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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-793**

In re the Marriage of:
Michael Edward Bates, petitioner,
Appellant,

vs.

Jeanette May Bates,
Respondent.

**Filed January 11, 2011
Affirmed
Johnson, Chief Judge**

Ramsey County District Court
File No. 62-F8-98-002187

Edward F. Rooney, Minneapolis, Minnesota, and Joel A. Seltz, Seltz & Seltz, PLLP,
Minneapolis, Minnesota (for appellant)

Sarah Martin Arendt, St. Anthony, Minnesota (for respondent)

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

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

In 1999, Michael Edward Bates and Jeanette May Bates divorced after 27 years of marriage. The dissolution judgment required Mr. Bates to pay Ms. Bates temporary spousal maintenance of \$1,000 per month for nine years. In 2008, Ms. Bates moved to modify spousal maintenance to make it permanent. The district court granted the motion and ordered Mr. Bates to make monthly maintenance payments of \$1,193 until Ms. Bates's remarriage or death. We affirm.

FACTS

The parties were married in 1972. Their marriage was dissolved in 1999 by the Ramsey County District Court. They have two children, both of whom reached adulthood before the dissolution.

At the time of the dissolution, Mr. Bates was 54 years old and was working as the human resources director of a privately held corporation at an annual salary of \$80,000 per year, which yielded a net monthly income of \$3,974. His reasonable monthly expenses were \$2,519. Ms. Bates was 52 years old at the time of the dissolution and was employed at a casino in Wisconsin. She had a net monthly income of \$1,281 and reasonable monthly expenses of \$2,267. She previously had worked for 12 years as a paraprofessional for a public school in the Twin Cities area. The district court awarded Ms. Bates temporary spousal maintenance of \$1,000 per month, to cease upon the earliest occurrence of her remarriage, her anticipated retirement date of October 5, 2008, or her death. The district court also awarded Ms. Bates half of the proceeds of Mr. Bates's

profit-sharing plan from a former employer, half of the funds in his IRA, and all of the funds in her own retirement benefit plan from the public school system.

After the dissolution, Mr. Bates enjoyed an increase in income. In 2007, his gross income was approximately \$186,000. In 2008, he earned gross income of approximately \$157,000 in the first ten months of the year. He also accumulated assets in several retirement accounts. In 2008, he had approximately \$92,000 in a 401(k) account with his then-current employer and approximately \$475,500 in an IRA. In April 2009, however, Mr. Bates's position was eliminated, and he entered into a severance agreement that entitled him to eight months of severance pay in the form of continued salary payments of approximately \$11,000 per month, through December 2009. Mr. Bates was 64 years old when his position was eliminated, and he stated in an affidavit in June 2009 that he intended to retire. Since leaving his job in human resources, he has worked at a public golf course, earning \$7 per hour.

After the dissolution, Ms. Bates did not have consistent employment and has experienced a decrease in income. In 2001, the casino terminated her employment, and she received unemployment benefits in 2001 and 2002. In 2003, she moved back to the Twin Cities. She earned \$5,837 that year by working part-time for four employers. In 2004, she returned to Wisconsin and worked for a local school district and for a Boys & Girls Club. She earned an average of approximately \$8,200 annually from 2004 to 2006. In 2007, Ms. Bates moved to California. At the time of the district court's order, she worked as a nanny for two children in the San Francisco area, earning a gross annual salary of \$33,600, which yielded a net monthly income of \$2,150. The district court

found that her reasonable monthly expenses are \$3,791. At the time of the district court's order, Ms. Bates was 63 years old.

Ms. Bates's financial assets consist of a small portion of the funds that she was awarded in the 1999 dissolution judgment. Between 2000 to 2008, she withdrew \$112,250 from those accounts to pay for living expenses and taxes. She stated that approximately \$45,000 remains in the accounts. She stated that she would be eligible for social security only if she were to stop working. She also stated that her monthly benefits from the public-school retirement plan and from social security would be reduced if she applied for them before reaching the age of 66.

Pursuant to the 1999 judgment, the temporary spousal-maintenance payments were scheduled to cease in October 2008. In August 2008, Ms. Bates moved to modify spousal maintenance. In October 2009, the district court granted the motion and made spousal maintenance permanent. The district court also modified the amount of the maintenance award by requiring Mr. Bates to pay \$1,193 per month, with cost-of-living adjustments. In March 2010, the district court denied in relevant part Mr. Bates's motion for amended findings or a new trial. Mr. Bates appeals.

D E C I S I O N

Mr. Bates argues that the district court erred in two respects when granting Ms. Bates's motion to modify spousal maintenance. He first argues that the district court erred by making the award of spousal maintenance permanent. He also argues that the district court erred by failing to consider the decrease in income he experienced after his severance payments ceased in December 2009.

A district court may modify an award for spousal maintenance based on a substantial change in any one of eight enumerated financial circumstances if the change makes the existing award unfair and unreasonable. Minn. Stat. § 518A.39, subd. 2(a), (b) (2008). The changes in financial circumstances most relevant to this case are “substantially increased or decreased gross income of an obligor or obligee” and a “substantially increased or decreased need of an obligor or obligee.” *See id.*, subd. 2(a)(1), (2). The district court also must consider the statutory factors that are relevant to an initial award of spousal maintenance, such as the financial resources of the parties, the duration of the marriage, the standard of living established during the marriage, and the age and physical and emotional condition of the spouse seeking maintenance. *Id.*, subd. 2(d) (citing Minn. Stat. § 518.552, subd. 2 (2008)). “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).

The party seeking modification of a spousal-maintenance award bears the burden of demonstrating a substantial change in circumstances that renders the existing order unfair and unreasonable. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). We apply a clear-error standard of review to a district court’s findings of fact concerning spousal maintenance, *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992), and an abuse-of-discretion standard of review to a district court’s decision to modify an existing maintenance award, *Hecker*, 568 N.W.2d at 709-10.

I. Permanency of Award

Mr. Bates first argues that the district court erred by making the award of spousal maintenance permanent. He disputes the district court's finding that Ms. Bates experienced a substantial increase in need. *See* Minn. Stat. § 518A.39, subd. 2(a)(2). He contends that Ms. Bates voluntarily limited her employment and improperly liquidated her retirement savings in the ten years since the divorce.

The district court found that, until 2007, Ms. Bates "sought employment . . . that was commensurate with her work history but was unable to secure employment which allowed her to become completely self supporting." The district court attributed Ms. Bates's employment difficulties to a "lack of marketable skills." The district court further found that, since 2007, even with increased income, Ms. Bates is unable to meet her needs in light of the cost of living in the San Francisco area. The district court concluded by finding that she is unable to support herself through employment and her financial assets and that the existing award of spousal maintenance is unfair and unreasonable.

In making its findings, the district court expressly rejected Mr. Bates's contention that Ms. Bates voluntarily limited her own income. The district court stated that Mr. Bates's submissions were "almost entirely focused on the failure of [Ms. Bates] to become gainfully employed, a situation that he views entirely of her making." The district court also stated that "there is no evidence to suggest that [Ms. Bates] worked part time or did not diligently seek employment." The district court accurately characterized the evidentiary record. Mr. Bates submitted an affidavit in which he complained

generally about Ms. Bates's lack of earned income, but he did not offer any specific evidence to support his accusations, such as evidence that Ms. Bates had passed up particular employment opportunities. On the other hand, Ms. Bates submitted an affidavit in which she described her financial circumstances after the divorce, including unsuccessful job applications.

Mr. Bates also contends that Ms. Bates has failed to satisfy the assumption stated in *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987), that a recipient of temporary maintenance “not only should strive to obtain suitable employment and become self-supporting but . . . will attain that goal.” *Id.* at 198. The language quoted by Mr. Bates describes a maintenance recipient who is capable of becoming self-supporting and, thus, deserving of an award of temporary, not permanent, spousal maintenance. *Id.*; *see also Maiers v. Maiers*, 775 N.W.2d 666, 669-70 (Minn. App. 2009) (affirming award of temporary maintenance to wife who would become self-supporting); *Aaker v. Aaker*, 447 N.W.2d 607, 611 (Minn. App. 1989) (same), *review denied* (Minn. Jan. 12, 1990). In contrast, a person with “limited ability to compete in the labor market” and a “speculative” earning capacity, like the spouse in *Nardini*, is entitled to an award of permanent spousal maintenance. *Nardini*, 414 N.W.2d at 197-99; *see* Minn. Stat. § 518.552, subd. 3 (2008) (stating that doubt about maintenance recipient's ability to become self-supporting “shall” be resolved in favor of permanent award); *see also Reif v. Reif*, 426 N.W.2d 227, 231 (Minn. App. 1988) (holding that permanent maintenance is appropriate because “whether and when [former wife] will be able to meet her own needs cannot be determined with certainty”).

The district court determined in 1999 that Ms. Bates would become self-supporting because her employment income and temporary maintenance would sustain her until retirement, at which time she could rely on retirement funds awarded to her in the dissolution. That determination was, in essence, a prediction that proved to be inaccurate. When the parties divorced, Ms. Bates was 53 years old and had marginally marketable skills. After the divorce, Ms. Bates lost her job, received unemployment benefits, held a number of positions with limited hours, and eventually found work as a nanny at less than subsistence wages. The district court's 1999 determination that temporary spousal maintenance was appropriate, which was based on forward-looking findings, does not foreclose the possibility that, in 2009, the district court may determine that permanent spousal maintenance is appropriate. The possibility of a different determination, based on additional information, is inherent in the concept of a motion to modify spousal maintenance. *See Hecker*, 568 N.W.2d at 709-10 & n.3 (stating that failure of assumptions underlying temporary maintenance award may be substantial change in circumstances justifying modification of maintenance).

The evidence presented to the district court in 2009 supports the district court's finding that Ms. Bates presently is unable to support herself. In light of that evidence, the district court did not commit clear error by finding that Ms. Bates's needs have substantially increased and that the pre-existing maintenance award is unfair and unreasonable. And in light of that finding, the district court did not abuse its discretion by modifying the award of temporary maintenance by making it permanent. *See Zamora v. Zamora*, 435 N.W.2d 609, 612 (Minn. App. 1989) (holding that recipient's inability to

become self-supporting justified modification of spousal maintenance from temporary to permanent); *Karg v. Karg*, 418 N.W.2d 198, 202 (Minn. App. 1988) (same). Thus, the district court did not err by granting Ms. Bates's motion to modify and awarding permanent spousal maintenance.

II. Reduction in Mr. Bates's Income

Mr. Bates also argues, in the alternative, that when setting the amount of permanent spousal maintenance, the district court erred by failing to consider the fact that his income would decrease substantially in December 2009 upon the expiration of his severance payments.

A district court considering a motion to modify spousal maintenance must review all relevant factors "that exist at the time of the motion." Minn. Stat. § 518A.39, subd. 2(d). Thus, the district court must assess the parties' actual income at that time, without regard for anticipated or speculative changes in income. *See Carrick v. Carrick*, 560 N.W.2d 407, 412 (Minn. App. 1997) (holding that district court erred by setting maintenance based on obligor's anticipated decrease in income rather than actual income).

In this case, Ms. Bates filed her motion to modify spousal maintenance in August 2008. At that time, Mr. Bates's gross income was approximately \$11,000 per month. The district court properly evaluated Ms. Bates's motion based on the income Mr. Bates was receiving at that time. *See Carrick*, 560 N.W.2d at 412. Thus, the district court did not err by finding that Mr. Bates's income had substantially increased since the 1999

dissolution judgment and by using his August 2008 income when setting the amount of permanent spousal maintenance.¹

Mr. Bates also contends that the district court erred by failing to distinguish between financial assets that he was awarded in the dissolution judgment and financial assets that he acquired after the divorce. The district court referred to both the financial assets Mr. Bates received in the dissolution judgment and the financial assets he generated subsequently and stated that, considering both types, Mr. Bates “is in a position to contribute to the support of [Ms. Bates] from employment and assets acquired subsequent to the divorce.” Mr. Bates relies on *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009), in which the supreme court held that a spousal-maintenance award may not be based on income to be derived from marital assets that previously were awarded to the obligor-spouse in the divorce decree. *Id.* at 640. But Mr. Bates did not argue to the district court that, when setting the amount of spousal maintenance, the district court should not consider income derived from the financial assets that were awarded to him in the 1999 dissolution judgment. Thus, we will not consider the argument on this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).²

Affirmed.

¹We note that, in April 2010, Mr. Bates filed a conditional motion for modification of spousal maintenance. After this appeal has run its course, Mr. Bates is free to pursue that motion, which the district court should analyze and decide based on his income at the time of the motion. *See* Minn. Stat. § 518A.39, subd. 2(d); *Carrick*, 560 N.W.2d at 412.

²The district court’s order was filed before the supreme court issued its opinion in *Lee*. The parties and the district court should be mindful of *Lee* in any future proceedings on Mr. Bates’s pending motion to modify.