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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0786**

In re the Marriage of:
David Allen Winegar, petitioner,
Appellant,

vs.

Shirley Ann Winegar,
Respondent.

**Filed April 14, 2009
Affirmed; motions denied
Schellhas, Judge**

Aitkin County District Court
File No. 01-F6-06-000315

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Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this marriage-dissolution action, appellant seeks review of the district court's order denying his motion for a new trial or amended findings and conclusions of law. Because appellant has failed to demonstrate that the challenged findings are clearly erroneous and has failed to demonstrate that the district court abused its discretion, we affirm.

FACTS

Appellant David Allen Winegar and respondent Shirley Ann Winegar were married in 1976. When judgment in the marriage-dissolution action was entered, the parties were ages 56 and 58, respectively, and had four adult children. Unable to reach agreement on all issues, the parties tried the issues of spousal maintenance, valuation of David Winegar's dental practice, division of certain real property, allocation of certain debts, and attorney fees. After the district court issued its findings of fact, conclusions of law, and order for judgment, David Winegar moved for a new trial or amended findings and conclusions of law. The district court denied the motion. This appeal follows.

DECISION

David Winegar argues that the district court abused its discretion in its award of spousal maintenance, award of certain real property, allocation of debt, valuation of his dental practice, and attorney fees. Shirley Winegar argues that the district court should be affirmed, moves to strike portions of David Winegar's brief, appendix, and reply brief,

and moves for an award of attorney fees. David Winegar opposes Shirley Winegar's motions and seeks attorney fees.

“When considering a motion for amended findings, a district court must apply the evidence as submitted during the trial of the case and may neither go outside the record, nor consider new evidence.” *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006). “This court reviews denials of such motions under an abuse-of-discretion standard.” *Id.* Under Minn. R. Civ. P. 59.01, a new trial may be granted for some or all of the issues in a case for numerous causes, including that the decision reached is not justified by the evidence. “[T]he granting of a new trial rests in the discretion of the trial court, and the trial court’s decision will be reversed only for a clear abuse of discretion.” *Klein v. Klein*, 366 N.W.2d 605, 606 (Minn. App. 1985), *review denied* (Minn. June 27, 1985).

I. Spousal Maintenance

David Winegar challenges the district court’s finding that his reasonable monthly expenses are \$8,000 and its award of permanent spousal maintenance to Shirley Winegar in the amount of \$7,750 per month. In cases involving marriage dissolution, the district court is accorded broad discretion with respect to the division of property and allowance of spousal maintenance. *See Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). The district court must resolve the matter in a manner “that is against logic and the facts on record before [an appellate] court will find that the trial court abused its discretion.” *Id.* (citing *Holmes v. Holmes*, 255 Minn. 270, 274, 96 N.W.2d 547, 551 (1959)). The district court must balance the obligor’s ability to provide maintenance with the obligee’s needs

and ability to meet her needs. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). A determination of a party's reasonable expenses is a factual finding. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (remanding in part due to failure to make findings as to the parties' separate expenses). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). Findings of fact are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). In this case, we will uphold the findings of the district court unless they are clearly erroneous.

David Winegar argues that the district court erred in rejecting his claimed reasonable monthly expenses of \$11,141 and in finding that his reasonable monthly expenses are \$8,000. He argues that the \$8,000 figure is against the weight of the evidence and results in such a gross inequity that it must be clearly erroneous. A finding of a party's reasonable expenses is a factual finding reviewed for clear error. *Stich*, 435 N.W.2d at 53; *Gessner*, 487 N.W.2d at 923. We review the district court's finding regarding David Winegar's reasonable monthly expenses in consideration of its determination that he has the ability to pay spousal maintenance of \$7,750 per month.

David Winegar argues that the district court's finding of his reasonable monthly expenses is erroneous because it does not include his actual payments on the mortgage indebtedness that encumbers the parties' homestead. But, at trial, both parties based their monthly expenses on estimated mortgage expenses because the parties plan to sell the marital homestead. Thus, David Winegar did not introduce any evidence of his actual

debt service on the homestead mortgages, despite asking the district court to award him sole occupancy of the homestead until its sale. He testified that he did know his actual mortgage expense but thought it was more than the mortgage expense included in his budget. Only when he filed his post-trial motions did he submit to the district court the actual amount of the homestead mortgage debt service and ask the court to include the amount in his monthly expenses. A party may not raise an issue for the first time in a post-trial motion and may not complain of a ruling on appeal when the party did not provide the district court with evidence needed to rule in the party's favor. See *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("On appeal, a party cannot complain about a district court's failure to rule in [his] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003); *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (stating that issue is not timely raised when it appears for the first time in a post-trial motion), *review denied* (Minn. Oct. 15, 2002).

David Winegar also argues that the district court erred in excluding savings for retirement of \$1,000 as a reasonable monthly expense. The district court reasoned that retirement savings of \$1,000 should be excluded because David Winegar's dental practice sets aside three percent of his income for retirement. David Winegar argues that the evidence does not support the district court's reasoning because (1) he did not testify that his practice sets aside three percent of his income for retirement; and (2) based on financial statements for 2006, his practice did not set aside three percent of his income for

retirement. But, based on our review of the record, David Winegar did testify that his dental practice pays a three-percent match on his retirement:

SHIRLEY WINEGAR'S COUNSEL: Okay, now the practice pays benefits to you as well as your employees; correct?

DAVID WINEGAR: Correct.

SHIRLEY WINEGAR'S COUNSEL: In other words, it pays your health insurance?

DAVID WINEGAR: And that's in my salary, I believe, the health insurance and the - - I believe it is.

SHIRLEY WINEGAR'S COUNSEL: All right.

DAVID WINEGAR: I believe it is. I'm sure it is.

SHIRLEY WINEGAR'S COUNSEL: *And it also pays a match on your retirement of three percent; correct?*

DAVID WINEGAR: *Correct.*

(Emphasis added.) Furthermore, Exhibit 107, which David Winegar testified reflects his income from 2002 to 2006, reflects a retirement contribution made by the practice in the amount of three percent of David Winegar's salary from the dental practice. David Winegar's arguments fail to demonstrate clear error and are contrary to the record.

David Winegar also argues that the district court erred in rejecting his claimed monthly expenses of \$700 for restaurants, \$400 for a car payment, and \$1,000 for Willey's Marine. But he testified at trial that the restaurant and Willey's Marine expenses would decrease after the finalization of the marriage dissolution and that he did not currently have the car payment. Accordingly, the district court properly reduced David Winegar's claimed monthly expenses and found that his reasonable monthly expenses are \$8,000, which is only slightly less than the \$8,041 figure we calculate by doing the math. None of David Winegar's arguments demonstrates clear error. The

district court's determination that David Winegar's reasonable monthly expenses are \$8,000 is supported by the evidence.

David Winegar argues that the district court abused its discretion in setting the amount of spousal maintenance because when the award is added to Shirley Winegar's earned income, the total exceeds her reasonable monthly expenses. He argues that based on the spousal maintenance award and the district court's determination of the parties' reasonable monthly expenses, a large disparity exists in the parties' discretionary funds. Finally, he argues that the district court erred in finding that his income is sufficient to pay spousal maintenance in an amount necessary to sustain the marital standard of living and to provide both parties funds to accumulate for retirement. We disagree.

A comparison of the parties' discretionary funds should begin with the parties' net incomes, but here, the parties failed to provide the district court with adequate evidence of their net incomes. *See Schreifels v. Schreifels*, 450 N.W.2d 372, 373 (Minn. App. 1990) ("In order to properly consider the financial ability of a spouse, the court must determine the spouse's net or take-home income."). Some net-income information is found in Exhibit 112: Shirley Winegar's net income from employment and rental income is \$44,559 per year or \$3,713 per month, and David Winegar's net income from employment is \$217,462 per year or \$18,122 per month. But the record contains no evidence about how each party's tax liability was calculated or whether the parties considered the tax consequences of the spousal maintenance award to Shirley Winegar. At oral argument before this court, Shirley Winegar's counsel acknowledged that Exhibit 112 may not be entirely accurate, and David Winegar's counsel argued that where the

district court is provided with inadequate information on which to determine the parties' incomes, the district court has a duty to seek more information from the parties. We disagree. The parties, not the district court, are responsible for providing the court with evidence that would allow the court to rule in their favor. *Eisenschenk*, 668 N.W.2d at 243. A party may not complain on appeal that information needed to rule in the party's favor was lacking when the reason the information was lacking was that the party failed to provide it. *Id.*

In reviewing the evidence provided to the district court, we are able to make a limited assessment of the discretionary funds left to each party after the transfer of maintenance. After adding maintenance (\$7,750) to Shirley Winegar's net income, as reflected in Exhibit 112, Shirley Winegar is left with monthly income of \$11,463. Based on this rough calculation, which does not include taxation on the spousal maintenance, Shirley Winegar is left with \$5,257 in discretionary funds after meeting her reasonable monthly expenses (\$6,206). After subtracting maintenance from David Winegar's net income, as reflected in Exhibit 112, and adding the monthly payments of \$672 that he will receive on a note awarded to him, David Winegar is left with monthly income of \$11,044. Based on this rough calculation, which does not include a tax deduction for spousal maintenance, David Winegar is left with \$3,044 per month in discretionary funds—more than three times his requested retirement-savings expense of \$1,000 per month. The tax consequences of the payment and receipt of spousal maintenance will reduce the evident disparity in the parties' discretionary funds. *See* 26 U.S.C. 71(a)

(2006) (“Gross income includes amounts received as alimony or separate maintenance payments.”).

A spousal maintenance award is reviewed for an abuse of discretion. *Erlandson*, 318 N.W.2d at 38. A district court abuses its discretion when it resolves the matter in a manner “that is against logic and the facts on record.” *Rutten*, 347 N.W.2d at 50. In making an award of spousal maintenance, a district court must consider the factors set forth in Minn. Stat. § 518.552, subd. 2 (2008). Though the statute lists multiple factors, “the issue is basically the financial needs of [the obligee] and her ability to meet those needs balanced against the financial condition of [the obligor].” *Erlandson*, 318 N.W.2d at 39-40 (discussing Minn. Stat. § 518.552, subd. 2 (1980)).

Though maintenance is dependent upon the obligee’s showing of need, *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989), an award in excess of a recipient’s needs is not necessarily an abuse of discretion, *Walker v. Walker*, 553 N.W.2d 90, 96 n.2 (Minn. App. 1996). In *Lyon*, an award was remanded because the recipient could meet her needs without *any* contribution from the other spouse. 439 N.W.2d at 22. In *Walker*, this court addressed a maintenance award where need was shown and the recipient was awarded maintenance that left her with a surplus of roughly \$4,700 per year. 553 N.W.2d at 96. In *Walker*, the obligor challenged the award as “arbitrary,” but this court disagreed, noting that the obligee’s annual income with maintenance would exceed her expenses but concluding that the case was “not the type of unusual case that would require a reversal of a spousal maintenance award,” citing *Lyon*. *Id.* at n.2. Under *Walker* and its application of *Lyon*, an award of maintenance is not an abuse of discretion solely because

it leaves the recipient with a surplus of funds after meeting reasonable expenses. The district court's findings are not clearly erroneous. As noted above, both parties are left with discretionary funds after meeting their reasonable expenses. David Winegar is left with discretionary funds of \$3,044 per month.

The disparity in the parties' discretionary funds is not so large as to constitute an abuse of discretion. The district court's award of maintenance was designed to provide Shirley Winegar the ability to save for retirement so that she will have sufficient funds to meet her needs upon retirement. And, the statements of Shirley Winegar's counsel at oral argument persuade us that the district court's award of maintenance was set in contemplation of a future modification upon retirement. The district court made findings to support its award of maintenance to Shirley Winegar, and under *Walker*, the court did not abuse its discretion.

II. Division of Real Property

A. Homestead Sale and Disposition of Adjoining Vacant Lot

David Winegar argues that the district court abused its discretion in its disposition of the vacant lot, which the parties own jointly with another couple and which is located next to the parties' homestead. The district court ordered the parties to "complete an exchange agreement with the adjoining landowners." David Winegar argues that the order forces the adjoining landowners to sell their interest in the lot owned jointly by the parties and that the district court lacked jurisdiction over the adjoining landowners. But the district court has not, as David Winegar argues, "force[d] the co-owners of the Big Sandy Lake Lot to enter into an exchange agreement" with the parties. The district court

merely reiterated what the parties anticipated would happen with respect to the homestead and the Big Sandy Lake lot and reserved jurisdiction over both the homestead sale and the sale of the adjoining lot. The district court's reservation of jurisdiction is an appropriate method of dealing with the uncertainties in the disposition of these assets. *See Danielson v. Danielson*, 721 N.W.2d 335, 340 (Minn. App. 2006) (ruling that when parties seek division of a marital asset in which a third party may have an interest, the district court may include the asset in the property division while recognizing that the judgment may be reopened and adjusted if the third party is determined to have an interest). The district court's order does not "force" the adjoining landowners to enter into an agreement with David Winegar and Shirley Winegar and the reservation of jurisdiction over the homestead and Big Sandy Lake lot sale was not an abuse of the district court's discretion.

B. Pharmacy Building, Rental Income and Holder Note

The district court awarded the pharmacy building with its rental income to Shirley Winegar. David Winegar argues that because the parties always intended that the pharmacy building would provide retirement income for them, the district court abused its discretion by awarding sole ownership of the pharmacy building to Shirley Winegar. David Winegar argues that the pharmacy building and its rental income should be awarded to both parties. He disputes the district court's finding of rental income produced by the pharmacy building and argues that a promissory note (the Holder Note), which the district court awarded solely to him, should be awarded to both parties along with the pharmacy building.

A district court's distribution of property will not be reversed unless the district court resolves the question in a manner "that is against logic and the facts on record." *Rutten*, 347 N.W.2d at 50. The district court found that the award of the pharmacy building to Shirley Winegar would decrease entanglement between the parties and would provide Shirley Winegar income into retirement that would decrease her need for spousal maintenance. We conclude that the district court did not abuse its discretion by awarding the pharmacy building and its rental income to Shirley Winegar.

The district court found that the pharmacy building produces net rental income of \$50,000 per year. David Winegar challenges this finding as unsupported by the evidence and argues that the district court should have acknowledged future rent increases with corresponding decreases in the award of spousal maintenance to Shirley Winegar. A determination of income is a factual finding reviewed for clear error. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). The amount of maintenance is reviewed for an abuse of discretion. *Erlandson*, 318 N.W.2d at 38.

The district court's finding that the parties received net rental income from the pharmacy building of approximately \$50,000 per year is supported by the record and not clearly erroneous. David Winegar testified that "from 2005 to 2009 we have a base rent that provides somewhere around \$50,000 net off of the pharmacy rental." Net rental income of \$50,000 is also reflected on Exhibit 112. Because the finding is supported by uncontradicted evidence, it is not clearly erroneous. Similarly, that the district court also did not account for future rent increases is not clearly erroneous. David Winegar testified that the leases were renewable, that the rent was "tied . . . to prime at 4.5 percent," and

that upon lease renewal, the rent would increase if the prime rate increased. His testimony reflects uncertainty as to whether the leases will be renewed and whether the rent will increase. Because the record reflects uncertainty, the district court did not err in determining the rental income without possible future increases. Step reductions in maintenance based on future increases in an obligee's income are inappropriate when there is uncertainty as to the future increases. *Schreifels*, 450 N.W.2d at 374.

As to the Holder Note, David Winegar complains that the district court added to his property column the balance owed to the parties on the note. But his complaint is without merit because the district court awarded the note to him.

C. Hunting Land and Cabin

David Winegar argues that the district court erred in awarding him the parties' one-half interest in a hunting cabin and surrounding land and including the value of the property in his distribution of property from the marital estate. He claims that the property was gifted to the parties for the benefit of their children and that the parties had always intended to deed the property to their children. A district court's distribution of property will not be reversed unless it abuses its discretion by resolving the question in a manner "that is against logic and facts on record." *Rutten*, 347 N.W.2d at 50.

A non-marital gift is property acquired as a gift by "bequest, devise, or inheritance made by a third party to one but not to the other spouse." Minn. Stat. § 518.003, subd.3b (2008). The hunting property was not a non-marital gift—it was conveyed to both parties and was part of the parties' marital estate. The district court did not abuse its discretion in awarding the one-half interest solely to David Winegar.

III. Value of Dental Practice

David Winegar argues that based on his testimony, the district court abused its discretion by not discounting the value of his dental practice for lack of marketability and by ignoring the tax consequences of a sale. A district court's valuation of an asset is a factual finding that will not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). And a district court's valuation need not be exact; the figure reached need only lie within a reasonable range of figures. *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979). But the valuation should be "supported by either clear documentary or testimonial evidence or by comprehensive findings issued by the court." *Ronkvist v. Ronkvist*, 331 N.W.2d 764, 766 (Minn. 1983).

Here, the district court did not clearly err in valuing the dental practice. The value found by the district court is supported by documentary and testimonial evidence and lies within a reasonable range of figures submitted to the court. The district court found the value of the dental practice by deducting the value of the dental building from the appraised value of the practice. The appraiser accounted for marketability of the practice in his appraisal. The primary evidence offered at trial by David Winegar regarding his contention that the practice should be further discounted for lack of marketability was his own testimony and, as to the tax consequences of sale, he failed to provide sufficient information to support his calculations. The district court rejected David Winegar's testimony as not credible. We defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

IV. Allocation of Marital Debt

“Debt is apportionable as part of the marital property settlement.” *Justis v. Justis*, 384 N.W.2d 885, 889 (Minn. App. 1986), *review denied* (Minn. May 29, 1986). “The division of marital debts is treated in the same manner as division of assets.” *Id.* A district court has broad discretion in distributing property, and will not be reversed unless it abuses its discretion by resolving the matter in a manner “that is against logic and facts on record.” *Rutten*, 347 N.W.2d at 50.

The district court ordered David Winegar to service all mortgage indebtedness of the marital homestead until it is sold. David Winegar argues that the rental income from the pharmacy building should be used to service the mortgages on the homestead because the mortgages were incurred to fund construction of the building and the rental income was used to service the mortgages during the marriage. The district court did not abuse its discretion in ordering David Winegar to service the homestead mortgage indebtedness, while awarding the pharmacy building rental income to Shirley Winegar. The homestead mortgage indebtedness is not entirely related to the pharmacy building. David Winegar testified that roughly \$330,000 of the \$408,000 first mortgage was used for the pharmacy building and that roughly \$100,000 of the second mortgage was used for an undeveloped commercial lot and the parking lots for the dental and pharmacy buildings. He also testified that the unpaid balance on the second mortgage was reduced to roughly \$40,000 before the commencement of the marriage dissolution. At the time of trial, the balance on the second mortgage had increased to \$100,000, but the increase was due to spending unrelated to the pharmacy building. Because the indebtedness secured by the homestead

is not entirely related to the pharmacy building, the district court did not abuse its discretion in assigning the debt service to David Winegar. Additionally, David Winegar did not argue at trial that the pharmacy building rental income and the homestead mortgage indebtedness should be assigned together. *See Grigsby*, 648 N.W.2d at 726 (stating that an issue is not raised in a timely fashion when it is raised for the first time in a post-trial motion).

V. Motions on Appeal

Shirley Winegar moves to strike portions of David Winegar's brief, appendix, and reply brief and for attorney fees on appeal. David Winegar opposes the motions and seeks his own award of attorney fees on appeal. Shirley Winegar has submitted extensive argument in favor of her motions. Her motion to strike is repetitious of her argument in her principal brief and primarily complains of David Winegar's references to his post-trial motion, which is part of the record on appeal under Minn. R. Civ. App. P. 110.01. Shirley Winegar also complains about David Winegar's inaccurate citations to the record. A "flagrant violation" of Minn. R. Civ. App. P. 128.03 may lead to nonconsideration of an issue or dismissal of an appeal; lesser violations can diminish a brief's persuasiveness. *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). This court conducts a review of the record and independently evaluates whether a party's submissions accurately describe the record. Based on our review of the record, Shirley Winegar's claimed errors do not rise to the level of "flagrant violations" and her argument would have been more appropriately limited to her principal brief. David

Winegar's response to Shirley Winegar's motions are lengthy and repetitious of his principal arguments in this appeal.

Shirley Winegar's motion to strike is denied, and both parties' motions for attorney fees on appeal are denied.

Affirmed; motions denied.