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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2150**

In re the Marriage of: Aaron Di Luong, petitioner,
Appellant,

vs.

Julie Ho,
Respondent.

**Filed October 14, 2019
Affirmed in part, reversed in part, and remanded
Ross, Judge
Concurring in part, dissenting in part, Reilly, Judge**

Hennepin County District Court
File No. 27-FA-18-1044

Mark Gray, Minneapolis, Minnesota (for appellant)

J. Lee Novelli, Novelli Law Office, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Reilly,
Judge.

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

ROSS, Judge

The district court dissolved Julie Ho and Aaron Di Luong’s marriage, awarded Ho permanent spousal maintenance, classified one of Ho’s retirement accounts as her nonmarital property, and required Di Luong to pay Ho’s need-based attorney fees. Di Luong appeals the spousal-maintenance award, the retirement-account classification, and

the attorney-fee award. Because the evidence of Ho's disability, Di Luong's income, and the circumstances of Ho's retirement account support the district court's spousal-maintenance and property-classification decisions, we affirm in part. But because the district court misapplied the law by concluding that Di Luong had the means to pay Ho's attorney fees, we reverse the attorney-fee award and remand for consideration of Ho's conduct-based attorney-fee argument.

FACTS

Aaron Di Luong and Julie Ho divorced in 2018, ending their 19-year marriage. Ho had been the primary income earner until 2016 when medical conditions prevented her from working. Di Luong gambled excessively throughout the marriage, and after they separated he withdrew at least \$39,700 from checking and savings accounts before filing for bankruptcy.

Di Luong and Ho presented financial evidence in the dissolution trial. Ho was unemployed and represented that her monthly expenses totaled \$3,934, \$2,946 of which the district court found reasonable. Di Luong represented that his monthly expenses totaled \$1,720, an amount the district court found reasonable but reduced to \$1,370 because he received \$350 monthly from his mother to help him pay for food and meet his credit-card payment obligations. It also found that Di Luong netted \$3,271 in monthly income from part-time and full-time employment. The district court ordered Di Luong to pay \$973 in monthly child support plus a \$75 monthly medical-assistance reimbursement, and it found

that this left him a monthly \$889 surplus from which the district court could consider Ho's request for spousal maintenance.¹

The district court determined that Ho should receive spousal maintenance and decided that Di Luong should share in Ho's hardship, as he would have if the marriage had continued. It ordered him to pay her \$1,300 monthly in permanent spousal maintenance. This arrangement left each party with a monthly budget deficit: Di Luong's was about \$400 and Ho's about \$1,650.

The district court divided the marital estate, which consisted mainly of the marital home and the parties' bank and retirement accounts. It found that one of Ho's retirement accounts, which she opened and contributed to entirely before the parties' marriage, was her nonmarital property. The district court awarded Ho the marital home, divided the parties' interests in their marital accounts (including one of Ho's retirement accounts), and ordered Ho to pay Di Luong two equalizers totaling over \$130,000 to offset the value of marital assets that she retained. But out of concern that Di Luong's preexisting arrears and gambling propensities might interfere with his making timely child-support payments, it ordered that her equalizer payment was not due "until Mr. Di Luong no longer has a child-support obligation."

Ho moved the district court to order Di Luong to pay need-based and conduct-based attorney fees. Neither party had cash or income that could cover the fees. The district court

¹ We observe that the district court's calculations would apparently yield a surplus of \$853, not \$889, based on the numbers it considered. Di Luong does not challenge this finding.

granted the motion by deducting the approximately \$24,450 in accrued fees from Ho's equalizer obligation.

Di Luong appeals.

DECISION

Di Luong challenges three aspects of the judgment and decree. He asks us to hold that the district court erred by awarding Ho permanent spousal maintenance, classifying one of Ho's retirement accounts as her nonmarital property, and essentially reducing Di Luong's property award to cover Ho's attorney fees.

I

Di Luong's argument contesting Ho's spousal-maintenance award does not lead us to reverse. We review the district court's factual findings underlying a spousal-maintenance award for clear error, its determination of an award's amount and duration for an abuse of discretion, and its legal conclusions de novo. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). The district court may order spousal maintenance if it finds that the spouse requesting it lacks sufficient means to provide for her reasonable needs or is unable to provide adequate self-support. Minn. Stat. § 518.552, subd. 1(a)–(b) (2018). If the movant proves need, the district court must then consider various factors to determine the amount and duration of maintenance. *Id.*, subd. 2 (2018). Based implicitly on one of those factors—an obligor's ability to meet his own needs “while meeting those of the spouse seeking maintenance,” *id.*, subd. 2(g)—Di Luong contends that the record lacks evidence that he had the ability to pay \$1,300 monthly in spousal maintenance.

It is true that the district court's maintenance order leaves Di Luong with a shortfall. But district courts have broad discretion in deciding how much spousal maintenance to award. *Reinke v. Reinke*, 464 N.W.2d 513, 514 (Minn. App. 1990). Although a district court might in most circumstances act within its discretion by treating an inability to pay as a bright line capping a maintenance award, the statute requires only that the district court "consider" the obligor's ability to pay, along with other factors. And we are bound by our precedent that holds that a maintenance award that leaves the obligor with a deficit does not by itself reflect an abuse of discretion. *See Ganyo v. Engen*, 446 N.W.2d 683, 687 (Minn. App. 1989). That the award leaves Di Luong with a deficit is therefore not alone a basis to reverse.

Di Luong emphasizes that the award "leaves [him] with about 42% of his income after paying child support" while leaving Ho "with about 58%," and he argues that this is fundamentally unfair. But the arrangement results from the district court's findings of the parties' respective reasonable monthly expenses and their incomes. *See Giesner v. Giesner*, 319 N.W.2d 718, 720 (Minn. 1982) (recognizing district court's discretion to assign a maintenance amount that essentially leaves divorced parties to share financial hardship). Aside from asking rhetorically, "How could the reasonable monthly living expenses of one party to a marriage be \$1,370 while the other party's monthly living expenses were more than double that?", Di Luong never challenges as clearly erroneous the district court's findings as to Ho's expenses. Indeed, Di Luong expressly observes that the district court explained in detail exactly how it pared down Ho's claimed expenses to the \$2,946 that it found reasonable. Di Luong argues instead, oddly, that we should reverse because "[t]he

district court failed to issue ‘sufficiently detailed’ findings regarding [his] expenses.” (Emphasis added.) The argument ignores the fact that the district court determined Di Luong’s expenses simply by accepting as reasonable the precise expense amount that he claimed for himself and reduced it only by the outside support he received from his mother.

We leave the expense findings intact because the district court had no duty to explain to Di Luong why it was accepting as reasonable the expenses that he claimed for himself, and Di Luong does not identify any finding of Ho’s expenses that we should reverse for clear error. The district court decided that the parties should share the pain of the combined income-to-expense deficit, leaving Ho with the substantially larger burden. Given the district court’s broad discretion and the unique circumstances of this case, we see no abuse of discretion in that approach.

Di Luong argues that the district court clearly erred by finding that Ho is disabled and unable to work for the foreseeable future. The district court should not award maintenance without considering the “physical and emotional condition of the spouse seeking maintenance.” Minn. Stat. § 518.552, subd. 2 (2018). We will reject a factual finding as clearly erroneous if reasonable evidence does not support it and we are left with a definite and firm conviction that the finding is a mistake. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The evidence supports the finding. It was undisputed that Ho had stopped working during the marriage because of a medical condition. The district court considered a recent letter from Ho’s physician saying that she and other specialists had been treating Ho since 2013 for neurological, gastrointestinal, and muscular problems that “have hindered her ability to return to work,” and treatment was

ongoing. The district court credited Ho's extensive testimony about her "current health problems," including neck pain, tension headaches, paresthesia, sensory disturbances, gastrointestinal issues, stomach pain, and "some multilevel degenerative disc disease." It also considered her testimony about her "inability to sit for long periods at a computer due to her neck pain and paresthesia[]." The evidence reasonably supports the district court's finding about Ho's current physical and mental condition as applied to her ability to work, and Di Luong identifies no evidence tending to contradict the finding.

Di Luong argues convincingly that the district court improperly considered Ho's future inability to contribute to a retirement fund. When deciding whether to award maintenance, the district court must consider "the loss of earnings, seniority, retirement benefits, and other employment opportunities foregone by the spouse seeking spousal maintenance." Minn. Stat. § 518.552, subd. 2(e). Ho's future inability to save for retirement due to her inability to work is not a "foregone" opportunity that she sacrificed for the sake of the marriage. But the error in the district court's assessment on this factor does not support reversing because it does not affect the outcome. *See* Minn. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). The district court's spousal-maintenance award is sufficiently supported otherwise, and its discussion leaves us certain that this factor had little bearing on the decision. Remanding for reconsideration would not change the result.

II

Di Luong argues that the district court erred by classifying Ho's AXA retirement account as her nonmarital property. We review *de novo* whether property is marital or nonmarital, but we defer to the district court's findings of fact about how the parties acquired assets, reviewing them for clear error. *Swick v. Swick*, 467 N.W.2d 328, 330 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). We see no error in the district court's findings or its legal conclusion.

We reject Di Luong's suggestion that Ho failed to prove that her retirement account was nonmarital property. Although property acquired during the marriage is presumptively marital, property acquired before the marriage is nonmarital along with its increased value. Minn. Stat. § 518.003, subd. 3b (2018). Ho testified that she opened and contributed to the account only before the marriage. "A nonmarital interest in property may be established on the basis of credible testimony." *Kerr v. Kerr*, 770 N.W.2d 567, 570 (Minn. App. 2009). Di Luong offered no competing evidence. He implies that Ho should have been required to prove that the account generated no income and that the district court should have discussed whether it paid dividends. But Di Luong cites no evidence contradicting Ho's testimony or showing that the account generated income. We affirm the district court's conclusion that the retirement account is Ho's nonmarital property.

III

We are persuaded by Di Luong's argument that the district court did not justify ordering him to pay Ho's attorney fees. We review the district court's attorney-fee award for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

Di Luong argues that the district court clearly erred by finding that he had the ability to pay Ho's attorney fees. The district court "shall" award need-based attorney fees only if it finds, among other things, that the party from whom the fees are sought has "the means to pay them" and conversely that the party seeking fees "does not have the means to pay them." Minn. Stat. § 518.14, subd. 1(2)–(3) (2018). We believe that the fee award here resulted from an irreconcilable application of the controlling phrase, "the means to pay."

The district court should have followed the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning," unless there is some variation in usage that reasonably suggests that the words have different meanings. *Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 690 (Minn. 2009) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S. Ct. 607, 609 (1932)). We need not define "means to pay" to resolve this appeal; we need only conclude, as the context of the statute compels us to conclude, that the term "means to pay" carries the same meaning when applied to the obligor and the obligee alike.

But the district court did not apply the same meaning of the "means to pay" triggering qualifier. The district court's calculation of income and expenses, including spousal maintenance and child support, resulted in each party being left with a substantial monthly deficit. The mutual deficits therefore rendered both parties unable to pay attorney fees from income. The only source remaining for either party to pay the fees was their marital property. In other words, either *each* party had the "means to pay" based on the value of the equal division of marital property or *neither* party had the "means to pay" because expenses exceeded income. They were identically situated regarding their means

to pay. The only way the district court could have found that Di Luong, but not Ho, had the means to pay was by applying a different meaning of “means to pay” to each party.

The district court implicitly did so. It reasoned that, because Di Luong would receive cash equalizer payments from Ho, Di Luong had the means to pay while Ho did not. But the equalizer payments are simply the marital property to which Di Luong is entitled so as to offset the value of marital property to which Ho is entitled. By deeming Di Luong as having the “means to pay” the fees based on his right to the equalizer payments that Ho must eventually make from her retirement account, the district court overlooked the fact that Ho and Di Luong will have the same means to pay the same amount at that same time from the same source. The district court did not explain why Di Luong’s share of the property division afforded him the means to pay but Ho’s equal share did not afford her the means to pay. We conclude that either *both* parties had the means to pay or *neither* party had the means to pay. In either case, as a matter of law the statute did not authorize the district court to order need-based attorney fees. We reverse on this issue.

Because the district court decided Ho’s attorney-fee request based on her need and not her alternative theory that Di Luong’s conduct justified the attorney-fee award, it chose not to address Ho’s conduct-based theory. See Minn. Stat. § 518.14, subd. 1 (authorizing fee award “against a party who unreasonably contributes to the length or expense of the proceeding”). In reversing the need-based fee award, we therefore instruct the district court on remand to address Ho’s conduct-based argument for attorney fees.

Affirmed in part, reversed in part, and remanded.

REILLY, Judge (concurring in part, dissenting in part)

I concur with the opinion of the court that the district court did not err by awarding Ho permanent spousal maintenance and by classifying one of Ho’s retirement accounts as her nonmarital property. However, I respectfully dissent from the majority’s holding that the district court abused its discretion by ordering Di Luong to pay Ho’s attorney fees. Because our standard of review is whether the district court abused its discretion in its attorney-fee award, and because the district court properly applied the statutory elements to findings supported by the record, I would affirm.

In a marriage-dissolution action, a district court “shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding,” provided that the district court 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 (2018).

Such attorney fees are generally referred to as “need-based fees,” *see, e.g., Geske v. Marcolina*, 624 N.W.2d 813, 816-17 (Minn. App. 2001), and we review an award of need-based attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). This court “will rarely reverse” a district court’s 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). If the 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.

Here, I would hold that the district court’s factual findings on the statutory elements are supported by the record. First, the district court found that the fees were necessary to enable Ho to “assert her rights in this proceeding,” particularly given Di Luong’s gambling losses. The record supports the district court’s finding on the first element.

Regarding the second and third elements, the district court determined that Di Luong had the means to pay the fees, while Ho did not. Di Luong submitted evidence that his monthly living expenses totaled \$1,720, while his monthly income netted \$3,271 from full- and part-time employment, plus an additional \$350 per month from his mother. Ho is unemployed, has no income, and has reasonable monthly expenses of \$2,946. The evidence in the record is sufficient to affirm the district court’s finding that the second and third statutory elements were satisfied.

In sum, because the district court’s factual findings are supported by the record and are not clearly erroneous, I discern no abuse of the district court’s discretion in awarding need-based attorney fees to Ho, and I would affirm.