STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1440

In re the Marriage of: Melissa F. Feierabend, petitioner,
Appellant,

vs.

David Feierabend,
Respondent,

and

State of Minnesota, County of St. Louis,
Intervenor.

Filed December 6, 2021
Affirmed in part, reversed in part and remanded
Connolly, Judge

St. Louis County District Court
File No. 69DU-FA-15-47

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

Gerald O. Williams, Williams Divorce & Family Law, P.A., Woodbury, Minnesota (for appellant)

Michael D. Dittberner, Linder, Dittberner & Winter, Ltd., Edina, Minnesota; and

Matthew H. Beaumier, Beaumier Trogdon Orman Hurd & Viegas, PLLP, Duluth, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Frisch, Judge; and Smith, John, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant-wife challenges the termination of her spousal maintenance award and the award of conduct-based attorney fees to respondent-husband; by cross-appeal, he challenges the requirement that he pay past and future withholding fees for child support. Because we see no abuse of discretion in the termination of appellant's spousal maintenance award, we affirm that decision; because the award of attorney fees is not supported by the requisite findings, we reverse and remand it; and because the district court abused its discretion in requiring respondent to pay child-support withholding fees when he had never been informed of or agreed to that requirement, we reverse that decision.

FACTS

Appellant Melissa Feierabend and respondent David Feierabend were married in 2002; their three children were born in 2003, 2005, and 2008, and are now 18, 16, and 13. In 2009, respondent relocated to Massachusetts for employment reasons while appellant remained in Duluth, Minnesota, with the children.

In 2015, appellant petitioned for dissolution of the marriage, which was dissolved following her appearance at a default hearing. She and the children moved to Minneapolis so they could attend a particular private school. She included the monthly tuition payment

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

of $3,795 in her $9,762.92 monthly expenses when she moved to vacate the dissolution and for financial relief. The parties agreed to vacate the parts of the decree concerning custody, child support, spousal maintenance, and division of their marital assets and liabilities. The district court ordered respondent to pay monthly child support of $1,589, monthly spousal maintenance of $2,000, and half the tuition.

In 2016, the parties settled their property division and custody and parenting time issues. Following a trial, the district court in 2017 issued amended findings of fact, conclusions of law and order, finding that: (1) appellant claimed monthly income of $3,169 and expenses of $9,822, leaving a deficit of $6,653; (2) her pre-marital assets were largely non-liquid; (3) she sought $3,500 monthly in spousal maintenance; and (4) respondent claimed monthly income of $7,423 and expenses of $4,709, leaving him a surplus of $2,714. The district court set respondent's monthly child-support payment at $1,757 and his permanent monthly spousal maintenance obligation at $1,500.

The parties agreed to the appointment of a parenting consultant and to a calculation of child support based on their 2018 income tax returns. At a January 2020 hearing on child-support modification, appellant disclosed that the children's tuition was actually paid not by her but by her parents. The child-support magistrate (CSM) ordered respondent to pay child support of $1,994 from January to September 2019 and $1,882 thereafter.

In March 2020, respondent moved to terminate the spousal maintenance award on the ground that appellant had misrepresented her expenses by including the tuition payments. In May 2020, he filed a supporting affidavit stating that appellant had purchased a home for $691,000, which would not have been possible if her income were what she

reported. Appellant filed a responsive affidavit stating that her needs had not substantially decreased as a result of removing the tuition expense and were about $7,000 monthly. At a hearing on the motion to terminate spousal maintenance, the district court questioned appellant's need for it in view of her purchase of a $691,000 house and asked for further financial information. She and her attorney agreed and provided an affidavit saying that her income included dividends of $27,250, capital gains of $38,478, spousal maintenance of $17,687, and some other small amounts; that she sold her real property in Duluth for $145,000, which was used for the down payment on her new house; and that she sold her Duluth homestead for $323,600 and used the money to refinance the new house and buy a car.

The district court issued an order terminating spousal maintenance and granted respondent's motion for $2,500 in attorney fees associated with the parenting consultant motion; it also required respondent to be responsible for withholding fees for child support. Appellant challenges the termination and the attorney fee award; respondent challenges the requirement that he pay the child-support withholding fees.

DECISION

1. Termination of spousal maintenance

A decision on whether to modify spousal maintenance is discretionary with the district court. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997); *Kemp v. Kemp*, 608 N.W.2d 916, 920 (Minn. App. 2000). "Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3 (2020).

In its 2020 order, the district court explained its 2016 award of $1,500 in permanent spousal maintenance:

> The Court found [appellant's] monthly income to be $3,169 and expenses $9,821.89. The Court permitted appellant to include the . . . tuition of $3,795 per month as a reasonable and necessary expense because she testified that she was responsible for it . . . . [Appellant] testified that she received a monthly payment of somewhere between $1,700--$2,000 from [a] trust of which she is a beneficiary but claims that she has no ability to freely access the funds of that trust which was valued, in 2016, at approximately $1,000,000.[1] The Court had nothing to contradict her assertion that she cannot access the funds and so relied on her sworn testimony. . . . [Appellant] had also received [real] property that was identified in the Stipulation and incorporated into the final Decree order. The value of the property in assessing the need for maintenance was not considered as assets available to meet [appellant's] expenses as they were not liquid assets.
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> Spousal maintenance was initially awarded based on the need established by [appellant] because her income and expenses were so far apart. Nearly $4,000 of the gap was the tuition she claimed to pay. . . .

The district court also explained its 2020 decision to terminate spousal maintenance:

> [Appellant] now states that her income before accounting for taxes but including child support and maintenance is $6,592.50 per month and she has expenses exceeding $7,000 . . . . [She] originally had rental income which offset her housing costs. She no longer has the rental income because she sold the rental property.
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> . . . In 2016, she was working on completing the program to tutor children with dyslexia but she had not completed it. She has now completed the program and has been providing tutoring services for children. Her self-

[1] The trust was actually found to have a value of $618,227 in an amended decree.

employment income . . . [net profit] for the year is reported as $2,593.

. . . .

. . . [Appellant's] testimony at the [2020 child-support] hearing reflects that . . . she has not been paying the tuition for the children. This results in a substantial decrease in expenses for [appellant.]

. . . What is still concerning to the Court is that in 2016 [appellant] claimed she needed spousal maintenance and urged the Court for more than $1,500 per month, yet four years later, subtracting the tuition which was not part of her previous expenses, and even after liquidating her real estate, she more than doubled her housing costs and still claims to need the $1,500 per month in maintenance. The mortgage, homeowners insurance and property taxes on the mortgage of $389,000 is $4,224.00 per month . . . [which] alone exceeds her claimed monthly income without including child support or spousal maintenance. How she qualified for a mortgage with the income that she presents to the Court is baffling. . . .

. . . In 2016, and throughout this case, [appellant] has *engaged in a shell game of sorts*. It has been difficult to get clear answers or concrete supporting documentation of what her financial picture is at least as it pertains to income.

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. . . [Appellant's] IRS form 1116, Foreign Tax Credit reflects Gross income for all sources [of] $99,777. . . . [I]t appears that [appellant] has additional passive income from foreign sources of $99,777 for the year 2019.

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. . . Outside of the spousal maintenance and child support it is impossible for the court to point to concrete numbers to account for [appellant's] total income. What the court does have is the mortgage documents that clearly show [appellant] purchased a home with a mortgage . . . that would not be possible on her stated income of $6,592, even with the large down payments she made. . . . The total for her housing

> expenses alone [is] $3,443 per month. This amounts to 52% of her stated income of $6,952 per month. *Simply said[,] none of this adds up.*
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> [Appellant's] affidavit of income and expenses argues that there is a clear gap between income and expenses. However, that gap is due to her choices to have expenses that are not reasonable and necessary. The math makes it clear that she had the ability to greatly reduce her expenses by making more prudent financial decisions and [if she had,] she would not have a deficit to close between her claimed income and expenses and therefore not have a need for spousal maintenance. She has [now] completed the training to work in her field of choice so it is reasonable to expect that she would be working. . . . [Appellant's] choices are hers but it is not fair to require [r]espondent to subsidize her choices.

Appellant argues that reversal is required because the district court impermissibly shifted to appellant the burden of showing a change in circumstances. We disagree. This argument ignores two facts. First, appellant in 2016 testified that a significant part of her expenses was the tuition, and she was awarded maintenance because of the extent to which her expenses exceeded her 2016 income. But in 2020, she testified that the tuition was not actually part of her expenses, because her parents paid it.

Second, when the district court said at the hearing, "[L]et's face it, we all know you don't afford a half million [dollar] house on what . . . she is alleging her income is. It doesn't happen," appellant's attorney volunteered to provide information as to how appellant was able to acquire a $691,000 house when her claimed monthly income was $6,592 and her claimed expenses $7,000. The district court was not "impermissibly shifting the burden" when it asked appellant to explain the conflict in her own testimony

and the inconsistency in her financial records; it could not have asked respondent for these explanations. Reversal is not required on the ground that the district court shifted the burden of proof.

Appellant goes on to argue that "[t]he trial court is bound by the findings as set out in the Amended Judgment and Decree and it sets the baseline." But those findings were based in part on testimony appellant now admits was inaccurate, namely her claim that the tuition was her expense: when the CSM asked if the tuition was included in her expenses, she answered "Correct," and when asked if she was saying the tuition she was claiming in her expenses was actually paid by her parents, she answered, "Yes, and . . . everyone's always known that."

But the district court did not "know that": it stated that it included the tuition as appellant's reasonable and necessary expense because appellant testified that she was responsible for it. Appellant argues in her brief that the district court's finding "that the tuition is not [her] expense and was not at the time the court originally ordered maintenance is clearly erroneous." But she provides no support for the view that, if a party says an item was paid and is being paid by someone else, it is an error to exclude that item from the party's expenses. *See generally, Honke v. Honke*, 960 N.W.2d 261, 268 (Minn. 2021) (stating that "the principal of post-dissolution gifts, including cash gifts, qualifies as a 'financial resource' within Minnesota's maintenance statute).

The district court also found in 2016 that appellant's Duluth real properties were not liquid assets with which she could pay her expenses and found in 2020 that the liquidation by sale of those properties was "a substantial change in [appellant's] financial

circumstances." Appellant argues that "a [district] court cannot require the maintenance seeking spouse to sell off assets to provide for the spouse's reasonable needs or to provide adequate self support." But the district court did not require appellant to sell off the Duluth properties; she chose to sell them, thereby giving up an income stream that had contributed to her housing expense, and she also chose to invest the proceeds in a manner that resulted in a disproportionate housing expense for someone with her claimed income.

The district court said at the hearing,

> You don't buy a house that costs that much [$691,000] if somebody else isn't helping you . . . Where's the need [for maintenance]? . . . I feel like I'm flying in the dark here. You say I'm supposed to go with what happened before [i.e., the 2016 judgment], but I can't play dumb . . . [T]here's a lot of money somewhere and how she's choosing to use it, I don't know.
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> . . . Why should [respondent] be basically helping fund a very high lifestyle? . . . [T]hat's my challenge here and I just can't ignore it and say, nope, she still needs [maintenance.]
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> I'm wondering . . . how much does [appellant] get to receive in gifts before it becomes significant? [A] house, a car or something . . . at [some] point, it feels like . . . it's a shell game, like it's hiding that income. If the money . . . was put in a bank account, it would count right now as a significant increase and [respondent's] spousal maintenance [obligation] would go away if [appellant] had $256,000 sitting in there. Because it's in a house, she gets to shield it? I don't understand that.

Both parties discuss *Honke*, 960 N.W.2d at 263 (holding that "[i]n amending maintenance awards, district courts are required to consider whether the principal of a post-dissolution cash gift is an available financial resource for the recipient of spousal

maintenance"). *Honke* involved a permanent monthly spousal maintenance award of $7,900 to an obligee spouse who received two one-time gifts from her parents totaling $500,000 over three years and an obligor spouse whose employment status changed and who moved to eliminate or amend the maintenance award. *Honke*, 960 N.W.2d at 264. The supreme court reversed the district court's conclusion that it could not, as a matter of law, consider the principal of the obligee spouse's post-dissolution gifts in addressing her ability to support herself, reasoning that post-dissolution gifts to an obligee spouse were a "financial resource" within the meaning of Minn. Stat. § 518.552, subd. 2(a) (2020) (listing an obligee's financial resources as one of the relevant factors to be considered in determining or modifying a maintenance award.) *Id.* at 267. If "financial resources" have been held to include post-dissolution cash gifts, we believe "financial resources" would also include funds resulting from post-dissolution liquidation of nonmarital assets, particularly when the non-liquid nature of those assets had previously been considered a basis for awarding permanent spousal maintenance.

Appellant relies on a footnote to Honke's rejection of the obligee's argument that "financial resources" means "only the income produced by post-dissolution assets" because "there is simply no reference to 'income-producing' or 'income-producing assets' within the plain definition of the phrase." *Id*. at 269. *Honke* annotates this: "All of our precedents cited by the parties dealt with either marital property awards; pre-dissolution, non-marital property; or the income of the payor spouse." *Honke* then cites four cases: *Broms v. Broms*, 353 N.W.2d 135, 138 (Minn. 1984) (implicitly recognizing that a maintenance-seeking spouse could use the income from a pre-dissolution non-marital

family trust for self-support); *Curtis v. Curtis*, 887 N.W.2d 249, 254-55 (Minn. 2016) (considering the income potential of a stock portfolio awarded as part of a marital property award); *Erlandson v. Erlandson*, 318 N.W.2d 36, 40 (Minn. 1982) (considering the investment income from a non-marital, pre-dissolution personal injury award as a source of income); and *Lee v. Lee*, 775 N.W.2d 631, 639 (Minn. 2009) (calculating the income of the payor spouse to determine his ability to pay maintenance). *Honke*, 960 N.W.2d at 269 n.4. Appellant quotes the citations of *Broms* and *Erlandson*, but does not refute the view that *Honke*'s interpretation of "financial resource" to include the principal of a post-dissolution cash gift logically extends to include the funds resulting from post-dissolution liquidation of non-marital assets.

The district court did not abuse its discretion in concluding that appellant's financial resources as evinced by her purchase of a $691,000 home preclude her need for spousal maintenance or in terminating spousal maintenance.[2]

II. Attorney Fee Award

Conduct-based attorney fee awards are reviewed for an abuse of discretion. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).

In March 2020, respondent moved for an order awarding him $2,500 in attorney fees and costs "with respect to the motion for the entry of [an] order for appointing a parenting consultant." The district court found that, "[f]rom at least as early as mid-November 2019, [r]espondent, through his attorney, actively sought to reach an agreement

[2] Because we affirm the termination of spousal maintenance, we do not address its effective date, an issue respondent raised only if we reversed and remanded the termination.

with [appellant] to finalize an order for a parenting time consultant. . . . It took five months and a formal motion to resolve the parenting consultant matter" and granted respondent's motion with no further explanation.

Appellant argues that this award was an abuse of discretion and should be reversed because respondent did "not identify a statutory or contractual basis for the recovery of [attorney] fees"; respondent argues that, because the order "contains no findings supporting the award and the billing records attached to [respondent]'s attorney's affidavit reflect fees billed on issues other than the parenting consultant appointment issue, . . . the award of fees should be reversed and remanded to the district court for further consideration." We agree and reverse and remand the attorney-fee award.

III. Recovery Fees for Child Support

The parties' March 2017 amended judgment and decree provided in paragraph 11, "Withholdings from Income," that "All child support and spousal maintenance payments shall be withheld from the wages of [r]espondent," and in paragraph 8, "Spousal Maintenance," that "[a]ny fees associated with the withholding shall be paid by [r]espondent." There was no equivalent provision in paragraph 9, "Child Support." But the district court's September 2020 order makes respondent responsible for both "the cost recovery fee associated with the collection and support for the years 2017 through 2019," an amount of $2,368.74 to be paid to appellant within 60 days, and the total collection recovery fees for every year.

Respondent argues that these orders as they apply to child-support withholding fees are an abuse of discretion because: (1) the parties' March 2017 amended decree did not

require him to pay fees for child support withholding; (2) appellant's proposed conclusions of law, like the decree, provided that respondent would pay only the maintenance withholding fees, not the child support withholding fees; and (3) he was not notified either by the district court or by appellant that he would be made responsible for those fees as well as for maintenance withholding fees; in fact, until her reply brief for this appeal, appellant never mentioned the child-support withholding fees.

Appellant does not refute this except by asserting that, when she replied to respondent's motion to terminate maintenance, she asked for "such other and further relief as the Court may deem just, fair and equitable in the circumstances." But respondent could not have inferred from this very general language that appellant was seeking to make him responsible for the particular item of child-support withholding fees. Because respondent was never notified that he would be made responsible for child support withholding fees, imposing those fees on him was an abuse of discretion and should be reversed.

We affirm the termination of spousal maintenance, reverse and remand respondent's $2,500 attorney fee award, and reverse the requirement that respondent pay the past and future withholding fees for child support.

Affirmed in part, reversed in part, and remanded.