing not to be at home when the parties' daughter is at home after school does not demonstrate that wife has not taken good-faith efforts to be employed. *See Justis v. Justis*, 384 N.W.2d 885, 891 (Minn. App. 1986) (stating that it is proper to consider whether obligee is "the custodian of young children whose circumstances make it appropriate that she not be required at

this time to seek full-time employment outside the home”), *review denied* (Minn. May 29, 1986).

Husband also argues that when determining wife’s need for maintenance, the district court erred in failing to consider the marital property awarded to wife. *See* Minn. Stat. § 518.552, subd. 2(a) (listing property awarded to obligee as factor to consider in determining need for maintenance). There is no dispute that shortly before the evidentiary hearing, husband exercised a stock option, which resulted in the payment of \$137,602 to wife in accordance with the property-distribution provisions of the dissolution judgment. Husband contends that when determining maintenance, the district court refused to consider the income that wife could earn by investing this money and other savings that she had. But the district court did consider this potential investment income and found that “the recent stock option payment is a one-time event and [wife] should be entitled to invest those sums to provide for her future needs rather than spending the income on her current expenses.” Husband has not shown that the district court abused its discretion by allowing wife to retain the investment income from this property award.

Reopening the record

Husband argues that the district court erred in reopening the record and allowing wife to submit evidence that her expenses had increased because her significant other had moved out. But husband has not shown that the district court relied in any way on the evidence submitted after the evidentiary hearing and, therefore, has shown no prejudice as a result of the evidence. Consequently, husband has not shown that he is entitled to

relief as a result of this alleged error. *See Petition of Otter Tail Power Co.*, 417 N.W.2d 677, 679-80 (Minn. App. 1988), *review denied* (Minn. Mar. 23, 1988) (holding that to obtain relief on appeal, party generally must establish prejudice as a result of a tribunal's actions).

We conclude that the district court abused its discretion by including in wife's reasonable expenses wife's monthly payments for the installment loan and for attorney fees for the current proceeding, but husband has not shown that the district court abused its discretion by failing to impute to wife income for full-time employment or by failing to consider wife's investment income. Therefore, we affirm in part, reverse in part, and remand for a determination of the amount of permanent maintenance.

Affirmed in part, reversed in part, and remanded.