This opinion is nonprecedential except as provided by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
A21-0328

In re the Marriage of:

Mark David Plucinski, petitioner,
Appellant,

vs.

Ellen Marie Budzynski,
Respondent.

Filed April 11, 2022
Affirmed
Smith, Tracy M., Judge

Olmsted County District Court
File No. 55-FA-06-3390

Dominique J. Navarro, Navarro Law Firm, PLLC, Rochester, Minnesota (for appellant)

Kay Nord Hunt, Michelle K. Kuhl, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Respondent Ellen Marie Budzynski moved the district court to enforce the obligations of her former spouse, appellant Mark David Plucinski, to pay spousal maintenance and to maintain life insurance securing his maintenance obligation;

respondent also sought reimbursement of her attorney fees. Appellant brought a countermotion seeking to terminate his maintenance obligation. The district court issued an order deciding both motions. It denied appellant's motion to terminate maintenance, but it did reduce the maintenance obligation. It granted respondent's motion to enforce appellant's obligations and awarded respondent conduct-based attorney fees. Appellant challenges the district court's order, arguing that the district court should have terminated his obligation and should not have awarded conduct-based attorney fees. We affirm.

FACTS

Appellant and respondent were married for 22 years. Their marriage was dissolved in 2007 by a stipulated judgment and decree. Under that judgment and decree, appellant was ordered to pay respondent permanent maintenance in the amount of $3,000 per month, which over time increased to $3,666.20 per month due to cost-of-living adjustments. In August 2020, appellant emailed respondent that he could no longer afford to pay his maintenance obligation and would stop payment beginning September 1, 2020. He has not paid maintenance since August 2020. Under the stipulated judgment and decree, appellant was also required to maintain life insurance to secure his maintenance obligation. He let his policy lapse in 2020 and did not obtain a new one.

In November 2020, respondent moved the district court to enforce appellant's maintenance and life-insurance obligations and to order appellant to reimburse her for legal fees that she had incurred. Appellant filed a countermotion to terminate his maintenance obligation.

As further factual background, in the few years immediately preceding the motions in this matter, appellant disposed of many of his assets. Most significantly, appellant gave away valuable assets in an unfavorable settlement agreement in another divorce. In September 2015, appellant had remarried, to M.L. He and M.L. divorced in May 2019. In their settlement agreement, appellant agreed to give a substantial amount of assets to M.L. These assets included an unencumbered house valued at $320,000 that he had recently inherited from his mother; 50% of appellant's share of his pension; and 100% of a 401(k) account through March 2019. Appellant also agreed to give M.L. 40% of his income in maintenance after making maintenance payments to respondent.[1] Apart from giving away assets in this marital-dissolution agreement, appellant also gifted his adult children a total of $52,000.

By the time of the motions at issue here, appellant's and respondent's financial circumstances had changed. In 2007, when the spousal-maintenance obligation was established, appellant had a gross annual income of $110,672.04. In 2018, he earned $123,195.16. In September 2019, appellant was forced to retire from his job. At the time of the motions, appellant's income was $2,699.60 per month from social security, but he was expected to start receiving pension payments once he finalized retirement-related matters in connection with the dissolution of his marriage with M.L. Appellant's monthly expenses were $3,317.89. As for respondent, in 2019, she had a gross annual income of

[1] Appellant emphasized to the district court that he was not represented by counsel for the divorce from M.L. In that dissolution proceeding, M.L. was represented by the estate-planning attorney who represented both her and appellant, and appellant voluntarily waived the conflict of interest and decided to proceed unrepresented.

$73,300, which included $45,005.07 from employment and $43,561 from maintenance. Respondent also was receiving $1,315.82 per month from a pension account. Her monthly expenses were $5,545.27.

Throughout litigation of the motions in the district court, appellant failed to fully respond to respondent's discovery requests. For example, he failed to disclose whether he received a severance package after he lost his job, did not provide tax transcripts, did not provide all his bank statements, failed to disclose documents relating to inheritances he had received from his mother and brother, and did not provide records of maintenance payments to M.L. In addition, appellant claimed that he was living in an apartment in New Jersey, but he provided proof of only one rent payment and did not produce evidence of a lease renewal for 2021. Also, although appellant's second divorce was finalized in May 2019 after less than four years of marriage, he did not complete the division of his retirement account until September 2020, delaying proceedings in the district court here because he did not yet have all the documents from that dissolution.

The district court held a hearing on the parties' motions in December 2020. In its subsequent order, the district court denied appellant's request to terminate his maintenance obligation but reduced his obligation to $2,000 per month because of respondent's increase in income and because of appellant's decrease in income due to his job loss. In explaining its decision not to terminate maintenance, the district court stated that, while appellant had had a substantial change in financial circumstances, the change was in part the result of his

"dissipation"[2] of assets over the previous three years, done in bad faith to avoid paying his maintenance obligation to respondent. Additionally, the district court granted respondent's order to enforce appellant's maintenance and life-insurance obligations and ordered appellant to pay respondent conduct-based attorney fees in the amount of $9,676.55 for legal fees that respondent incurred between August and December 2020. The district court explained that appellant compelled respondent to move the court to enforce his maintenance obligation, permitted his court-mandated life-insurance policy to lapse, and acted in bad faith by failing to fully respond to respondent's discovery requests.

Appellant appeals both the denial of his motion to terminate his maintenance obligation and the award of conduct-based attorney fees.

DECISION

I. The district court did not abuse its discretion by refusing to terminate appellant's maintenance obligation.

In a dissolution proceeding, courts may award, or parties may stipulate to an award of, spousal maintenance. Minn. Stat. § 518.552 (2020). Permanent maintenance awards can be modified as provided according to statute. Minn. Stat. § 518A.39, subd. 2 (2020).

An appellate court reviews a district court's decision whether to modify an existing maintenance award for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997). A district court abuses its discretion if it makes findings of fact that are not

[2] "Dissipation" can refer to giving away or hiding assets in *anticipation* of divorce in order to avoid a maintenance obligation. *See, e.g.*, *Bollenbach v. Bollenbach*, 175 N.W.2d 148, 155 (Minn. 1970). Here, the district court used the term to describe appellant's giving away of assets after the divorce in order to terminate his established maintenance obligation.

supported by the record, misapplies the law, or resolves the issue contrary to logic and facts on record. *Bender v. Bernhard*, ___ N.W.2d ___, ___, 2022 WL 697767, at *4 (Minn. Mar. 9, 2022); *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019). We uphold findings of fact supporting a spousal-maintenance decision unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). We review questions of law de novo. *See Honke v. Honke*, 960 N.W.2d 261, 265 (Minn. 2021).

To succeed on a motion to modify or terminate maintenance, the moving party must show that there has been a substantial change of circumstances since the original maintenance award and that these changed circumstances make the original award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2; *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *rev. denied* (Minn. Aug. 5, 2003). "Unreasonable and unfair" are "strong terms which place upon the claimant a burden of proof more than cursory." *Kielley v. Kielley*, 674 N.W.2d 770, 779 (Minn. App. 2004) (quotation omitted).

Changed circumstances that can satisfy the statute include a "substantially increased or decreased gross income of an obligor or obligee" and a "substantially increased or decreased need of an obligor or obligee." Minn. Stat. § 518A.39, subd 2(a). It is presumed that there has been a substantial change of circumstances, and the current maintenance obligation is "rebuttably presumed to be unreasonable and unfair," if "the gross income of an obligor or obligee has decreased by at least 20 percent through no fault or choice of the party." *Id.* at subd. 2(b)(5). The district court will also apply the factors under Minn. Stat. § 518.552 when considering a modification of maintenance. *Id.* at subd. 2(e). Relevant factors include the financial resources of the party seeking maintenance and that party's

ability to meet needs independently and "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." Minn. Stat. § 518.552, subd. 2.

But "[w]here an obligor voluntarily creates a change of circumstances, the trial court should consider the obligor's motives." *Richards v. Richards*, 472 N.W.2d 162, 164 (Minn. App. 1991). A voluntary change in circumstances will not generally result in a modification of a maintenance obligation if the change was made in bad faith and was "primarily influenced by a specific intent to decrease or terminate maintenance." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 717 (Minn. App. 2009) (quotation omitted), *rev. granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010).[3]

Appellant argues that the district court abused its discretion by denying his motion to terminate his maintenance obligation because, since the loss of his job, his only income has been from social security and respondent's income exceeds his own, which, he argues, constitutes a substantial change rendering his current maintenance obligation unfair or unreasonable under Minn. Stat. § 518A.39, subd. 2. Appellant additionally argues that the district court erred by considering assets that he had acquired after his marriage to respondent because those assets were non-income producing and nonmarital. Respondent, for her part, points out that the district court, by lowering appellant's maintenance

[3] Though *Hemmingsen* and *Richards* each dealt with an obligor's voluntary decision to retire early, thus reducing the obligor's income, *see Hemmingsen*, 767 N.W.2d at 715-17; *Richards*, 472 N.W.2d at 164, the principles underlying those cases apply equally to voluntarily disposing of income-producing assets in bad faith for the purpose of terminating a maintenance obligation.

obligation, did, in fact, recognize appellant's reduced income. But, she argues, the district correctly refused to terminate maintenance because it properly found that appellant willingly limited his income and gave away his assets in order to avoid his maintenance obligation. She further contends that appellant forfeited any challenge to the district court's findings of bad faith because he failed to address the district court's findings.

A. The district court was not required to terminate appellant's maintenance obligation because of the change in the parties' incomes.

Starting with appellant's assertion that the change in the parties' incomes demanded termination of his maintenance obligation, we conclude that the district court did not abuse its discretion by modifying, rather than terminating, maintenance. The district court found that, though appellant had involuntarily lost his job, his reduced ability to pay maintenance was partially based on his intentional dissipation of assets, which the district court found was done in bad faith to avoid his maintenance obligation. The district court supported its order with factual findings related to appellant's giving away of assets, including $52,000 that he gifted to his adult children and his voluntary agreement to give M.L. a substantial portion of his assets in their divorce, including a nonmarital home and a significant maintenance award. The district court also pointed to money that appellant distributed from various bank accounts, appellant's payment of M.L.'s bills after they were divorced, and the lack of evidence in the record showing that appellant ever made a maintenance payment to M.L.

These findings, which are supported by the record, are sufficient for the district court's determination that appellant intentionally and in bad faith gave away his assets to

avoid his maintenance obligation, making a continued maintenance obligation not unreasonable or unfair. Because the district court balanced the fact that appellant involuntarily lost his employment against the fact that appellant intentionally and in bad faith gave away assets, it did not abuse its discretion by lowering, rather than terminating, appellant's maintenance obligation despite the change in the parties' incomes.[4]

B. The district court did not erroneously consider non-income-producing assets.

Turning to appellant's argument that the district court erred because it considered non-income-producing assets, we conclude that it lacks merit. In general, maintenance payments come from "future income or earnings." Minn. Stat. § 518.003, subd. 3a (2020). The district court found that appellant deliberately and in bad faith gave away sizeable income-producing assets in his settlement agreement with M.L. An obligor cannot, in order to avoid a maintenance obligation, voluntarily liquidate a capital asset if it will diminish his future earning capacity. *See Sieber v. Sieber*, 258 N.W.2d 754, 757 n.2 (Minn. 1977). Further, the supreme court has held that district courts can rely on the income-producing potential of assets belonging to an *obligee* when determining maintenance and can even require obligees to reinvest assets in a way that would produce more income. *Curtis v. Curtis*, 887 N.W.2d 249, 253 (Minn. 2016); *see also Honke*, 960 N.W.2d at 269 (requiring district courts "to consider whether the principal of post-dissolution cash gifts is a source

[4] Regarding respondent's argument that appellant forfeited his challenge to the district court's finding of bad faith by failing to address the district court's findings in his briefing, we do not need to decide the forfeiture issue because the findings are supported by the record.

of income available for a maintenance recipient's self-support"). Though *Curtis* and *Honke* deal with an obligee's, and not an obligor's, self-limiting of earnings or income, the principle logically applies to both situations and supports the conclusion that appellant's intentional giving away of income-producing assets to avoid his maintenance obligation made a continued maintenance obligation not unreasonable or unfair.

Moreover, appellant cannot now complain that the district court failed to rule in his favor when he did not provide the evidence to fully address the issue, especially when he carried the burden of proof to terminate maintenance. *See Kielley*, 674 N.W.2d at 779; *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating, in a child-support appeal, that, "[o]n appeal, a party cannot complain about a district court's failure to rule in her favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question"), *rev. denied* (Minn. Nov. 25, 2003). The district court found that appellant "intentionally withheld discovery documents" from respondent "to hide his dissipation" and that appellant "acted in bad faith in responding to [respondent's] discovery requests." Because "[a] party has a duty to supply financial information" to the district court and "[f]ailure to do so justifies adverse inferences," it was valid for the district court to consider appellant's refusal to fully and in good faith participate in discovery when determining whether to modify his maintenance obligation. *Spooner v. Spooner*, 410 N.W.2d 412, 413 (Minn. App. 1987); *see also Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (holding that a district court may consider a party's failure to provide financial documentation when determining whether to modify maintenance).

C. The district court did not err by considering nonmarital property.

Finally, appellant's argument that the district court erred by considering appellant's nonmarital property is without merit. District courts can consider income realized from nonmarital property when calculating an obligor's ability to pay spousal maintenance. *See Lee v. Lee*, 775 N.W.2d 631, 632 (Minn. 2009) (holding that the district court can consider pension payments derived from benefits earned by the obligor prior to and subsequent to marriage to the obligee when calculating a maintenance obligor's ability to pay maintenance, while also holding that pension payments derived from benefits earned by the obligor during the marriage and previously awarded to the obligor as marital property could not be considered when determining his ability to pay maintenance).

In sum, the district court did not abuse its discretion when it denied appellant's motion to terminate his maintenance obligation and instead reduced his obligation.

II. The district court did not abuse its discretion by ordering appellant to pay conduct-based attorney fees.

Appellant argues that the district court abused its discretion by ordering him to pay conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1 (2020). District courts may, in their discretion, award "additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1.[5] The party moving for attorney fees has the burden to show that the

[5] Because neither party has questioned whether Minn. Stat. § 518.14, subd. 1, provides a substantive basis for awarding conduct-based attorney fees, we assume without deciding that the statute does provide a substantive basis. *See Madden*, 923 N.W.2d at 702; *Geske v. Marcolina*, 624 N.W.2d 813, 818 n.5 (Minn. App. 2001) (discussing conduct-based attorney fees).

conduct of the other party warrants an award. *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The district court must make findings that explain the basis for an award of conduct-based attorney fees. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). The award of conduct-based attorney fees is reviewed for an abuse of discretion. *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014).

The district court did not abuse its discretion by ordering appellant to pay respondent attorney fees she incurred between August and December 2020. The district court explained that it awarded respondent conduct-based attorney fees because it found that respondent was compelled to move the court to enforce appellant's maintenance obligation, that appellant permitted his life-insurance policy to lapse, and that appellant failed to fully respond to respondent's discovery requests. The discovery issues alone were sufficient to justify the district court's decision to award conduct-based attorney fees because the findings related to discovery delay show that appellant "unreasonably contribute[d] to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1; *cf. Rask v. Rask*, 445 N.W.2d 849, 855 (Minn. App. 1989) (affirming an award of conduct-based attorney fees under Minn. Stat. § 518.14 (1988) because a party "refused to cooperate in discovery"). The district court's award of conduct-based attorney fees was not an abuse of discretion.

Affirmed.