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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1462

In re the Marriage of:
Michelle E. Li-Kuehne,
petitioner,
Respondent,

vs.

Stephen E. Kuehne,
Appellant

Filed June 18, 2018
Affirmed
Worke, Judge

Stearns County District Court
File No. 73-F9-01-002106

James J. Vedder, Brittney M. Miller, Moss & Barnett, Minneapolis, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Smith, John, Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

In this spousal-maintenance dispute, appellant argues that the district court abused its discretion by (1) declining to modify appellant's spousal-maintenance obligation, (2) requiring appellant to secure his maintenance obligation by maintaining a life-insurance policy naming respondent as the beneficiary, and (3) awarding respondent conduct-based attorney fees. We affirm.

FACTS

Appellant-husband, Stephen E. Kuehne, and respondent-wife, Michelle E. Li-Kuehne, married in 1988. The district court dissolved their marriage in 2003. At the time of the dissolution, wife was unemployed while husband was employed as a radiologist. As part of the spousal-maintenance order, husband and wife agreed that their monthly living expenses were $15,000 per month each and agreed to the following maintenance step-downs: husband would pay wife $12,500 per month from March 2003 through August 2006, and $10,000 per month from September 2006 through August 2009. Afterwards, there would be a de novo review of spousal maintenance. Husband also agreed to obtain a $1 million life-insurance policy naming wife as the beneficiary to secure his maintenance obligations.

In August 2009, the district court held a hearing on the spousal-maintenance award. Wife was then employed as a tenure-track accounting instructor earning $56,953 in gross income per year. Husband's income varied, ranging from a high of $798,740 in 2003 to a low of $542,817 in 2008. The district court ordered permanent spousal maintenance to wife of $6,000 per month, subject to biannual cost-of-living adjustments. The court also ordered Husband to continue maintaining the life-insurance policy.

In March 2017, wife submitted notice for her biannual cost-of-living adjustment.[1] In response, husband moved to modify his maintenance obligations. In his motion, husband requested that the district court deny wife's cost-of-living adjustment, terminate or substantially reduce his maintenance obligation, and terminate the requirement that he maintain the life-insurance policy. Husband also filed an untimely amended motion on June 14 and an untimely affidavit on June 23. The court accepted these filings over wife's objections.

At the time of the hearing on husband's modification motion, husband and wife were both 54 years old. Husband was earning $640,787 in gross income per year. Wife was now a tenured professor earning $72,157 in gross annual income. At the hearing, husband argued that wife's increased income should relieve him of his maintenance obligations. He also expressed an interest in "eventual retirement," which he argued would constitute a change in circumstances that should affect his future maintenance obligations.

The district court denied husband's requests. The court determined that husband's general intention to retire at some unspecified time in the future did not constitute a substantial change in circumstances requiring modification of his current maintenance obligation. The district court also determined that wife would be unable to meet her monthly living expenses without a continuing award of spousal maintenance and the

[1] Wife was already receiving $6,542.80 in maintenance per month due to previous cost-of-living adjustments.

circumstances justified keeping the life-insurance policy in place. Additionally, the district court concluded that husband's requests were likely retaliatory in response to wife's "routine request for a cost-of-living adjustment," husband increased the legal costs of the proceeding by failing to respond to discovery requests and untimely filing his pleadings in a timely manner, and husband's motion had "no basis in law or fact." Because of this behavior, the district court awarded wife $8,000 in conduct-based attorney fees. Husband appeals.

D E C I S I O N

On appeal, husband argues that the district court abused its discretion by declining to modify his spousal-maintenance obligation, by continuing to require him to maintain the life-insurance policy, and by awarding wife conduct-based attorney fees.

Spousal maintenance

We review decisions concerning modifications of spousal-maintenance for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997). A district court abuses its discretion if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). An award for spousal maintenance may be modified based on a substantial change in circumstances if the change makes the existing award unfair and unreasonable. Minn. Stat. § 518A.39, subd. 2(a), (b) (2016). Circumstances that may warrant modification include "substantially increased or decreased gross income of an obligor or obligee" and "substantially increased or decreased need of an obligor or obligee." *Id.*, subd. 2(a)(1), (2). The party moving to modify a spousal-maintenance award bears the burden of demonstrating a substantial change in circumstances that renders the existing order unfair and unreasonable. *Hecker*, 568 N.W.2d at 709.

Husband argues that wife's recent income increase is a substantial change in circumstances requiring modification. Wife was previously employed as a tenure-track accounting instructor earning $56,953 per year. She recently acquired tenure and now earns $72,157 per year—about a 27% increase in her income.

The district court determined that wife's higher income did not warrant modification because, although wife's income increased by about 27%, husband's income increased by almost 41% in that same time. The district court found that husband now earns approximately $640,787 per year—almost nine times higher than wife—and that husband's increase in income "results in a significantly greater dollar amount than does the 27% increase in [wife]'s income." The district court also found that wife has now "reached the height of her career and earning capacity." And even with this increase, wife still "does not earn sufficient income to meet her living expenses, even though those expenses have already been reduced below the marital standard of living."[2]

When reviewing a district court's determination of income for maintenance purposes, this court will not set aside the district court's findings of fact unless they are "clearly erroneous." *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). Here, although wife's income did increase, the district court correctly noted that husband's

[2] The district court found that wife's current monthly living expenses were $12,382, including $300 per month for the parties' children. It also found that wife's "expenses are $2,161 less than her expenses were at the time of the 2009 proceeding, and are less than the agreed upon marital standard of living of $15,000 per month."

income rose even more in that same time.[3] Given that wife has now reached her maximum earning potential along and that she still requires spousal maintenance to meet her living expenses, it was not unreasonable and unfair to continue requiring husband to provide support.

Husband also argues that the district court did not adequately account for his intention to retire, which would be a substantial change in circumstances. The district court rejected this argument because it found that husband was 54 years old, he continued to be employed as a medical doctor, and he was arguably "a decade or more away from normal retirement age." While the district court stressed that it was not requiring husband to work until a certain age, the court did stress that it was requiring husband to "actually show a change in circumstances before he seeks modification of his spousal maintenance obligation." The court concluded that husband's "thinking about retirement sometime in the future" was a general aspiration but not a present change of circumstances.

In the child-support context, this court has noted that determining whether a substantial change in circumstances has occurred requires "comparing the parties' circumstances at the time support was last set or modified to their circumstances *at the time of the motion to modify*." *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005)

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[3] Husband argues that Minnesota law presumes that a 20% change in an obligee's gross income is considered a substantial change in circumstances. Husband is incorrect; the statute states that a 20% *decrease* in gross income triggers the presumption. Minn. Stat. § 518A.39, subd. 2(b)(5) (2016). Husband presents additional statutory authority and caselaw to support this argument, but these authorities are inapplicable because they concern a presumption that exists only in the child-support context. Husband argues that we should apply this same presumption in his spousal-maintenance case, but this is an issue for the legislature, not the courts.

(emphasis added). And any finding of change must be supported "upon clear proof of facts . . . existing at the time" the award "was last modified." *Wiese v. Wiese*, 295 N.W.2d 371, 372 (Minn. 1980).

Husband did not present any facts to the district court showing that his retirement was imminent. *See Hemmingsen v. Hemmingsen*, 767 N.W.2d 711 (Minn. App. 2009) (addressing the intersection of retirement and modification of maintenance), *review granted* (Minn. Sept. 9, 2009), *appeal dismissed* (Minn. Feb. 1, 2010). Husband complains that he should not be forced "to retire first and then argue about a reduction or termination of maintenance payments," but the law does not require husband to retire first; the law only requires a party to demonstrate "clear proof of facts" that exist at the time of the motion to modify, illustrating his intent. *Wiese*, 295 N.W.2d at 372. Husband's general aspiration to retire at some unspecified point in the future is too abstract to qualify as clear proof of fact, and we conclude that the district court did not abuse its discretion in denying husband's motion to modify on this ground.

Lastly, husband claims that the district court did not analyze the required statutory factors under Minn. Stat. § 518.552, subd. 2 (2016) when it decided to keep the maintenance award intact. If a party seeking to modify a maintenance award fails to show a substantial change in circumstances, the district court is not obligated to consider the statutory factors in section 518.552. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) ("The failure to show such a change [in circumstances] precludes a modification of maintenance obligations under [the spousal-maintenance-modification statute]. Therefore, it is not necessary for the [district] court to make findings regarding any other factors addressed in the statute.”). Because the district court did not abuse its discretion in determining that husband failed to show a substantial change in circumstances, it was not required to examine the maintenance award in light of these statutory factors.

Life-insurance policy

Husband claims the district court’s decision to continue requiring him to maintain a life-insurance policy benefiting wife was “unfair and irrational.” We initially note that the standard for reviewing a district court’s decision regarding whether to modify a maintenance-related obligation is whether the district court’s decision constituted an abuse of its discretion. *Hecker*, 568 N.W.2d at 709-10. Here, husband concedes that Minnesota courts often use life-insurance policies to secure payments. For instance, in *Laumann v. Laumann*, this court wrote that district courts have “discretion to consider whether the circumstances justifying an award of maintenance also justify securing it with life insurance.” 400 N.W.2d 355, 360 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). And in *Walker v. Walker*, we determined that a district court did not abuse its discretion by requiring a life-insurance policy at the conclusion of a 30-year marriage where the secured party was 60 years old. 553 N.W.2d 90, 96 (Minn. App. 1996). Other cases have echoed the conclusion that the use of life-insurance policies to secure spousal--maintenance awards is neither unfair nor irrational. *See, e.g., Arundel v. Arundel*, 281 N.W.2d 663, 667 (Minn. 1979) (“We have allowed provisions for life insurance to secure permanent alimony.”); *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007) (“Additionally, the circumstances in this case compel us to conclude that the district court abused its discretion by refusing to require Kampf to carry life insurance as security."), *review denied* (Minn. Aug. 21, 2007).

The district court determined that husband should continue to maintain a life-insurance policy benefitting wife. The district court wrote that it had previously "determined that circumstances justified securing [wife]'s spousal maintenance award with life insurance." "Circumstances have not changed," the court stated, as evidenced by husband's decision "not to convert the policy into a permanent policy," despite his financial advisor's advice to do so, and the fact that wife's portion of the policy is "minimal in comparison to [husband]'s substantial income." We agree with the district court's reasoning, and because caselaw allows the use of life-insurance policies to secure maintenance, we conclude that requiring husband to maintain life insurance was not an abuse of its discretion.

Conduct-based attorney fees

Husband challenges the district court's decision to award wife conduct-based attorney fees based on husband's dilatory and retaliatory behavior in litigating this matter. Courts may levy conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2016). This court reviews an award of conduct-based attorney fees for an abuse of discretion. *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007).

The district court awarded wife conduct-based fees because it found that (1) husband's motion to modify maintenance was made in retaliation for wife's "routine request for a cost-of-living adjustment," (2) husband increased the litigation costs of wife's routine request by failing to respond to wife's discovery requests, (3) husband failed to file his pleadings in a timely manner, and (4) husband filed motions with "no basis in law or fact." In support of this last point, the district court wrote that husband's financial circumstances had "undeniably improved" since the parties' divorce and husband's own cash-flow analysis showed that wife could not meet her living expenses without a continued award of spousal maintenance.

We do not believe the district court abused its discretion by awarding wife attorney fees. This dispute was initiated when wife sent a notice[4] to husband of a routine, biannual cost-of-living adjustment that she was entitled to under a previous spousal-maintenance order. Husband then challenged the entire maintenance award. While husband is correct that his state of mind should not matter if he raised meritorious arguments, additional factors undermine his position. For instance, husband filed an untimely amended motion and an untimely affidavit which delayed progression of the case. And the district court correctly noted that husband's own evidence showed that wife would have trouble meeting her living expenses without spousal maintenance. We conclude that the decision to award wife conduct-based attorney fees was not an abuse of the district court's discretion.

Affirmed.

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[4] These cost-of-living adjustments do not require wife to formally move the court, they only require her to send "notice of the intended adjustment" to husband. *See* Minn. Stat. § 518A.75, subd. 2 (2016).