STATE OF MINNESOTA
IN COURT OF APPEALS
A10-786

Jane Deborah Rockler, petitioner,
Respondent,

vs.

Gary Steven Edelston,
Appellant.

Filed March 8, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-FA-000221672

Michael Ormond, Ormond & Zewiske, Minneapolis, Minnesota (for respondent)

M. Sue Wilson, M. Sue Wilson Law Offices, P.A., Minneapolis, Minnesota (for appellant)

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

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 denying his motion to modify or terminate spousal maintenance, appellant-husband argues that the district court (1) abused its discretion when it found that respondent-wife's increased income was not a substantial change in

circumstances warranting modification, and (2) erred by failing to impute to wife the income that she would have earned had she not retired early. We affirm.

FACTS

Appellant-husband Gary S. Edelston and respondent-wife Jane D. Rockler, f/k/a Jane D. Edelston, were married in June 1970. The marriage was dissolved in January 1999. At the time of the dissolution, wife was employed as a teacher and earned a gross annual income of approximately $40,000. The district court found wife's reasonable monthly expenses to be $4,000 and ordered husband to pay wife $2,200 per month in permanent spousal maintenance. The maintenance award was not subject to a cost-of-living adjustment and was to terminate upon the death of either party or wife's remarriage. Husband appealed the district court's spousal-maintenance award, and this court affirmed. *Edelston v. Edelston*, C9-99-1225 (Minn. App. Apr. 11, 2000).

In June 2008, wife retired from teaching. At the time of her retirement, wife's gross annual income was approximately $59,859, and her projected income for 2009 was $60,457. In November 2009, husband brought a motion to reduce or terminate his spousal-maintenance obligation based on his assertion that wife is able to meet her needs independently. Wife filed a responsive motion seeking to increase husband's spousal-maintenance obligation and requesting an award of attorney fees. Following a hearing, the district court denied both parties' motions. The district court based its denial on the following findings:

20. [Husband] did not provide the Court with any current income information, but stipulated on the record that he could continue to pay his spousal maintenance obligation.

21. [Wife] asserts that she is unable to meet her current monthly living expenses without her receipt of spousal maintenance.

22. In June of 2008, [wife] elected to retire at age 60.

23. The Court finds this to be an early age of retirement based upon the age in which [wife] would be entitled to social security benefits which would be 66 years of age.

24. [Husband] argues that [wife's] income, had she not retired, would have been sufficient for her to support her reasonable monthly budget, however [husband] urges the Court to accept the budget as set forth in the parties' Judgment and Decree in 1999, without any increase.

25. In June 2008, [wife's] annual gross income was approximately $59,859, with projected income for 2009 of $60,457.

26. [Wife] does not contest her ability to earn the projected income of [$60,457], and stated in her Affidavit that she retired so that she could spend more time with her grandchildren and travel.

27. Upon her retirement, [wife] began receiving monthly pension payments of $999 from the Teacher's Retirement Association, ("TRA"). Since her retirement, this amount has increased [to] $1,024 due to a COLA increase.

28. [Wife's] retirement benefits provide her with gross monthly income of $4,024. ($1,024 from her TRA benefits, and $3,000 in voluntary withdrawals from her IRA account).

29. [Husband] argues that [wife's] net monthly income, had she not retired, would have been $5,271, including [wife's] monthly wages from teaching ($3,195),

and an assumed draw on her IRA account in the amount of $2,076.

30. While the Court is sympathetic to [husband's] argument that he should not be responsible for paying for [wife's] choice of early retirement; the Court is not persuaded that if [wife] were to continue working, she would make voluntary monthly withdrawals of $2,076 from her IRA account. Nor does the Court find it equitable or fair to stack [wife's] teaching income and retirement income for the purpose of reducing [husband's] spousal maintenance obligation.

31. Within the parties' Judgment and Decree, the Court found that [wife] was employed and had a monthly gross income of $3,563 per month.

32. Since 1999, [wife's] income has increased 29%, or approximately a 3% annual increase from 1999-2009; a figure that demonstrates a gradual increase in her income over the course of ten years.

33. The Court is not persuaded that this demonstrates a substantial change in [wife's] income. Such modest annual increases could have been reasonably anticipated, and does not render the existing order unfair and unreasonable.

34. As such, the Court finds that [husband] has not met his burden of showing that the original spousal maintenance award in the parties' Judgment and Decree is unreasonable and unfair due to the substantially decreased needs of [wife].

This appeal follows.

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) (2010). Whether to modify maintenance is discretionary with the district court, and its decision will not be reversed absent an 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). 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, 585-86 (Minn. App. 2006) (applying this definition of "clearly erroneous" in a maintenance appeal).

I.

Husband argues that wife's increased income constitutes a substantial change in circumstances that renders his existing maintenance obligation unreasonable and unfair. An award of spousal maintenance may be modified upon a showing of a substantial increase or decrease in the gross income of an obligor or obligee, or a substantial increase or decrease in the needs of an obligor or obligee, either of which makes the terms of the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a)(1)–(2). If the grounds for modification are shown to exist, the district court must consider the factors set forth in Minn. Stat. § 518.552 (2010) to determine the amount and duration of the

modified award. Minn. Stat. § 518A.39, subd. 2(d). No single factor is dispositive and each case must be determined on its own facts. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39 (Minn. 1982). 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).

The district court found that wife's income had increased by 29%,[1] or approximately 3% per year,[2] between 1999 and 2009, but concluded that "[s]uch modest annual increases could have been reasonably anticipated, and does not render the existing order unfair and unreasonable." Husband argues that whether such an increase was reasonably anticipated at the time of the original decree "is inapposite to the issue of whether such an increase is substantial" and that wife's increased income "is substantial in and of itself." But the fact that a permanent-spousal-maintenance obligee's income has increased is not by itself sufficient to require a maintenance modification. *Borchert v. Borchert*, 391 N.W.2d 74, 76 (Minn. App. 1986).

Husband further contends that the district court abused its discretion by awarding wife spousal maintenance in an amount that exceeds her reasonable monthly expenses of $4,000 as determined in the dissolution decree. But an award of maintenance that leaves

[1] It appears that the district court's finding that wife's income increased 29% is based on the fact that $3,563, wife's monthly income at the time of the dissolution, is 71% of $5,038, the monthly income wife could have earned if she had taught school in 2009. ($60,457 ÷ 12 = $5,038.08) ($3,563 ÷ $5,038 = 0.707). We think that it is more accurate to say that the increase in income from $3,563 per month to $5,038 per month is a 41.4% increase [(5,038 – 3,563) ÷ 3,563 = .414], which is an annual increase of 3.5%.

[2] Due to compounding, a 29% increase over 10 years is a 2.6% annual increase.

the obligee with a surplus of funds after meeting reasonable expenses does not necessarily constitute an abuse of discretion. *Walker v. Walker*, 553 N.W.2d 90, 96 n.2 (Minn. App. 1996).

Furthermore, husband's assertion that the spousal-maintenance award gives wife income that exceeds her reasonable monthly expenses is based on his argument that the parties' original judgment and decree prohibited any cost-of-living adjustment to the spousal-maintenance award and this prohibition has the practical effect of freezing wife's marital-standard-of-living budget. But prohibiting cost-of-living adjustments to the maintenance award does not mean that wife's reasonable expenses to maintain the marital standard of living are permanently fixed at the amount needed to do so at the time of the dissolution. Husband cites nothing in the record that indicates that wife's reasonable monthly expenses have not changed since the dissolution.

II.

Husband next argues that the district court abused its discretion in calculating wife's gross monthly income. In making this argument, husband offers several methods for calculating wife's income, all of which take into account wife's projected income from teaching and the present availability of penalty-free distributions from wife's retirement account. With exceptions not at issue here, "gross income" means "any form of periodic payment to an individual." Minn. Stat. § 518A.26, .29(a) (2010); *see also Lee v. Lee*, 775 N.W.2d 631, 635 n.5 (Minn. 2009) (applying definition to maintenance award). "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). But an abuse of discretion is not shown simply because the record could support a different result or because this court might have reached a different result on the same record. *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 412 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000).

The district court found that wife's "retirement benefits provide her with gross monthly income of $4,024" and held that it was not "equitable or fair to stack [wife's] teaching income and retirement income for the purpose of reducing [husband's] spousal maintenance obligation."

Husband argues that "the availability of the penalty-free income generated by the Brinker Capital IRA must be included as income to [wife] for purposes of calculating whether she is able to meet her monthly living expenses independently, even though the retirement asset was awarded as marital property." Husband contends that the supreme court's decision in *Lee* establishes that the penalty-free distributions from wife's retirement account must be included as income when calculating spousal maintenance. We disagree. In *Lee*, the supreme court explicitly stated that it was not addressing this issue because the obligee "did not challenge the decision of the district court that included in her income her share of the pension payments, even though they were awarded to her as marital property." *Lee*, 775 N.W.2d at 640 n.10.

Furthermore, husband's argument that income from the Brinker Capital IRA must be included as income to wife when determining whether she is able to independently meet her monthly living expenses is based on the premise that wife could have met her needs by continuing to work and supplementing her employment income with

withdrawals from the IRA. But husband has not cited any authority for his premise that potential withdrawals from a retirement account must be included in wife's income because wife reached the age when withdrawals could be made without paying an early-withdrawal penalty. Wife began making withdrawals from the IRA when she retired and no longer received employment income. Under husband's argument, wife must be treated as if she were simultaneously working and retired.

Husband also argues that wife's "projected salary at the time of her early, voluntary retirement must be considered for purposes of calculating spousal maintenance." Husband relies on *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541, 544-45 (Minn. App. 2006), and *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005), cases in which this court held that a party's earning capacity, rather than actual income, may be used in determining a party's need for maintenance.[3] But both of these cases were decided in the context of initially determining spousal maintenance, not modifying spousal maintenance. Husband attempts to avoid this distinction by pointing out that "[t]he factors set forth in Minn.

[3] Husband also relies on unpublished authority to argue that it is "neither fair nor logical" to impute income to a spousal-maintenance obligor who voluntarily retires in good faith without also taking into account the earning capacity of a spousal-maintenance obligee who voluntarily retires early. Unpublished opinions are of limited value in deciding an appeal. *See* Minn. Stat. § 480A.08, subd. 3(c) (2010) (stating "[u]npublished opinions of the Court of Appeals are not precedential"); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("stress[ing] that unpublished opinions of the court of appeals are not precedential" and noting that "[t]he danger of miscitation [of unpublished opinions] is great because unpublished decisions rarely contain a full recitation of the facts"). Moreover, the unpublished authority cited by husband is distinguishable from this case and there is no caselaw that supports husband's assertion that the earning capacity of an obligee receiving permanent spousal maintenance who retires early should be considered.

Stat. § 518.552 are identical whether one is establishing spousal maintenance or modifying spousal maintenance." However, the factors set forth in Minn. Stat. § 518.552 are only considered after the grounds for modification are shown to exist. *See* Minn. Stat. § 518A.39, subd. 2(d). Husband cites no authority that indicates that a permanent-maintenance obligee's earning capacity, rather than actual income, must be used to determine whether the grounds for modification exist.

The district court found that [husband] "has not met his burden of showing that the original spousal maintenance award in the parties' Judgment and Decree is unreasonable and unfair due to the substantially decreased needs of [wife]." When a district court denies a motion for modification of spousal maintenance based on the obligor's failure to show a substantial change in circumstances that renders the existing award unreasonable and unfair, the district court need not make further findings on statutory factors. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987). Thus, because husband failed to establish a basis for modification, there was no need for the district court to make findings regarding the statutory factors that govern a determination of the amount of spousal maintenance.

Affirmed.