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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1521**

In re the Marriage of:
James Patrick Pnewski, petitioner,
Respondent,

vs.

Joan Susanne Pnewski,
Appellant.

**Filed June 4, 2018
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge**

Washington County District Court
File No. 82-FA-15-344

Jaime Driggs, Henson & Efron, P.A., Minneapolis, Minnesota (for respondent)

Bradley John Haddy, Minnesota Esquire, LLC, Mendota Heights, Minnesota (for
appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Connolly, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the district court's award of spousal maintenance, arguing that the district court abused its discretion because it (1) concluded that appellant unjustifiably self-limited her income, (2) miscalculated respondent's monthly mortgage expense, and

(3) included costs related to the children in calculating respondent's monthly budget. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Appellant-mother Joan Pnewski and respondent-father James Pnewski married in 1997 and have three joint children. Respondent petitioned for dissolution in January 2015, seeking joint physical and legal custody, child support, and spousal maintenance. Prior to trial, the parties agreed to joint physical and legal custody but were unable to resolve child support or spousal maintenance. The district court held a four-day bench trial to determine those issues.

Both parties testified at trial about their income. Respondent testified that he worked as a behavioral intake coordinator at Fairview Health, earning \$4,289 per month. He stated that the parties agreed that he would focus on caring for the children so that appellant could focus on her career.

Appellant testified that she worked at a financial institution, now known as Woodbury Financial Services, as a financial analyst, senior business analyst, and in various other positions from 1999 to 2014. In her last year at Woodbury Financial Services, appellant earned more than \$100,000 per year in salary and bonus, working 24 to 30 hours per week. Woodbury Financial Services eliminated appellant's position in the course of downsizing in 2014. She received severance pay that was the equivalent of seven months of her base salary and later received unemployment benefits until February 2015.

Appellant remained unemployed until April 2015 when she accepted a position as a financial analyst at Thomson Reuters. The position paid \$80,000 per year. After one

week of work, appellant quit because she learned that she was required to work more than 40 hours per week. She testified that she could not care for the children if she was required to work that many hours. Appellant was then again unemployed until July 2015 when she began working as a project manager for Craftsman Home Improvements. At the time she was hired, appellant worked approximately 30 hours per week and earned \$39,000 per year. By the time of trial, Craftsman had increased appellant's annual salary to \$45,000.

Appellant asked the district court to use her current income of \$45,000 in determining whether she was obligated to pay maintenance to respondent. Respondent, conversely, asked the district court to use appellant's earning capacity and not her current income. Respondent retained a vocational expert, Lynn Arbogast, to conduct a vocational evaluation of appellant. Arbogast testified at trial that appellant could earn between \$90,000 and \$100,000 annually if she worked as a financial analyst. Arbogast also concluded that appellant had not engaged in a good-faith search to find a job that better matched her qualifications because she had not used appropriate job-search resources. Appellant did not retain an expert.

The district court dissolved the marriage, awarded the parties joint legal and joint physical custody of their children, divided their marital property and assets, and awarded spousal maintenance and child support to respondent. The district court ordered appellant to pay respondent \$775 per month as permanent spousal maintenance based on its determination that appellant had an earning capacity of \$86,000 and ordered appellant to pay respondent a monthly net child-support obligation of \$430. This appeal follows.

DECISION

Appellant asserts the district court awarded respondent an excessive amount of spousal maintenance. We first address respondent's argument that, because appellant did not bring a posttrial motion for a new trial, this court's scope of review¹ is limited to whether the evidence sustains the district court's findings of fact and whether those findings of fact support the district court's conclusions of law and its judgment. In support of this argument, respondent cites authorities predating *Alpha Real Estate Co. v. Delta Dental Plan*, which addressed the impact on an appellate court's scope of review when a posttrial motion for a new trial was not made: "Motions for a new trial pursuant to Minn. R. Civ. P. 59.01 are not a prerequisite for appellate review of substantive questions of law when a genuine issue of law is properly raised and considered at the district court level." 664 N.W.2d 303, 311 (Minn. 2003).

Here, spousal maintenance was the focus of considerable dispute in the district court. As a result, "the district court had ample opportunity to consider these issues and

¹ Respondent's brief uses the phrase "standard of review," rather than "scope of review." Because the terms "standard of review" and "scope of review" are often conflated, we take this opportunity to note that "[s]cope of review deals with matters that are properly before the appellate court for its consideration. Put another way, scope of review defines what the appellate court will look at." 3 Eric J. Magnuson, David F. Herr, Sam Hanson, *Minnesota Practice* § 103.17 (2017 ed.). Standard of review, however, "is distinct" from scope of review because standard of review "deals not with what issues the court will examine, but how the court will look at the issues before it." *Id.* Standard of review "concerns the judicial or statutory definition of the substantive authority of the appellate court to modify the decision of the lower tribunal[.]" while scope of review "does not involve the substantive rules that control the appellate court's resolution of an issue on the merits, but rather the judicial and extrajudicial rules that determine the propriety of the appellate consideration of any given issue." *Id.*

did not need more time to flesh out or refine its reasoning.” *Id.* Because spousal maintenance was properly before the district court, appellant did not need to raise that issue in a motion for a new trial in order to preserve it for review by this court. We therefore address the merits of appellant’s argument.

We review a district court’s award of spousal maintenance for an abuse of discretion. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). 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 spouse seeking maintenance “lacks sufficient property, including marital property apportioned to the spouse, to provide for [the] reasonable needs of the spouse” or “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 a maintenance award depends on a 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 the 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 and 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).

Unjustifiably Limiting Income

Appellant contends that the district court abused its discretion in awarding respondent spousal maintenance based on her earning capacity rather than her income at the time of trial. The district court’s calculation of income is given deference and will not be reversed unless “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). In awarding spousal maintenance, the district court must consider “the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance.” Minn. Stat. § 518.552, subd. 2(g). In determining a spousal-maintenance award, the district court may consider an obligor’s earning capacity if “it is impracticable to determine an obligor’s actual income,” or “the obligor’s actual income is unjustifiably self-limited.” *Melius v. Melius*, 765 N.W.2d 411, 415 (Minn. App. 2009) (quotation omitted).

The district court here determined that appellant “unjustifiably self-limited her income,” reasoning that appellant “should be employed in a position that is commensurate with her professional training, experience, and wage history and that enables her to support

herself and her family as she historically did throughout her marriage.” The district court was “not persuaded that [appellant] . . . sought full-time and/or higher-paying positions in good faith [after] leaving her position at Woodbury Financial Services” and “impute[d] income to [appellant] in the amount of \$86,000 gross income per year or a gross monthly income of \$7,167.”

The district court’s maintenance award is supported by the evidence. The district court relied on the testimony and report from Arbogast, respondent’s vocational expert, who testified that she interviewed appellant; reviewed her curriculum vitae (CV), appellant’s job-search log, and her previous wages; and then completed a labor-market survey based on data from the Robert Half employment agency and the Minnesota Department of Labor & Industry. Arbogast also testified about appellant’s job-search methods. She noted that appellant used Indeed and Craigslist but did not network or utilize employment-recruiting companies or LinkedIn. Arbogast opined that appellant had not engaged in an effective job search and was significantly underemployed because “[s]he [was] not earning or working at the level that the majority of her work history supports.” Arbogast testified that appellant could earn between \$90,000 to \$100,000 per year, based on her work history, wage history, education, and the highest level paying job she had in her career.

Appellant contends that the district court should not have considered this testimony because Arbogast was not a neutral expert. We defer to the district court’s judgment of the credibility of witnesses, *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988), including expert witnesses, *In re Paternity of B.J.H.*, 573 N.W.2d 99, 104 (Minn. App. 1998). Under

Minn. R. Evid. 702, a witness qualified as an expert by “knowledge, skill, experience, training, or education” may testify to assist the fact-finder. Nothing in rule 702 requires that an expert be a neutral witness. And appellant could have retained an expert as well. The mere fact that Arbogast was not appointed by the district court did not preclude the district court from considering her testimony.

The district court also relied, in part, on appellant’s own testimony in concluding that appellant unjustifiably self-limited her income. Appellant acknowledged that she earned twice what respondent earned throughout the marriage. Appellant testified that she hoped to find a job that would pay more than she was earning at Craftsman and felt like she was settling when she accepted this position. She conceded that she could potentially earn between \$90,000 and \$100,000 annually and find a job that paid \$86,000 annually. Appellant argues, however, that the district court ignored her testimony that \$45,000 accurately reflects her income and that her salary at Thomson Reuters did not reflect her earning capacity because she could not work the hours required for the position.

Although there is evidence in the record to support a different conclusion, the district court’s calculation of appellant’s earning capacity is not “manifestly contrary to the weight of the evidence” and is “reasonably supported by the evidence as a whole.” *Kampf*, 732 N.W.2d at 633 (quotation omitted). Therefore, the district court did not abuse its discretion in calculating spousal maintenance based on appellant’s earning capacity.

Calculating Respondent’s Needs

Appellant argues that the district court improperly calculated respondent’s needs because it miscalculated respondent’s monthly mortgage expense and included costs

related to the children in respondent's budget. At trial, respondent submitted a budget based on the standard of living during the parties' marriage, amounting to \$5,348 in monthly expenses. The district court reduced some of respondent's proposed expenses, including his vacation, liquor store, and online service-account expenses, but increased his mortgage expense. It also removed the cost of the children's medical and dental insurance premiums from respondent's monthly budget, reasoning that these costs would be accounted for in the child-support order. The district court concluded that respondent's monthly expenses were \$5,051.

The district court then determined respondent's monthly income. Respondent worked 34 hours per week at Fairview Health as a behavioral intake coordinator. The district court found that respondent worked full-time because Fairview characterized respondent as a full-time employee. Respondent testified that he earned \$51,473 annually, or \$4,289 monthly. The district court accepted this amount to be respondent's monthly net income. Based on his monthly expenses of \$5,051, and his monthly income of \$4,289, the district court determined that respondent had a monthly shortfall of \$762. As a result, the district court determined that respondent is not capable of financially supporting himself and is in need of spousal maintenance from appellant.

Appellant argues that the district court erred in calculating respondent's monthly expenses because it improperly calculated his monthly mortgage expense. A district court's determination regarding a party's expenses constitutes a factual determination that will only be reversed if it is clearly erroneous. *Melius*, 765 N.W.2d at 414; *see also Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992) (stating that we will uphold a district

court's findings of facts regarding spousal maintenance unless they are clearly erroneous). Factual findings are clearly erroneous if 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).

Respondent testified that he allocated \$1,637 for his monthly mortgage payment—the amount that reflected the mortgage payment the parties paid during their marriage. Appellant testified that the parties paid \$1,750 for their previous mortgage and that she currently paid \$1,747 for her refinanced mortgage. The district court ultimately concluded that it was "appropriate to increase [respondent's] projected monthly mortgage expense to \$1,750 per month as consistent with the parties' marital standard of living." The district court reasoned that, "[g]iven the parties' history of home ownership throughout their marriage," each spouse should be allowed "an expense item in their budget to pay a reasonable monthly mortgage payment." The district court's decision to allocate \$1,750 for respondent's monthly mortgage expense is a factual finding that is supported by evidence in the record, including appellant's own testimony. Therefore, it is not clearly erroneous.

Appellant next argues that the district court erred in calculating respondent's monthly expenses because the district court included the children's expenses in its calculation. Respondent sought to include the children's medical and dental insurance premiums, haircuts, school lunches, daycare, activities and equipment, and cell-phone expenses in the budget he submitted to the district court. With the exception of the

children's medical and dental insurance premiums, the district court included these expenses, which amounted to \$477 of respondent's total monthly budget of \$5,051.

Appellant contends that child support should account for costs related to the children, not spousal maintenance. To determine whether the district court properly included the children's expenses in respondent's monthly budget to determine the spousal-maintenance award, we must consider whether the district court properly applied the law. Spousal maintenance is "an award made in a dissolution . . . proceeding . . . of payments from the future income or earnings of one spouse for the support and maintenance *of the other*." Minn. Stat. § 518.003, subd. 3a (2016) (emphasis added). A district court may award spousal maintenance if it finds that the party seeking maintenance "lacks sufficient property, including marital property apportioned to the spouse, to provide for [the] reasonable needs *of the spouse*." Minn. Stat. § 518.552, subd. 1(a) (emphasis added). The spousal-maintenance statute only refers to the needs of the spouse, not the needs of the children.

The children's needs should instead be accounted for in the child-support calculation, as demonstrated by the child-support statutes. See Minn. Stat. §§ 518A.26-.79 (2016). Child support "means an amount for basic support, child care support, and medical support." Minn. Stat. § 518A.26, subd. 20. "Basic support includes the dollar amount ordered for a child's housing, food, clothing, transportation, and education costs, and other expenses relating to the child's care." *Id.*, subd. 4. In calculating childcare costs, the district court "must order that work-related or education-related child care costs of joint children be divided between the obligor and obligee based on their proportionate share of

the parties' combined monthly PICS.” Minn. Stat. § 518A.40, subd. 1. And Minn. Stat. § 518A.43, subd. 1, allows the district court to deviate from the presumptive child-support guidelines if necessary to account for the children’s educational needs or to allow the children to maintain the same standard of living that they had while their parents were married.

The overarching policy of the child-support statutes “is to ensure that children’s needs are met.” *Strandberg v. Strandberg*, 664 N.W.2d 887, 890 (Minn. App. 2003). The children’s haircuts, school lunches, daycare, activities and equipment, and cell-phone costs can be categorized as food, education, childcare, or other costs related to the children’s care. See Minn. Stat. § 518A.26, subds. 4, 20; see also Minn. Stat. § 518.003, subd. 3a. Because the child-support statutes provide that these costs should be accounted for in the child-support calculation and because the spousal-maintenance statutes explicitly state that a spousal-maintenance award should provide for the needs of the other spouse, we conclude that the district court abused its discretion by including child-related costs in respondent’s monthly budget. We therefore remand the case to the district court to re-calculate respondent’s spousal-maintenance award without including costs related to the children in determining respondent’s monthly expenses. On remand, the district court may exercise its discretion in determining whether to reopen the record.

Affirmed in part, reversed in part, and remanded.