STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2335

In re the Marriage of:
LeAnn Marie Hendrickson,
f/k/a LeAnn Marie Murra, petitioner,
Appellant,

vs.

Wayne Arnold Murra,
Respondent.

Filed September 21, 2010
Affirmed
Peterson, Judge

Blue Earth County District Court
File No. 07-FA-04-1765

Jon G. Sarff, Sarff Law Office, Mankato, Minnesota (for appellant)

Michael H. Kennedy, Kennedy & Kennedy, Mankato, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Willis, 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

PETERSON, Judge

In this appeal from an order that reduces her spousal-maintenance award, appellant-wife argues that (1) the district court understated respondent-husband's income, (2) husband failed to make an adequate job search, and (3) her modified maintenance award fails to adequately consider her reasonable monthly living expenses. Because appellant has not shown that the district court's findings of fact are not supported by the record or that the district court misapplied the law, we affirm.

FACTS

Appellant-wife LeAnn Hendrickson challenges the district court's grant of respondent-husband Wayne Murra's motion to reduce his maintenance obligation. Husband, a mortgage banker who made a substantial income at the time of the 2005 judgment dissolving the parties' marriage, moved to terminate or reduce his maintenance obligation when his employer eliminated his job and he later took a new job earning 82% less than he earned at the time of the dissolution. Wife argues that, in granting husband's motion, the district court understated husband's income, should have found husband's job search to be inadequate, and failed to adequately consider her expenses.

D E C I S I O N

A party moving to modify spousal maintenance must show that substantially changed circumstances render the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2008). Whether to modify maintenance is discretionary with the district court, and its decision will not be reversed absent a clear abuse of that discretion.

Kemp v. Kemp, 608 N.W.2d 916, 921 (Minn. App. 2000); *see also Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981) (noting that district court has "broad discretion to determine the propriety of a [spousal-maintenance] modification"). A district court abuses its discretion if its decision is based on findings of fact that are unsupported by the record, if it misapplies the law, or if it resolves the question in a manner contrary to logic and the facts on the record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997) (making findings unsupported by record or misapplying law); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1994) (resolving the matter in manner contrary to logic and facts on record). Findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *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); *see McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006) (applying this definition of "clearly erroneous" in a maintenance appeal).

I.

The district court found husband's "anticipated annual earnings from employment and real estate holdings [to be] $93,800." Without elaboration, wife asserts that the district court "abused its discretion in failing to consider [husband's] ability to pay spousal maintenance based on his current unearned income derived from [his] rental property, investments and earnings since the time of the original divorce proceedings on August 11, 2005. See Statement of Facts at paragraphs 2, 5, 6, and 7."

With exceptions not at issue here, "gross income" means "any form of periodic payment to an individual," Minn. Stat. § 518A.29(a) (2008),[1] and includes sufficiently dependable investment income and bonuses. *See Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985) (stating that, while investment income is to be included in income, parties are not generally required to liquidate assets to pay their expenses). *Compare McCulloch v. McCulloch*, 435 N.W.2d 564, 566-67 (Minn. App. 1989) (excluding bonuses deemed "speculative" from maintenance payor's income) *with Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987) (stating that a dependable source of income may properly be included in calculation of income when addressing maintenance), *review denied* (Minn. Oct. 30, 1987). "A district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004).

Paragraph 2 of the statement-of-facts section of wife's brief addresses wife's income and expenses, not husband's. And while paragraph 5 mentions husband's income, it mentions neither rental income nor investment income. Further, it fails to acknowledge that the $93,800 figure found by the district court includes husband's income from "real estate holdings."

Paragraph 6 of wife's statement-of-facts section states that "[husband] can then make up the difference between $5,967 and $4,764.49 or $1,202.51 per month through income derived from his other rental property and investments which were not considered

[1] Maintenance is addressed in Minn. Stat. § 518.552 (2008), but definitions in chapter 518A apply to maintenance disputes. *Lee v. Lee*, 775 N.W.2d 631, 635 n.5 (Minn. 2009).

by the [district court]." The $5,967 figure mentioned by wife was her maintenance award before it was temporarily reduced to $2,983.50 during husband's job search. The $4,764.49 figure is 61% of what the district court found to be husband's gross monthly income and appears to assume that because wife has 61% of the parties' combined monthly expenses, she should receive 61% of husband's (gross) monthly income. This argument, however, does not show that the finding of husband's income is clearly erroneous. As noted, the $93,800 figure *includes* income from husband's real estate holdings. Also, the $93,800 figure is a *gross* figure and accounts for neither taxes nor the costs associated with maintaining the rental property. Further, wife cites no authority for her assumption that husband's (gross) income should be divided in proportion to the parties' monthly expenses. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue absent adequate briefing); *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (stating that an assignment of error based on mere assertion and unsupported by argument or authority waived unless prejudicial error is obvious); *see also Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) (citing *Wintz* in a family-law appeal); *Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) (citing *Schoepke* in a family-law appeal), *review denied* (Minn. Oct. 24, 2001). And because Minn. Stat. §§ 518A.39, subd. 2(a), 518.552 (2008) recite standards for deciding whether to modify existing maintenance awards and setting the amount of maintenance awards that are different from wife's proposed nonstatutory prorating-of-income standard, it is

not apparent how the district court can have erred or abused its discretion by not applying wife's proposed nonstatutory standard.

Paragraph 6 of wife's statement-of-facts section also lists four insurance policies and an additional $935,391.85 in assets awarded to husband in the dissolution judgment and notes that husband earned substantial income between the 2005 dissolution and his employer's October 2008 elimination of his position, apparently suggesting that earnings from these funds should be deemed to produce income in addition to that found by the district court. The vast majority of these assets, however, appear to be retirement-related accounts and the cash-surrender value of insurance policies. Husband is age 55. Wife does not address the extent to which these funds are currently available to husband or what taxes and penalties he might incur if he were to start using retirement funds at this time. Thus, the extent to which husband's retirement-related funds are currently available to him is, on this record, unclear. The remaining amounts listed in paragraph 6 are a "stock purchase account" and a "Choice Account." Even if the full amounts of these accounts currently exist, can be invested, and the proceeds of their investment can be counted as husband's current income, the record lacks evidence showing what those amounts might earn.

Wife also asserts that husband "earned approximately $700,000 annually for three years from August 11, 2005 until he was laid off on October 3, 2008," seemingly implying that these funds should have provided husband with sufficient funds to invest to produce income in addition to that found by the district court. But wife introduced no evidence of husband's investment income and did not argue that husband failed to

produce discovery. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that "a party cannot complain about a district court's failure to rule in her favor" if one reason it did not do so was because she "failed to provide the district court with the evidence that would allow the district court to fully address the question"), *review denied* (Minn. Nov. 23, 2003). As a result, any findings on husband's investment income would have been improperly speculative. *See Justis v. Justis*, 384 N.W.2d 885, 891 (Minn. App. 1986) (stating, in the child-support context, that a district court cannot speculate on a party's future income), *review denied* (Minn. May 29, 1986).[2]

Paragraph 7 of wife's statement-of-facts section essentially repeats what was asserted in paragraph 6. Therefore, paragraph 7 fails to support wife's argument for the same reasons that paragraph 6 does.

II.

Wife challenges the finding that husband "made a prima facie showing of good faith effort to find reasonably appropriate employment. [Wife] has not made a showing that meaningfully brings into question [husband's] claims of good faith effort." Whether a party acts in good faith is, essentially, a credibility determination. *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985). Appellate courts defer to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *see Eisenschenk*, 668 N.W.2d at 241 (citing these aspects of *Tonka Tours* and *Sefkow*). Thus,

[2] The district court's finding that "[e]ach of the parties possess significant financial assets that could be liquidated to provide additional income from interest or other investment earnings" suggests that it was aware that the record lacked evidence of the investment income of both parties.

we defer to the district court's finding that husband's job search was adequate. Even if we did not defer to that determination, wife's argument would be unpersuasive. The focus of her argument is her assertion that husband made only four job applications, that the applications were made only in the Mankato area and not in the Twin Cities area, and that the positions husband applied for were not of the same type as the one he lost. The transcript of the hearing on the parties' posttrial motions shows that the district court was aware of wife's arguments, that the district court affirmatively rejected them, and that the district court put significant weight on wife's failure to produce evidence that, despite husband's assertions to the contrary, he could have taken a job allowing him to earn significantly more than the job that he took. *See Eisenschenk*, 668 N.W.2d at 243 (addressing party's obligation to produce evidence that allows district court to fully address issue). Also, while husband produced traditional documentation for four job applications, his submissions to the district court, including his attorney's argument, stated that he made other attempts to get a job that did not involve a formal application and rejection. Regarding his pursuit of jobs in the Mankato area, husband stated that most of his mortgage experience is in that area, that mortgage banking is a repeat and referral business, and that, upon making inquiries in the Twin Cities, he learned that his greatest "value" was in the Mankato area. He also stated that he wanted to stay in the Mankato area to assist the parties' children with their needs. On this record, we will not overturn the district court's credibility determination on this subject.

III.

Citing paragraphs 1, 3, 8, and 9 of her statement-of-facts section, wife asserts that the district court abused its discretion in reducing her maintenance award "without taking into consideration the parties' relative monthly living expenses." Paragraph 1 of wife's facts section notes that she incurs 61% of what the judgment states are the parties' reasonable monthly expenses and asserts that her "unearned income" is significantly less than predicted in the dissolution judgment. Paragraph 3 of the facts section asserts that wife lacks the ability to pay her reasonable monthly expenses. Paragraph 8 of the facts section states, without citing any authority, that, if maintenance is to be reduced, "the amount of spousal maintenance awarded should be modified to reflect the relative combined monthly household expenses of the parties to ensure that the burden of this change in circumstances is borne equally by the two parties," and paragraph 9, also without citing any authority, states that "[s]ince [wife] has 61% of the parties' combined monthly household expenses, at a minimum [wife] should have received at a minimum 61% of [husband's] annual income of $93,800 or $4,764.49 per month."

We have already rejected wife's unsupported assertion that simply because she incurs 61% of the parties' combined expenses she is entitled to 61% of husband's gross income. Regarding wife's argument that her maintenance award should not be reduced because her investment income is significantly less than predicted, we note that, if the assumptions underlying a maintenance award are not satisfied, the failure to satisfy those assumptions can be the substantial change in circumstances necessary to justify a modification of maintenance. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 & n.3 (Minn.

1997). Wife, however, did not move to modify maintenance. Nor did she introduce evidence of her investment income other than her own general assertions. And she did not attempt to explain *why* her investment income was unexpectedly low. *See Eisenschenk*, 668 N.W.2d at 243 (addressing party's obligation to produce evidence that allows district court to fully address issue). And because "[i]t is not within the province of [appellate courts] to determine issues of fact on appeal," *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966), this court cannot address these questions.

IV.

Husband asks this court, "[i]n the interests of justice," to terminate his maintenance obligation. *See* Minn. R. Civ. App. P. 103.04 (stating that appellate courts can address issues as justice requires). Because husband asked the district court to terminate or reduce his maintenance obligation, and the district court reduced his obligation, husband's request is, essentially, a challenge to the district court's refusal to terminate the obligation. The proper way for husband, as a respondent, to seek review of a district court's ruling adverse to him was to file either a notice of review or a notice of related appeal. *Compare* Minn. R. Civ. App. P. 106 (2008) (addressing a respondent's right to review through December 31, 2009) *with* Minn. R. Civ. App. P. 106, 103.02, subd. 2, 104.01, subd. 4 (Supp. 2009) (addressing a respondent's right to review effective January 1, 2010). Husband did neither. Therefore, his challenge to the district court's refusal to terminate maintenance is not properly before this court, *In re Estate of Barg*, 752 N.W.2d 52, 74 (Minn. 2008), and we decline to address the issue.

Affirmed.