STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1240

In re the Marriage of:
Ruth Ann Strand, petitioner,
Appellant,

vs.

Roger Allen Strand,
Respondent.

Filed July 1, 2008
Affirmed in part, reversed in part, and remanded; motion denied
Johnson, Judge

Chippewa County District Court
File No. 12-F1-04-000369

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Considered and decided by Willis, Presiding Judge; Johnson, Judge; and Muehlberg, Judge.*

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

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Ruth Ann Strand and Roger Allen Strand were married in 1972 and divorced in 2006. The district court's final judgment of dissolution valued and divided their property, provided for payment of child support and spousal maintenance from Roger Strand to Ruth Strand, and awarded attorney fees to Ruth Strand. In this appeal, Ruth Strand challenges 14 aspects of the district court's judgment. We conclude that the district court did not err with respect to the issues raised except for the finding concerning Roger Strand's net monthly income, which is discussed below in part III.A. Thus, we affirm in part, reverse in part, and remand for reconsideration of Roger Strand's income and, if appropriate, the amount of Roger Strand's spousal maintenance obligation.

FACTS

For the sake of clarity and simplicity, we will refer to the former couple by their first names in the remainder of this opinion.

Ruth and Roger were married in November of 1972. They raised four children, the youngest of whom graduated from high school in 2006. At the time that dissolution proceedings commenced, the family lived in Milan. They also owned residential rental property in St. Cloud and various parcels of rural real estate in Chippewa and Swift counties. Their personal real estate holdings were valued at approximately $677,000. Ruth and Roger also owned retirement accounts worth approximately $387,000; cash, investments, and life insurance policies worth approximately $350,000; and personal property valued at approximately $103,000.

Roger also was the sole owner of IRNY, Inc., a corporation through which the family conducted their farming operations. At the time of trial, IRNY owned 170 acres of real estate, a pickup truck, grain, equipment, shares in an agricultural cooperative, and cash. IRNY's net assets were valued at approximately $472,000.

Roger also was the sole owner of Strand of Milan, Inc. (SOMI), a corporation that sold herbicides, insecticides, and pesticides to area farmers. While the district court action was pending, SOMI was losing money, which prompted Roger to sell most of the assets of the company. The proceeds of the sales of SOMI assets were approximately $942,000.

Ruth commenced this dissolution action in July 2004. The five-day trial began in February 2006 and concluded on the last day of June 2006. The district court's 60-page decision containing findings of fact, conclusions of law, and an order for judgment and decree was filed on November 22, 2006. After both parties moved for amended findings or a new trial, the district court amended certain findings, denied the alternative motions for new trial, and entered an amended judgment on April 24, 2007. Ultimately, the district court found that the marital estate contained assets valued at approximately $1,997,000 and awarded half of the assets to each party. The district court made Roger responsible for approximately $354,000 of the parties' debt and Ruth responsible for approximately $9,000 of debt. The district court ordered Roger to pay Ruth $1,370 per month in spousal maintenance and to pay approximately $12,000 of her attorney fees. Ruth appeals.

D E C I S I O N

I. Valuation of Assets

Ruth first challenges the district court's valuation of certain assets. The valuation of an asset is a finding of fact and will not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001); *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975). Appellate courts do not require a district court's asset valuation to be exact; it is necessary only that the valuation be "within a reasonable range of figures." *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979) (*citing Hertz*, 304 Minn. at 145, 229 N.W.2d at 44).

A. Proceeds of Sales of SOMI Assets

Ruth argued to the district court that, during the dissolution proceedings, Roger dissipated the proceeds of the sales of SOMI assets. Generally, a party "shall" be compensated if, without the party's consent, the party's spouse disposes of marital assets in a manner that is "not in the usual course of business or for the necessities of life." Minn. Stat. § 518.58, subd. 1a (2006). Nonetheless, "when martial property is disposed of prior to or during a dissolution proceedings, but redounds to the marital estate before the division of that estate, Minn. Stat. § 518.58, subd. 1a, does not apply." *Sirek v. Sirek*, 693 N.W.2d 896, 900 (Minn. App. 2005).

The district court found that Roger applied the proceeds of the sales of SOMI assets to "marital obligations of the parties identified as SOMI debts," that Ruth is in the same or better position than if Roger had not sold those assets, and that, therefore, the district court was "unable to find that [Roger] dissipated marital assets." Because the

SOMI sale proceeds were used to pay debts of the marital estate before the estate was divided, the SOMI sale proceeds redounded to the benefit of the marital estate. Thus, Ruth is not entitled to any remedy under Minn. Stat. § 518.58, subd. 1a.

Ruth also argues that Roger sold SOMI assets at less than their fair value. Her argument focuses on a personal financial statement that Roger submitted to the bank in January 2005 showing a $400,000 valuation for SOMI. She argues that, because SOMI's debts exceeded the proceeds of the asset sales such that the company had a negative net worth, Roger must have sold SOMI assets for less than fair market value. But the financial statement on which Ruth relies is the only evidence supporting her argument. There was other evidence that SOMI's financial statements were inaccurate. There also was abundant evidence that Roger acted reasonably in disposing of assets. His efforts were described in the district court's decision. Ruth does not rebut Roger's evidence that he acted reasonably and does not point to any alternatives that were unreasonably overlooked. Thus, the district court's finding on this issue is not clearly erroneous.

Ruth further argues that, even after SOMI discontinued operations, Roger used a SOMI credit card for approximately $19,000 in personal expenses that benefitted only him. Roger argues in response that he repaid that amount in a note payable to SOMI. Ruth has not demonstrated that the district court clearly erred by finding that Roger did not dispose of marital assets in this manner.

B. Mortgage Payments

The district court ordered the parties to sell the St. Cloud rental property, which the parties purchased with funds obtained by mortgaging their homestead. The district

court further ordered Ruth to reimburse Roger for half of the mortgage payments he had made on the homestead after service of the dissolution summons. Although the district court did not identify the amount of these payments, it did find that Roger made all of the mortgage payments after issuance of the summons. Ruth argues that the reimbursement requirement was error because there was no evidence of the disposition of the rental income received from the property.

The burden of proving the improper disposition of an asset is on the party asserting an improper disposition. Minn. Stat. § 518.58, subd. 1a. Ruth's argument incorrectly assumes that the burden of proof is on Roger to show that he did *not* improperly dispose of the assets. Furthermore, to prevail on appeal, an appellant must show both error and prejudice. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see also* Minn. R. Civ. P. 61 (providing that harmless error shall be ignored). Ruth essentially admits that the record does not show the amount of rental income from the St. Cloud property or its disposition. Thus, she did not carry her burden of proof in the district court and has not demonstrated on appeal that she was prejudiced by the district court's ruling. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that party cannot claim error if party did not introduce necessary evidence), *review denied* (Minn. Nov. 25, 2003). Furthermore, Ruth suggests that Roger used the rental income to pay the mortgage on the St. Cloud rental property. Such a disposition of the rental income would not be improper because it would satisfy a marital debt. *See Sirek*, 693 N.W.2d at 900.

C. Distributions from Investment in Cooperative

IRNY owns an interest in, and received distributions from, the Chippewa Valley Agrafuels Cooperative (CVAC). Ruth argued to the district court that distributions paid by CVAC to IRNY should be attributed to Roger because he allegedly used those distributions for non-marital purposes. Roger testified that the CVAC distributions were deposited into IRNY's bank account. IRNY was considered a marital asset during the division of property. The district court declined to attribute the distributions to Roger on the ground that Ruth had not shown that Roger had improperly used the funds.

Ruth now argues that she should be awarded half of $12,000 in CVAC distributions to IRNY that she believes IRNY paid to SOMI as a farm management fee. But she concedes that there is no clear evidence of such a payment from IRNY to SOMI; she merely cites evidence that Roger did not know the recipient of the payment. She argues that the district court should have shifted the burden of proof to Roger because he had control over IRNY's finances, but that argument is contrary to the statute that places the burden of proof on the party asserting the improper disposition. *See* Minn. Stat. § 518.58, subd. 1a. Even if IRNY paid the management fee to SOMI, it would have remained in the marital estate. *See Sirek*, 693 N.W.2d at 900. Thus, Ruth fails to explain how she was prejudiced by the district court's findings.

Ruth makes a similar argument concerning an unspecified amount of crop income, which she asserts should be attributed to Roger. But she has not identified any evidence contrary to the district court's findings. Roger testified that he sold the crops during the dissolution proceedings and either invested the proceeds on behalf of the family or

deposited them into the IRNY account. Thus, Ruth again fails to explain how she was prejudiced by the district court's findings.

D. Transfers to Children

During the district court proceedings, Roger transferred 500 bushels of beans from IRNY to each of three of the parties' children as payment for certain services they had provided to IRNY. On appeal, Ruth argues that the transfers were improper. The case on which she relies, *Greer v. Greer*, 350 N.W.2d 439 (Minn. App. 1984), is distinguishable. In that case, there was no antecedent debt to justify the transfer. *Id.* at 442. Here, there was evidence that the children provided services to IRNY. Furthermore, Roger testified that the family had exchanged commodities for services "for a number of years" and that the transfers at issue were "a continuation of what I've been doing." The district court found that the transfers were "consistent with the way the parties provided for their children." We defer to the district court's findings of fact. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations).

E. The Parties' Home

The district court valued the parties' home at $220,000 and awarded it to Ruth. Ruth argues that the home should be valued at $200,000. She relies on an affidavit in which Roger valued the home at $200,000 despite appraisals in 2003 of $220,000 for mortgage purposes and $290,000 for insurance purposes. Roger testified that when he signed the affidavit, he believed the $200,000 figure to be correct but that, at the time of trial, he believed, based on his understanding of prices of similar homes in the area, that

the home could sell for between $220,000 and $250,000. Viewed in the light most favorable to the district court's finding, the record supports the $220,000 valuation. *See Thompson v. Thompson*, 739 N.W.2d 424, 429 (Minn. App. 2007); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

F. Pickup Truck

SOMI owned a 2004 pickup truck valued at $16,035. In December 2005, Roger traded it in for a 2006 truck priced at $32,054. The district court found that, at the time of trial, the 2006 truck was worth $26,700, was owned by IRNY, and was "fully encumbered." The district court awarded the 2006 truck to Roger. Ruth argues that there was a loss of $16,035 attributable to the trade-in of the 2004 truck, that this loss constitutes a "dissipation" of the marital estate, and that $16,035 should be apportioned to Roger with a corresponding adjustment to the amount of the equalization payment. Roger argues that he paid SOMI for the 2004 truck by including an amount of roughly the same value in a note he gave to SOMI. The evidence shows that Roger added $4,500 to the note, leaving approximately $11,500 unpaid. In light of the overall marital estate and the division of assets and debt, this discrepancy does not make the property award so inequitable as to require a remand. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimus error). Thus, we will not disturb the district court's finding regarding the truck.

II. Filing of Joint Tax Return

The district court ordered Ruth to sign joint personal income tax returns that had been prepared for 2005, which she had refused to sign. Whether to require joint tax

returns is discretionary with the district court. *See Theroux v. Boehmler*, 410 N.W.2d 354, 356 (Minn. App. 1987); *Southwell v. Southwell*, 413 N.W.2d 580, 583 (Minn. App. 1987); *Hedelius v. Hedelius*, 361 N.W.2d 421, 424-25 (Minn. App. 1985).

During the marriage, the business accounts of SOMI were used to pay some family expenses. During the district court proceedings, SOMI's financial statements were adjusted to reflect increased expenses and a debt owing from Roger to the company, which was recognized by a note payable. Ruth argues that she should not be required to sign the personal income tax returns because the SOMI tax returns continue to reflect expenses that are not business-related. The district court, however, noted that "[n]o testimony or evidence was submitted" to establish improper expenses. Both parties' experts testified that filing a joint tax return for 2005 "was most advantageous for each party." Roger argues that Ruth "knew . . . that certain personal expenses were paid for out of the business," and Ruth's testimony confirms that point. Roger also argues that Ruth can have the returns reviewed by her tax professional before signing them and can present any dispute about them to the district court. Furthermore, Ruth would not be prejudiced by signing the joint tax returns because the judgment provides that the parties should share taxes, penalties, and interest arising from tax returns filed during the marriage and further provides that if a party acts improperly with respect to tax liabilities, that party will hold the other party harmless from any obligations arising from the improper conduct. Moreover, whether she will incur any tax liabilities is currently speculative. *See Miller v. Miller*, 352 N.W.2d 738, 744 (Minn. 1984) (stating that district court should not consider tax implications of property division if doing so requires

speculation). Thus, the district court did not abuse its discretion in directing the filing of joint 2005 tax returns.

III. Spousal Maintenance and Child Support

The district court awarded Ruth permanent spousal maintenance of $1,370 per month. The district court declined to award spousal maintenance to Ruth retroactively, declined to award Ruth child support retroactively, and rejected Ruth's request that Roger's maintenance obligation be secured with a life insurance policy. Ruth challenges each of these rulings.

A district court may award spousal maintenance if a spouse is unable to support herself through employment in view of the marital standard of living. Minn. Stat. § 518.552, subd. 1(b) (2006). A district court should balance the recipient's need against the obligor's ability to pay. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). On appeal, appellate courts ask whether the district court abused its "broad" discretion in setting the amount of spousal maintenance. *Taylor v. Taylor*, 329 N.W.2d 795, 797 (Minn. 1983). The findings of fact underlying a maintenance award will be set aside only if they are clearly erroneous. *McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989).

A. Calculation of Roger's Income

The district court found Roger's net monthly income to be $3,387. Ruth argues that the district court failed to include bonuses that Roger potentially could earn pursuant to his employment contract with Cargill.

An obligor's ability to pay spousal maintenance should include bonuses if they are "dependable." *McCulloch*, 435 N.W.2d at 566-67 (excluding bonuses deemed "speculative"); *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987) (excluding bonuses deemed undependable), *review denied* (Minn. Oct. 30, 1987). The district court found that Roger's future receipt of incentive pay was "speculative and not a dependable source of income." Roger testified that he had not ever received a bonus from Cargill, although he had worked there only five months when the trial started. Roger further testified that, based on his performance up to the time of trial, he expected to receive either no bonus or a bonus of approximately $100 for the first year of his employment contract. Thus, the district court's finding that Roger's bonus was not dependable was not clearly erroneous.

Ruth also argues that the finding of Roger's net monthly income does not include $16,410 in annual income that the district court found Roger would receive from real property awarded to him in the judgment. Ruth is correct; although she asked the district court to consider that source of income, the district court did not make any finding explaining why the $16,410 was not included in Roger's net monthly income. Without specific findings on the issue, we cannot review the propriety of the exclusion of this amount from Roger's net monthly income. Therefore, we reverse the finding of Roger's net monthly income and remand so that the district court may consider whether Roger's net monthly income should include earnings from the real estate awarded to him in the judgment. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (remanding where district court failed to make adequate maintenance-related findings).

B. The Parties' Expenses

The district court, after deducting what it deemed to be an inappropriate $2,250 mortgage payment from Roger's claimed monthly expenses of $5,710, noted that the remainder of Roger's monthly expenses amount to $3,640. The district court also noted that Ruth claimed monthly expenses of $5,823. In the next paragraph, the district court found that the parties were "similarly situated" and "should have approximately equal monthly expenses." The district court then adopted the mid-point between $3,460 and $5,823 and found that "each party has reasonable monthly expenses of $4,642." This finding is not clearly erroneous in light of the court's interest in setting reasonable monthly expenses at a fair and equitable level that will allow the parties to achieve the marital standard of living. *See Lee v. Lee*, 749 N.W.2d 51, 60 (Minn. App. 2008); *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409-12 (Minn. App. 2000).

C. Amount of Spousal Maintenance

The district court awarded Ruth monthly maintenance of $1,370. Ruth challenges the amount of the award. Considering the district court's findings that her reasonable monthly expenses are $4,642 and net monthly income is $642, she will have a monthly deficit of $2,630 after receiving $1,370 in monthly maintenance. She argues that she is entitled to monthly maintenance of $3,850.

Generally, awarding spousal maintenance requires balancing the recipient's need against the obligor's ability to pay. *Erlandson*, 318 N.W.2d at 39-40. Because we are reversing and remanding with respect to the finding of Roger's net monthly income, a change in Roger's reasonable net monthly income might alter his ability to pay spousal

maintenance. Therefore, on remand, the district court shall reconsider the amount of Roger's spousal maintenance obligation to the extent necessary to account for any change in the finding concerning his net monthly income.

D. Security for Spousal Maintenance

The district court denied Ruth's request to require Roger to secure his spousal maintenance obligation with a life insurance policy. Whether to require a maintenance obligor to secure a maintenance obligation with life insurance is discretionary with the district court. Factors to be considered in deciding whether to require insurance include the maintenance recipient's age, education, vocational experience, and employment prospects. *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

Ruth did not seek to require a life insurance policy until her post-trial motion for amended findings or a new trial. Therefore, her request was not properly before the district court. *See, e.g.*, *Antonson v. Ekvall*, 289 Minn. 536, 186 N.W.2d 187, 189 (1971) (stating that claim was made "too late" when made for first time in motion for new trial); *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (applying *Antonson* in dissolution appeal), *review denied* (Minn. Oct. 15, 2002). Furthermore, *Kampf* is distinguishable. Compared to the maintenance recipient in *Kampf*, Ruth is better educated, has a higher estimated earning capacity, and has half as much in reasonable monthly expenses. *See* 732 N.W.2d at 635-36. Thus, the district court did not abuse its discretion by not requiring Roger to secure his maintenance obligation with a life insurance policy.

E. Retroactivity

The district court's May 2005 order for temporary relief awarded the parties joint physical custody of their only minor child, who was 17 years old at that time. The district court reserved child support and maintenance, in part because Roger was paying many of Ruth's expenses. Ruth argues that she was entitled to $1,744 per month in retroactive child support for the 12-month period between her May 2005 motion for temporary relief and the child's emancipation. She also seeks $3,600 per month in retroactive spousal maintenance.

A district court has discretion to award retroactive child support in a dissolution judgment. In deciding whether to do so, the district court may consider the potential obligor's contributions to the child during the period in question. *In re Support of J.M.K.*, 507 N.W.2d 459, 461 (Minn. App. 1993). While the district court action was pending, Ruth lived in the parties' home, while Roger paid many of the family's significant expenses, such as the mortgage, car insurance premiums for Ruth and the children, gasoline for their cars, utility bills for the home, real estate taxes, and Ruth's monthly grocery bill. The district court did not make a finding concerning the amount of these regular payments. Ruth testified that they were approximately $1,000 per month. Roger's pretrial affidavit and Ruth's budget, however, suggest that these amounts were $2,363 per month. The district court's post-trial order shows that the district court considered Roger's ongoing payments when denying Ruth's request for retroactive support. In light of the payments Roger was making, we conclude that the district court

did not abuse its discretion by denying Ruth's request for retroactive support and maintenance.

IV. Attorney Fees

In marital dissolution proceedings, the court has discretion to award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2006). Conduct-based fees may be awarded regardless of the recipient's need for, and the payor's ability to pay, those fees. *Gales v. Gales*, 553 N.W.2d 416, 423 (Minn. 1996). On appeal, conduct-based fee awards are reviewed for an abuse of discretion. *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007).

A. Fees Incurred in the District Court

The district court awarded Ruth $11,869.30 in conduct-based attorney fees for Roger's violations of discovery orders. Ruth argues that she is entitled to an additional $7,009.80 in attorney fees because the district court omitted fees she incurred in November and December 2005. Ruth raised this issue in a post-trial motion, but the district court did not explicitly grant her relief. Because we cannot assume that the district court erred by not addressing the question, we must assume that the district court implicitly denied the motion. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth*). Our review of the relevant billing statements shows that Ruth substituted attorneys in November 2005. The second attorney's billing statements are insufficiently detailed to

demonstrate that the services performed were required because of Roger's refusal to produce discovery. Thus, we will not reverse the district court on this point.

Ruth also seeks additional fees for amounts billed by her first attorney. She made this argument in her post-trial motion, but the district court concluded that the fees at issue were not related to Roger's failure to produce discovery. The district court stated that the amounts in question "appear to be consistent with trial preparation in a complex dissolution and not the result of [Roger's] failure to be forthcoming." Thus, we conclude that the district court did not clearly err in this finding.

B. Fees Incurred on Appeal

Roger filed a motion in this court seeking $1,350 in conduct-based attorney fees on the ground that the statement of facts in Ruth's brief is inadequate and lacks citations to the record. An award of conduct-based fees on appeal is discretionary with this court. *Clark v. Clark*, 642 N.W.2d 459, 466 (Minn. App. 2002).

An appellant's brief must contain a statement of facts relevant to the relief sought. If the district court's findings of fact are challenged on appeal, the evidence "tending directly or by reasonable inference to sustain" the challenged findings "shall be summarized," and "[e]ach statement of a material fact shall be accompanied by a reference to the record." Minn. R. Civ. App. P. 128.02, subd. 1 (c); *see also* Minn. R. Civ. App. P. 128.03 (addressing citations to the record); *Cole v. Star Tribune*, 581 N.W.2d 364, 372 (Minn. App. 1998). This case has an extensive record, and Ruth's appellate brief raised 14 separate arguments. At oral argument, Ruth's counsel explained

reasons justifying the structure of appellant's brief. Although strict compliance with the rules is the better practice, we decline to award conduct-based attorney fees on appeal.

On remand, the district court shall have discretion regarding whether to reopen the record.

Affirmed in part, reversed in part, and remanded; motion denied.