18CA2249 Marriage of Coplin 03-12-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA2249
Jefferson County District Court No. 16DR31081
Honorable Diego G. Hunt, Judge

In re the Marriage of

Mariko Coplin,

Appellee,

and

William Coplin,

Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE LIPINSKY
Fox and Berger, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 12, 2020

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

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¶ 1 In their dissolution of marriage case, William Coplin (husband) and Mariko Coplin (wife) agreed that wife should receive an indefinite award of spousal maintenance. They disagreed as to the amount of the award, however. Wife proposed not less than $11,000, while husband suggested an award of $3000 or $5000. In a comprehensive ruling, the court awarded wife $10,000 per month, subject to modification "pursuant to statute and related authority." Husband appeals. We affirm.

I. Appellate Standard of Review

¶ 2 The district court has broad discretion to determine the amount and duration of a maintenance award. *In re Marriage of Tagen*, 62 P.3d 1092, 1095 (Colo. App. 2002); *see also* § 14-10-114(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."). Absent an abuse of discretion, we will not reverse a district court's maintenance award. We will not disturb a district court's maintenance order supported by competent evidence. *See In re Marriage of Lafaye*, 89 P.3d 455, 460 (Colo. App. 2003). However, we review de novo whether the district court applied the correct

legal standards. *See LaFond v. Sweeney*, 2015 CO 3, ¶ 12, 343 P.3d 939, 943.

II. "Reasonable Financial Need"

¶ 3 Husband contends that the district court's findings underlying the maintenance award lack record support and specificity, as the court did not determine the precise amount of wife's "reasonable financial need." He also argues that the court erred by disregarding wife's evidence of her expenses, relying instead on the expenses listed in his sworn financial statement (SFS). We discern no abuse of discretion.

A. Evidence

¶ 4 Wife's SFS, which she testified was accurate, reflected approximately $6800 in monthly expenses. Wife testified, however, that her SFS presented a "bare-bones" amount that did not account for income taxes or expected increases in housing costs, and did not reflect the expenses the parties had incurred to maintain their marital lifestyle. By contrast, husband's SFS identified $19,000 of monthly expenses.

¶ 5 Both parties introduced evidence concerning the marital lifestyle. Husband testified that the parties had a "good middle-

class lifestyle" and never wanted for anything. Wife testified that they had enrolled their now-adult children in after-school educational programs; husband frequently took partially reimbursable trips to medical conferences, including some held overseas; and she would take two- to three-week trips to Japan once every year to year and a half. Other record evidence showed that the parties owned timeshares in California and Hawaii; established accounts for their children totaling more than $150,000; provided at least one child with a car; and acquired pearls, emeralds, and an engagement ring.

B. Analysis

¶ 6 A district court addressing a maintenance request shall make an initial written or oral finding concerning the financial resources of each party, including, but not limited to, the actual or potential income from separate or marital property, and reasonable financial need as established during the marriage. § 14-10-114(3)(a)(I)(C)-(D). The district court shall also consider the financial resources of the payor spouse and the parties' lifestyle during the marriage. § 14-10-114(3)(c)(II)-(III).

¶ 7 We reject husband's argument that the court failed to "make a finding as to the specific dollar amount of [w]ife's needs as required by section 14-10-114(3)(a)(I)(D)." That section does not require such a specific finding.

¶ 8 Rather, what constitutes a party's reasonable needs is liberally construed and depends on the particular facts and circumstances of the parties' marriage. *In re Marriage of Yates*, 148 P.3d 304, 313 (Colo. App. 2006) ("The phrase 'reasonable needs' has been liberally construed, and determination of a spouse's reasonable needs is dependent on the particular facts and circumstances of the marriage."); *see In re Marriage of Thornhill*, 232 P.3d 782, 788 (Colo. 2010); *In re Marriage of Olar*, 747 P.2d 676, 681 (Colo. 1987). "Reasonable financial need" does not merely mean the minimum requirements to sustain life. *In re Marriage of Weibel*, 965 P.2d 126, 129 (Colo. App. 1998).

¶ 9 The court agreed with wife that her SFS reflected only a "bare-bones budget to meet her financial needs." It found that, because the parties enjoyed the benefit of husband's income while married, wife's expenses should be considered in light of that lifestyle. The court further found that husband's SFS reflected "the lifestyle the

parties enjoyed while they were married." The court noted that husband paid more than $10,000 per month on dining out, vehicles, the children, vacations, and travel. It also stressed that husband saved $2000 per month above the $3135 he contributed each month to his retirement savings. The court concluded that such expenses were "indicative of the types of expenses that the family regularly incurred" during the marriage.

¶ 10 By finding that husband's SFS more accurately reflected the parties' marital lifestyle than did wife's SFS, the court impliedly concluded that wife's "[r]easonable financial need as established during the marriage" fell somewhere between her stated needs of $6800 per month and husband's $19,000 monthly expenditures. *See In re Marriage of Nelson*, 2012 COA 205, ¶ 41, 292 P.3d 1214, 1221 (holding that a trial court's implied findings on maintenance are sufficient). The court did not err in reaching this conclusion. *See In re Marriage of Page*, 70 P.3d 579, 584 (Colo. App. 2003) (upholding maintenance award based upon an implicit conclusion that wife's reasonable needs were substantially less than she averred); *see also People in Interest of A.J.L.*, 243 P.3d 244, 249-50 (Colo. 2010) ("The credibility of witnesses, the sufficiency, probative

value, and weight of the evidence, and the inferences and conclusions to be drawn from it are within the trial court's discretion."). Nor did the court err in looking to husband's SFS to help it reach this determination.

¶ 11 Although we acknowledge that some of the expenses on husband's SFS do not relate to the marital lifestyle or correlate with wife's needs, because the record shows that the court equally considered wife's SFS and all relevant testimony on the issue, the court did not exceed its discretion in relying on husband's SFS. *See In re Marriage of Rose*, 134 P.3d 559, 561-62 (Colo. App. 2006) (a court may look to family spending practices as evidence of a party's reasonable needs). We decline to disturb the court's findings.

III. Investment Income

¶ 12 Husband contends that the district court erred by failing to include the investment income wife could realize on her share of the property division as part of her gross income for maintenance purposes. We disagree.

A. Evidence

¶ 13 Per the parties' agreement, the court awarded wife $765,514.60 in investment and retirement accounts. Husband's

expert testified that wife could generate $49,707 in interest each year with a 6.45% total return on this property division, or $38,533 with a 5% total return. Husband's expert further testified that, if wife chose to withdraw her qualified retirement assets as part of the dissolution, such withdrawal would be penalty-free because of her age. Wife's expert similarly testified that wife could withdraw the qualified retirement funds without being subject to a tax penalty.

B. Analysis

¶ 14 Section 14-10-114(3)(a)(I)(A) requires the district court to make initial oral or written findings determining each party's gross income. Income "means the actual gross income of a party," § 14-10-114(8)(a)(II), and "[g]ross income" includes income from any source, § 14-10-114(8)(c)(I). Gross income does not include earnings or gains on a retirement account unless a party takes a distribution from the account. § 14-10-114(8)(c)(II)(E). However,

> [i]f a party may take a distribution from the account without being subject to a federal tax penalty for early distribution and the party chooses not to take a distribution, the court may consider the distribution that could have been taken in determining the party's gross income.

Id.

¶ 15 We need not address husband's argument that the court erred in finding that, "although [wife] may draw from some of the accounts without penalty, given her age there are tax implications for doing so." But, even if the court erred in making this finding, and the evidence established that wife could make withdrawals from her retirement accounts without paying a penalty, it was still within the court's discretion not to include any such distributions as income to wife. *See id.*

¶ 16 Moreover, we are not convinced by husband's argument that wife's future distributions would be considered "income." For maintenance purposes, the parties' "financial circumstances must be assessed as of the date of the decree or the date of the hearing on disposition of property if such hearing precedes the date of the decree." *In re Marriage of de Koning*, 2016 CO 2, ¶ 28, 364 P.3d 494, 498; *see also In re Marriage of Wright*, 2020 COA 11, ¶ 24, ___ P.3d ___, ___ (maintenance is based on the parties' financial circumstances at the time the order is entered). "[A]s of the date . . . of the hearing," wife did not have any retirement accounts from which she was taking or could take distributions; all of the retirement accounts were in husband's name. *de Koning*, ¶ 28, 364

P.3d at 498. And while wife later received a significant share of those accounts as part of the property division, any future income she earned from that allocation did not reflect her "financial circumstances . . . as of . . . the date of the hearing." *Id.*

¶ 17 This conclusion does not mean that a district court may disregard future income when determining maintenance. To the contrary, section 14-10-114(3)(a)(I)(C) *requires* the court to make findings on "[t]he financial resources of each party, including but not limited to the actual *or potential* income from separate or marital property." (Emphasis added.) Section 14-10-114(3)(c)(I) further directs the court to consider, as a relevant factor to the amount and term of maintenance, "the actual *or potential* income from separate or marital property or any other source." (Emphasis added.) It is thus apparent that the legislature recognized the significance of a spouse's future income; however, it stopped short of defining such future income as "actual gross income" for purposes of the maintenance calculation.

¶ 18 The statute indicates that pension and retirement benefits "actually received" are income, while pension and retirement benefits arising from the property division are not.

§ 14-10-114(8)(c)(I)(H) (Gross income includes "[p]ension payments and retirement benefits actually received that have not previously been divided as property in this action . . . ."). Therefore, the statute is written in a way that encourages the court to consider a spouse's future financial resources and income, while recognizing that those resources are not determinative of the spouse's financial circumstances at the time of the decree or hearing.

¶ 19 Here, the court acknowledged that wife would realize significant returns on her property division, discussing the experts' testimony on the issue and husband's position that wife could pay her reasonable monthly expenses with just her income and investment income.

¶ 20 Even so, the court disagreed that wife should have to "tap into" the potential returns on the investments allocated to her to meet her needs. The court found that it was not only unreasonable under the circumstances to require wife to do so, but that it would, contrary to husband's argument, improperly require her to deplete her marital property before she qualified for maintenance. It is well settled that a spouse is not required to deplete his or her share of

the marital property to qualify for maintenance. *See, e.g.*, *In re Marriage of Nordahl*, 834 P.2d 838, 842 (Colo. App. 1992).

¶ 21 Yet husband avers there is a difference between a spouse relying on investment proceeds and having to spend down the principal of an asset. He argues that the former is not a depletion of the marital property. While husband's point is well-taken, we are not persuaded.

¶ 22 In *In re Marriage of Bartolo*, 971 P.2d 699, 700 (Colo. App. 1998), the court ordered the husband to balance its uneven property division by making a $110,857 cash payment to the wife. The court then awarded the wife $2500 in monthly maintenance. *Id.* The husband argued that the wife's receipt of the balancing payment was sufficient to provide her with living expenses for the next three to four years. *Id.* at 702. Another division of this court disagreed, concluding that, "since [the] wife should not be required to deplete her share of the marital property in order to qualify for maintenance, her receipt of the balancing payment cannot be viewed as a substitute for maintenance." *Id.*

¶ 23 The cash balancing payment at issue in *Bartolo* is no different from the future investment income at issue here. The income

derives from an asset that the wife received during the property division. If wife must turn to the property division to access the income she requires to provide for her needs, she is depleting her property before being entitled to maintenance. This concept does not differentiate between a spouse's invasion of the principal of an asset awarded and his or her reliance on income earned therefrom. It prohibits a spouse from having to use any part of the property awarded to meet his or her needs before receiving maintenance. Thus, even if wife uses only the income earned on the retirement accounts, that concept is disallowed. *See id.*; *Nordahl*, 834 P.2d at 842. *But cf.* § 14-10-114(3)(f) (court may award additional marital property or otherwise adjust the distribution of marital property or debt to alleviate the need for maintenance or reduce the amount or term of maintenance awarded).

¶ 24 In sum, we see no reason to depart from the court's findings. The court had no statutory obligation to include wife's investment earnings as part of her income. *See* § 14-10-114(8)(c)(II)(E).

¶ 25 We reject husband's last argument that allowing wife to grow her assets would create an unfair savings rate. Husband's argument misunderstands the concept of a savings rate, which is

built into a maintenance award and intended to allow a spouse to meet his or her needs in the event of a disaster, to allow him or her to make future acquisitions, or for retirement. *See Weibel*, 965 P.2d at 129-30. Allowing wife to conserve her share of the property division is not akin to creating a savings rate as part of a maintenance award.

IV. Impoverishment

¶ 26 Citing to wife's expert's thirty-year projections of the parties' net worth, husband argues that a $10,000 monthly maintenance award would result in wife accruing a $4 million net estate while he would be left with a net worth of negative $620,000. This assertion misrepresents the expert's analysis.

¶ 27 Wife's expert offered *two* projections for husband's net worth. The first, summarized above, relied solely on husband's SFS to determine his spending. In the second, the expert "normalized," or equalized, husband's spending habits with those of wife. That resulting projection, which the expert opined was the "fair" one, showed a $6.8 million net estate to husband after thirty years.

¶ 28 Regardless, the court rejected the expert's projections by finding them "likely inaccurate" and based on "incorrect

assumptions and miscalculations." We see no reason to rely on this evidence if the district court did not. *See In re Estate of Owens*, 2017 COA 53, ¶ 22, 413 P.3d 255, 262 (holding that reviewing court may not reweigh evidence or substitute its judgment for that of the district court).

¶ 29 In any event, we are not persuaded by husband's impoverishment claim. *See In re Marriage of Staggs*, 940 P.2d 1109, 1110-11 (Colo. App. 1997) (a district court may not enter an order that will impoverish one of the parties). Husband earns more than $36,000 per month working as a physician. Although husband's SFS claimed $19,000 in expenses, at least $3500 would transfer to wife by virtue of her receipt of the marital home, he testified that the $2000 set aside for savings was "not happening anymore," and he acknowledged he would no longer be required to pay wife's health insurance costs. Thus, even with a $10,000 monthly maintenance obligation, husband's salary would allow him to pay all his remaining expenses and have at least $12,500 per month left over. Even assuming husband continued to pay all $19,000 of the expenses listed in his SFS, he would still retain $7000 from his salary each month.

¶ 30 Because husband need not deplete his savings or property division to meet his maintenance obligation, we reject his final claim that the maintenance award is "an impermissible appropriation of the entirety of [his] estate." *See Lopez v. Lopez*, 148 Colo. 404, 406, 366 P.2d 373, 374 (1961) (A maintenance award "should not result in an appropriation of the entire estate of the husband, or in the impoverishment of the husband to the extent that he is unable to maintain himself as a working unit.").

V. Appellate Attorney Fees

¶ 31 Wife seeks an award of her appellate attorney fees under section 13-17-102, C.R.S. 2019. Wife asserts that, because the record supports the court's maintenance award, husband's appeal is lacking in merit and therefore frivolous.

¶ 32 "Standards for determining whether an appeal is frivolous should be directed toward penalizing egregious conduct without deterring a lawyer from vigorously asserting his client's rights." *Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984). Fees should be awarded only in clear and unequivocal cases when the appellant presents no rational argument, or the appeal is prosecuted for the purpose of harassment or delay. *In re Marriage*

of Boettcher, 2018 COA 34, ¶ 38, 454 P.3d 321, 327, *aff'd*, 2019 CO 81, 449 P.3d 382.

¶ 33 This is not the case here, so we deny the request.

VI. Conclusion

¶ 34 The judgment is affirmed.

JUDGE FOX and JUDGE BERGER concur.