COLORADO COURT OF APPEALS

DATE FILED: September 19, 2019
CASE NUMBER: 2018CA271

Court of Appeals No. 18CA0271
Arapahoe County District Court No. 17DR30324
Honorable Frederick T. Martinez, Judge

In re the Marriage of

Sepideh Zareparsi,

Appellee,

and

Robert W. Burman,

Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE TOW
Richman and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 19, 2019

Sherman & Howard L.L.C., Mechelle Y. Faulk, Elizabeth A. Ford, Denver, Colorado, for Appellee

Hinds and Hinds Family Law, P.C., Nathan M.J. Dowell, Greenwood Village, Colorado, for Appellant

¶ 1 In this dissolution of marriage proceeding, Robert W. Burman (husband) appeals the district court's maintenance and attorney fee awards. We reverse and remand for further proceedings.

I. Relevant Facts

¶ 2 Husband and Sepideh Zareparsi (wife) have two children. In 2009, wife, a geneticist, quit her job so she could stay at home with the then-two-year-old children. She testified that she earned her highest salary of $73,839 the year before she quit working.

¶ 3 At permanent orders, wife requested $15,629 in monthly maintenance for eight years. She testified that the $9000 she received from husband as temporary maintenance had been insufficient to meet her needs during the proceedings.

¶ 4 Wife testified that she could not work full-time because one of the parties' two children required extensive care. She further explained that while she could work two-thirds time for $40,000 annually, she would need additional training and education before re-entering the workforce.

¶ 5 Husband argued that wife did not need maintenance because she could immediately earn between $10,582 and $12,000 per month. However, he suggested that a reasonable maintenance

award to wife would be either $4960 or $5615 per month, based on his calculations.

¶ 6 The district court found that wife could earn $3750 per month working, for example, in a post-doctoral fellowship while she upgraded her skills and knowledge. It found that husband earned $39,135 per month as a radiologist. Using these incomes, the district court calculated maintenance per the advisory guidelines within section 14-10-114(3)(b)(I)-(II), C.R.S. 2017, and ordered husband to pay wife $13,404 in monthly maintenance for eight years.

¶ 7 Based on this same disparity of income, and noting wife's unemployment at the time of the hearing, the district court ordered husband to pay $32,530 of wife's attorney fees.

II. Maintenance Calculation

¶ 8 Husband argues that the district court erred by relying on the advisory guideline term and amount of maintenance. Because we agree in part, we reverse the maintenance award and remand for further proceedings.

A. Applicable Authority

¶ 9 Section 14-10-114 sets forth a multi-step procedure the district court must follow when determining whether to award maintenance. As relevant here, the second step in that process is for the district court to determine the advisory guideline amount and term of maintenance, if applicable, based upon the duration of the marriage and the parties' combined gross incomes. § 14-10-114(3)(a)(II), (b). At the time of the district court's order, the advisory guidelines applied when "the parties' combined, annual adjusted gross income does not exceed the greater of two hundred forty thousand dollars or the uppermost limits of the schedule of basic child support obligations . . . ." § 14-10-114(3)(b), C.R.S. 2017.[1] The uppermost limits of the child support obligations at the time were, and remain, $360,000. § 14-10-115(7), C.R.S. 2019.

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[1] In 2018, the legislature amended the statute to eliminate the alternative cap established by the child support guidelines, and stated in even more unequivocal language that the advisory guidelines for determining the amount of maintenance do not apply to parties whose income exceeds the cap. Ch. 251, sec. 1, § 14-10-114(3)(b), (3.5), 2018 Colo. Sess. Laws 1544–45. Thus, the application of the advisory maintenance guidelines is now limited to parties whose combined gross income does not exceed $240,000. § 14-10-114(3.5), C.R.S. 2019.

¶ 10 However, because the parties' combined adjusted gross income exceeded $360,000, the advisory guideline did not apply. Instead, the district court was required to consider "[t]he factors relating to the amount and term of maintenance set forth" in section 14-10-114(3)(c). § 14-10-114(3)(a)(II)(B). Section 14-10-114(3)(c) provides a list of thirteen factors relevant to a maintenance determination.

¶ 11 We review de novo whether the district court applied the correct legal standard. *LaFond v. Sweeney*, 2015 CO 3, ¶ 12.

B. Analysis

¶ 12 The district court's $13,404 monthly award was premised solely on its maintenance worksheet, which, in turn, calculated the advisory guideline amount per section 14-10-114(3)(b), C.R.S. 2017. But because the parties' combined income exceeded $360,000 per year, the advisory guideline calculation procedure did not apply. Instead, the district court should have based its maintenance award on its findings under subsections (3)(c) and (3)(d).

¶ 13 We recognize that the district court orally addressed most of the relevant factors provided in section 14-10-114(3)(c). For example, the district court found that husband was "at the top of his game" and historically earned a higher income than wife, while

wife had been out of work, and needed to transition to her new residence in California and reintegrate into the workplace. *See* § 14-10-114(3)(c)(I)-(II) (court must consider spouses' respective financial resources); § 14-10-114(3)(c)(VI) (court must consider whether one party has historically earned higher or lower income). The district court also discussed the parties' lifestyle and standard of living during the marriage, at least to the extent the parties had presented any evidence on that issue. However, while the findings the district court made certainly support its decision to award maintenance in the first instance, they do not explain the basis for the $13,404 amount.

¶ 14 Had the court offered reasons why its subsection (3)(c) findings correlated to the $13,404 award — such as finding that amount necessary for wife to pay her monthly expenses — we might have reached a different conclusion. But the court solely relied on the advisory guidelines to calculate the maintenance amount, which, under subsection (3)(b), it was not permitted to do.

¶ 15 The statute does not reveal precisely why the legislature elected to make the advisory guideline amount inapplicable to high-income families. Perhaps the concern was the possibility that

maintenance awards under this calculation would be too high; however, it is equally likely that the concern was just the opposite — that consideration of the advisory guideline maintenance amount in these scenarios would set the anchor, so to speak, at a figure below what would be appropriate for the receiving spouse.[2] Thus, we do not consider the error to have been harmless.

¶ 16 We therefore reverse the award and remand for the district court to reconsider wife's maintenance request. Because maintenance awards are based on the parties' financial circumstances when such orders are entered, the district court may take additional evidence of changed financial circumstances as it deems appropriate. *In re Marriage of Kann*, 2017 COA 94, ¶ 79. For similar reasons, the district court must follow the steps outlined in the current statute to determine an appropriate maintenance award.

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[2] In making this observation, we do not intend to suggest that the amount of maintenance ordered by the district court in this case was either too high or too low. The error here lies not in the precise number, but in how it was derived. We express no opinion on whether, upon full consideration of the statutory factors, the appropriate amount of maintenance will be lower, higher, or approximately the same as originally ordered.

C. Other Considerations

¶ 17 We briefly address husband's other contentions, which may arise on remand.

¶ 18 (1) Husband argues that the court did not determine wife's reasonable monthly needs. We agree and direct the court to make such a finding on remand. *See* § 14-10-114(3)(a)(I)(D), C.R.S. 2019 (court shall consider reasonable financial need as established during the marriage); § 14-10-114(3)(c)(I) (court shall consider the ability of the recipient spouse to meet his or her needs independently).

¶ 19 (2) Husband argues that the court failed to find that wife required maintenance. Under section 14-10-114(3)(d),

> the court shall award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it inappropriate for the spouse to be required to seek employment outside the home.

¶ 20 We presume from the court's decision to award maintenance that it implicitly made these findings. *See In re Marriage of Nelson*,

2012 COA 205, ¶ 41 (acknowledging that, though it is better practice to make explicit findings, implied findings are sufficient). Even so, as the case is being remanded in any event, we direct the court on remand to enter more specific findings under section 14-10-114(3)(d).

¶ 21 (3) Husband argues that the court should have considered wife's future income. We disagree, because "[a]wards of maintenance must be based upon the parties' needs and circumstances at the time of the hearing, rather than upon their past or future conditions." *In re Marriage of Simon*, 856 P.2d 47, 51 (Colo. App. 1993).

¶ 22 (4) Husband argues that the court erred by following the advisory guideline to determine the term of maintenance — that is, the length of the maintenance period. While it may have been error to do so in the initial order, it would not be error for the district court to do so on remand. *See* § 14-10-114(3.5) (permitting consideration of the advisory guideline term of maintenance even if the joint income exceeds the statutory cap).

¶ 23 (5) Husband argues that the court erred because it did not (a) reserve jurisdiction over maintenance under section 14-10-114(3)(g)

and *In re Marriage of Caufman*, 829 P.2d 501, 504 (Colo. App. 1992); or (b) award an incrementally decreasing maintenance award. Husband did not raise these arguments at permanent orders, so we need not address them. *See In re Marriage of Garrett*, 2018 COA 154, ¶ 35. Nevertheless, the court may, in its discretion, entertain these options on remand.[3] *See id.*

¶ 24 (6) Husband appears to argue that section 14-10-122, C.R.S. 2019, unfairly places the burden on him to seek a maintenance modification when wife's financial circumstances change. This argument is more appropriately directed to the legislature. *See Dove Valley Bus. Park Assocs., Ltd. v. Bd. of Cty. Commr's*, 945 P.2d 395, 403 (Colo. 1997) ("Absent constitutional infringement, it is not [the reviewing court]'s province to rewrite the statutes."); *Keel v.*

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[3] That being said, we reject husband's implication that he is *entitled* to either approach. The cases he relies on in support of his request for incremental decreases in maintenance (*In re Marriage of Sim*, 939 P.2d 504 (Colo. App. 1997)) and for the court to reserve jurisdiction to address the contingency of wife's future increase in income (*In re Marriage of Fisher*, 931 P.2d 558 (Colo. App. 1996) and *In re Marriage of Caufman*, 829 P.2d 501 (Colo. App. 1992)) merely provide that the use of these tools is within the district court's discretion. If the district court has discretion to use such tools, it necessarily has discretion to decline to use them as well.

Indus. Claim Appeals Office, 2016 COA 8, ¶ 46 (reviewing court does not amend statutes; that is the legislature's prerogative).

¶ 25 (7) Husband argues that a change in the maintenance award may require a change in the child support obligation. He is correct, and the court on remand may need to reconsider the child support award based on the award of maintenance, if any, to wife. *See* § 14-10-115(5)(a)(I)(Y), (5)(a)(I.5); *see also In re Marriage of de Koning*, 2016 CO 2, ¶ 22 (noting that maintenance award calculation precedes child support determination).

III. Attorney Fee Award

¶ 26 Husband contends that the court erred by making him pay $32,530 of wife's attorney fees. We need not address this argument, because the attorney fees award must be reconsidered in light of the new maintenance award. *See In re Marriage of Huff*, 834 P.2d 244, 248 (Colo. 1992) (attorney fee award must be reviewed in light of any maintenance award); *see also In re Marriage of Wormell*, 697 P.2d 812, 815 (Colo. App. 1985) (maintenance and attorney fees are inextricably intertwined).

¶ 27 However, to the extent it may arise on remand, we address husband's argument that the attorney fees were improperly allocated as a marital debt.

¶ 28 Debts incurred during the marriage but which are dissolution litigation costs should be allocated under section 14-10-119, C.R.S. 2019. *See In re Marriage of Burford*, 26 P.3d 550, 559 (Colo. App. 2001).

¶ 29 Because wife incurred the $32,530 in litigation costs during the marriage, they should not have been included as part of the property division. Yet, it appears that the court may have twice awarded the $32,530 — once as attorney fees to wife under section 14-10-119, and again as a debt to wife on the marital property spreadsheet.

¶ 30 Contrary to wife's argument, simply removing the amount from the property spreadsheet does not leave the parties with an equal property division. Removing the debt leaves wife with $32,530 more of the marital estate, when the intent of the court's order appears to have been an equal property division.

¶ 31 Regardless, the court on remand needs to clarify this discrepancy and, if necessary, modify the property division to

ensure that wife's litigation costs are not part of the marital property division. This nominal reconsideration will not affect the remainder of the property division. And if the court on remand again determines that wife is entitled to have husband pay some of the attorney fees she incurred during the marriage, it should not allocate them as a marital debt. *See id.*

IV. Appellate Attorney Fee Request

¶ 32 Wife's request for an award of appellate attorney fees under section 14-10-119 should be addressed on remand. *See Kann*, ¶ 84 (holding that district court is better equipped to resolve the factual issues associated with an appellate attorney fee request).

V. Conclusion

¶ 33 The judgment is reversed, and the case remanded for the court to reconsider the maintenance and attorney fee awards, and, if necessary, child support, and to consider wife's appellate attorney fee request.

JUDGE RICHMAN and JUDGE HARRIS concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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