

19CA0558 Marriage of Karsten 06-25-2020

COLORADO COURT OF APPEALS

DATE FILED: June 25, 2020
CASE NUMBER: 2019CA558

Court of Appeals No. 19CA0558
Jefferson County District Court No. 18DR30468
Honorable Christopher C. Zenisek, Judge

In re the Marriage of

Tammy D. Karsten,

Appellant,

and

Louis G. Karsten,

Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE FOX
Navarro and Brown, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 25, 2020

Elizabeth Henson Mediator PC, Elizabeth Henson, Greenwood Village,
Colorado, for Appellant

Bradley Devitt Haas & Watkins, P.C., Andrew D. Haas, Kelci L. Sundahl,
Golden, Colorado, for Appellee

¶ 1 In this dissolution of marriage case between Tammy D. Karsten (wife) and Louis G. Karsten (husband), wife appeals the spousal maintenance and attorney fees portions of the district court's permanent orders. We reverse and remand the case to the district court for further proceedings.

I. Background

¶ 2 In 2018, wife petitioned to dissolve the parties' twenty-two-year marriage. At that time, wife was fifty-seven years old and husband was fifty-two years old.

¶ 3 During the marriage, husband owned and operated a business called Karsten Electrical Services LLC. He organized the business as an S-corporation for tax purposes, and the parties stipulated to a joint expert, who valued it at \$680,000.

¶ 4 Wife cared for the parties' three children, two of whom are now emancipated, and worked part-time for the business.

¶ 5 At the time of the permanent orders hearing, the parties had already divided their marital property and debts. The only issues that remained by the time of the permanent orders hearing related to maintenance and attorney fees. The district court found that husband's monthly income was \$13,563 and wife's was \$2730. The

court then ordered husband to pay wife monthly maintenance of \$3787 for ten years¹, denied wife’s request to require husband to guarantee his maintenance obligation with a life insurance policy, and declined to award attorney fees to wife.

¶ 6 After the district court denied her motion for post-trial relief, wife appealed.

II. Maintenance

A. Husband’s Income

¶ 7 Wife first contends that the district court erred in its maintenance award because it improperly determined husband’s income. We agree.

¶ 8 The district court has broad discretion in deciding the amount and duration of a maintenance award, and, absent an abuse of discretion, its decision will not be reversed. *See* § 14-10-114(2), (3)(e), C.R.S. 2019 (“The court has discretion to determine the award of maintenance that is fair and equitable to both parties based upon the totality of the circumstances.”); *see also In re*

¹ Because the dissolution petition predates January 1, 2019, the maintenance is taxable to wife and increases her tax liability. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017); *see also* § 14-10-114(3)(a)(I)(E), C.R.S. 2019.

Marriage of Wright, 2020 COA 11, ¶ 15; *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 14 (concluding that the revised statute intended “for the district court to retain broad discretion” over maintenance). The court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if it misapplies the law. *In Interest of Spohr*, 2019 COA 171, ¶ 32. We review de novo whether the court applied the correct legal standards to its findings of fact concerning maintenance. *In re Marriage of Thorstad*, 2019 COA 13, ¶ 27.

¶ 9 At the permanent orders hearing, wife, relying primarily on the business’s year-end profit and loss statement, argued that husband was earning \$346,745 per year or \$28,895 per month. Wife arrived at that amount by taking husband’s yearly wages from the business (\$127,487), plus the net income from the business itself (\$197,802), which had already accounted for his wages, and then adding the annual total for in-kind payments he received from the business (\$21,456).

¶ 10 The district court found that husband had “control over the [business] and significant discretion over how [it] [was] run and . . . the amount that [was] paid in salaries, including his own.” But in determining husband’s gross income, the district court rejected

wife's argument that the business's net income was also attributable to him. The court explained that a business "can have [net] income and not necessarily disperse it" because it may choose to reinvest the income for such things as "new materials . . . [,] new trucks, real estate, investments, [or] further benefits for employees."

¶ 11 In the end, the district court used husband's monthly wages of \$11,775, as reported in a payroll summary, and monthly in-kind health care payments of \$1788, to determine that his income was \$13,563 per month or \$162,756 per year. The court reasoned that wife's suggested yearly income of \$347,000 for husband did not match up with the parties' comfortable, but not lavish, lifestyle, or the business's agreed value of \$680,000.

¶ 12 On appeal, wife maintains that husband's gross income should have included his wages under section 14-10-114(8)(c)(I)(A), (B) and the business's net income under section 14-10-114(8)(c)(I)(W). Alternatively, she asserts that the district court erred in relying on his payroll summary instead of applying the formula for a self-employed spouse's income under section 14-10-114(8)(c)(III)(A). We agree that the court erred in relying on husband's payroll summary, which he had complete control over, in

determining his income as a self-employed business owner. We further conclude that the court should have instead applied the formula for determining a self-employed spouse's income under section 14-10-114(8)(c)(III)(A).

¶ 13 Our analysis requires us to interpret certain sections of the maintenance statute.

¶ 14 The interpretation of statutes is an issue of law we review *de novo*. *In re Marriage of Zander*, 2019 COA 149, ¶ 11 (*cert. granted in part* Apr. 13, 2020); *see* § 2-4-101, C.R.S. 2019. To interpret a statute, we always look first to the statute's plain language, giving words and phrases their plain and ordinary meaning. *Zander*, ¶ 12. We must read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all its parts. *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 973 (Colo. App. 2009). If the language is clear and unambiguous on its face, we apply the statute as written. *In re Marriage of Chalat*, 112 P.3d 47, 54 (Colo. 2005).

¶ 15 Section 14-10-114(3) details the process the district court must follow when considering a maintenance request. *Wright*, ¶ 13. The district court calculates maintenance based on a spouse's gross

income. § 14-10-114(3)(a)(I)(A); *Wright*, ¶ 14. Generally, gross income includes income from “any source.” § 14-10-114(8)(c)(I), (II) (listing income excluded from the definition of gross income for maintenance purposes). Gross income expressly includes “salaries,” “[w]ages,” and “income from general partnerships, limited partnerships, closely held corporations, or limited liability companies.” § 14-10-114(8)(c)(I)(A), (B), (W). And when, as here, a spouse is self-employed, his or her “‘gross income’ [from self-employment] equals gross receipts minus ordinary and necessary expenses . . . required to produce such income.” § 14-10-114(8)(c)(III)(A); *see In re Marriage of Gibbs*, 2019 COA 104, ¶ 11.

¶ 16 In our view, there is an important distinction between an employed spouse receiving a salary from a business under section 14-10-114(8)(c)(I)(A), (B) and a self-employed spouse receiving a discretionary salary from his or her own closely held business under section 14-10-114(8)(c)(I)(W), (III)(A). In the latter case, the district court must apply the formula in section 14-10-114(8)(c)(III)(A) to compute a self-employed spouse’s income for maintenance purposes. Because husband is self-employed and his income is derived from his business, of which he is the only owner,

his income is not automatically limited to the salary that he chooses to pay himself. Rather, the court was required to calculate husband's income from self-employment by using his business's "gross receipts minus ordinary and necessary expenses." *See id.*

¶ 17 That formula recognizes the fact that a self-employed spouse can manipulate his or her own compensation to avoid paying maintenance. It also addresses the district court's apparent concerns that businesses often choose to reinvest their income rather than paying it to their owners and that legitimate business expenses, including taxes, should not be ignored. If such expenses have historically been "ordinary and necessary . . . to produce such income," they can be appropriately deducted from the business's gross receipts before arriving at a self-employment income figure. § 14-10-114(8)(c)(III)(A).

¶ 18 Accordingly, we reverse this portion of the judgment and remand the case to the district court to recalculate husband's self-employment income under section 14-10-114(8)(c)(III)(A), as directed here, and then to redetermine maintenance. *See Spohr*, ¶ 32. The court should also allow the parties to present evidence of

their current economic circumstances on remand. *See Wright*, ¶ 24; *see also In re Marriage of Morton*, 2016 COA 1, ¶ 14.

B. Maintenance Duration

¶ 19 Because we remand the case for reconsideration of maintenance, we need not address wife's additional argument that the district court abused its discretion in setting the maintenance duration at only ten years. *See* § 14-10-114(3)(a)(I)-(II), (b), (c).

C. Life Insurance

¶ 20 Next, wife contends that the district court erred in denying her request to have husband secure the maintenance award by maintaining life insurance for wife's benefit. Because we cannot determine from the record the basis for the court's ruling, we instruct the court to revisit the issue and make additional and explicit findings on remand.

¶ 21 In its discretion, the district court may require the payor spouse to provide reasonable security for the payment of maintenance in the event of the payor spouse's death prior to the end of the maintenance term. § 14-10-114(6)(a); *see In re Marriage of Sim*, 939 P.2d 504, 508 (Colo. App. 1997). Reasonable security

may include obtaining life insurance for the benefit of the recipient spouse. § 14-10-114(6)(b).

¶ 22 The district court summarily denied wife's request that husband carry life insurance to cover his maintenance obligation. Because the court made no findings in support of its denial, we have no basis on which to review the ruling or determine whether the court abused its discretion. *See In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008) (remanding for additional, specific findings sufficient to give the appellate court a clear understanding of the basis of the district court's order and to enable the appellate court to determine the grounds upon which it reached its decision). Accordingly, the district court must make findings on remand explaining its decision. *See id.*

¶ 23 To the extent the issue may arise on remand, we reject wife's argument that when denying a request to guarantee future maintenance payments with life insurance, the district court was required to make findings addressing each of the factors under section 14-10-114(6)(b)(I)-(VI). Those factors apply only when the district court *grants* a request for life insurance. *See id.* ("In

entering an order *to maintain life insurance*, the court shall consider [the six factors].”) (emphasis added).

III. Attorney Fees in the District Court

¶ 24 Wife contends that the district court abused its discretion by not ordering husband to contribute to her attorney fees under section 14-10-119, C.R.S. 2019. Because we have already concluded that the court on remand must revisit the maintenance award, the court must also reconsider wife’s request for attorney fees on remand. *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).

IV. Appellate Attorney Fees and Costs

A. Section 14-10-119

¶ 25 Asserting that their financial resources are disparate, both parties ask for appellate attorney fees under section 14-10-119. *See In re Marriage of Gutfreund*, 148 P.3d 136, 141 (Colo. 2006) (section 14-10-119 empowers the court, after considering the

parties' financial resources, to equitably apportion costs and fees between them on relative ability to pay).

¶ 26 We direct the district court on remand to determine whether an award of appellate attorney fees under section 14-10-119 is appropriate after considering the parties' current financial resources. *See* C.A.R. 39.1; *In re Marriage of Durie*, 2018 COA 143, ¶ 50, *aff'd on other grounds*, 2020 CO 7.

B. Section 13-17-102

¶ 27 Husband seeks his appellate attorney fees under section 13-17-102, C.R.S. 2019, on the basis that wife's appeal is substantially frivolous, groundless, and vexatious. Because wife prevailed on appeal, we deny his request.

C. C.A.R. 39(a)(3)

¶ 28 Given our disposition, we grant wife's request for appellate costs. *See* C.A.R. 39(a)(3) ("[I]f a judgment is reversed, costs are taxed against the appellee."); C.A.R. 39(c)(2) ("A party who wants costs to be taxed in the appellate court must file an itemized and verified bill of costs with the clerk of the trial court.").

V. Conclusion and Remand Instructions

¶ 29 We reverse the maintenance portion of the judgment and remand the case for the district court to recalculate husband's income and reconsider wife's maintenance request under section 14-10-114. The court is further instructed to make the additional findings regarding wife's request that husband secure his maintenance payments through life insurance. The court shall reconsider wife's attorney fee request under section 14-10-119 in light of its reconsideration of maintenance and shall determine the parties' request for appellate attorney fees. Appellate costs will be assessed against husband under C.A.R. 39(a)(3).

JUDGE NAVARRO and JUDGE BROWN 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: March 5, 2020

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