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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1318

In re the Marriage of:
Tracy Joan Van Steenburgh, petitioner,
Respondent,

vs.

Mark Edward Clyma,
Appellant.

Filed March 3, 2014
Affirmed
Crippen, Judge[*]

Dakota County District Court
File No. 19-F3-07-006475

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

Patricia A. O'Gorman, Patricia A. O'Gorman, P.A., Cottage Grove, Minnesota (for respondent)

Richard D. Goff, Law Offices of Richard D. Goff, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Connolly, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Because appellant failed to show a change in circumstances rendering the 2008 temporary spousal maintenance award unreasonable and unfair, we affirm the district court judgment denying his motions to permanently extend the award. We affirm the district court's denial of appellant's motion to strike expert reports or grant a continuance because respondent's late identification of experts was due to appellant's delayed statement of the specific basis for his modification motion. Finally, appellant also failed to demonstrate an inability to pay his own attorney fees, and we affirm the denial of a fee award.

FACTS

In 2008, appellant Mark Edward Clyma and respondent Tracy Joan Van Steenburgh divorced. The dissolution district court determined that Clyma's reasonable monthly budget was $7,691.35, but it ordered Van Steenburgh to pay him $10,000 per month in temporary spousal maintenance for five years. The dissolution court found that Clyma could easily find employment in his chosen field and that he could earn "at least $70,000 per year" by the time that the temporary spousal maintenance period ended. This court affirmed the dissolution court's order. *See Van Steenburgh v. Clyma*, No. A09-1258, 2010 WL 1753303, at *1 (Minn. App. May 4, 2010), *review denied* (Minn. July 20, 2010).

In February 2013, Clyma moved the district court to make the temporary spousal maintenance award permanent, claiming difficulty in meeting the district court's predictions of his future income. He also moved for an award of attorney fees. Clyma served Van Steenburgh with discovery requests, which focused primarily on her income and assets but

also requested "copies of all statements or reports from . . . potential expert witnesses." Van Steenburgh objected to the majority of Clyma's discovery requests as irrelevant.

Two weeks before the scheduled hearing date and ten days after a deposition that included numerous questions about his efforts to obtain suitable employment, Clyma submitted an amended motion and supplemental affidavit, including a budget reporting $15,612 in monthly living expenses and various documents showing his sporadic job-search efforts. Responding to his new documents five days before the hearing, Van Steenburgh submitted two expert reports that assessed Clyma's budget and employment prospects and job-search efforts.

At the motion hearing, Clyma moved the district court to either exclude the expert reports or grant a continuance. The court first elected to hear arguments on the substance of the spousal maintenance motion. Noting that the dissolution court had found one of Van Steenburgh's experts "most persuasive with regards to [Clyma's] employability," the district court found that although "[i]n most instances, a good faith effort would have resulted in employment in [Clyma's] field within 24 hours," Clyma "has failed to take reasonable steps to rehabilitate and has failed to seek long-term employment solutions." It also found that Clyma willfully avoided employment for three years "because he did not want such employment to impact his child support payments." The district court castigated Clyma for his "grossly excessive" monthly budget and his "lifestyle in excess of the lifestyle he lived during the marriage," and it noted that Clyma had already received spousal maintenance payments of $138,000 in excess of his previously established expenses. Based on these factual findings, it ruled that Clyma had not met his burden to show a change in

circumstances justifying permanent spousal maintenance, and it denied his motions, including "all motions not [previously] addressed."

D E C I S I O N

1.

Appellant Clyma argues that the district court abused its discretion by denying his motion for permanent spousal maintenance because he is unable to meet his own needs. A district court has "broad discretion to determine whether to later modify" a spousal maintenance award. *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). "There must be a clearly erroneous conclusion that is against logic and the facts on record before this court will find that the trial court abused its discretion." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). To justify modifying a spousal maintenance award, the moving party "bears the burden of showing a substantial change of circumstances . . . since [maintenance] was originally set." *Youker*, 661 N.W.2d at 269. Such a change in circumstances must be sufficient to render the original award "unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2 (2012).

Clyma argues that his failure to meet the dissolution court's predictions about his future income constitutes a change in circumstances requiring modification of spousal maintenance. He cites *Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn. 1997), to support his argument that even willful failure to become self-sufficient necessitates permanent spousal maintenance. But although *Hecker* supports the conclusion that a district court may award permanent spousal maintenance when a maintenance recipient intentionally fails to become self-sufficient, it does not require the district court to do so. Accordingly, especially in the

context of facts unlike those in *Hecker*, and despite the different district court determination in *Hecker*, denying Clyma's motion was within the district court's discretion.

Evidence of Clyma's deliberate refusal to rehabilitate adequately supports the district court's denial of his motion. In an opinion specifically analyzing *Hecker*, this court has stated "that a spouse receiving temporary maintenance must make a good-faith effort to rehabilitate." *See Youker*, 661 N.W.2d at 270. In other words, a spouse receiving temporary maintenance "is obligated to make reasonable attempts to rehabilitate, and [he] may seek a remedy if that attempt fails." *Id.* The district court concluded that "[Clyma's] current financial position is a result of his choices and [Clyma] alone is responsible for them." Because this conclusion is amply supported by the record it is not clearly erroneous. An employment expert determined that Clyma "could be in a position earning an annual salary of $80,000 - $120,000 after 3-5 years." The dissolution court found the expert's testimony to be "most persuasive" in determining Clyma's earning potential and the district court in 2013 implicitly adopted that credibility finding. The district court also noted that Clyma had already received $138,000 in excess of his expenses during the temporary spousal maintenance period, and it found that "[t]he distribution of assets, along with the maintenance ordered, provided [Clyma] ample opportunity to become self-sufficient."

Moreover, the record establishes that Clyma avoided many opportunities to improve his employment situation. Clyma's budget included a line-item specifically for education, retraining, or skills improvement, but Clyma attended only a single community college course over the course of five years. Clyma also refused to consider retraining or to pursue employment opportunities outside of what he perceived as his narrow range of expertise.

Finally, Clyma's sporadic submissions of employment applications were interspersed with extensive periods during which he did not seek employment at all. The record supports the district court's factual finding that Clyma's employment situation resulted from his "self-limiting choices." The court did not abuse its discretion by denying Clyma's motion for permanent spousal maintenance.

2.

Clyma argues that the district court erred by allowing Van Steenburgh to violate discovery rules and that her expert reports should have been suppressed or, in the alternative, that the district court should have granted him a continuance. We review a district court's orders relating to discovery only for an abuse of discretion, "determining whether the district court made findings unsupported by the evidence" or whether it misapplied the law. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). A district court's factual findings may be implicit, *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001), and we review implicit findings only for clear error, *see Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985).

Clyma argues that Van Steenburgh "was in clear violation" of Minnesota Rule of Civil Procedure 26.02 when she failed to identify her expert witnesses until five days before the hearing, violating his "absolute right to a summary of the grounds for each opinion held by an opponent's expert." *See Dennie v. Metropolitan Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). The question of whether discovery rules were violated presents a question of law, which we review de novo. *State v. Nerz*, 587 N.W.2d 23, 24–25 (Minn. 1998). Rule 26.02 allows a party to require "any other party to identify each person whom the other

party expects to call as an expert witness" and "to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Minn. R. Civ. P. 26.02(e)(1)(A). Clyma's Interrogatory 16 mirrored this language.

Clyma properly confined his interrogatory to persons that Van Steenburgh "expected to testify." *See id.* When he served his interrogatories and document requests on Van Steenburgh, Clyma's disclosures and discovery requests were exclusively focused on Van Steenburgh's ability to pay. Because she found these issues irrelevant to Clyma's motion for permanent spousal maintenance, Van Steenburgh had no reason to expect any experts to testify regarding them. The record establishes that when she became aware of Clyma's post-deposition amended motion and supplemental affidavit, Van Steenburgh promptly provided notice of the expert reports she intended to rely upon to oppose Clyma's amended motion.[1] This response complied with discovery rules. *See Gebhard v. Niedzwiecki*, 265 Minn. 471, 476, 122 N.W.2d 110, 114 (1963) (holding that when a party discovers new information making previous interrogatory answers "inaccurate, untrue, or incomplete," she is required to disclose the information).

[1] Clyma acknowledges that the district court implicitly found credible Van Steenburgh's attorney's statements that her delay in identifying experts was solely the result of Clyma's delay in clarifying the basis for his motion. Citing two unpublished opinions of this court, he argues that the district court's finding was unsupported by the evidence because attorney's statements are not evidence. But unpublished opinions of the court of appeals are not precedential. *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009). And the cases Clyma cites are distinguishable in that the attorney statements in those cases related to material facts other than the attorneys' own knowledge and motives; the issue here involves what Van Steenburgh's attorney knew and intended.

Moreover, a finding that Van Steenburgh violated discovery rules would not entitle Clyma to reversal. Clyma cites decisions affirming sanctions or a continuance, but he disregards the standard of our review; we recognize that selection of a remedy is within the discretion of the district court. *Rediske v. Minn. Valley Breeder's Ass'n*, 374 N.W.2d 745, 750 (Minn. App. 1985), *review granted* (Minn. Dec. 11, 1985), *appeal dismissed* (Minn. May 15, 1986). Clyma cites no cases reversing a district court's refusal to suppress expert reports or grant a continuance.

3.

Finally, Clyma contends that the district court erroneously failed to order Van Steenburgh to pay Clyma's attorney fees. We review a district court's decision regarding the award of attorney fees for an abuse of discretion. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). The district court may award attorney fees to a party in a spousal maintenance modification proceeding based either on the party's need or the other party's conduct. *See* Minn. Stat. § 518.14, subd. 1 (2012). Need-based fees require the moving party to demonstrate "that an award is necessary for a party to assert his or her rights in an action, that the payor has the financial means to pay the fees, and that the payee lacks the means to pay the fees." *Crosby*, 587 N.W.2d at 298. The party seeking payment of his fees bears the burden to produce evidence that he lacks the ability to pay the fees himself. *Moravick v. Moravick*, 461 N.W.2d 408, 409 (Minn. App. 1990).

Clyma asserts that the gap between his current expenses and his current income demonstrates that he lacks the means to pay his attorney fees. But he again overlooks the

district court's findings that he received $138,000 of spousal maintenance payments in excess of his needs, plus other assets valued in excess of $649,000. He also overlooks the district court's findings that his claim of current expenses is grossly excessive. These findings support the district court's implicit conclusion that Clyma was not entitled to need-based attorney fees.

Clyma also argues that conduct-based attorney fees are justified based on Van Steenburgh's violations of discovery rules. Because we earlier concluded that Van Steenburgh did not violate discovery rules, this argument is also without merit.

Affirmed.