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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0131**

In re the Marriage of:
Casey Alena Holloway, petitioner,
Respondent,

vs.

Kent Bradford Holloway,
Appellant.

**Filed January 14, 2019
Reversed and remanded
Worke, Judge**

Hennepin County District Court
File No. 27-FA-09-2992

David L. Olson, Edina, Minnesota (for respondent)

John T. Burns, Jr., Burnsville, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion in awarding permanent spousal maintenance and need-based attorney fees. We reverse and remand.

FACTS

Appellant-husband Kent Bradford Holloway and respondent-wife Casey Alena Holloway married in 1997 when husband was 23 years old and wife was 21 years old. As a teenager, wife was diagnosed with depression. Husband was aware of wife's mental-health condition. Wife worked prior to the marriage, but lost jobs due to symptoms of her depression. Wife did not work during the marriage. Husband earned approximately \$60,000 per year during the marriage.

The parties separated after seven years of marriage. Following the separation, wife got a job in catering delivery in 2005. Wife was promoted to manager, but when she could not handle the stress, she quit in 2007. Husband also found new employment when the parties separated and his earnings increased.

In 2009, wife petitioned for marital dissolution. The parties entered into a marital termination agreement (MTA). The parties agreed to joint legal and joint physical custody of their two children. Wife acknowledged that, while "not presently employable," she may be capable of gainful employment in the future, "which she has held in the past." Wife's monthly expenses for her and the children were \$3,047. Husband agreed to pay wife an upward deviation in child support, because if payments were identified as spousal maintenance, wife's disability payments could have terminated. Child support was to

decrease when the oldest child emancipated. Husband also agreed to liquidate shares of stock and transfer the proceeds to wife to purchase a vehicle. The parties' February 2010 judgment and decree incorporated the MTA.

In June 2013, when child support was to decrease, wife moved to establish spousal maintenance, or increase child support. Wife asserted that she was "hoping to be able to be working" to offset the reduction, but her depression prevented her from working. Wife claimed that her monthly expenses increased to \$3,427. Despite husband asserting that he should be allowed the benefit of the MTA, he agreed to continue paying wife the original amount. When child support ended in June 2016, husband, again, agreed to continue paying wife; husband paid wife \$3,300 per month in interim spousal maintenance. Wife agreed to cooperate with a vocational assessment.

In January 2017, wife met with Jan Lowe for a vocational assessment. Lowe reported that wife earned her GED and had taken college courses. Wife's employment history includes: housekeeping, a collection agency, calls and orders for a televised home-shopping company, a floral shop, her mother's office, and catering delivery. Wife's vocational testing indicated "high average to above average ranges of vocational development." Lowe reported that wife demonstrates "raw potential" to succeed in graduate-school-level programs. Lowe stated, however, that wife is unable to realize her potential due to her mental-health issues.

Lowe reviewed wife's medical records, and relied heavily on one record from 2015, in determining that wife "has not yet been able to make the gains necessary to increase her functioning to a level necessary to perform competitive work activity." Lowe provided

wife with contact information for 14 organizations providing vocational-rehabilitation and employment services for individuals with mental-health issues. Lowe noted that wife “said Vail Place was not successful in helping her become employed.” Lowe recommended that wife receive approval from her mental-health provider in conjunction with establishing a vocational-rehabilitation plan.

In March 2017, wife moved to establish spousal maintenance. Wife asserted that her monthly expenses had increased to \$4,335.53 due to medical insurance and cost of living. But at a deposition, wife admitted that her budget was not an accurate reflection of her circumstances. Wife also acknowledged that, following Lowe’s assessment, she did not contact her mental-health providers or any organization that could assist her in finding employment. Wife stated that since she quit her job in 2007, she had not attempted to find employment. Wife also admitted that, despite Lowe’s statement that wife reported that Vail Place was not successful in helping her become employed, she “didn’t go to Vail Place” for help finding a job. At a hearing on wife’s motion, her attorney stated that wife would seek vocational-rehabilitation assistance when her treatment professionals felt she was ready.

On June 15, 2017, the district court issued an order for spousal maintenance. The district court found wife’s monthly budget to be reasonable, but for \$160 for cigarettes, and reduced wife’s budget to \$4,175.53. The district court reduced husband’s budget for food, legal fees, retirement, and his child’s college tuition. The district court found that husband’s gross monthly income is \$13,349.89. The district court concluded that “wife is not able to obtain and maintain employment consistent with Jan Lowe’s report” and was

entitled to \$5,000 per month in permanent maintenance. The district court also awarded wife \$5,000 in need-based attorney fees.

Husband moved for amended findings challenging wife's budget, Lowe's report, reductions in his budget, findings regarding wife's inability to work, the spousal-maintenance award, and the attorney-fees award. The district court denied husband's motion. This appeal followed.

D E C I S I O N

Spousal maintenance

Husband argues that the district court abused its discretion in awarding wife permanent spousal maintenance in the amount of \$5,000 per month, asserting that the district court failed to consider all relevant circumstances.

Spousal maintenance may be awarded to a spouse who is unable to provide adequate self-support considering the standard of living established during the marriage and all relevant circumstances. Minn. Stat. § 518.552, subd. 1(b) (2018). This court reviews a district court's spousal-maintenance decision for an abuse of discretion. *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016). 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). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted).

Husband does not dispute that wife is presently unable to provide self-support. Once the appropriateness of a maintenance award is established, a district court must consider all relevant factors in determining the amount and duration of the award. Minn. Stat. § 518.552, subd. 2 (2018). These factors include: (1) financial resources of the party seeking maintenance; (2) time needed to acquire education or training to find appropriate employment and the probability of finding employment; (3) marital standard of living; (4) duration of the marriage and length of absence from employment; (5) loss of earnings and employment opportunities; (6) age, physical, and emotional condition of the spouse seeking maintenance; (7) ability of the spouse from whom maintenance is sought to pay; and (8) contribution of each party to the marital property. *Id.*

The district court found: (1) financial resources—the parties received little assets as part of the judgment and decree, and it is doubtful that wife could meet her needs independently because of her mental-health issues; (2) time to acquire education or training and the probability of finding employment—“[e]ven without concerns over wife’s mental health,” she will require time to become self-supporting because she has been out of the workforce for the entirety of the marriage; (3) marital standard of living—husband earned \$60,000 or less during the marriage, the parties lived a middle-class lifestyle and did not have money for entertainment or luxury items; (4) duration of the marriage and length of absence from employment—wife did not work during the 12 years of marriage due to her mental-health issues; (5) loss of earnings and employment opportunities—wife lost earnings and opportunities due to her mental-health issues; (6) age, physical, and emotional condition—wife is 40 years old and suffers from mental-health issues; (7) ability of

husband to pay—husband’s income will not fully cover both households requiring the parties to adjust their budgets; and (8) contribution to marital property—wife was unable to contribute to the marital estate or consistently care for the parties’ children due to her mental-health issues.

The record shows that wife’s mental-health issues are a concern, but the district court’s spousal-maintenance award focuses solely on that concern rather than an actual analysis of all statutory factors. Wife’s mental-health issues are appropriately considered under one factor—age and physical and emotional condition. *See id.*, subd. 2(f). The district court’s analysis of the remaining factors erroneously culminates in further contemplation of wife’s mental-health issues.

For example, in considering the duration of the marriage and the length of wife’s absence from employment, the district court found that during the marriage, wife remained at home, her skills became outmoded, and her earning capacity permanently diminished. The district court stated: “Had wife worked during the marriage, her work history and experience would certainly have enhanced her earning capacity and she possibly would have retirement savings[,] [but] [w]ife was unable to obtain and maintain employment due to her . . . mental illness.” This finding mischaracterizes the circumstances of the marriage. First, the district court identified the marriage as a 12-year marriage but did not otherwise account for the fact that the parties lived separately after seven years of marriage. Second, the year the parties separated, wife found employment for two years. Finally, wife’s earning capacity was not permanently diminished due to her sacrificing employment for the marriage and family. The district court stated in its amended findings that wife did not

sacrifice employment opportunities for the marriage or the family; but, rather, did not work due to her mental-health issues. The district court did not thoroughly consider all relevant factors, but essentially considered only one. *See Passolt v. Passolt*, 804 N.W.2d 18, 25 (Minn. App. 2011) (stating that the maintenance statute *requires* that the district court must consider *all* relevant factors), *review denied* (Minn. Nov. 15, 2011).

Husband also challenged several of wife's budget items. The district court determined that, even if it reduced some of the budget items, wife would still need \$5,000 per month in spousal maintenance. A district court's determination regarding a party's expenses constitutes a factual determination that will be reversed if it is clearly erroneous. *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009); *see also Gessner*, 487 N.W.2d at 923 (stating that we will uphold a district court's factual findings 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 v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). The evidence does not support several of wife's budget items, rendering the district court's findings clearly erroneous and requiring reversal.

First, while nominal, wife denied several expenses in her budget. Wife included \$6 per month for a chimney sweep, but admitted that she never had her chimney swept. Wife had \$40 per month for manicure/pedicure, but stated that she had not had one in at least a year. Additionally, the district court found that the marital lifestyle did not include luxury items, which a manicure/pedicure may be classified as. Wife included \$80 per month for her phone, but stated that her mother pays her phone bill. Wife allocated \$120 for

entertainment, but stated that she does not spend \$120 on entertainment. Wife included \$32.23 for health-club memberships, but admitted that she does not use her memberships.

Additionally, wife duplicated and misidentified expenses. Wife included \$100 per month for her credit-card charges, which include, gifts, perfume, and clothes. But wife budgeted an additional \$130 for gifts, \$100 for beauty supplies, and \$75 for clothing. Thus, this credit-card budget is duplicative. Finally, wife included a \$118.39 budget item for a car loan. Husband paid wife nearly \$7,000 to buy a vehicle. Wife did not use the money for a car, instead she used it for a down-payment on a townhome. Wife secured a loan for a vehicle, but stated that she later refinanced her vehicle loan to pay attorney fees. The evidence shows that the \$118.39 monthly payment is not entirely for a car loan, but also a loan to pay attorney fees. The district court reduced husband's attorney-fee budget, but did not make the same reduction to wife's budget. Eliminating these items would reduce wife's budget by nearly \$500. The district court clearly erred in finding that wife's budget was "reasonable and realistic" when the record does not support several budget items.

Husband further contends that wife could be capable of employment, but has no incentive to even search for employment when the district court's award is permanent. Based on the record, we agree. Wife's vocational testing indicated "high average to above average ranges of vocational development." Lowe stated that wife has "raw potential" to successfully complete graduate-school-level programs. Despite these results, Lowe determined that wife is unable to perform competitive work activity. This conclusion was reached without wife attempting to seek assistance from an organization provided by Lowe that helps individuals with mental-health conditions with vocational rehabilitation.

Wife worked from 2005-2007, and the record shows that she has successfully engaged in solo cross-country road trips. There is nothing in the record to indicate that wife's condition has worsened since 2007. Additionally, in the 2009 MTA, wife agreed that she was not presently employable, but could be capable of gainful employment, which she has held in the past. Further, in 2013, when wife moved to establish spousal maintenance, she stated that she had "hop[ed] to be able to be working by now." Finally, at the hearing in March 2017, wife's attorney indicated that wife would seek rehabilitative assistance when her treatment professionals felt she was ready.

The record shows that wife contemplated/contemplates finding employment and does not believe that she is completely incapable of being employed. In the past, wife's employment choices may not have been fitting for her condition. Perhaps if wife sought assistance from a program qualified in vocational rehabilitation and employment services for individuals with wife's restrictions, she may find more suitable opportunities. Lowe provided wife with 14 resources. Unless this was merely an exercise without expected action, it is futile to offer resources with the belief that they will never be used. It is improper to assume that wife cannot work when she has not even tried to work.

Finally, husband argues that the district court failed to consider his ability to pay by not finding his net income. In determining whether a spouse has the ability to pay spousal maintenance, "the [district] court must make a determination of the payor spouse's net or take-home pay." *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). As a result of the district court's failure to make this finding, we are unable to fully review the district court's spousal-maintenance award.

Attorney fees

Husband also argues that the district court abused its discretion by awarding wife need-based attorney fees. *See Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001) (stating that a district court’s award of attorney fees will not be reversed absent an abuse of discretion), *review denied* (Minn. Feb. 21, 2001). A district court shall award attorney fees to enable a party to contest a proceeding if it finds that “the fees are necessary for the good faith assertion of the party’s rights . . . and will not contribute unnecessarily to the length and expense of the proceeding; . . . the party from whom fees . . . are sought has the means to pay them;” and the party seeking fees does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2018).

The district court found that wife has shown need and that her fees are necessary for a good-faith assertion of her rights. The district court found that husband has the means to pay, based in part because he has “a gross annual income of \$178,198.69.” Here, again, without a finding on husband’s net income, we are unable to determine to what extent husband has the ability to pay the need-based attorney fees.

Because the district court failed to fully consider all relevant statutory factors in determining the amount and duration of spousal maintenance, failed to reconcile wife’s budget with the record evidence, failed to incentivize wife to advance minimal efforts to find employment, and failed to find husband’s net income, we reverse and remand for factual findings and an order consistent with this opinion. The district court, in its discretion, may reopen the record on remand.

Reversed and remanded.