STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1682
A08-1684

Judy Ann Davis, n/k/a Judy Abrams, petitioner,
Respondent,

vs.

Steven Jerad Davis,
Respondent,

Berkley Risk Administrators, intervenor,
Appellant.

Filed June 9, 2009
Affirmed in part, reversed in part, and remanded; motion remanded
Bjorkman, Judge

Dakota County District Court
File No. 19-F2-05-013588

Daniel S. McGrath, Steingart, McGrath & Moore, P.A., 3300 Edinborough Way, Suite 601, Edina, MN 55435 (for respondent Judy Abrams)

Steven J. Davis, 760 Evergreen Drive, #106, Burnsville, MN 55337 (pro se respondent)

Dean A. LeDoux, Megan L. Anderson, Gray, Plant, Mooty, Mooty & Bennett, P.A., 500 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Bjorkman, 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

BJORKMAN, Judge

In these consolidated appeals, appellant-intervenor challenges the district court's amended judgment and decree in respondents' dissolution action and a separate order and judgment awarding respondent-wife supplemental attorney fees. Because the district court did not abuse its discretion in denying appellant's motion for a new trial and its dissolution findings are not clearly erroneous, we affirm the district court's distribution of the marital property. But because the district court failed to make adequate findings to support its award of attorney fees to respondent-wife in both the judgment and decree and the supplemental order, we reverse and remand. We also remand the motion by respondent-wife for attorney fees incurred in defense of this appeal.

FACTS

Following respondent Steven Davis's (husband) termination from his position as chief financial officer of appellant Berkley Risk Administrators Company, LLC (BRAC) for embezzlement, respondent Judy Davis, n/k/a Judy Abrams (wife), initiated a dissolution proceeding. Husband and wife entered into a marital termination agreement (MTA), valuing their marital estate "as of October 1, 2004, prior to the discovery of Husband's alleged thefts." The MTA awarded wife the parties' homestead and household furnishings, several life insurance policies, a portion of husband's Scudder IRA, certain escrowed funds, two cars, and the parties' anticipated 2004 income tax refunds. Husband received his personal articles, as well as certain marital assets that he liquidated, without wife's knowledge, after October 1, 2004, in order to pay partial

restitution to BRAC for the funds he embezzled. These assets included his Fidelity 401(k) plan, $100,698 of his Scudder IRA, and two cars that he purchased partially with marital assets. The district court incorporated the MTA into a dissolution judgment and decree filed May 18, 2005 (2005 dissolution judgment and decree).

Upon learning of the 2005 dissolution judgment and decree, BRAC moved to intervene in the dissolution action, asserting its potential right to the property distributed to wife, pursuant to orders BRAC obtained in Hennepin County District Court prohibiting husband from transferring his assets. BRAC also moved to freeze all of wife's assets. The district court granted BRAC's motion and ordered that "BRAC may serve upon all parties and file its Motion to Vacate the Property Distribution set forth in the Dissolution Decree." The court also enjoined wife's rights and access to any of the property "explicitly or implicitly referenced in the [2005 dissolution judgment and decree]."

More than a year passed and BRAC had not yet filed a motion to vacate the 2005 dissolution judgment and decree. Wife petitioned the district court to release a portion of her frozen assets and requested attorney fees. The district court granted wife's motion, releasing a portion of the escrowed funds to her, and reserving her claim for attorney fees.

BRAC subsequently filed an intervenor's complaint in the dissolution action, seeking a judgment declaring the 2005 dissolution judgment and decree to be invalid and alleging that the respondents' property distribution constituted a fraudulent transfer in violation of the Minnesota Uniform Fraudulent Transfers Act, Minn. Stat. §§ 513.41-.60

(2006) (MUFTA).[1] Wife moved to dismiss BRAC's complaint and cross-claimed for abuse of process and attorney fees. The district court denied wife's motion to dismiss, but ordered BRAC to file its MUFTA action as a separate civil action. The district court also awarded wife $1,000 in attorney fees from BRAC, "[s]ince the actions of the Intervenor created extra legal work for [wife]."

After the new civil file was opened for the MUFTA action, BRAC filed a separate motion to vacate the property distribution in the 2005 dissolution judgment and decree and requested an order setting an evidentiary hearing to determine the extent of husband's interest in the marital estate. BRAC and wife also filed cross-motions for partial summary judgment in the MUFTA action. The district court conducted a hearing, which the parties refer to as a summary-judgment hearing.[2] The district court's order states that wife and husband "perpetrated a fraud upon the Court in submitting a Marital Termination Agreement and proposed Judgment and Decree that did not accurately reflect the nature and quantity of their marital estate, and misstated [husband's] status regarding his prosecution for embezzlement." The order vacates the 2005 dissolution judgment and decree and directed the matter to proceed to trial as previously scheduled.

Following the court trial, the district court issued a new dissolution judgment and decree (2008 dissolution judgment and decree), reserving BRAC's MUFTA claims and

[1] It appears BRAC chose this course in order to avoid the timing limitations contained in the dissolution statute. *See* Minn. Stat. § 518.145, subd. 2 (2006) (stating that a motion to vacate "must be made within a reasonable time . . . not more than one year after the judgment and decree").

[2] The parties did not provide a transcript of this hearing, and the district court's subsequent order does not reference summary-judgment motions.

wife's cross-claims, and dividing respondents' marital property in essentially the same manner as the 2005 dissolution judgment and decree. But the district court used a new valuation date of October 5, 2007, the date on which BRAC's appraisers entered wife's homestead to value the real and personal property awarded to wife in the 2005 dissolution judgment and decree. The district court also ordered BRAC to pay wife attorney fees of $80,858.48, based on its findings that wife's fees were unnecessarily increased by BRAC's intervention in the dissolution action, that wife lacks the means to pay the fees, and that BRAC has the means to contribute. Following the entry of the 2008 dissolution judgment and decree, wife requested a supplemental award to cover the attorney fees she incurred during the court trial and in responding to post-hearing submissions. The district court issued an order awarding additional fees in the amount of $17,637 (supplemental attorney-fee order), which appears to incorporate only the need-based findings from the 2008 dissolution judgment and decree.

BRAC moved for amended findings or a new trial. The district court held a hearing and filed an amended judgment and decree (2008 amended dissolution judgment and decree) on September 9, 2008.[3] The amended findings are substantially the same as those in the 2008 dissolution judgment and decree. Following entry of the 2008 amended dissolution judgment and decree, wife filed an affidavit of default of judgment debtor, requesting that the district court enter judgment on the attorney fee awards in the 2008 amended dissolution judgment and decree and the supplemental attorney-fee order, which

[3] No transcript from the hearing was provided.

BRAC had not paid. The district court entered judgment in the amount of $99,249 against BRAC (attorney-fee judgment). These consolidated appeals follow.

D E C I S I O N

At the outset, we note that the procedural history of the district court cases that are the background for these consolidated appeals is not entirely clear. The district court's use of separate files for the dissolution and MUFTA actions has added to the confusion. Despite the complicated history, we note that it is the 2008 amended dissolution judgment and decree and supplemental attorney-fee order that are before us for review. The district court expressly reserved BRAC's MUFTA claims for resolution in a separate proceeding. To the extent that BRAC's arguments on appeal invite us to make factual determinations with respect to the MUFTA claims, we decline to do so. *See Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) ("It is not within the province of this court to determine issues of fact on appeal."). BRAC must obtain resolution of those issues in the district court.

We also reject BRAC's argument that a new trial is warranted because the district court improperly re-cast the proceedings as a dissolution trial. While the transcript reflects some confusion among counsel as to the exact purpose of the court trial and whether the prior summary-judgment order included a liability determination with respect to BRAC's MUFTA claims, the district court plainly stated that "[t]he J & D has been vacated, so basically we're doing a divorce trial today . . . ." And because the district court has not yet ruled on BRAC's MUFTA claims, it is not possible to review BRAC's request for a new trial on that issue.

I.

BRAC argues that it is entitled to a new trial based on procedural irregularities and because several amended findings are contrary to the applicable law and the evidence. The record reflects that the district court issued the 2008 amended dissolution judgment and decree in response to BRAC's motion for amended findings or a new trial. The district court's denial of BRAC's motion for a new trial is implicit in this decision. The district court has the discretion to grant a new trial, and we will not disturb the district court's decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A. The record supports the district court's property distribution.

A district court has broad discretion when dividing the parties' marital property, and we will not reverse or alter a property division absent a clear abuse of this discretion or erroneous application of the law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005).

A district court may not divide marital property based on a party's misconduct. Minn. Stat. § 518.58, subd. 1 (2008). Rather, the division should be based on other relevant factors, including the length of the marriage, the parties' liabilities, and each party's employability. *Id.* Furthermore, "[t]he court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property . . . ." *Id.* As a general rule, "equal division of the wealth accumulated through the joint efforts of the parties" is presumptively appropriate on dissolution of "a long term marriage." *Miller v. Miller*, 352 N.W.2d 738, 742 (Minn.

1984). But a district court's division of property must ultimately be based on the particular facts and circumstances of each case. *Lenzmeier v. Lenzmeier*, 304 Minn. 568, 571, 231 N.W.2d 71, 74 (1975). An appellate court "will affirm the [district] court's division of property if it had an acceptable basis in fact and principle even though [the appellate court] might have taken a different approach." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002).

BRAC first challenges the district court's consideration and inclusion in the marital estate of the assets that husband liquidated to partially repay BRAC before the dissolution action was commenced. BRAC argues that the district court erroneously treated these as dissipated assets under Minn. Stat. § 518.58, subd. 1a (2008) (allowing district court to compensate spouse for marital assets other spouse transferred or disposed of in contemplation of or during dissolution), without regard to the fact that husband liquidated these assets prior to the dissolution proceedings.

But the unique circumstances of this case required the district court to address the devaluation of the marital estate following husband's liquidation of substantial marital assets. Indeed, the MTA, 2005 dissolution judgment and decree, and 2008 amended dissolution judgment and decree are all structured around the notion that husband's unilateral decision to liquidate his retirement accounts before wife filed the dissolution action was unduly unfair to wife because it resulted in "a marked depreciation in the amount or value of the marital assets." To find otherwise and ignore the assets that husband liquidated, as BRAC suggests, would undermine the intent of section 518.58, subdivisions 1 and 1a, in protecting each spouse's interest in the marital assets, as well as

the overall objective that the division of marital assets in a dissolution be "just and equitable." *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987).

Additionally, under Minn. Stat. § 518.58, subd. 1, the district court shall consider, in equitably distributing marital property, "the contribution of each [spouse] in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property." Here, although husband did not dissipate assets in anticipation of the dissolution, he failed to preserve the value of the marital property by liquidating substantial funds without wife's knowledge. Under these circumstances, the district court did not err in assigning to husband, as a distribution, the assets that he liquidated to repay BRAC prior to the dissolution proceedings.

BRAC next argues that the district court clearly erred in finding that husband liquidated "60 percent" of the marital estate prior to the dissolution proceedings to make partial restitution to BRAC. BRAC contends that the partial restitution it received amounted to less than 30% of the marital estate. But the marital estate was not valued at the amount BRAC actually received in restitution when husband liquidated the assets. As wife notes, husband's early liquidation of his retirement assets to repay a portion of the embezzled funds to BRAC came at a price. He incurred early withdrawal penalties and substantial tax consequences that reduced the value of these assets, something that would not have happened if they had been intact at the time of the dissolution. The 60% reduction the district court used is a reasonable approximation of the amount by which

the marital estate was diminished as a result of husband's unilateral liquidation of these assets and is not contrary to the evidence.

Finally, BRAC contends that the district court erred in failing "to properly consider other relevant evidence and equities to determine a truly non-fraudulent, fair, and *equitable* division of [the] marital estate" and in awarding wife essentially 100% of the marital assets.[4] But as noted previously, the district court's primary concern in distributing the property was the "equities." After vacating the 2005 dissolution judgment and decree, the district court set a new valuation date, received additional evidence, and reconsidered all of the evidence over the course of a two-day trial. The district court has the discretion to determine the valuation date for purposes of the marriage dissolution. *See* Minn. Stat. § 518.58, subd. 1 (identifying a presumptive valuation date); *Grigsby v. Grigsby*, 648 N.W.2d 716, 720 (Minn. App. 2002) ("The district court has broad discretion in setting the marital property valuation date."), *review denied* (Minn. Oct. 15, 2002). The district court heard extensive testimony regarding the value of the parties' homestead and wife's failure to disclose an $85,000 cashier's check that was partially funded with a nonmarital inheritance. The district court made

[4] For this second argument, BRAC relies on the unpublished case *McCormick v. McCormick*, No. A07-1638, 2008 WL 4470819, at *4-*5 (Minn. App. Oct. 7, 2008), in which this court reversed and remanded an award of 100% of the marital equity in a homestead to wife, finding that it was too extreme and an abuse of discretion. Although unpublished, *McCormick* cites a string of published cases which indicate we have never "upheld the complete denial of a share of the accumulated marital property to one party in a dissolution action." 2008 WL 4470819, at *5. However, the unique circumstances of this case support the very unequal division of assets in the 2008 amended dissolution judgment and decree. The cases cited in *McCormick* do not alter the district court's discretion to fashion a fair and equitable division of marital assets depending on the circumstances of the case.

credibility determinations regarding this testimony. Based on the record, we conclude that the district court did not abuse its discretion or legally err in distributing the marital property.

B. The district court's findings of fact are not clearly erroneous.

BRAC also challenges several of the district court's findings in the 2008 amended dissolution judgment and decree. BRAC argues that this court should vacate several amended findings "to the extent that they discuss BRAC's supposed conduct and motives below," because they are immaterial to the district court's legal conclusions, unsupported by the evidence, and reflect bias.[5]

We will not set aside the district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *In re Estate of Rock*, 612 N.W.2d 891, 894 (Minn. App. 2000). A finding is clearly erroneous if, after considering the record in the light most favorable to the findings and deferring to the fact-finder's credibility determinations, we are "left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted).

After careful review of the record, we conclude that the district court's findings are supported by reasonable evidence and are therefore not clearly erroneous. Because it would unnecessarily extend the length of this opinion, we decline to address BRAC's specific challenges to each finding. As an appellate court, our duty in addressing the

[5] We address BRAC's challenges to findings 30, 65, and 72-79, relating to the award of attorney fees to wife, in the following section.

district court's fact findings requires only that "we consider all the evidence, as we have done here, and determine that it reasonably supports the findings." *Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951); *see also Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004) (applying *Wilson* in a family-law appeal).

II.

Resolution of the attorney fee issue is complicated by the district court's issuance of multiple orders awarding essentially the same fees, and the fact that the supplemental attorney-fee order was reduced to judgment in the MUFTA action file rather than the dissolution file. BRAC challenges the award of attorney fees to wife on three grounds, arguing that: (1) the district court failed to cite a statutory basis for the award; (2) it cannot be ordered to pay attorney fees in a dissolution action based on its status as a third party; and (3) if the district court did intend to base the award on Minn. Stat. § 518.14 (2008), it erred in applying the statute because the evidence does not support the findings. We address each argument in turn.

A. Section 518.14 provides a basis for the attorney-fee awards.

Generally, attorney fees are not awarded absent a contractual or statutory basis. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). If such a basis exists, a district court's award of attorney fees will not be overturned absent an abuse of discretion. *Burns v. Burns*, 466 N.W.2d 421, 424 (Minn. App. 1991).

Here, although not expressly stated in any of the district court's orders, it is evident that the district court based its award of attorney fees to wife on Minn. Stat. § 518.14, which provides for awards of attorney fees in family-law proceedings based on

a party's need or improper conduct. The 2008 amended dissolution judgment and decree contains numerous findings regarding both wife's need for fees and BRAC's conduct that increased wife's fees. We conclude that the district court awarded attorney fees based on section 518.14.

BRAC argues that the district court "erred in even considering that statute" because it does not apply to MUFTA actions. We disagree. BRAC's argument overlooks the fact that the dissolution and MUFTA actions were separate pending matters. The district court order requiring BRAC to initiate a separate civil action in which to pursue its MUFTA claims did not convert the entire dissolution proceeding into a MUFTA action. And the district court's order vacating the 2005 dissolution judgment and decree required the court to issue a new judgment and decree in order to effectuate the parties' divorce. The district court did so after the two-day dissolution trial.

Because the district court's award of fees was made in the 2008 dissolution judgment and decree, section 518.14 provides a basis for awarding attorney fees. Additionally, although the district court's subsequent supplemental attorney-fee order and related judgment were entered in the MUFTA file, it is apparent that the district court intended this award to supplement the fee award it made in the 2008 dissolution judgment and decree under section 518.14. We note that because section 518.14 applies to proceedings under chapters 518 and 518A, it is not an appropriate basis for awarding attorney fees in a MUFTA action. But because the district court reserved BRAC's MUFTA claims for resolution in a separate proceeding, we presume, despite the MUFTA

file designations, that the district court intended the attorney-fee awards to apply only to the dissolution proceeding and therefore appropriately based its award on section 518.14.

B. Section 518.14 applies to BRAC because, through intervention, BRAC became a party to the proceeding.

By its express terms, section 518.14 permits an award of attorney fees against a "party" based on need or conduct. The term "party" in section 518.14 is not necessarily limited to a spouse or former spouse involved in the proceeding. By voluntarily intervening in the dissolution action, BRAC made itself a party to the proceeding. *See Reads Landing Campers Ass'n, Inc. v. Township of Pepin*, 533 N.W.2d 45, 49 (Minn. App. 1995) ("By intervention, a third party becomes a party to a suit pending between others." (quotation omitted)), *aff'd*, 546 N.W.2d 10 (Minn. 1996).

We previously considered an award of attorney fees against a non-spouse under section 518.14 in *Sammons v. Sammons*, 642 N.W.2d 450 (Minn. App. 2002). In *Sammons*, husband and wife divorced after lengthy court proceedings. 642 N.W.2d at 454. Following entry of the judgment and decree, husband's mother moved to vacate the provisions that imposed a constructive trust in favor of wife upon properties that belonged to mother. *Id.* at 454. The district court denied the motion, and mother appealed. *Id.* at 454-55. Wife moved for attorney fees to cover the expenses she incurred on appeal. *Id.* at 455. We considered wife's motion for an award of fees against mother, but denied it on the basis that wife had not made adequate showings that mother had the ability to pay the fees or that conduct-based fees were appropriate. *Id*. at 458-59.

BRAC contends that *Sammons* "does not support the application of § 518.14 to a third party non-spouse because no such fee award was made in that case," and the court did not rule specifically on that issue. But as wife argues, *Sammons* indicates that consideration of an award of fees against a "party" in a dissolution action, regardless of whether that party is a spouse, is appropriate. BRAC's suggested interpretation of the statute is contrary to the statute's plain meaning. As a "party," BRAC is subject to a potential attorney-fee award under Minn. Stat. § 518.14.

C. The district court's findings in support of awarding attorney fees to wife are inadequate.

Although we conclude section 518.14 is an appropriate basis for awarding attorney fees in this case, we agree with BRAC that the district court's findings in support of the awards are inadequate under the statute.

The statute permits awards of both need-based and conduct-based attorney fees, but the grounds for awarding fees in these two categories are different. Minn. Stat. § 518.14, subd. 1. Need-based attorney fees may be awarded if the district court finds: (1) the fees are needed for a party's good-faith assertion of rights; (2) the payor has the ability to pay the fees; and (3) the recipient is unable to pay the fees. *Id.* Conduct-based fees may be awarded, in the district court's discretion, "against a party who unreasonably contributes to the length or expense of the proceeding." *Id.* "[F]ee awards made under this provision must indicate to what extent the award was based on need or conduct or both." *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001); *see also Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001) (remanding attorney-fee issue, stating

that lack of findings "preclude[d] effective review" of fee award because district court awarded both need- and conduct-based fees under section 518.14 but did not indicate how much of the award was for either reason), *review denied* (Minn. Feb. 21, 2001).

Here, the district court's findings identify several instances when BRAC's conduct unnecessarily increased wife's fees, and address wife's inability to pay her fees. But the findings do not indicate which portion of the fee awards is attributable to each category of fees. As in *Haefele*, the district court's findings are not "sufficient to show what combination of need or conduct support all, or different parts of, the entire award," and we are not able to conduct an effective review. 621 N.W.2d at 767. Accordingly, we conclude that the district court abused its discretion in failing to adequately identify the portions of the awards attributable to conduct, need, or both, and we reverse and remand to the district court for additional findings.

There is also merit to BRAC's argument regarding the reasonableness of wife's claimed fees. The amount of the initial award, $80,858.48, is based on the affidavit and summary of fees wife provided in support of her request. The fee summary lists, by month, the fees wife incurred between July 2005, when BRAC intervened in the action, and February 2008. Although the record supports the district court's finding that BRAC unreasonably contributed to the length of the proceeding by waiting to file the motion to vacate and confusing the procedure of the case, the fee summary does not provide a basis for determining what portion of wife's attorney fees are attributable to BRAC's conduct. And there is no record before us of the evidence wife submitted to the district court in support of her request for supplemental attorney fees. On remand, the district court

should make specific findings regarding the amount and reasonableness of wife's attorney fees and distinguish the need- and conduct-based components of any award.

Wife also moves for attorney fees incurred in defense of this appeal. *See* Minn. R. Civ. App. P. 139.06 (prescribing procedure for seeking appellate attorney fees). If there is a statutory basis for awarding attorney fees for the district court proceedings, a party who reasonably defends the district court decision on appeal may be entitled to additional fees, to avoid dilution of the original award. *Bucko v. First Minn. Sav. Bank, F.B.S.*, 471 N.W.2d 95, 99 (Minn. 1991). Because we are remanding the issue of attorney fees for additional findings, we also remand the motion for appellate attorney fees and direct the district court to consider and decide that motion.

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