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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0840**

In re the Marriage of:
Nicole Marie Anne Sanders, petitioner,
Appellant,

vs.

Joseph James Sanders,
Respondent.

**Filed March 25, 2019
Affirmed
Slieter, Judge**

Dakota County District Court
File No. 19AV-FA-14-229

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for appellant)

Brian K. Flakne, Flakne Law Offices, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Schellhas, Judge; and Slieter,
Judge.

UNPUBLISHED OPINION

SLIETER, Judge

This matter comes before the court following an evidentiary hearing from which the district court awarded appellant permanent monthly maintenance in the amount of \$500. Previously, appellant was awarded temporary monthly maintenance of \$1,000 pursuant to

the parties' stipulated judgment and degree (J&D) that reserved the issue after 36 months.¹ Appellant requests this court rule that the district court abused its discretion in its permanent maintenance award because: (1) it is based upon an incorrect determination on respondent's income; and (2) it fails to address the parties' reasonable expenses in accordance with the marital standard of living. Additionally, appellant requests this court rule that the district court abused its discretion by denying her request for need-based attorney fees. Because the district court properly applied the law and exercised its discretion, we affirm.

FACTS

Appellant and respondent had been married 22 years when they separated in 2013. During their marriage, respondent was the primary wage earner and appellant was a homemaker who cared for their joint child and her two older children from a previous marriage. Appellant held some part-time jobs during the marriage, including one position as a housecleaner. During the last few years of their marriage, appellant earned her licensed practical nurse (LPN) degree and became employed as an LPN. The parties' joint child reached majority by the time they divorced.

In January 2014, the parties were granted a stipulated J&D. By the J&D, respondent agreed to a temporary maintenance award to appellant in the amount of \$1,000 per month for 36 months, starting January 1, 2014. In addition, if appellant enrolled full-time in

¹ Pursuant to Minn. Stat. § 518.552, subd. 2 (2018), maintenance awards are either awarded on a temporary or permanent basis. In this case, the J&D provided an award for a 36-month period of time. In this context, the award constituted a temporary maintenance award.

school during that 36-month period, respondent agreed to pay an additional \$750 per month for up to nine months. At the time of divorce, appellant anticipated attending school to obtain her registered nurse license. Maintenance following the 36-months award was reserved. The J&D also divided the parties' property and debt. The parties divided their personal property equally, including their retirement accounts, vehicles, and checking and savings accounts. Respondent received the marital homestead, valued at \$190,800, but subject to two mortgages totaling \$227,772. Additionally, respondent assumed \$28,398 in other debt obligations compared to \$6,000 debt awarded to appellant.

Appellant did not return to school as a full-time student during the 36-month temporary maintenance period. On November 30, 2016, appellant filed a motion requesting that the court make the temporary maintenance award of \$1,000 per month permanent and award her need-based attorney fees.

At the evidentiary hearing on August 1, 2017, both parties presented evidence, including their own testimony, about their respective income and expenses. Respondent's witness, a vocational evaluator, testified as to appellant's earning capacity indicating she was appropriately employed. Respondent's mother also testified as to certain debt and property that the J&D awarded to respondent.

In the district court's order following the evidentiary hearing, the court found that appellant's annual gross income was \$42,461, a gross monthly income amount of \$3,538, and that respondent's annual gross income was \$90,648, a gross monthly income amount of \$7,554. It also made findings as to each party's reasonable expenses. Appellant claimed \$3,962 of monthly expenses, the district court made several adjustments and found

appellant's reasonable monthly expenses were \$2,950. Respondent claimed \$7,319 of monthly expenses, the district court made several adjustments and found respondent's reasonable monthly expenses were \$4,990.

The district court applied each of the factors of Minn. Stat. § 518.552, subd. 2 to its findings and concluded this review supported an award of permanent maintenance to appellant. The court awarded appellant \$500 per month of permanent maintenance. The court also found: "[r]espondent does not have sufficient resources to pay his living expenses, spousal maintenances as ordered herein, his attorney fees and [appellant's] attorney fees." Therefore, the district court denied both parties' requests for attorney fees.

On January 5, 2018, appellant filed a motion for amended findings, pointing out that the district court did not make findings as to net income. Appellant's motion also requested that the district court reconsider its findings as to the parties' income and expenses, and reconsider its denial of need-based attorney fees. Of particular note, appellant's motion also noted that the district court's finding related to respondent's gross annual income based on the 2015 tax return was "stale information" and "[r]espondent fail[ed] to produce current income information, he failed to provide it in discovery as well."

In its March 26, 2018 order on appellant's motion to amend findings, the district court modified its findings of fact by adding findings as to the parties' net monthly incomes, and corrected one typographical error, though otherwise denied the remaining requests. The amended findings related to net monthly income are as follows: (1) identifying appellant's net monthly income as \$2,839; and (2) identifying respondent's net monthly income as \$5,029. In a brief memorandum attached to the order, the district court explained

the calculation of net income, noting that the court “essentially [took] judicial notice of the 2017 federal and state tax tables” to calculate the parties’ net monthly incomes; applied withholding as “[s]ingle and [one] for each party”; and applied FICA and Medicare withholding of 7.65% for each party. As a result of the amended income, the district court’s findings as to parties’ net incomes and expenses were as follows:

	Appellant	Respondent
Monthly Gross Income	\$3,538	\$7,554
Net Monthly Income	\$2,839	\$5,029
Reasonable Expenses	\$2,950	\$4,990
Excess/shortfall	- \$111	\$39

On March 28, 2018, appellant’s counsel submitted correspondence to the district court requesting an opportunity to bring a motion for reconsideration under Minnesota Rule of General Practice 115.11. Appellant’s counsel noted the March 26, 2018 order added findings related to the parties’ net income relying on tax tables, but it did not explicitly provide the calculations. Appellant’s counsel sought for review of the district court’s calculations or for the district court to amend the memorandum to explain its calculations. The district court denied appellant’s requests on April 12, 2018.

This appeal followed.

DECISION

I. Did the district court abuse its discretion in awarding \$500 per month in permanent maintenance?

The district court has broad discretion in calculating an award of maintenance, and the appellate court reviews that award for abuse of discretion. *Curtis v. Curtis*, 887 N.W. 2d 249, 252 (Minn. 2016). A district court abuses its discretion where its findings of fact

are unsupported by the record or where it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). Where maintenance is concerned, the appellate court reviews a district court's factual findings for clear error. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009) (citing *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); Minn. R. Civ. P. 52.01). Clear error occurs when the appellate court has the "definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). In reviewing an award of maintenance, the court views the record in the light most favorable to the district court's findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (citing *Lossing v. Lossing*, 403 N.W.2d 688, 690 (Minn. App. 1987); *Rinker v. Rinker*, 358 N.W.2d 165, 167 (Minn. App. 1984)).

"In the event of an award of temporary maintenance with a reservation of jurisdiction, a subsequent request to extend spousal maintenance would be based on the factors applicable to awarding maintenance in the first instance, not the standards for a modification of spousal maintenance." *Maiers*, 775 N.W.2d at 668 (citing *Gatfield v. Gatfield*, 682 N.W.2d 632, 639 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004); *Zamora v. Zamora*, 435 N.W.2d 609, 611 n.1 (Minn. App. 1989)). A court may grant maintenance for either spouse in a dissolution of marriage case if (1) the spouse lacks sufficient property to provide for their reasonable needs based on the standard of living established in the marriage; or (2) lacks the ability to provide adequate self-support, based on the standard of living in the marriage, through appropriate employment, or the spouse is the custodian of the child with needs making it appropriate not to seek employment out

of the home. Minn. Stat. § 518.552, subd. 1 (2018); *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989). A district court must consider eight statutory factors in deciding the amount and duration of a maintenance award. Minn. Stat. § 518.522, subd. 2.

Each decision regarding maintenance “must be decided on its own facts and no single statutory factor for determining the type or amount of maintenance is dispositive.” *Broms v. Broms*, 353 N.W.2d 135, 138 (Minn. 1984) (citing *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982)). “A district court’s determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous.” *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004) (citing *Schreifels v. Schreifels*, 450 N.W.2d 372, 373 (Minn. App. 1990)). When reviewing the record regarding maintenance, appellate courts leave credibility determinations to the district court, who is in the best position to assess credibility. *Robert v. Zygmunt*, 652 N.W.2d 537, 544 (Minn. App. 2002) (citing *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001)), review denied (Minn. Dec. 30, 2002).

Appellant raises two issues with the district court’s maintenance determination. First, appellant contends the district court abused its discretion because it inaccurately calculated respondent’s income. Second, appellant asserts the district court did not properly address reasonable expenses in light of the marital standard of living. Each of these issues will be addressed in turn.

A. Income calculation

In determining the obligor’s income, for the purpose of Minn. Stat. § 518.552, subd. 2, the district court may rely upon different means to assess income for maintenance.

Hemmingsen v. Hemmingsen, 767 N.W.2d 711, 719-20 (Minn. App. 2009), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010). When actual income for maintenance cannot be determined, a district court may: (1) estimate an obligor's income; or (2) impute income when the obligor limits income in bad faith. *Id.* (citing *LeRoy v. LeRoy*, 600 N.W.2d 729, 733 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999); *Fulmer v. Fulmer*, 594 N.W.2d 210, 213 (Minn. App. 1999); *Ferguson v. Ferguson*, 357 N.W.2d 104, 108 (Minn. App. 1984); *Melius*, 765 N.W.2d at 416-17).

The district court's March 26, 2018 order, amending the December 5, 2017 order, found that respondent's annual gross income was \$90,648 and net monthly income was \$5,029. The order states that this finding was "based on [r]espondent's 2015 income tax return." However, the following sentences describe two other pieces of evidence that the district court relied upon in determining respondent's income: (1) respondent's 2016 paystubs through the December 4, 2016 pay period, which was consistent with an approximate annual income of \$90,000 for 2016, and (2) respondent's average income of \$88,917 for the years 2012-2015.

The district court explicitly relied on respondent's 2016 paystub from between December 21, 2015 to December 4, 2016. The district court identified the extensive evidence it relied upon in reaching its calculation of income which is a reasonable basis for the court's determination of respondent's income. Further, the district court assessed credibility in favor of respondent's testimony related to his income. Appellant has not shown that the district court's finding of respondent's income is contrary to logic or against the evidence in the record. *Dobrin*, 569 N.W.2d at 202 (citing *Rutten v. Rutten*, 347

N.W.2d 47, 50 (Minn. 1984)) (identifying the reviewing court finds clear abuse of discretion on a maintenance award when the district court's conclusion was "against logic and the facts on record").

Appellant argues respondent's failure to provide updated income information at the time of trial should have resulted in a negative inference against his assertions. Minnesota courts permit adverse inferences against a party failing to produce information within their possession and control. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436-37 (Minn. 1990) (quoting *Kmetz v. Johnson*, 113 N.W.2d 96, 100 (Minn. 1962)). In family law proceedings, the Minnesota Supreme Court recognizes a party's failure to supply essential information in the process justifies inferences adverse to that party. *Bollenbach v. Bollenbach*, 175 N.W.2d 148, 155 (Minn. 1970); *see also Doering v. Doering*, 629 N.W.2d 124, 132-33 (Minn. App. 2001) (recognizing an affirmative duty to disclose even in the absence of a request in family proceedings), *review denied* (Minn. Sept. 11, 2001). But a party is not entitled to an adverse inference to be drawn when it fails to attempt to obtain the evidence through discovery mechanisms. *Butt v. Schmidt*, 747 N.W.2d 566, 576 n.3 (Minn. 2008) (citing *Kmetz*, 113 N.W.2d at 100-01).

The record fails to show a request made by appellant to compel respondent to provide updated documentation. At the beginning of the evidentiary hearing, appellant did not make any requests before the district court related to respondent's failure to provide current income information. Appellant's counsel cross-examined respondent related to the lack of documentation in light of his testimony. During the cross examination of respondent, appellant's counsel explicitly informed respondent that the court would have

to rely on respondent's testimony about income due to respondent's failure to provide documentation of a tax return or updated records. Appellant's counsel did not make a request to the district court for a negative inference against respondent at that time.

The district court appeared to rely on its ability to assess credibility to reach the income calculation that it determined. Based on counsel's failure to explicitly request a negative inference against respondent or utilize discovery tools, the district court did not abuse its discretion by not making the unrequested adverse inference.

Further, appellant argues that the district court abused its discretion by relying on 2017 tax tables instead of using the actual tax returns in the record (appellant's 2016 tax return and respondent's 2015 tax return) to calculate net income. Appellant also argues the district court erred by choosing a single FICA and Medicare deduction to apply to both parties' incomes, rather than using the parties' tax returns in the record to determine their net income. Appellant points out that, contrary to the district court's assertion that it had no information from which to determine net monthly income, the parties' tax returns provided evidence in the record on which the district court could have relied to calculate net income.

"In order to determine ability to pay, 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). A net income determination must be "within a 'reasonable range of figures.'" *Schreifels*, 450 N.W.2d at 373 (Minn. App. 1990) (quoting *Johnson*, 277 N.W.2d at 211). A district court acts within its discretion in applying a tax rate if it has "a 'reasonable and supportable basis for making

an informed judgment as to [the] probable liability.’” *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007) (quoting *Maurer v. Maurer*, 623 N.W.2d 604, 608 (Minn. 2001)) (alteration in original), *review denied* (Minn. Aug. 21, 2007).

The district court’s March 26, 2018 amended order states:

During the evidentiary hearing the parties submitted income information but did not provide any information or exhibits as to their respective positions as to the calculation of net monthly incomes. In order to make an accurate calculation of the net monthly incomes the [c]ourt has essentially taken judicial notice of the 2017 federal and state tax tables. The year of 2017 was used as that was the year in which the parties’ gross monthly incomes were determined. Also, the withholding was determined on the basis of [s]ingle and [one] for each party. Finally, FICA and Medicare withholding of 7.65% was factored into the calculation.

The district court’s detailed explanation for relying on the 2017 federal and state tax tables for its determination of gross income for 2017 is reasonable. The district court calculated respondent’s income by considering his 2015 tax return, 2016 paystubs, and his average income since 2012. The district court acted appropriately by calculating the net income based upon this overall assessment utilizing the 2017 tax tables rather than solely relying on the 2015 tax return. The district court’s use of the 2017 tax tables does not rise to a level of contrary to logic to support reversal of the maintenance award.

B. Reasonable expenses in light of the marital standard of living

Reasonable expenses in maintenance cases “vary from case to case depending on the unique characteristics of the party seeking maintenance and the standard of living established during the marriage.” *Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009). A party’s reasonable expenses do not merely include the “bare necessities of life” an obligee

can expect an amount of maintenance in accordance with the marital standard of living at the time of divorce to the extent an obligor has an ability to pay maintenance. *Id.* (quotation omitted).

Appellant contends that the district court erred in determining her reasonable expenses, by failing to adequately factor in the parties' marital standard of living. Appellant takes issue with the district court's method of "selectively balancing some expense while leaving others intact" and the disparity between the district court's findings as to the parties' reasonable monthly expenses (\$2,950 for appellant and \$4,990 for respondent).

The December 5, 2017 order went into detail describing its analysis and adjustment of the parties' respective budgets. The district court explained reductions made to appellant's vehicle maintenance and registration expenses. The district court deleted appellant's expenses for Roth IRA contributions, attorney fees, and savings for the prospective purchase of a townhouse, since none of these types of items were included in respondent's budget. The district court also deleted a tax liability expense because it was temporary, and deleted an XM radio expense it considered unnecessary. The court recognized respondent's vehicle payments warranted appellant also being awarded payments as part of her reasonable expenses.

As to respondent's budget, the court explained reductions to monthly food budget and auto insurance, and described why it considered these amounts unreasonable. The court also reduced respondent's budget item as to 401k contribution, to the same

percentage of income that appellant contributes to her 401k, and reduced respondent's charitable donations budget item to be consistent with appellant's budget.

In its attempt to make the parties' budgets as categorically similar as possible, the district explained in detail its reasoning. Notably, aside from eliminating an XM radio expense, the district court did not reduce or eliminate any of appellant's expense categories that would typically be implicated by marital standard of living, such as: vacations, groceries, eating out, and haircare. As to the amount of retirement saving, the district court analyzed two vastly different amounts and considered reasonable savings, relied on the assumption that it would be reasonable to consider the percentage of income appellant put into savings (3%) as the reasonable amount in savings. The district court's findings as to the parties' reasonable expenses are logical and thorough, and not clearly erroneous.

II. Did the district court abuse its discretion by not awarding appellant need-based attorney fees?

In the context of reviewing a need-based award of attorney fees, the Minnesota Supreme Court has stated: "The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion." *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (citing *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 808 (Minn. 1995)). This court "will rarely reverse" a district court decision to award or deny attorney fees. *Rosenberg v. Rosenberg*, 379 N.W.2d 580, 587 (Minn. App. 1985), review denied (Minn. Feb. 19, 1986). However, if statutory requirements are met for need-based attorney fees, then a district court "shall" award the need-based attorney fees. Minn.

Stat. § 518.14, subd. 1 (2018); *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999); *see generally Geske v. Marcolina*, 624 N.W.2d 813, 816-19 (Minn. App. 2001).

In marriage dissolutions, need-based attorney fees are provided under Minn. Stat. § 518.14 (2018). Minnesota Statutes section 518.14, subd. 1 provides:

[I]n a proceeding under this chapter or chapter 518A, the court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided 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.

Appellant argues the district court abused its discretion by denying her request for need-based attorney fees under Minn. Stat. § 518.14 because she provided evidence related to each of the statutory factors required. In particular, appellant contends respondent's financial condition (under the temporary maintenance award) was able to reduce debts, support the parties' adult joint child, support respondent's significant other, contribute to a 401k and HSA, and possesses substantial assets.

In the December 5, 2017 order, the district court made an explicit finding related to need-based attorney fees sought by appellant. The district court found:

[Appellant] also seeks need based attorney fees in bringing this action. Both parties had valid and meritorious facts to support

their respective positions. Respondent was assigned the substantial share of the parties' debts, for which he continues to be obligated. While [r]espondent also received a substantial share of the parties' assets, the vast majority are retirement assets which are not accessible other than through loans. As such, [r]espondent does not have sufficient resources to pay his living expenses, spousal maintenances as ordered herein, his attorney fees and [appellant's] attorney fees.

This finding made by the district court addresses Minn. Stat. § 518.14, subd. 1(1) and 1(3), recognizing appellant made a good-faith assertion of her rights and respondent's does not have the means to also pay for appellant's attorney fees.

The district court found respondent lacked the ability to pay appellant's attorney fees in light of the outstanding debt obligations that, as of the evidentiary hearing, continued to be owed from the dissolution, and the marital resources awarded to respondent in the J&D would require obtaining loans against those assets. Respondent's financial resources are greater than appellant's financial resources based on the district court's net income calculation. But the district court's determination of reasonable expenses recognized respondent's reasonable expenses are higher than petitioner creating only a marginal surplus in respondent's favor (\$39). The district court acted in accordance with its discretion to deny need-based attorney fees.

Affirmed.