This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0848

In re the Marriage of:

Teresa Marie Nordahl, petitioner,
Respondent,

vs.

Steven Edward Nordahl,
Appellant.

Filed July 29, 2024
Affirmed in part, reversed in part, and remanded; motion denied
Ede, Judge

Anoka County District Court
File No. 02-FA-15-263

Kay Nord Hunt, Michelle K. Kuhl, Lommen Abdo, P.A., Minneapolis, Minnesota; and

Ryan Anderson, Anderson Family Law, Golden Valley, Minnesota (for respondent)

Michelle K. Olsen, Jacob M. Birkholz, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Ede, Judge; and Halbrooks, Judge.*

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

NONPRECEDENTIAL OPINION

EDE, Judge

In this spousal-maintenance dispute, appellant argues that the district court abused its discretion in denying his motion to modify spousal maintenance because the district court made clearly erroneous factual findings in deciding whether to include bonuses, overtime pay, and an employee stock option plan (ESOP) in its calculation of respondent's gross income. By notice of related appeal, respondent asserts that the district court abused its discretion by denying her motion for need- and conduct-based attorney fees. Appellant moves to strike portions of respondent's brief, maintaining that certain statements are unsupported by the record. Because we conclude that the district court did not abuse its discretion by excluding bonuses and overtime pay from its calculation of respondent's gross income and by denying respondent's motion for conduct-based attorney fees, we affirm in part. But because we conclude that the district court abused its discretion by neglecting to make findings of fact about whether the ESOP was a form of periodic payment to respondent and that this error may require reconsideration of respondent's motion for need-based attorney fees, we reverse in part and remand for further proceedings. We also deny appellant's motion to strike as moot.

FACTS

Appellant Steven Edward Nordahl and respondent Teresa Marie Nordahl were married for about 25 years.[1] The parties separated in December 2013, and in July 2014, Teresa petitioned for dissolution of the marriage.

In February 2016, the district court filed a dissolution decree. Steven moved for amended findings of fact, and in April 2016, the district court entered an amended decree. In the amended decree, the district court revised certain dollar amounts, but the outcome of the dissolution remained substantially the same. The district court awarded Teresa temporary spousal maintenance of $2,500 per month—to be paid until 2028—and need-based attorney fees.

Steven appealed the district court's dissolution decree, challenging the district court's award of spousal maintenance and attorney fees. *Nordahl v. Nordahl*, No. A16-1020, 2017 WL 1548617, at *2, *4 (Minn. App. May 1, 2017), *rev. denied* (Minn. July 18, 2017). Steven argued, among other things, that the district court abused its discretion in awarding spousal maintenance by not including her employer's contributions to the ESOP in the district court's calculation of Teresa's income. *Id.* at *3. We noted that Teresa's ESOP had "partial vesting after three years and full vesting after seven years" and that "Teresa's interest in the ESOP was unvested at the time of trial and [would] not fully vest until 2021." *Id.* at *1, *3. Reasoning that "any benefit from the ESOP is contingent on future events," we affirmed the district court's decision in that appeal, concluding that "the

[1] Because the parties have the same surname, we refer to them throughout this opinion by their first names.

district court did not abuse its discretion by not considering the value of Teresa's interest in the ESOP." *Id.* at *3.

In 2018, Teresa notified Steven that the spousal-maintenance award would be adjusted for cost of living, consistent with the district court's amended decree. In 2022, Steven was again notified that the spousal-maintenance award would be adjusted for cost of living. In response to the second cost-of-living adjustment, Steven filed a motion requesting that the district court order a reduction in his spousal-maintenance obligation and allow him to forgo the second adjustment.

Teresa then moved for an award of need- and conduct-based attorney fees. Teresa's motion was supported by two affidavits. In the first affidavit, Teresa's counsel alleged that Steven had unreasonably contributed to the length of the post-decree proceeding by "serving unduly burdensome and overly broad formal discovery requests, and failing to engage in any alternative dispute resolution efforts." In the second affidavit, Teresa requested need-based attorney fees based on Steven's "much higher income level" and conduct-based attorney fees based on Steven's decision to "engage in expensive litigation and discovery processes on nothing more than his 'belief[.]'" Teresa also maintained that the current spousal-maintenance obligation was reasonable and fair.

Steven later filed a motion requesting that the district court continue the motion for modification of spousal maintenance, compel Teresa to comply with Steven's discovery requests, and award conduct-based attorney fees for Teresa's failure to comply with his discovery requests. In a memorandum accompanying the motion, Steven asserted that he met the standard to establish the modification of spousal maintenance. Steven argued that, because Teresa's income had increased by approximately 53 percent, from $17 per hour to $26 per hour, the current order was unreasonable and unfair. Steven also contended that, because Teresa had sufficient resources to meet her needs, the district court should terminate her award of spousal maintenance. As to attorney fees, Steven maintained that Teresa failed to establish that he unreasonably contributed to the length of the proceeding and that he should be awarded attorney fees because Teresa delayed the proceedings by failing to comply with discovery requests.

At a motion hearing in September 2022, the parties discussed Steven's discovery motion. At the outset, the district court commented that it had "never seen such an onerous request" and inquired "why [Steven thought] that [he was] entitled to everything that [he was] asking for" because the district court had "never seen anything like it." Steven's attorney explained that Steven was requesting the information about Teresa's life insurance, mortgage, and new employment. Teresa's counsel responded that Teresa was doing her best to provide the district court with the requested information.

The district court addressed Teresa's contention that the discovery was "onerous" by stating that it did not "expect her to go hire an expert and do . . . forensic examinations." But the district court also said that it did not "understand why she [could not] . . . just . . . submit bills to prove up [her] budget" because, in examining her budget, the district court identified "things that [it could not] figure out" and did not "think [it was] onerous to have her submit bills, so that [the district court could] figure how much she spends each month on various things." The district court therefore ordered Teresa to provide information on her life insurance, mortgage, and new employment, and the district court ordered Steven to provide reciprocal discovery.

Responding to the district court's request that the parties brief their issues, Steven filed a memorandum in which he requested that the district court consider Teresa's ESOP as income, asserting that the ESOP was fully vested and that Teresa's employer made annual contributions to it. Teresa disagreed and argued that the ESOP is an illiquid retirement account that she cannot access until she retires from the company or reaches 70.5 years old. Teresa also maintained that Steven had "ample resources to pay all [her] attorney fees." The district court later filed an order denying both parties' requests for conduct-based attorney fees. The district court found that, although discovery had been complex, neither party "unnecessarily delayed the proceedings nor . . . unreasonably contributed to the expense of the proceeding."

In February 2023, the district court filed an order denying Steven's motion to modify maintenance. In calculating Teresa's gross income, the district court did not include overtime or bonus income. Nor did the district court include Teresa's ESOP in her gross income. Instead, the district court found that the ESOP "was not a liquid asset." The district court also found that both Teresa's and Steven's gross incomes had increased since the dissolution decree, as did each of their monthly expenses. Teresa's pay had increased to $26 an hour and Steven's pay had increased to $64.27 an hour. But the district court found that the increases in income were not a substantial change in circumstances. And the district court found that, even if the increased incomes were a substantial change, Steven had failed to establish that the spousal-maintenance award was unreasonable or unfair.

Despite having already ruled on the parties' motions for conduct-based attorney fees, the district court reiterated that those motions were denied because the proceedings were not delayed by the need to clarify or limit discovery and "[n]either party ha[d] acted unreasonably or increased the cost or length of the proceedings." The district court also denied Teresa's motion for need-based attorney fees, reasoning that—even though Steven had the means to pay Teresa's attorney fees—Teresa also had the means to pay such fees.

Steven appeals and Teresa cross-appeals.

DECISION

On appeal, Steven maintains that the district court abused its discretion in denying his motion to modify spousal maintenance by making clearly erroneous findings of fact about whether Teresa's bonuses, overtime pay, and ESOP are part of her gross income. In her cross-appeal, Teresa asserts that the district court abused its discretion by denying her motions for need- and conduct-based attorney fees. Steven moves to strike portions of respondent's brief, asserting that certain statements are unsupported by the record. We address each of the parties' arguments in turn.

I. The district court abused its discretion in denying Steven's motion to modify spousal maintenance.

"A district court has broad discretion in its decisions regarding spousal maintenance, and we will not reverse absent a clear abuse of discretion." *Sinda v. Sinda*, 949 N.W.2d 170, 174 (Minn. App. 2020). "A court abuses its discretion if it makes findings of fact that are not supported by the record, misapplies the law, or resolves the matter in a manner that is contrary to logic and the facts on record." *Id.* at 175 (quotation omitted). "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). "Factual findings are clearly erroneous when they are 'manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.'" *Sinda*, 949 N.W.2d at 175 (quoting *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006)).

A district court may modify an award of spousal maintenance if the party seeking such modification demonstrates "a substantial change in circumstances that makes the existing award 'unreasonable and unfair.'" *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019) (quoting Minn. Stat. § 518A.39, subd. 2(a), (b) (2018)). "One of the statutory modification factors that may support a finding of a substantial change in circumstances is the 'substantially increased or decreased gross income of an obligor or obligee.'" *Backman v. Backman*, 990 N.W.2d 478, 485 (Minn. App. 2023) (quoting Minn. Stat. § 518A.39, subd. 2(a)(1) (2022)).

"In determining a party's 'gross income,' a district court must apply the statutory definition of that term in chapter 518A." *Id.* (citing Minn. Stat. § 518A.26, subd. 1 (2022)) (other citations omitted). "The statutory definition of 'gross income' refers to section 518A.29." *Id.* (citing Minn. Stat. § 518A.26, subd. 8 (2022)). "Section 518A.29 states that 'gross income' includes 'any form of periodic payment to an individual,' such as salaries, wages, and disability benefits, among other things, and also includes 'potential income under section 518A.32.'" *Id.* (quoting Minn. Stat. § 518A.29(a) (2022)). As the supreme court has noted, the term "'payment' . . . generally means that a benefit must be actually received by the [party], as opposed to merely vested or owed, in order to constitute income." *Haefele v. Haefele*, 837 N.W.2d 703, 710 (Minn. 2013). And the term "'periodic' . . . generally means marked by repeated cycles[] or happening or appearing at regular intervals." *Id.* (quotations omitted).

A. The district court did not abuse its discretion by excluding Teresa's bonuses from her gross income.

Steven first argues that the district court abused its discretion by excluding Teresa's bonuses from her gross income. The record defeats this claim.

"Bonuses may be included in a party's gross income, but only if they are a regular, dependable form of payment." *Sinda*, 949 N.W.2d at 176. The district court found that Teresa's company provided two bonuses. The first bonus was a profit-sharing bonus, which the district court found was discretionary and could be terminated at any time. The second bonus was a performance bonus, which the district court found was subject to yearly change. Based on this information, the district court concluded that Teresa's bonuses would not be used to calculate her gross income because the bonuses were an inconsistent, unpredictable, and unreliable form of income that were not guaranteed. This finding is not clearly erroneous because it is supported by the record.

Teresa's pay stubs from 2015 to 2022 establish that her bonuses are inconsistent, ranging from $0 to $7,000. Several documents in the record also establish that the bonuses are unpredictable and unreliable. For example, one document explains that employees only receive bonuses when the company exceeds its net profit goals at midyear and year end. Another document reflects that Teresa's performance bonus program may change on a yearly basis and can be discontinued. We have concluded that a district court does not abuse its discretion by excluding a bonus from gross income when a bonus "may or may not be paid every year depending on . . . profitability." *Haasken v. Haasken*, 396 N.W.2d 253, 261 (Minn. App. 1986).

Considering the foregoing evidence, we discern no abuse of discretion because the district court did not clearly err in finding that Teresa's bonus compensation falls outside the statutory definition of gross income.

B. The district court did not abuse its discretion by excluding Teresa's overtime from her gross income.

Steven next contends that the district court abused its discretion by excluding Teresa's overtime from her gross income. We are not persuaded.

Subject to other requirements not relevant to our analysis in this appeal, Minnesota Statutes section 518A.29(b)(2)(iii) (2022) provides that gross income precludes "compensation received by a party for employment in excess of a 40-hour work week, provided that . . . the party demonstrates and the district court finds, that . . . the excess employment is voluntary and not a condition of employment." But "[w]here overtime income has been a regular, steady source of income for the past several years, the [district] court may properly include the overtime income . . . although the opportunity to work overtime in the future may decrease." *Strauch v. Strauch*, 401 N.W.2d 444, 448 (Minn. App. 1987).

Here, the district court found that there was no evidence before it that "overtime [was] now required and [was] an integral part of [Teresa's] position." As an initial matter, Steven argues that the district court misstated the legal standard for determining overtime as income. Steven contends that the correct standard is whether overtime has been a steady source of income, not whether overtime is voluntary or a condition of employment. But the statute that governs the calculation of gross income states that such income does not include overtime if "the party demonstrates, and the *court finds*, that . . . the excess employment is voluntary and not a condition of employment." Minn. Stat. § 518A.29(b)(2)(iii) (emphasis added). Thus, the district court was merely applying the law to the facts at hand.

Steven contends that Teresa's overtime pay should have been used to calculate her gross income because overtime was a regular, steady source of compensation. But the record evidence supports the district court's finding that overtime was not a required or integral part of Teresa's employment.

Teresa's pay stubs from the first few months of 2022 establish that her overtime situation has remained substantially the same during that period. These records reflect that overtime was not a required or integral part of Teresa's employment, and Teresa did not receive overtime pay as a steady source of income. Over those months, Teresa's overtime varied from zero to 13.08 hours in a two-week pay period. She worked only 58.85 hours of overtime over five months.

This record evidence persuades us that the district court did not abuse its discretion because its finding that Teresa's overtime wages do not qualify as gross income is not clearly erroneous.

C. **The district court abused its discretion by declining to consider Teresa's ESOP in calculating her gross income.**

Steven maintains that the district court abused its discretion by overlooking Teresa's ESOP as part of its gross-income calculation. This argument has merit.

The district court did not use Teresa's ESOP to calculate her annual gross income because it determined that the ESOP was "not a liquid asset." The district court did not cite a statutory or jurisprudential basis for this determination, nor are we aware of one. We conclude that, in making this decision, the district court misapplied the law and therefore abused its discretion by excluding the ESOP from Teresa's gross income for a reason that lacks legal support.

As noted above, gross income is "any form of periodic payment to an individual." *Sinda*, 949 N.W.2d at 176 (quotation omitted). And periodic means "marked by repeated cycles[] or happening or appearing at regular intervals." *Haefele*, 837 N.W.2d at 710 (quotations omitted). Rather than analyzing whether the ESOP was a liquid asset, the district court should have made findings about whether the ESOP was a periodic payment to Teresa, i.e., a payment marked by repeated cycles, or one happening or appearing at regular intervals. *See Sinda*, 949 N.W.2d at 176; *Haefele*, 837 N.W.2d at 710. Without such findings, we cannot otherwise review whether the district court properly excluded the ESOP from its gross-income calculation.

Because the district court misapplied the law by neglecting to make findings of fact about whether the ESOP was a form of periodic payment to Teresa, we reverse and remand for the district court to determine whether the ESOP meets the legal definition of gross income and, if necessary, to reconsider its resolution of Steven's motion to modify spousal maintenance in light of that determination. *See Stevens v. Stevens*, 501 N.W.2d 634, 637 (Minn. App. 1993) (noting that, "[e]ven where the record supports the [district] court's decision, the failure to make specific findings compels a remand"); *see also Dougherty v. Dougherty*, 443 N.W.2d 193, 195 (Minn. App. 1989) (reversing the district court's modification of a maintenance award after the district court failed to make specific findings about how gross income at the time of modification related to gross income at the time of the original decree). On remand, the district court has the discretion to reopen the record as may be necessary to address this issue.

II. The district court erred in denying Teresa's motion for need-based attorney fees but did not abuse its discretion by denying her motion for conduct-based attorney fees.

In her cross-appeal, Teresa contends that the district court erred in denying her motion for need-based attorney fees and abused its discretion by denying her motion for conduct-based attorney fees. While we conclude that the district court's reconsideration of Teresa's gross income on remand may require reconsideration of Teresa's motion for need-based attorney fees, we disagree that the district court abused its discretion by denying her motion for conduct-based attorney fees.

A. The district court's finding that Teresa has the means to pay for her attorney fees is not supported by the evidence.

Teresa asserts that the district court abused its discretion in denying her motion for need-based attorney fees. Because we are remanding the determination of Teresa's gross income to the district court, we also remand the issue of whether to award her need-based attorney fees.

The district court "shall award attorney fees . . . in an amount necessary to enable a party to carry on or contest the proceeding" if 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.

Minn. Stat. § 518.14, subd. 1 (2022).

The district court found that Teresa has the means to pay for her own attorney fees based on Teresa's gross annual income of $89,624—which includes over $35,000 in annual spousal maintenance—and a savings account that contained more than $36,000 as of May 2022. As explained above, Teresa's spousal-maintenance award may decrease on remand—based on the district court's reconsideration of Steven's motion to modify spousal maintenance—if the district court determines that the ESOP meets the legal definition of gross income. As a result, we cannot review whether the district court's finding that Teresa has the means to pay for her own attorney fees is supported by the evidence. Because that finding was based in part upon the district court's consideration of the over $35,000 in spousal maintenance that Teresa receives each year, we reverse and remand for the district court to reconsider Teresa's motion for need-based attorney fees along with Steven's motion to modify spousal maintenance.

B. The district court did not abuse its discretion by determining that Steven did not unreasonably delay the proceedings.

Teresa argues that Steven delayed the proceedings because his discovery requests sought irrelevant information. We are unconvinced.

"A conduct-based attorney-fee award is reviewed for an abuse of discretion." *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022) (quotation omitted).

Under Minnesota Statutes section 518.14, subdivision 1, a district court may "in its discretion," award "additional fees, costs and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." "Generally, conduct-based attorney fees are to be based on the party's behavior occurring during the litigation process." *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The party moving for conduct-based attorney fees has the burden of showing that the other party's conduct "unreasonably contributed to the length or expense of the proceeding." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). "Fee awards under Minn. Stat. § 518.14 may be based on the impact a party's behavior has had on the costs of the litigation regardless of the relative financial resources of the parties." *Dabrowksi v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991); *see also Gales v. Gales*, 553 N.W.2d 416, 423 (Minn. 1996) (citing *Dabrowski* for the proposition above).

In support of her argument, Teresa points to Steven's request for Teresa's mortgage information as an example of irrelevant discovery. The mortgage information, however, was relevant to the district court's consideration of Steven's motion to modify spousal maintenance. Indeed, the district court specifically ordered Teresa to provide Steven information about her mortgage.

Moreover, Teresa's contention ignores the fact that her own actions in response to Steven's discovery requests affected the length of the proceedings. Teresa's attorney inadvertently omitted information about Teresa's ESOP statements from Teresa's disclosures and did not provide that information to Steven until the morning of their September 2022 motion hearing. In addition, because Teresa had not provided relevant discovery to Steven, it was necessary for the district court to order that she produce her most recent pay stub, information about her mortgage and life insurance, and any basis for her expenses, such as bills. Based on our careful review of the record, the district court's determination that the duration and expense of the proceedings stemmed from the complexity of discovery rather than the parties' conduct is supported by the evidence.

We therefore conclude that the district court did not abuse its discretion by denying Teresa's motion for conduct-based attorney fees.

III. Steven's motion to strike is moot.

Steven moves to strike three factual statements from Teresa's appellate brief, asserting that we should do so because the statements are not supported by the record. We disagree.

The record on appeal consists of "[t]he documents filed in the district court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Because we have access to the record, we need not and do not rely on any extraneous factual statements in Teresa's brief. And because we do not rely on the challenged statements, we deny Steven's motion as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot because the supreme court did not rely on the material in question).

Affirmed in part, reversed in part, and remanded; motion denied.