STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0263

In re the Marriage of:
Jeannine Colleen Scott Salchow, n/k/a Jeannine Colleen Farnsworth,
Respondent,

vs.

Kenneth Joe Salchow, Jr.,
Appellant.

Filed April 4, 2022
Affirmed
Bratvold, Judge

Dakota County District Court
File No. 19AV-FA-19-2662

John DeWalt, Melissa Chawla, DeWalt, Chawla + Saksena, LLC, Minneapolis, Minnesota; and

Lyndsay J. Howard, Howard Family Law, LLC, Eagan, Minnesota (for respondent)

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

Diane Kaer, Kaer Law P.C., Apple Valley, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Slieter, Judge; and Kirk, Judge.*

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal from a final judgment and decree awarding permanent spousal maintenance, appellant first argues the district court abused its discretion because it awarded spousal maintenance in an amount that exceeded respondent's reasonable expenses. Second, appellant argues the district court abused its discretion by awarding respondent $25,000 in need-based attorney fees and $5,000 in conduct-based attorney fees. We affirm.

FACTS

Appellant-husband Kenneth Joe Salchow Jr. and respondent-wife Jeannine Colleen Farnsworth married December 11, 1999. In September 2019, wife petitioned for divorce. Wife moved for temporary relief under Minn. Stat. § 518.131 (2018), requesting temporary spousal maintenance and need-based attorney fees. The district court awarded wife $3,216 per month in temporary spousal maintenance and $6,000 in need-based attorney fees.

The parties sold their marital homestead, divided the proceeds, and agreed on division of marital property. The parties were unable to "resolve the issues related to spousal maintenance and attorney fees." The district court issued partial stipulated findings of fact, conclusions of law, and order for judgment and decree of dissolution of marriage (July partial judgment) and set the unresolved issues for trial.

On August 27, 2020, a three-day trial began, and wife, husband, and three experts testified. Husband's vocational expert opined about wife's earning capacity, and husband and wife each offered testimony by financial experts analyzing the "historical spending and

cash flow" during marriage. Following trial, the district court issued findings of fact, conclusions of law, and order for judgment and judgment and decree addressing the unresolved issues (October judgment).

Relevant to the issues on appeal, the district court found husband's gross monthly income was $20,559 based on husband's annual gross income and bonus income. While the district court found husband also received restricted stock units (RSUs) as compensation, the district court did not include RSUs in husband's income because husband's receipt of the RSUs was subject to his employer's discretion. The district court found husband's monthly budget of $8,024 to be reasonable.

The district court found wife's gross monthly income was $3,487. After receiving wife's monthly budget of $7,200 and reviewing husband's challenges to wife's budget, the district court found that "[i]n light of the marital standard of living, Wife's monthly expenses totaling $6,405 per month is reasonable." Based on wife's income and reasonable needs, the district court determined wife was "unable to provide adequate self-support, after considering the standard of living established during the marriage." The district court ordered, "Husband shall pay Wife $4,050 per month as and for permanent spousal maintenance."

In resolving the attorney-fee dispute, the district court found that "the requested fees are necessary for the good faith assertion of Wife's rights," and that "Husband has the ability to make payment on Wife's attorney's fees and costs" due to his RSU compensation, "which [was] not [] included in Husband's income for purposes of payment of spousal maintenance." The district court also found wife lacked "the ability to make payment on

her attorney's fees." The district court ordered, "Husband shall pay Wife $25,000 as and for need-based attorney fees and costs."

Husband moved for amended findings, challenging the district court's findings related to wife's reasonable expenses, wife's earning capacity, and husband's financial expert's analysis. Wife opposed husband's motion and asked for need-based and conduct-based attorney fees.

In a February 2021 order and judgment, the district court considered each of husband's challenges and amended one finding of fact on the scope of husband's financial expert's analysis. The district court denied husband's other requests for amended findings. The district court granted wife's request for conduct-based attorney fees after finding husband "sought to amend a number of findings that were clearly contrary to his trial position, contrary to his expert reports submitted at trial and/or [that] are a clear misstatement of the record evidence or the Court's actual findings." The district court awarded wife $5,000 for conduct-based attorney fees because husband's "motion ha[d], in part, unnecessarily contributed to the length and delay in this proceeding."

Husband appeals.

DECISION

I. The district court did not abuse its discretion in the amount awarded for spousal maintenance.

Appellate courts review a district court's broad discretion in a spousal-maintenance decision for an abuse of discretion. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). A district court abuses its discretion if it resolves the matter in a manner "that is against logic

and the facts on record." *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016) (quoting *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997)). We review legal questions de novo and factual findings for clear error. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *rev. denied* (Minn. Aug. 21, 2007). Factual findings are clearly erroneous if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quotation omitted).

A district court may order spousal maintenance if it finds that the spouse requesting maintenance

> (a) lacks sufficient property . . . to provide for reasonable needs of the spouse considering the standard of living established during the marriage . . . or
>
> (b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment . . . .

Minn. Stat. § 518.552, subd. 1 (2020); *see also Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (stating that an award of spousal maintenance requires a showing of need).

The district court may award spousal maintenance "in amounts and for periods of time, either temporary or permanent," as it deems just and after considering "all relevant factors," including: (1) "the financial resources of the party seeking maintenance" and their ability to meet financial needs without maintenance; (2) the time necessary for the spouse to acquire training or education to enable them to "find appropriate employment" and the probability of the spouse becoming self-supporting; (3) "the standard of living established during the marriage"; (4) "the duration of the marriage"; (5) the "loss of earnings" and "employment opportunities forgone by the spouse seeking spousal maintenance"; (6) the

age and condition of the spouse seeking maintenance; (7) "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance"; and (8) each spouse's contribution to the value of marital property. Minn. Stat. § 518.552, subd. 2 (2020). "No single factor is dispositive, and the district court must weigh the facts of each case to determine whether maintenance is appropriate." *Kampf*, 732 N.W.2d at 634.

Husband argues the district court clearly erred in four findings of fact underlying the amount of spousal maintenance: (A) wife's reasonable need for rent or mortgage payments; (B) wife's reasonable need for storage-facility payments; (C) wife's reasonable need to repay her student loan; and (D) wife's reasonable need for retirement savings. We address each argument in turn.

A. Mortgage or rent

The district court found wife's reasonable monthly housing expense was $1,807. Husband argues this finding is "entirely speculative as to when, if ever, Wife will incur her projected housing expense." Husband points out that during the eight months "after the trial court awarded Wife temporary spousal maintenance so that she could live independently of her mother," wife did not move out from her mother's apartment. Husband is correct that wife has been living with her mother in a one-bedroom apartment, sleeping on the sofa.

Husband argues the district court's error is like the error corrected in *Rask v. Rask*, 445 N.W.2d 849 (Minn. App. 1989). In *Rask*, the district court included a $610 mortgage payment in determining respondent-wife's reasonable monthly needs, relying on the

"estimate[]" provided by respondent-wife. *Id.* at 854. This court held that "[s]ince there is no evidence in this record concerning when or whether respondent will begin incurring the mortgage expense, we hold that the trial court erred by including this amount as part of respondent's monthly needs." *Id.*

Rask does not guide our analysis, however, because the spouse awarded maintenance in *Rask* did not produce evidence of the mortgage payment. *Id.* In contrast, this record includes evidence supporting wife's reasonable need to pay rent or mortgage payments and the amount. The district court credited wife's testimony about the cost of renting a one-bedroom apartment in Dakota County along with two exhibits. The district court also noted husband's monthly budget included $2,895 for renting a two-bedroom apartment, recognizing husband needed "an additional room for a home office." The district court found that $1,807 per month for a one-bedroom apartment for wife was "reasonable in light of the marital standard of living."

Wife's delay in securing a one-bedroom apartment does not mean the expense is unreasonable. The district court acknowledged wife's testimony that she did not move from her mother's apartment after the temporary maintenance award "[b]ecause [she] can't afford it. All [her] extra money has gone to paying [her attorney]." Because the district court's findings rest on record evidence, the district court did not clearly err by finding wife's reasonable monthly expense for rent or mortgage payments was $1,807.

B. Storage

The district court found wife's reasonable monthly storage expense was $603. The district court noted that the historical spending report prepared by husband's expert

supports $603 per month for storage "in at least five of the nine months analyzed." Husband argued during trial the amount should be reduced to $177 per month, but the district court found "[t]here is no credible evidence to support Husband's proposed budgetary figure of $177." In his motion to amend and on appeal, husband argues wife's reasonable needs do not include both rent *and* storage, citing wife's affidavit in support of her motion for temporary spousal maintenance, where she stated she would "not have [a storage] expense ONCE [she has] a residence." In its order denying husband's motion to amend, the district court found that wife's "testimony supports that even if she has a one-bedroom apartment, she will still need storage facilities."

Husband argues the district court's storage-expense finding is not supported by the record. We are not convinced. Wife testified her storage units contained personal items after the sale of the marital home, including "everything from the kitchen to [her] sewing room stuff to living room to bathroom," furniture, and clothing. Wife also submitted exhibits establishing the cost of one-bedroom apartments in Dakota County. The district court appears to have inferred that wife "will still need storage facilities" because of the amount in storage and the size of apartment wife was contemplating.

We review a district court's findings of fact for clear error. *Kampf*, 732 N.W.2d at 633. "[T]he clear-error standard does not contemplate a reweighing of the evidence, inherent or otherwise; it is a review of the record to confirm that evidence exists to support the [district court's] decision." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 222 (Minn. 2021).

We discern no clear error. The district court relied on record evidence to support its inference about wife's continuing need for storage. The district court noted that "modification may occur in the future . . . if other budgetary issues resolve." Because "an appellate court's duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the [district court's] decision," *id.* (quotation omitted), we conclude the district court did not clearly err by finding wife has a continuing need for storage.

C. Student loan

The district court found wife's reasonable monthly student-loan expense was $314. In the July partial judgment, the district court allocated this student-loan debt to wife. In the October judgment, the district court found wife would begin payments on this loan in September 2020. Husband argues this finding lacks record support because the July partial judgment setting out the property division included wife's stipulation that the debt "may be forgiven." Husband insists that "[i]t is pure speculation if Wife will ever have to make a payment of $314 a month."

We are not persuaded. As the district court stated, wife "provided documentary evidence" that payments on the loan were to begin in September 2020, and "Husband provide[d] no current credible evidence to refute Wife's testimony and evidence that the payments are to begin in September 2020." The district court also noted that modification may be appropriate and specifically identified the "satisfaction of the [student] loan" as a reason for modification.

Still, husband argues the district court erred in determining the debt amount because forbearance on the loan was extended. Husband cites information outside the record to support this argument. But an appellate court "cannot base its decision on matters outside the record on appeal." *Mitterhauser v. Mitterhauser*, 399 N.W.2d 664, 667 (Minn. App. 1987); *see also Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) ("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."). "The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01.

Husband acknowledges his argument rests on facts outside the record and asks this court to take judicial notice of the loan forbearance. "An appellate court may take judicial notice of a fact for the first time on appeal." *Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. App. 1987) (taking judicial notice of district court order in a related proceeding). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(b).

Even if we were to take judicial notice of the loan forbearance, this fact does not persuade us that the district court erred. Forbearance does not mean the loan has been forgiven. Husband does not dispute that, as a result of these dissolution proceedings and the July partial judgment, wife is responsible for this student loan. Thus, the district court did not clearly err by finding wife has a reasonable monthly student-loan expense of $314.

D. Retirement savings

The district court determined wife's expense of $350 a month for retirement savings was reasonable and "consistent with the marital standard of living" because "the cash flow analysis reflects that the parties historically contributed the statutory maximum retirement contribution to Husband's 401(k)." Husband argues this finding is clearly erroneous because "Wife, during the marriage, objected to Husband's 401(k) savings, viewing it as money that they could spend." In denying husband's motion to amend, the district court reasoned "retirement planning and savings was an integral part of the marital standard of living."

The district court relied on the historical cash-flow analysis provided by husband's expert, who opined the parties "contributed the statutory maximum" to retirement. In *Kampf*, this court held that including retirement savings in a spouse's monthly expenses to determine spousal maintenance was reasonable because "the parties' savings and retirement planning were an integral part of their standard of living during the marriage." 732 N.W.2d at 634. Here, the district court's analysis parallels *Kampf*. The record established that wife's request for $350 a month for retirement savings was "consistent with the marital standard of living."

Because the district court's finding is supported by record evidence, we conclude the district court did not abuse its discretion by including $350 a month for retirement savings in its award of permanent spousal maintenance.

II. The district court did not abuse its discretion by awarding attorney fees.

A. Need-based fees

Appellate courts review a district court's award or denial of need-based attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). A district court shall award attorney fees 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 . . . are sought has the means to pay them; and
>
> (3) that the party to whom fees . . . are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2020). A lack of findings on the statutory factors for a need-based-fee issue is not fatal when review of the district court's order reasonably implies that the district court considered the relevant factors, was familiar with the history of the case, and had access to the parties' financial records. *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001).

The district court awarded wife $25,000 in need-based attorney fees. Husband does not dispute the district court's determination that wife's fees are necessary for the good-faith assertion of her rights or that she lacked the means necessary to pay attorney fees. Husband contends the district court erred by finding he could pay the attorney fees based on his RSU income. First, husband points to the district court's finding that he has an $81 monthly shortfall based on income, his reasonable expenses, and the marital

standard of living. Husband also relies on the district court's decision not to use RSU income when calculating husband's monthly income.

Still, husband testified his employer pays RSU income quarterly, and he has used RSU income to pay off debt in the past. In the July partial judgment, the parties stipulated to husband's RSUs having a value of $4,197, and the October judgment found that the husband's RSU income from 2016 through 2019 ranged from $37,227 to $97,420 annually. The district court found that by February 28, 2020, husband had received $14,165.92 in RSU income for the year. Because record evidence establishes husband's RSU income is sufficient to pay for wife's attorney fees, the district court did not abuse its discretion by determining that husband has the means to pay $25,000 in need-based attorney fees.

B. Conduct-based fees

We review an award of conduct-based attorney fees for an abuse of discretion. *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). Minn. Stat. § 518.14 (2020) governs awards of attorney fees in family-law cases. "Nothing in [section 518.14] . . . precludes the court from awarding, in its discretion, 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. This court has recognized a district court's discretionary authority to award conduct-based attorney fees. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295-96 (Minn. App. 2007).

The district court awarded wife $5,000 in conduct-based attorney fees after finding that husband moved to amend "a number of findings that were clearly contrary to his trial

position, contrary to his expert reports submitted at trial and/or are a clear misstatement of the record evidence or the [district court's] actual findings."

Husband first argues that the district court lacked statutory authority to award conduct-based fees. But husband raises the issue of statutory authority for the first time on appeal. This court seldom considers issues raised for the first time on appeal. *Thiele*, 425 N.W.2d at 582. Even if we were to consider husband's argument, it is unpersuasive. Husband relies on a dissent from a supreme court order on the issue of conduct-based fees in a dissolution appeal. *Anderson v. Anderson*, No. A16-2006 (Minn. Aug. 6, 2018) (order for taxation of costs, disbursements, and attorney fees) (Gildea, C.J., dissenting). This court adheres to its own precedential opinions and the precedential opinions of the Minnesota Supreme Court. *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *rev. denied* (Minn. Sept. 21, 2010). A dissent is not a precedential opinion.

In the alternative, husband argues the district court abused its discretion by awarding conduct-based fees because husband did not unreasonably contribute to the length or expense of the proceeding. Husband also contends the district court's findings do not support the district court's award of conduct-based fees. We disagree. The district court made extensive findings in response to husband's motion to amend and commented that husband's "positions are more properly the purview of a motion to reconsider rather than the legal requirements supporting a good faith basis for a motion for amended findings." We conclude the district court did not abuse its discretion in making the conduct-based fee

award because the district court determined husband's motion to amend unreasonably contributed to the length and expense of the proceedings.

Affirmed.