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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1135**

In re the Marriage of: Dennis Lee Polla, petitioner,
Appellant,

vs.

Jolene Theresa Polla, n/k/a Jolene Theresa Chan,
Respondent.

**Filed July 3, 2017
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-FA-14-2798

Robb L. Olson, Luke K. McClure, GDO Law, White Bear Lake, Minnesota (for appellant)

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Considered and decided by Schellhas, Presiding Judge; Hooten, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant husband challenges the amount of spousal maintenance awarded to respondent wife, arguing that the district court (1) understated respondent's income; (2) should have imputed income to respondent based on full-time employment; and (3) overstated respondent's monthly expenses. We affirm.

FACTS

Appellant Dennis Lee Polla and respondent Jolene Theresa Chan, formerly known as Jolene Theresa Polla, were married in 1986. During their marriage, the parties had two children, both of whom are now adults. In September 2014, Polla petitioned for dissolution of the parties' marriage, and a dissolution trial was held in August 2015. In December 2015, the parties filed a stipulation regarding some of the issues that were disputed at trial. In relevant part, the parties agreed that Chan was entitled to permanent spousal maintenance from Polla, but did not agree on the amount of spousal maintenance. In March 2016, the district court issued findings of fact, conclusions of law, order for judgment, and judgment and decree, which incorporated the parties' stipulation and decided the remaining disputed issues.¹ The district court ordered Polla to pay permanent spousal maintenance to Chan in the amount of \$6,000 per month. Both parties moved for amended findings, and the district court denied both of the motions. Polla now appeals from the March 2016 judgment.

DECISION

Polla challenges the amount of the spousal maintenance award. We review a district court's spousal maintenance award for an abuse of discretion. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). However, we review questions of law related to spousal maintenance de novo. *Id.*

¹ The trial was held before a district court referee, who subsequently made findings of fact and conclusions of law. Because the district court adopted the referee's recommendations in all matters, we refer to the referee's findings, conclusions of law, and orders as those of the district court.

In a dissolution proceeding, a district court may award either party spousal maintenance if it finds that, in light of the standard of living established during the marriage, the party seeking maintenance (a) “lacks sufficient property, including marital property apportioned to the spouse, to provide for [the] reasonable needs of the spouse” or (b) “is unable to provide adequate self-support . . . through appropriate employment.” Minn. Stat. § 518.552, subd. 1 (2016); *see Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (stating that maintenance award depends on showing of need). If the district court determines that a maintenance award is appropriate, it must establish the amount and duration of the award after considering “all relevant factors,” including (1) “the financial resources of the party seeking maintenance” and that party’s ability to meet his or her needs independently; (2) the time required for the party seeking maintenance to acquire sufficient education or training to find appropriate employment; (3) the marital standard of living; (4) the length of the marriage and, “in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished”; (5) the loss of employment opportunities and benefits foregone by the party seeking maintenance; (6) the age and health of the party seeking maintenance; (7) the ability of the spouse from whom maintenance is sought to meet his or her own needs while meeting the needs of the spouse requesting maintenance; and (8) the contribution of each party to the acquisition and preservation of the marital property, “as well as the contribution of a spouse as a homemaker.” Minn. Stat. § 518.552, subd. 2 (2016). “No single factor is dispositive.” *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009).

After trial, the district court found that Polla's gross monthly income was \$22,274 per month and that his reasonable monthly expenses were \$5,820 while Chan's gross monthly income was \$2,958 per month and her reasonable monthly expenses were \$6,282. The district court, in applying the statutory factors and taking into consideration the tax ramifications of Chan's receipt of income and spousal maintenance, concluded that it was appropriate to award Chan permanent spousal maintenance in the amount of \$6,000 per month. Polla challenges the maintenance award on several grounds.

A. Chan's Income

Polla argues that the district court clearly erred in determining Chan's income. Specifically, Polla argues that the district court erred in relying on Chan's testimony and discounting documentary evidence in determining Chan's income.

"A district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009) (quotation omitted). "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." *Kampf*, 732 N.W.2d at 633 (quotation omitted).

Chan has a bachelor of science degree in chemical engineering, but has never worked in her field of study. Before the parties' children were born, Chan held a number of positions as a word processor, sales consultant, and administrative assistant. Chan stopped working in 1996, when the parties' first child was born, and returned to work in approximately 2003, when the parties' youngest child started school. From 2004 to 2010,

Chan worked part-time as a loan officer, and from 2011 to 2014, she worked part-time as an auditor.

Chan is currently employed by Running Aces Harness Park in two separate positions, as a pit dealer and a floor person. The district court found that Chan works approximately 25 hours per week at \$9 per hour as a pit dealer and approximately five hours per week at \$12.50 per hour as a floor person, earning a total of \$1,245 per month in wages and approximately the same amount in tips. Running Aces sets Chan's maximum weekly hours for both positions at 30 hours per week.

Chan is also employed part-time as an independent contractor doing phone audits of insurance premiums. The district court found that Chan earns approximately \$2,400 per year in this position.

The district court doubled the \$1,245 per month Chan earns from her Running Aces wages to account for the tips she receives, multiplied that amount by 12, and added the \$2,400 per year Chan earns through her auditing position to reach a total gross annual income of \$32,280. However, Chan asked the district court to use \$35,500 as her total annual gross income because her tips and auditing work varies, and the district court determined that the request was fair and reasonable. Therefore, the district court found that Chan had a gross annual income of \$35,500, or a gross monthly income of approximately \$2,958.

Polla argues that the district court improperly ignored documentary evidence that Chan's income is greater than \$35,500. Specifically, Polla points to a paystub from Running Aces, which indicates that from January 1, 2015, to April 22, 2015, Running Aces

paid Chan \$15,125.64. Polla contends that the paystub indicates that Chan earned a gross annual income of approximately \$51,859.34, or a gross monthly income of \$4,321.61 from Running Aces. Polla also argues that Chan's 2014 W-2 from Running Aces shows that she earns substantially more from Running Aces than the amount determined by the district court.

We conclude that the district court's finding of Chan's income is not clearly erroneous. It is true that Chan's W-2 for the income she earned from Running Aces in 2014 and her paystub from Running Aces dated April 22, 2015, indicate a higher monthly income than was determined by the district court. However, Chan testified regarding a number of factors that make calculations based on the paystub and the W-2 inaccurate.

Chan testified that the tips she receives vary. Chan also testified that she received a raise at work at some point after the paystub was issued. Specifically, the paystub reflects Chan earning an hourly wage of \$8, while Chan testified that she now makes an hourly wage of \$9 as a dealer. Since the paystub, Chan's work duties have changed, as she now works not only as a dealer, but also as a floor person approximately five hours a week for an hourly wage of \$12.50. Chan testified that a floor person directly supervises five dealers. Because she does not have direct customer contact in her floor person position, she presumably will not receive significant tips during the hours she works as a floor person.

Chan's paystub indicates that approximately 74% of the income that she received in 2015 up to the date of the paystub was from tips. Therefore, the discrepancy between Polla's calculation of Chan's income and the district court's calculation primarily stems

from the income received by Chan from the tips she receives. However, given the relatively limited time period reflected in the paystub, Chan's testimony that her tips vary, the addition of Chan's duties as a floor person without direct customer contact, and the resulting reduction in her hours as a dealer, the district court's finding regarding Chan's income is not clearly erroneous.

B. Imputing Full-Time Income to Chan

Polla argues that the district court erred by failing to find Chan capable of meeting a more significant portion of her needs through full-time employment. We disagree.

The district court did not directly discuss whether Chan should work full-time, but, after finding that Chan works 30 hours a week at Running Aces and performs some independent contractor auditing work, found that Chan "is appropriately employed." Polla contends that a party is not entitled to work part-time post-dissolution just because the party wants to, even in the absence of a finding of bad faith underemployment.

In support of this argument, Polla cites *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). Polla reads *Passolt* too broadly. In *Passolt*, the district court concluded that it could not impute income to wife without finding that wife was underemployed or unemployed in bad faith. *Id.* at 21. This court held that the district court could impute income to wife in the absence of such a finding, drawing on the language found in Minn. Stat. § 518.552, subd. 2, indicating that a party's ability to become partially or fully self-supporting is a factor to be considered when determining spousal maintenance. *Id.* at 24–25. *Passolt* represents only a correction of a

misunderstanding of the law, not a broad holding that the district court must impute income based on a reasonable possibility that a party might be able to provide more self-support.

The district court detailed Chan's work history, noting that she had not held a full-time position since the birth of the parties' first child in 1996, although she had held various part-time positions since 2003. The district court noted that while Chan worked part-time as a loan officer from 2004 until 2010 and earned \$81,944 in that position in 2005 during the mortgage boom, she was no longer eligible to be a loan officer due to a bankruptcy. The district court found that while Chan has a college degree, she has never worked in her area of study and her computer skills are outdated. The district court further determined that Running Aces does not give Chan the option of working more than 30 hours per week. The district court noted that while Chan had previously been employed as a customer service representative and an administrative assistant, she had not held such a position in over 20 years, before the birth of the parties' first child. In determining that Chan was "appropriately employed," the district court weighed these facts, as well as her contribution to the acquisition of the marital estate as a homemaker and caretaker of the parties' children.

In light of the spousal maintenance statute, the question is whether Chan's employment of approximately 30 hours per month is "appropriate employment." Minn. Stat. § 518.552, subd. 1(b). Although Chan admitted that she could be employed full-time if she found a different job, we conclude that, on this record, Polla has failed to show that Chan's employment is inappropriate under the circumstances. Thus, we conclude that the

district court did not err in declining to impute income that Chan could earn from full-time employment when making a finding regarding Chan's income.

C. Chan's Monthly Expenses

Polla argues that some of the district court's findings regarding Chan's living expenses are inconsistent with the parties' marital standard of living. Specifically, Polla argues that the district court overstated Chan's monthly grocery, entertainment, vacation, and vehicle payment expenses.

In setting spousal maintenance, the district court must determine "the standard of living established during the marriage." *Id.*, subd. 2(c). The district court's calculation of the parties' reasonable monthly expenses must be based on the parties' marital standard of living. *Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009). A district court's finding of a party's reasonable expenses is a finding of fact, which we review for clear error. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989).

The district court determined that the parties enjoyed a "comfortable lifestyle" during their marriage, noting that they had a large home, traveled internationally, frequently dined out, and purchased vehicles for their children. The district court also noted, however, that the parties overspent and incurred a substantial amount of debt during their marriage.

Polla essentially contends that the parties' marital standard of living was significantly lower than that found by the district court. During the parties' 29-year marriage, Polla, who has numerous advanced degrees, worked for various employers, including the University of Minnesota, the Department of Defense, and the CIA. Polla

currently works as an independent contractor with the Science and Engineering Institutes of the Singapore Government's Agency for Science, Technology, and Research. Since 1995, Polla has earned more than \$100,000 per year and since 2008 he has consistently earned more than \$250,000 per year.

Polla's dispute with the marital standard of living appears to stem from the fact that the parties were separated for a substantial period of time before Polla petitioned for dissolution in 2014.² The district court did not make any findings regarding when the parties separated or ceased living together, but the record reflects that the parties separated in 2000. The record also suggests that, while Polla paid most of the expenses for the marital residence, he did not pay all of Chan's expenses during the parties' separation, particularly in the later years of the parties' marriage. Chan testified that in 2012, she received medical and food assistance from the county for herself and the parties' children. Chan indicated that in 2012 Polla was paying the bills on the marital home and was giving her \$200 per week, but was not paying the copays for medical treatment for her and the parties' children.

The district court admitted into evidence a budget that Chan prepared for herself and the parties' children in connection with receiving assistance from the county, which Polla argues shows that Chan's expenses exceed the marital standard of living. However, Chan testified that the budget accurately reflected how she was forced to live in 2012 due to limited financial support by Polla, but was not reflective of the parties' standard of living

² There is no indication in the record that either party ever petitioned for legal separation prior to the petition for dissolution.

during their 29-year marriage. Keeping this in mind, we will evaluate Polla's arguments regarding individual items with Chan's reasonable expenses.

1. Groceries and Dining Out

Polla argues that Chan's expense of \$760 per month³ for groceries and dining out is not compatible with the marital standard of living, citing the fact that Chan listed \$800 in food expenses for herself and the parties' two children in her 2012 public benefits application. However, as discussed above, Chan testified that her expenses in 2012 were not reflective of the parties' marital standard of living.

Polla also points to a trial exhibit, which he claims shows that Chan's food expenses in 2014 were approximately \$500 per month. The exhibit is an analysis of Chan's spending that was put together by the office of Polla's attorney based on Chan's Wells Fargo account statements. The exhibit is broken into a limited number of categories, including "food" and "retail," and it is unclear what portion of the retail expenditures were used to purchase groceries. Polla argues that even if the food and retail categories are combined, the exhibit shows that Chan only spent approximately \$500 per month on food. But, Chan testified that she had not used credit cards for many years until a few months before trial and that she had a habit of withdrawing large sums of cash, which she used to pay many of her expenses. Chan specifically testified that she sometimes used cash to pay for groceries and

³ In her budget submitted to the district court, Chan claimed that she incurred \$105 per week in grocery expenses, for a total of \$460 per month, and \$300 per month in dining out expenses.

when eating out. Under these circumstances, the district court's finding regarding Chan's grocery and dining out costs is not clearly erroneous.

2. Entertainment

Polla argues that Chan's monthly entertainment expense of \$650 is unsupported by the record. First, Polla notes that the \$650 is greater than the \$400 entertainment expense that Chan listed for herself and the parties' two children in the 2012 public benefits application. But, as discussed above, there is evidence in the record that Chan's standard of living that year was not reflective of the parties' marital standard of living.

Next, Polla notes Chan's testimony that she likes to golf, gamble, and see movies and plays for entertainment. Polla argues that gambling should not be included in Chan's entertainment budget, citing *Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). In *Chamberlain*, involving a spousal maintenance award where the marital standard of living was beyond the parties' means, this court stated that "[t]he district court properly discarded numerous examples of unreasonable spending claims that respondent sought to include as part of the alleged standard of living of the parties." 615 N.W.2d at 409, 412. While *Chamberlain* may indicate that it is proper for a district court to reduce monthly living expenses to reflect the standard of living that would have been within the parties' means, it does not provide any indication that it was an abuse of discretion for the district court to fail to reduce Chan's entertainment monthly expenses to exclude gambling expenses that were not beyond the parties' means.

Here, the district court reduced some of Chan's monthly expenses as excessive. Specifically, the district court found that Chan's claimed mortgage payment of \$4,000 was excessive, noting that although the parties' current monthly payment on the marital home is \$5,710, the parties had overspent during the marriage and could not maintain the same level of spending post-dissolution. The district court determined that \$2,000 was a reasonable monthly mortgage payment for Chan. Moreover, Chan testified that the parties went to casinos together during their marriage, including casinos in Las Vegas and Reno. Given that the district court reduced some of the parties' expenses to reflect the marital standard of living that was within their means and that gambling was a form of entertainment that the parties enjoyed together during their marriage, the district court did not abuse its discretion by including gambling expenses as a part of Chan's monthly entertainment expenses.

Polla argues that Chan's entertainment budget must be reduced because Chan testified that she enjoys dining out for entertainment, but also included dining out as a separate item in her budget. Chan's testimony, however, does not indicate that dining out was included in her calculation of her entertainment expenses. Therefore, the district court's finding of Chan's entertainment expenses is not clearly erroneous.

3. Vacations

Polla claims that the district court's finding that Chan would incur \$500 per month for vacation expenses is clearly erroneous because it is merely an estimate and Chan had not taken vacations for a number of years prior to the dissolution. Polla notes that Chan testified that she did not take any vacations in 2014 and that she has not gone on vacation

“in a long time.” Chan testified that she anticipated spending \$6,000 a year on vacation, noting that she planned on visiting the parties’ children and other family out of state.

Chan testified that during their 29-year marriage the parties traveled “all over the world,” including visiting Europe “many times” and travelling to Asia and various vacation spots in the United States. The district court credited this testimony, stating that “[t]he parties travelled extensively during their marriage.” Given this evidence and the evidence indicating that Chan’s standard of living during the later years of the parties’ marriage was not reflective of the parties’ marital standard of living, we conclude that the district court’s finding is not clearly erroneous. *Cf. Robert v. Zygmunt*, 652 N.W.2d 537, 545 (Minn. App. 2002) (rejecting appellant’s argument that district court’s denial of spousal maintenance was an abuse of discretion because it deprived him of opportunity to maintain marital standard of living, reasoning that although parties’ marital standard had improved during final years of marriage, the parties’ lifestyle during 18 years of 21-year marriage was modest), *review denied* (Minn. Dec. 30, 2002).

4. Car Payment

Polla contends that the district court clearly erred by including a \$300 vehicle payment in Chan’s monthly expense. The parties agreed that the 2003 Dodge Caravan, which the district court valued at \$1,116, should be awarded to Chan. Chan testified that the vehicle has 193,000 miles on it and has various problems, including having oil leaks and a motor that frequently breaks down. The district court stated in its order denying the parties’ motions for amended findings that under these circumstances, \$300 per month was a reasonable vehicle payment, noting that the payment is lower than what Polla pays for a

vehicle payment for the parties' youngest child. The evidence indicates that Chan had an imminent need to replace her vehicle and the \$300 per month for a vehicle payment is not inconsistent with the marital standard of living. Therefore, we conclude that the district court's finding regarding Chan's car payment is not clearly erroneous.

Because the district court did not abuse its discretion in determining the amount of the permanent spousal maintenance award to Chan, we affirm the district court's spousal maintenance award.

Affirmed.