STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1590

In re the Marriage of:

Richard Abraham Brimacomb, petitioner,
Appellant,

vs.

Kelly Ann Brimacomb,
n/k/a Kelly Ann Hammer,
Respondent.

Filed November 23, 2010
Affirmed; motions denied
Shumaker, Judge

Hennepin County District Court
File No. 27-FA-000299536

Linda S.S. de Beer, Louise C. Rogness, de Beer & Associates, P.A., Lake Elmo, Minnesota (for appellant)

Michael D. Dittberner, Lisa Marie Stordahl Bachmeier, Linder, Dittberner & Bryant, Ltd., Edina, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Worke, Judge.

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

SHUMAKER, Judge

Appellant contends that the district court abused its discretion in failing to conduct a de novo review of the duration of an award of spousal maintenance and, further, made an evidentiary error. We affirm, and we deny respondent's motions to strike and for an award of attorney fees.

FACTS

We are asked to decide whether the district court abused its discretion by, allegedly, declining to conduct a de novo review of a permanent spousal-maintenance award, and by, allegedly, refusing to consider a vocational-evaluation report pertaining to the maintenance obligee.

After a trial in this proceeding to dissolve the 14-year marriage of appellant Richard Abraham Brimacomb and respondent Kelly Ann Hammer, the district court issued, and later amended, findings of fact, conclusions of law, and a judgment and decree. The district court found that Brimacomb was gainfully self-employed as a consultant with projected annual earnings for the year of the dissolution of $110,000; and that Hammer, who had not been employed outside of the home for 11 years, had either actual or anticipated annual earnings of $30,000 to $40,000.

Finding that Hammer lacked "sufficient resources and property to provide for her reasonable needs" and those of the parties' four children, "considering the standard of living established during the marriage," and that Hammer was "unable to provide adequate self-support through appropriate employment," the district court awarded to

Hammer "permanent spousal maintenance" of $2,050 each month. The court also found that "[t]here is some doubt regarding whether [Hammer] will ever be self-supporting at the marital standard of living."

Among its conclusions of law, the district court provided that, "[b]ased on the many uncertainties in this case, either party may move the court for *de novo* review on maintenance within twelve to eighteen months of the date of the Judgment and Decree."

Brimacomb later moved the district court for an order "[f]inding no basis for an award of spousal maintenance and eliminating [Brimacomb]'s spousal maintenance obligation. In the alternative, reducing the amount of [Brimacomb]'s spousal maintenance obligation and ordering [Brimacomb]'s obligation cease on December 31, 2012." A second district court judge, not the one who issued the judgment and decree, heard and denied Brimacomb's motion to eliminate permanent spousal maintenance, but reduced the award to $1,300 each month. As to the issue of the duration of the maintenance award, the court found that "[t]he Judgment and Decree is clear that the award of spousal maintenance is a permanent award. Also, [Hammer] currently is in need of an award of spousal maintenance. Therefore the Court reviews only the amount of spousal maintenance." Finally, the district court noted that Brimacomb sought "to be allowed to submit a late report from his vocational evaluator," but the court's order is silent as to whether the court considered the report. Brimacomb moved before a third district court judge to amend the findings in the second judge's order and to be allowed to submit the vocational report. The court denied the motion.

Alleging that the district court abused its discretion when it failed to conduct a de novo review of the duration of the maintenance award, and when it failed to consider the vocational-evaluation report, Brimacomb brought this appeal.

D E C I S I O N

Review of Spousal Maintenance

Brimacomb's contention on appeal is that the district court was obligated to conduct a de novo review of the duration of the spousal-maintenance award and, had it done so, would have concluded that there is no basis for an award of permanent spousal maintenance. Thus, a de novo review was to be the vehicle through which the court would reach and resolve the issue of the propriety of permanent maintenance. To the issue of the propriety of the award of permanent spousal maintenance we apply "an abuse-of-discretion standard of review . . . ." *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). On appeal, we will not disturb the district court's discretionary spousal-maintenance determination absent a showing of a clear abuse of discretion. *Maeder v. Maeder*, 480 N.W.2d 677, 679 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). The district court abuses its discretion in awarding spousal maintenance if the supporting findings of fact are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). Findings of fact 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).

In his motion for review of the maintenance award, Brimacomb sought to eliminate maintenance altogether or to reduce the amount and limit its duration. The district court conducted an evidentiary hearing on the motion, and aside from the question of the admission of the vocational evaluation report—which we address below—Brimacomb was permitted to present evidence and argument on the propriety of permanent maintenance as well as on the amount of maintenance. The court imposed no restriction on the evidence to be presented and did not limit that evidence only to the question of the amount of maintenance. Nevertheless, Brimacomb argues, the reviewing district court judge "apparently believed" that the prior judge "had limited the review of maintenance to a review of solely the amount of maintenance . . . ." He then notes that neither the parties nor the judge, at the outset of the hearing, sought or suggested such a limitation, and he cites various authorities for the proposition that a de novo review, without express limitation to amount, means that both the amount and duration of maintenance are to be reviewed.

Although the district court's finding that "[t]he Judgment and Decree is clear that the award of spousal maintenance is a permanent award," and "[t]herefore the court reviews only the amount of spousal maintenance" implies that no review of the duration of the award occurred, the order as a whole shows otherwise. Finding that "[Hammer] currently is in need of an award of spousal maintenance," the district court made several findings pertaining directly to the issue of the duration of the award. The district court found that Hammer "has no income-producing assets and no significant assets"; "[t]here is no evidence that she could ever become self-supporting at the standard established

during the marriage"; Hammer "was absent from employment and her education and skills and experience became outmoded"; "[w]hen she is able to resume work on a career track, her earning capacity will have become permanently diminished commensurate to the amount of time she spent out of the workplace"; while she was "a stay-at-home mother and homemaker for 11 years," Hammer "lost earnings, seniority, retirement benefits and other employment opportunities . . . "; and, despite her part-time employment, "she has not yet been able to start earning those benefits and opportunities."

These findings portray a 43-year-old homemaker who has limited employment skills in the current job market; has lost years of the typical collateral benefits of regular employment; has suffered a permanent diminution of earning capacity; has doubtful likelihood of ever becoming self-supporting at the standard of living she enjoyed during the marriage; and has no assets upon which to draw support. Not only do these findings directly address the issue of the duration of maintenance, Brimacomb has neither challenged any of them nor offered evidence to refute or cast doubt upon them. With these unchallenged findings of fact, the district court would be compelled to conclude that, at the very least, there is genuine uncertainty as to whether Hammer will ever become self-supporting. "With respect to the duration of an award of spousal maintenance, a district court must order permanent maintenance 'if the court is uncertain that the spouse seeking maintenance can ever become self-supporting.'" *Maiers*, 775 N.W.2d at 668 (quoting *Aaker v. Aaker*, 447 N.W.2d 607, 611 (Minn. App. 1989), *review denied* (Minn. Jan. 12, 1990)).

By statute, if there is uncertainty about the need for permanent maintenance, "the court shall order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3 (2008); *see* Minn. Stat. § 645.44, subd. 16 (2008*)* (stating that "'[s]hall' is mandatory." Furthermore, caselaw is clear that the statute "leaves little room for the exercise of discretion where the need for permanent maintenance is in question." *Bolitho v. Bolitho*, 422 N.W.2d 29, 32 (Minn. App. 1988).

Because the evidence clearly supports the district court's determination that Hammer "currently is in need of spousal maintenance" and because there is clear evidence that such need will persist indefinitely, there was neither an abuse of discretion nor error in the district court's action in response to Brimacomb's motion.

Vocational Evaluation Report

Brimacomb sought to submit to the district court the report of a vocational assessment of Hammer. The report apparently was untimely, but the court acknowledged it in its order following the de novo review hearing. We cannot tell from the record whether the court considered the report, and Hammer has moved to strike it from the record on appeal. But, as discussed below, whether or not the district court considered it, the report would not alter the court's conclusion. Therefore, we need not strike the report from the record on appeal.

After the de novo review, the district court found that Hammer "has the ability to work full time and earn $40,000 a year," and the court imputed such earnings to her. The vocational evaluator found that Hammer has the ability to "complete selected training programs at the graduate school level" and has "the ability to work full-time or prepare to

work full-time in career employment of a professional nature." These findings are consistent with the district court's findings. The evaluator also projected Hammer's earning potential in various careers after appropriate training. The likely earnings range the evaluator found was $35,000 to $40,000 at the entry level, with earnings in the range of $60,000 to $100,000 "accessed with 5 to 10 years of directly related work experience" in hospitality management. The evaluator's findings as to Hammer's current ability to become self-supporting are neither at odds with the district court's findings nor do they provide evidence that spousal maintenance should be limited in duration. They, like the evidence before the district court, portray Hammer's immediate ability to work full time and to earn approximately $40,000 annually and her conditional ability to earn a higher wage depending on further education and training, job experience, and job availability. In other words, the report suggests that Hammer's future ability to restore her earning capacity and support herself at or close to the standard of living she enjoyed during the marriage is tangibly uncertain.

Respondent's Motion for Attorney Fees

Hammer has moved for attorney fees on appeal under Minn. Stat. § 518.14, subd. 1 (2008), on the ground that the appeal constitutes an unreasonable contribution to the length and expense of the proceeding. To succeed on this motion, the moving party must show that the nonmoving party "unreasonably contributed to the length or expense of the proceeding." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). Attorney fees may also be awarded if an appeal is frivolous or is brought in bad faith. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21,

1989). Hammer has not shown that this appeal was frivolous or brought in bad faith or that it unreasonably contributed to the length or expense of the proceeding. Accordingly, Hammer's motion for attorney fees is denied.

Affirmed; motions denied.