STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1365

In re the Marriage of:
Robyn Elizabeth Gifford Anderson, petitioner,
Respondent,

vs.

Kurt Alan Anderson,
Appellant.

Filed June 30, 2009
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-FA-000292333

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Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

This is an appeal from a dissolution judgment and the district court's denial of appellant's posttrial motions. Appellant challenges the district court's denial of his motions, its decision in the dissolution judgment regarding the existence, valuation, and

division of a business asset, and its award of conduct-based attorney fees to respondent. We affirm.

FACTS

Respondent-wife Robyn Anderson[1] commenced the dissolution of the parties' marriage in June 2004. All issues were tried to the district court in a ten-day trial. On November 15, 2007, the district court filed its findings of fact, conclusions of law, order for judgment and judgment and decree, resolving all issues except for attorney fees. A substantial portion of the district court's findings addresses wife's claim that appellant-husband Kurt Anderson had an ownership interest in an online advertising company called Space150, LLC. The district court found that husband had concealed an equitable one-third ownership interest in the company. It found the interest to be worth $2,378,360 as of the 2004 valuation date, awarded the interest to husband, and ordered husband to pay wife one-half of its value. Wife served and filed notice of the November 15 judgment on November 21, 2007.

The district court addressed both parties' requests for conduct-based attorney fees in an order dated March 4, 2008. The district court granted wife's request for conduct-based attorney fees but denied husband's request.

On or after March 27, 2008, husband moved the district court for amended findings or a new trial, largely challenging the district court's decision on the Space150 issue. He subsequently amended the motion to also request amended findings or a new trial on the attorney-fee issue. The district court dismissed husband's motion for

[1] We note that wife is now known as Robyn White.

amended findings with respect to the November 15, 2007 judgment as untimely, and denied his motion for a new trial or amended findings on the attorney-fee issue. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in rejecting husband's posttrial motions.

We will not disturb the denial of a motion for amended findings or a new trial absent an abuse of the district court's discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

A. Motion for amended findings

A party may move the district court for amended or additional findings. Minn. R. Civ. P. 52.02. A motion for amended findings must be served "within 30 days after a general verdict or service of notice by a party of the filing of the decision or order." Minn. R. Civ. P. 59.03; *see also* Minn. R. Civ. P. 52.02 (referencing timing requirements in rule 59.03); *Mingen v. Mingen*, 679 N.W.2d 724, 726 (Minn. 2004). The district court may not extend this deadline. Minn. R. Civ. P. 6.02.

Husband does not dispute that he did not serve his motion for amended findings until at least 127 days after wife's notice of filing. He asserts that his motion was timely because the district court's order was not final and appealable until the attorney-fee issue was resolved. Neither rule 52.02 nor rule 59.03 requires that an order be appealable or finally determine all claims before a party may seek amended findings. Because husband

did not file his motion for amended findings until well outside the 30-day time frame, the district court properly dismissed the motion.

B. Motion for a new trial

Husband also argues that the district court erred by failing to address his motion for a new trial. The district court did not explicitly address husband's new-trial motion. But because this court cannot assume that the district court erred by failing to address the motion, *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949), we will treat the district court's silence as an implicit denial of husband's motion.

Husband's motion asserted the existence of newly discovered evidence but did not otherwise identify the legal basis for granting a new trial. Husband now maintains that he brought his motion pursuant to Minn. Stat. § 518.145 (2008) and rule 59.

Rule 59.01 permits a district court to grant a new trial for "[m]aterial evidence newly discovered." Minn. R. Civ. P. 59.01(d). But rule 59.03 requires that a motion seeking such relief be served "within 30 days after a general verdict or service of notice by a party of the filing of the decision or order." Minn. R. Civ. P. 59.03. Consequently, a motion under rule 59.01 would have been untimely and properly dismissed along with husband's motion for amended findings.

However, Minn. Stat. § 518.145, subd. 2(2), permits the district court to "relieve a party from a judgment and decree, order, or proceeding" and order a new trial if the movant demonstrates the existence of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03." *See* Minn. R. Civ. P. 60.02(b) (providing for essentially

identical relief). Although husband's rule 59.01 motion was untimely, he was entitled to seek relief under section 518.145.

"In order for relief from judgment to be granted where there is newly discovered evidence, such evidence must be relevant and admissible at trial, must be likely to have an effect on the result of a new trial, and must not be merely collateral, impeaching, or cumulative." *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 478 (Minn. App. 1987) (addressing rule 60.02), *review denied* (Minn. July 15, 1987). And the evidence must have existed at the time of trial but was not known to the party at that time. *Zander*, 720 N.W.2d at 365.

The evidence husband proffered as "newly discovered" was attorney time records purporting to show when a consulting agreement between Space150 and husband was drafted. Husband argues that the evidence demonstrated that the consulting agreement, which he characterizes as proof that he did not own any part of Space150, was actually drafted and signed in January 2002, and "not fabricated after the fact, as argued by [wife] and adopted by the Court." In other words, husband would use the proffered evidence to credit husband's testimony and discredit wife's testimony regarding whether husband had an ownership interest in Space150. As such, the evidence is merely cumulative and impeaching. Moreover, the evidence indicates that an attorney drafted such a document in December 2002 and January 2003, which supports the district court's determination that the document dated January 2002 was fabricated. Because the newly discovered evidence is cumulative, calculated to impeach other record evidence, and unlikely to

affect the outcome of a new trial, the district court did not abuse its discretion in implicitly denying husband's motion for a new trial.

II. The district court did not err in finding that husband concealed an equitable ownership interest in Space150.

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 the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We defer to the district court's findings of fact regarding division of property. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997).

Parties to a dissolution proceeding owe each other a fiduciary duty with respect to the use or transfer of marital assets. Minn. Stat. § 518.58, subd. 1a (2008). If one party claims that the other has concealed an ownership interest in a marital asset, the district court should determine the ownership of the asset in the dissolution proceeding. *Id.* (placing burden of proof on party claiming concealment); *see also Rand v. Rand*, 103 Minn. 5, 6-7, 114 N.W. 87, 87-88 (1907) (affirming district court's decision to award wife lien on husband's denied interest in real property that was in his daughter-in-law's name); *cf. Sanborn v. Sanborn*, 503 N.W.2d 499, 503 (Minn. App. 1993) (affirming district court's decision that husband committed fraud on court by intentionally misrepresenting or not disclosing the value of his interest in a business), *review denied* (Minn. Sept. 21, 1993). If the district court finds that a party has concealed an ownership interest in a marital asset, the district court "shall compensate the other party by placing both parties in the same position that they would have been in had the . . . concealment

. . . not occurred." Minn. Stat. § 518.58, subd. 1a; *see also* Minn. Stat. § 518.58, subd. 1 (2008) (requiring "a just and equitable division of the marital property").

A. Parol evidence

We first address husband's argument that Space150's articles of organization unambiguously indicate that William Jurewicz is the company's sole owner and that parol evidence was inadmissible to prove that husband has an ownership interest in the company. We review de novo the district court's application of the parol evidence rule. *Mollico v. Mollico*, 628 N.W.2d 637, 640 (Minn. App. 2001); *see also Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 145, 82 N.W.2d 48, 54 (1957) (stating that the parol evidence rule is a matter of substantive law, not a rule of evidence).

The parol evidence rule provides that "the terms of a final and integrated written expression may not be contradicted by parol evidence of previous understandings and negotiations . . . for the purpose of varying or contradicting the writing." *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. App. 1989) (quotation omitted), *review denied* (Minn. Apr. 26, 1989). But "a stranger to a contract is not bound by the parol evidence rule unless the stranger seeks to enforce rights which are based on the instrument." *Hous. & Redevelopment Auth. v. First Ave. Realty Co.*, 270 Minn. 297, 301, 133 N.W.2d 645, 649 (1965). Consideration of parol evidence is also permitted, even in a dispute between parties to a contract, when it is claimed that terms of the contract were misstated with the intent to mislead or deceive a third party. *Hield v. Thyberg*, 347 N.W.2d 503, 508 (Minn. 1984) (requiring clear and convincing evidence of misstatement).

Both exceptions apply here. Wife was a stranger to the articles of organization who sought to establish that husband had an interest in Space150, not to enforce rights under the articles of organization. Wife also claimed that the articles of organization were misstated with the intent to mislead or deceive her and the Internal Revenue Service. The district court did not err by considering evidence beyond Space150's written articles of organization.

B. Findings

Husband challenges virtually all of the district court's findings pertaining to Space150, arguing that they are unsupported by the record and represent a verbatim adoption of wife's proposed findings. We disagree.

The district court properly required wife to prove husband's interest in Space150 by clear and convincing evidence. *Hield*, 347 N.W.2d at 504; *see also Rand*, 103 Minn. at 7, 114 N.W. at 87 (requiring "clear and convincing proof" of husband's denied interest in real property). In finding that standard met, the district court made extensive findings addressing a broad range of evidence, including husband's admission to being a founder of the company, husband's representations to others regarding his interest in the company, numerous benefits husband received from the company, the time and money husband contributed to the company, the regularity and amount of payments husband received from the company, husband's business habits, and husband's initial motive to conceal an interest in the company to more easily settle tax disputes with the Internal Revenue Service. While the evidence is conflicting on many points, such as the extent of husband's financial contributions to Space150, it is evident that the district court

carefully weighed the evidence, making extensive and specific credibility findings in resolving these conflicts. We defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). Our careful review of the record confirms that the district court's findings are supported by the evidence. We decline to extend the length of this opinion by more specifically addressing husband's challenges to particular findings. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that an appellate court's "duty is performed when [it] consider[s] all the evidence . . . and determine[s] that it reasonably supports the findings"); *Vangsness*, 607 N.W.2d at 474-75 & n.1 (applying *Wilson* in dissolution case).

We also reject husband's contention that the district court adopted wife's proposed findings verbatim. Verbatim adoption of a party's proposed findings is not favored because it raises questions as to whether the district court independently evaluated the evidence and analyzed the issues. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). Comparison of the district court's findings on the Space150 issue with wife's proposed findings reveals approximately five sentences that the district court adopted verbatim. But those five sentences comprise a small portion of the ten pages of detailed and balanced findings on the issue in which the district court specifically rejected some of wife's arguments, addressed evidence supporting husband's position, and, as noted above, explicitly relied on credibility determinations. The district court's extensive findings have substantial foundation in the record and amply demonstrate that the district court independently reviewed the record.

C. Concealment

Finally, husband asserts that he never concealed an ownership interest in Space150 but merely denied that he had such an interest. The district court found that husband's denial constituted concealment because he denied the interest with the intent to defraud wife and the Internal Revenue Service. Because the record supports this determination, we reject husband's argument.

III. The district court did not err in its valuation of Space150.

Husband argues that the district court erred in valuing Space150 at three times the company's valuation-date revenue because it relied substantially on the testimony of one non-expert witness and failed to consider a number of factors indicated in *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987). A district court's findings of fact regarding valuation of an asset will not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). A finding of fact is clearly erroneous if "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006) (quotation omitted).

The district court was faced with a limited record on the valuation issue. Wife presented the testimony of a retired businessperson who had experience valuing advertising agencies for purchase and sale but was not an expert. He testified that Space150 had "a very nice list of blue-chip clients" and likely had substantial acquisition value to a traditional advertising agency. He also testified that he had reviewed Jurewicz's deposition testimony addressing valuation and concurred with Jurewicz's

assessment that the company would have a value of three times its revenue. The district court also reviewed Jurewicz's testimony regarding the financial status of the company.

Husband argues that *Nardini* requires a district court to consider eight factors in valuing a closely held business and that wife should have provided evidence as to each factor. *See Nardini*, 414 N.W.2d at 190 (outlining eight factors that "must be taken into consideration before a reasonable valuation can be made"). But there is no dispute that any interest husband has in Space150 is a marital asset, and wife was not required to prove the value of a marital asset. *See Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001) (stating that "a district court's decisions valuing and dividing marital property are made on the evidence submitted by both parties, but neither party bears an affirmative burden of proof"), *review denied* (Minn. Feb. 21, 2001). Based on his consistent denial of any interest in Space150, husband elected not to present any evidence of the company's value or of the value he contributes to the company. *See Roberson v. Roberson*, 296 Minn. 476, 477, 206 N.W.2d 347, 348 (1973) (stating that valuation of closely held business "ordinarily" should exclude "the value of personal services rendered by the owner" when valuation capitalizes income). Under these circumstances, the district court did not err in calculating valuation based on the reasonable, albeit limited, testimony wife presented. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (precluding party's complaint about unfavorable ruling when "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); *Thomas v. Thomas*, 407 N.W.2d 124, 126-27 (Minn. App. 1987) (stating that the district

court is not bound by any witness's opinion concerning values but cannot simply "reject an apparently valid calculation using an accepted method of valuation").

IV. The district court did not abuse its discretion in distributing husband's interest in Space150.

Nardini sets out three methods for accomplishing the just and equitable distribution of marital property when the parties are unable to agree:

> (1) If the asset is readily divisible, the court can divide the asset and order just and equitable distribution in kind; (2) the court can order the sale or liquidation of the asset and make a just and equitable division of the proceeds of sale or liquidation; or (3) the court can determine the value of the asset, order distribution of the entire asset to one of the parties, and order the recipient to pay to the other spouse a just and equitable share of the value of the asset.

414 N.W.2d at 188. The *Nardini* court advised against use of the third method but noted that "[t]he choice of methods usually depends on the type of asset to be divided." *Id.* at 188-89.

Husband asserts that the district court erred in distributing the asset according to the third *Nardini* method. But husband ignores the district court's findings that reject use of the first two methods as unreasonably burdensome on wife. The asset was not "readily divisible" due, in part, to husband's position that he did not possess this asset. And an ordered sale or liquidation of Space150, or even husband's share, could impact Jurewicz, who was not a party to the dissolution action. *Cf. Sammons v. Sammons*, 642 N.W.2d 450, 457 (Minn. App. 2002) (stating that "district court may not exercise jurisdiction over a nonparty" and "[lacks] personal jurisdiction to enter a judgment affecting [the property

rights of a nonparty]"). The district court did not abuse its discretion in ordering husband to pay one-half of the value of his interest in Space150 to wife.

Husband also challenges the district court's order directing him to pay the award to wife in monthly installments of approximately $20,000, contending that he cannot afford to pay that amount.[2] Whether a party has the ability to pay is a consideration when a district court is asked to award spousal maintenance. Minn. Stat. § 518.552, subd. 2(g) (2008). But husband cites no authority indicating that the district court must consider his ability to pay when awarding property. To the contrary, a district court is expected to order prompt payment, with interest, toward a property settlement. *See Thomas*, 407 N.W.2d at 127 (requiring district court to "make explicit findings of fact" regarding any deferred or interest-free payment schedule). Moreover, the record supports the district court's findings regarding husband's substantial income and the anticipated growth of Space150, suggesting that husband is able to make the scheduled payments. We find no abuse of discretion.

V. The district court did not abuse its discretion in awarding wife conduct-based attorney fees and denying husband's request for conduct-based attorney fees.

A district court may 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 (2008). Conduct-based attorney fees must be based on behavior occurring during the litigation, and the court must identify the specific conduct on which

[2] Although husband did not raise this issue before the district court, both parties addressed it on appeal. We briefly address the issue in the interests of justice. Minn. R. Civ. App. P. 103.04; *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002).

it bases the fee award. *Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001). Conduct-based attorney fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).

Husband argues that the district court abused its discretion by awarding wife conduct-based attorney fees. But he does not dispute the factual basis of the district court's findings. Rather, he once again asserts that the district court adopted verbatim "the arguments made by [wife] pertaining to attorney's fees." This contention is not borne out by the record. Husband also suggests that the decision to award almost $76,000 in fees was an abuse of discretion because it had the effect of essentially equalizing the parties' fees. But the district court awarded only those expenses specifically attributable to husband. To the extent the district court's award may be seen as an attempt to equalize the parties' fees, we find such a result consistent with the district court's observation—and husband's acknowledgement—that both parties were recalcitrant during the course of the litigation. *Cf. Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996) (affirming denial of conduct-based fees where both parties' conduct contributed to the expense of the case), *review denied* (Minn. Oct. 29, 1996). The district court did not abuse its discretion in awarding wife conduct-based attorney fees.

We also reject husband's argument that the district court abused its discretion by denying his request for attorney fees because wife unreasonably contributed to the length and expense of the proceeding by repeatedly reneging on mediated agreements. The district court denied husband's fee request based, in part, on a determination that husband

"failed to produce evidence that any written agreements were reached that [wife] reneged upon." We discern no error in this finding. Without any evidence to support the request,[3] the district court did not abuse its discretion in denying husband's request for conduct-based attorney fees.

Affirmed.

[3] Husband asserts that the district court improperly refused to consider evidence of wife reneging on mediated agreements. However, he failed to identify the evidence or where in the voluminous record the district court refused to consider it. We therefore are unable to address this argument. *Cf. Hecker v. Hecker*, 543 N.W.2d 678, 681-82 n.2 (Minn. App. 1996) (noting that "material assertions of fact in a brief properly are to be supported by a cite to the record, and such cites are particularly important where . . . the record is extensive"), *aff'd*, 568 N.W.2d 705 (Minn. 1997).