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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0151**

In re the Marriage of: Mark Wendell Hagen, petitioner,
Appellant,

vs.

Carol Marie Hagen,
Respondent.

**Filed February 5, 2018
Affirmed; motion granted
Hooten, Judge**

Carver County District Court
File No. 10-FA-15-236

Mark Wendell Hagen, Chaska, Minnesota (pro se appellant)

Carol Marie Hagen, Chanhassen, Minnesota (pro se respondent)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Smith, T.,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant argues that the district court erred by basing a spousal maintenance award on his earning capacity rather than his actual income, awarding permanent rather than temporary maintenance to respondent, improperly trying to equalize the parties' incomes,

and awarding attorney fees to respondent. Respondent also moves for additional attorney fees arising out of this appeal. We affirm and grant additional attorney fees.

FACTS

Appellant Mark Hagen and respondent Carol Hagen were married in 1998 and have three children together. In May 2015, appellant petitioned for a dissolution of their marriage. The Carver County district court conducted a dissolution trial in March 2016. The parties resolved the issues of child custody, parenting time, and property division, but tried the issues of child support, spousal maintenance, and the refinancing of the homestead before the district court.

The following facts were either stipulated to by the parties prior to trial or were submitted as evidence during the trial. Respondent has a high school diploma. In 1989, she started a small in-home business and since that time has earned an income from the business as the sole owner and employee. During the four tax years prior to the trial, the district court found that respondent earned an average gross annual income of about \$5,000 from the business. Since 1995, she has not worked outside of her own business, and throughout her marriage to appellant, she has been primarily responsible for raising their three children and maintaining their home. A vocational evaluator testified at trial that respondent, with her level of education and work experience, would be able to maintain full-time employment making a gross annual income of \$27,685 per year. The district court imputed to respondent the \$27,685 annual income, or about \$2,307 per month.

Appellant obtained a degree in Marketing and International Business from the University of Colorado at Boulder in 1993. Over the following 15 years, he worked in

several entry-level positions, never earning more than \$37,000 per year. In 2008, appellant started his own company, of which he has been the sole owner and through which he was self-employed, working in the medical field as an independent contractor for a variety of different medical companies. The district court found that appellant's average gross income from the 2012 through 2015 tax years was \$78,401 for short-term contract work with different companies. However, in the year prior to the trial, appellant was unable to obtain work as an independent contractor and he began seeking out employment as a salaried employee of a medical company. He claimed that because he was unable to find employment as a salaried employee, he was only able to earn \$9 per hour working 12 hours per week at a liquor store in the months preceding trial. At trial, a vocational evaluator, hired by appellant, testified that if appellant completed a 14-week course, he could either continue working in the medical field as a quality engineer with an average starting gross annual salary of \$54,198 or use his degree to work as a business analyst with an average starting gross annual salary of \$58,571. The district court imputed to appellant the \$58,571 salary, or about \$4,881.00 per month.

Appellant provided the district court with a budget that listed his monthly expenses at \$5,420.68. Respondent's budget showed her monthly expenses at \$3,530 per month. The district court awarded respondent a permanent spousal maintenance award of \$1,287 per month, bringing appellant's imputed gross monthly income down to \$3,594 and respondent's imputed gross monthly income up to \$3,594. The district court decided not to award any child support because the parties shared equal custody and parenting time of their children and each party's gross monthly income was the same after factoring in

spousal maintenance. The district court also awarded respondent \$3,500 in need-based attorney fees. This appeal follows.

DECISION

I.

Appellant first argues that the district court abused its discretion in awarding respondent a spousal maintenance award based on his earning capacity rather than his income at the time of trial. A district court has broad discretion when making decisions regarding spousal maintenance, and we review those decisions for an abuse of that discretion. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009). Because a determination of income is a finding of fact in the context of maintenance, we review those determinations for clear error. *Id.* We review questions of law related to spousal maintenance de novo. *Id.*

Appellant's central argument is that the district court erred by using his earning capacity rather than his actual income in its calculation of spousal maintenance even though there was no finding that his limited employment was in bad faith. However, this court explained that a district court is required to "find bad faith or unjustifiable self-limitation of income" in order to base an award of spousal maintenance upon the obligor's earning capacity. *Id.* at 415. While the district court never found that appellant acted in bad faith, it explicitly found that appellant's income was unjustifiably self-limited. The district court explained that "[w]hile [appellant] has not intentionally passed up employment opportunities, his lackadaisical job search prevented [him] from finding possible employment opportunities with an income commensurate to historical earnings." Because

the district court found that appellant had unjustifiably self-limited his income, we hold that the district court applied the correct legal standard.

Appellant does not explicitly challenge any of the factual findings on the issue of imputed income. But he does argue that the district court did not consider his mental health condition. We construe this to mean that appellant is challenging the district court's finding that he was "lackadaisical" in his job search because it did not consider that he suffered from anxiety.

At trial, appellant testified that his anxiety had an impact on his ability to find a job, and that he had struggled and had not "done as focused a job search as [he] otherwise would have or as organized a job search." The vocational evaluator testified that a person should spend at least 20 hours per week seeking employment in order to be considered diligent in their job search efforts. Appellant provided 13 emails that he sent to potential employers—which he said was just a sampling of the emails he had sent out—but the vocational evaluator testified that sending out only 13 emails in an eight to nine-month span does not constitute a diligent effort. While it is not clear from the record just how much time he spent searching for a job or how many emails he sent out to potential employers, the district court was in the best position to assess appellant's credibility at trial. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1998) (stating that appellate courts defer to district courts on credibility determinations). And the finding that appellant was lackadaisical is supported by the result of his job search—at the time of trial appellant had failed to obtain new contracts in the medical field, had not found permanent employment, and was working 12

hours per week at a liquor store making \$9 per hour. We hold that there was no clear error in finding that appellant was lackadaisical in his job search.

Because the district court applied the correct legal standard in using his earning capacity to calculate maintenance and because the district court's finding that appellant was lackadaisical in his job search was not clearly erroneous, we hold that the district court did not abuse its discretion in awarding maintenance.

Appellant next argues that the spousal maintenance award should have been temporary, not permanent, and that the district court did not give due regard to the statutory factors for spousal maintenance. The spousal maintenance statute makes clear that the district court can award "either temporary or permanent [maintenance], as the court deems just . . . after considering all relevant factors." Minn. Stat. § 518.552, subd. 2 (2016). The statute also explains that:

Nothing in this section shall be construed to favor a temporary award of maintenance over a permanent award, where the factors under subdivision 2 justify a permanent award.

Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.

Id., subd. 3 (2016).

Appellant specifically argues that the district court erred by not properly considering each of the eight factors listed in the maintenance statute. But, in our review of the district court's order, we conclude that there is no merit to this claim. The first factor deals with the financial resources of the party seeking maintenance. *Id.*, subd. 2(a). The district court found that respondent's budget of \$3,530 per month was reasonable and noted that the

vocational evaluator had put respondent's gross monthly earning capacity at \$2,307 per month. The district court also noted that respondent was not able to enjoy the \$300,000 homestead which appellant received when the parties divided their assets and had to seek alternative housing. The second factor deals with the time necessary for the party seeking maintenance to find appropriate employment. *Id.*, subd. 2(b). The district court discussed the results of respondent's vocational evaluation and noted that the vocational evaluator believed that respondent could find full-time employment, given her current skills, within six months. The standard of living established during the marriage is the third factor to be considered by the district court. *Id.*, subd. 2(c). The district court discussed both appellant's and respondent's income during the marriage. The length of the marriage and the length of a homemaker's absence from employment is the fourth factor. *Id.*, subd. 2(d). The district court noted that the parties were married in 1998. Other than her own small business, respondent has not worked for any employer since 1995. The fifth factor evaluates the employment opportunities forgone by the spouse seeking maintenance. *Id.*, subd. 2(e). The district court explained that respondent had been out of the workplace since 1995 and has been primarily responsible for the care of the parties' three children and maintaining the home. The sixth factor examines the age, physical condition, and emotional condition of the spouse seeking maintenance. *Id.*, subd. 2(f). The district court found that respondent was 52 years old at the time of trial and there is no indication in the record or the district court's findings that she had any physical or emotional conditions that would impede her ability to work full time. The seventh factor looks at the ability of the paying spouse to meet his or her own needs while meeting those of the spouse seeking

maintenance. *Id.*, subd. 2(g). The district court considered this factor by discussing appellant's earning potential and the modifications that he would have to make to his budget in light of his earning capacity in order to be able to meet his needs while making appropriate maintenance payments. The eighth factor looks to each spouse's contributions to the value of the marital property, as well as a spouse's contribution as a homemaker. *Id.*, subd. 2(h). The district court discussed respondent's role in taking care of the parties' children and home throughout the 18-year marriage.

Appellant also argues that the district court erred by trying to equalize the parties' incomes. He cites to *Snyder v. Snyder*, 298 Minn. 43, 53, 212 N.W.2d 869, 875 (1973) for this proposition. In *Snyder*, the obligee asked the district court to increase the maintenance award in light of the obligor's increased income, but the supreme court explained that maintenance exists to help provide for the other party's needs, not to act as a "lifetime profit-sharing plan." *Id.* (quotation omitted). In the case before us, the district court was attempting to create a maintenance award that provides for respondent's needs while allowing appellant to have sufficient funds to meet his own needs. The district court acknowledged, however, that the two parties did not have enough combined income for both to be able to meet their current monthly budgets, and that an even split was the closest that the district court could come to making sure that both parties had enough income to meet their monthly needs. Because this was not an example of a "lifetime profit-sharing plan" where the obligee would be receiving more than she needs according to the maintenance statute, we hold that the district court did not abuse its discretion in

formulating a maintenance award that results in both parties having the same monthly income.

Appellant's final argument is that the district court erred in ordering him to pay respondent's attorney fees. We review a district court's award of attorney fees for an abuse of discretion. *County of Dakota v. Cameron*, 839 N.W.2d 700, 711 (Minn. 2013). A district court shall award attorney fees when it finds:

- (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2016). The district court found: that respondent "should not have to deplete her property settlement in order to defend these proceedings," that respondent needed the award of attorney fees, and that appellant had the ability to pay the award. The district court based its determination in part on the fact that appellant had "maintained sole control over all marital resources since September 2015" and had "paid some of his own fees from marital resources while [r]espondent has not." We hold that the district court did not abuse its discretion in awarding respondent need-based attorney fees.

II.

Respondent has also requested that we award her \$15,000 in either need-based or conduct-based attorney fees incurred during this appeal. We apply the same three factors from Minnesota Statutes section 518.14 for a need-based award that we applied above: (1) that the fees are necessary for the assertion of respondent's rights, (2) that appellant can

pay the fees, and (3) that respondent does not have the means to pay her own fees. We agree that respondent, who does not have a full-time job and earns only a minimal income from her business, should not have to deplete her assets in order to defend herself in these proceedings. Appellant, on the other hand, has the ability to pay these attorney fees once he sells the marital homestead as he has been ordered to do by the district court. Respondent's need for attorney fees is also demonstrated by the fact that after the appeal was filed, her attorney withdrew and respondent had to continue with the appeal pro se.

We will award attorney fees based on the work that respondent's attorney completed relevant to the appeal prior to her withdrawal. To determine the amount that should be awarded, we are limited by the documents that we received from respondent. The only relevant documents in the record were an itemized list of charges from respondent's attorney and an August 2016 affidavit found in the record—from a previous request for attorney fees only a few months prior to the appeal—stating that the attorney's rate is reasonable. The itemized list of charges included charges for work done on this appeal as well as other matters involving respondent. In reviewing the itemized list and counting only the charges related to this appeal, we determined that respondent was charged \$4,455 by her attorney for work done on this appeal. The itemized list has the attorney's rate listed at \$300 per hour and a paralegal rate of \$150 per hour. These rates correspond to the rates listed as reasonable rates in the affidavit found in the record. Accordingly, we award respondent \$4,455 in attorney fees for this appeal.

Affirmed; motion granted.