STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1565

In re the Marriage of: Vitamin, petitioner,
Appellant,

vs.

Misha Gordin,
Respondent.

Filed December 1, 2009
Affirmed
Larkin, Judge

Stearns County District Court
File No. 73-F6-05-005053

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Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

LARKIN, Judge

In this marital-dissolution proceeding, appellant challenges the district court's identification of marital property, the findings of fact supporting the division of marital

property, and the propriety of the district court's in-kind division of marital artwork. Appellant has shown neither that the district court erred in identifying the marital property nor that the findings of fact are clearly erroneous or are otherwise inadequate to support the division of marital property. Nor has appellant shown that the district court otherwise abused its discretion in dividing the marital property. Therefore, we affirm.

FACTS

Appellant-mother Vitamin and respondent-father Misha Gordin married in April 1993. Before the marriage, father, with nonmarital funds, purchased what became the marital home. Father is a self-employed artist. Mother is a self-employed clothing designer. The dissolution judgment awards mother sole physical custody of the minor child, includes a *Karon* waiver of maintenance by both parties, and identifies and divides the parties' marital property. In dividing the marital art produced by father, the district court made an in-kind division. After the district court partially granted and partially denied the parties' posttrial motions, an amended judgment was entered. Mother appeals.

D E C I S I O N

I

We reject mother's argument that the judgment's identification of marital property is defective because it lacks adequate findings of fact addressing the factors listed in Minn. Stat. § 518.58, subd. 1 (2008). The factors listed in § 518.58, subd. 1, are used to achieve an equitable division of marital property, not to identify marital property. The definitions of marital and nonmarital property are in Minn. Stat. § 518.003, subd. 3b (2008).

Mother argues that the district court failed to recognize marital interests in an investment account and the home. Whether property is marital or nonmarital is a legal question that appellate courts review de novo; in doing so, however, appellate courts defer to the district court's underlying findings of fact, unless they are clearly erroneous. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002).

1. Investment Account: A comingling of marital and nonmarital property can result in nonmarital property being treated as marital if the nonmarital property is not readily traceable. *Wiegers v. Wiegers*, 467 N.W.2d 342, 344 (Minn. App. 1991) *see Baker v. Baker*, 753 N.W.2d 644, 653 (Minn. 2008) (noting this holding in *Wiegers*). Citing exhibits 22-25, mother argues that the account statements for father's investment account "proved that the account had been repeatedly replenished by the infusion of marital income and that extensive comingling had occurred throughout the 16 year marriage." Exhibits 22-25 cover only the period from September 1, 2007 to December 31, 2007, show a net deposit for all of 2007 of $1,934.45, and do not identify the source of the deposited funds. Thus, (a) the exhibits that mother cites address only a short portion of the parties' marriage; (b) the exhibits do not show the deposited funds to be marital; and (c) even if the entire 2007 net deposit was marital, it would constitute only about 2.7% of the account's $71,578.68 year-end value. Exhibits 22-25 do not show a comingling of marital and nonmarital interests in the investment account. Nor do they show that any comingling that may have occurred requires a determination that there is a marital interest in the account. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis error); *see also* Minn. R. Civ. P. 61

(requiring harmless error to be ignored). And exhibit 14, which includes account statements for most of the rest of 2007, does not alter our conclusion.

Property generated through expenditure of marital effort or resources is marital. *Baker*, 753 N.W.2d at 651; *Nardini v. Nardini*, 414 N.W.2d 184, 192 (Minn. 1987). Mother argues that the district court erred by not addressing the extent to which funds earned by father's investment account were the result of father's active management of that account during the marriage and therefore marital. The record leaves unclear whether mother explicitly made an active-appreciation argument to the district court. If she did not, the argument is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a party may not argue an issue on appeal on a theory not presented to the district court). Even if the argument is properly before this court however, the district court admitted that mother made some deposits into the account starting in 2000, but that "in each year thereafter, more funds were withdrawn than deposited causing a net draw-down of [father's] pre-marital funds [in the account.]" Thus, absent proof of pre-2000 marital contributions to the investment account (something not specifically alleged in this court), the record supports the district court's determination that there was not a marital interest in the investment account. And, while not dispositive of the issue, we note that the district court awarded mother $10,000 from the investment account in connection with the division of the marital art.

2. Home: Because mother did not show error in the district court's ruling that the investment account is father's nonmarital property, we reject her argument that a marital interest in the home arose from use of funds from that account on the home. We also

reject mother's argument that there should be a marital interest in the home arising from marital improvements to the home, and from marital labor and marital funds expended on the home. The district court found that (a) father bought the home before the marriage with funds that were "exclusively" his and that the home was not mortgaged when the parties married; (b) no changes were made to the home during the marriage that "increase[ed] its square footage or volume" and any interior improvements "occurred prior to the marriage or, if after the marriage, were paid for by [father with his nonmarital funds]"; and (c) improvements made after the marriage "may have contributed to the value of the property, but were paid for with the pre-marital assets of [father]."[1] These findings are consistent with mother's testimony that home improvements made during the marriage were paid for with funds from father's investment account. And when asked whether she claimed an interest in the home based on her contributions to the property, mother said that her claim was based on contributions "to the family." Mother has not shown that the district court erred by not identifying a marital interest in the home.

II

Mother challenges the division of marital property, arguing that the district court failed to make adequate findings on the property-division factors listed in Minn. Stat. § 518.58, subd. 1. Mother then tenders her view of the statutory factors in seriatim, often without alleging clear error in the findings that the district court did make.

[1] These findings address mother's assertion that the district court failed to adequately address her marital contributions to the home.

A. Mother's Argument

Mother's findings-based argument is defective for three reasons. First, she fails to specifically identify any prejudice arising from many of the allegedly missing findings. Similarly, she often fails to identify prejudice arising from differences between her recitation of what she apparently believes the findings should be and the district court's findings that address the statutory factors. Absent demonstrated prejudice, reversal is not warranted. Minn. R. Civ. P. 61; *see Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, an appellant must show both error and that the error caused prejudice).

Second, to the extent that mother is functionally asking this court to make findings consistent with her view of the statutory factors, she fails to recognize that this court, as an appellate court, cannot make findings of fact. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966).

Third, even if the record supports the findings that mother suggests, this is insufficient to show that the district court's findings are clearly erroneous. District court proceedings involve the presentation of evidence and the district court's resolution of conflicts in that evidence—often based on its view of witness credibility. Thus, depending on the district court's view of the evidence and the witnesses, any number of findings on a single question could be justified. For this reason, simply showing "[t]hat the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468,

474 (Minn. App. 2000). Because a given record might support multiple, conflicting, findings of fact on a single factual question, the law is clear.

> When a party challenges a [district] court's findings, the evidence tending directly or by reasonable inference to sustain the findings shall be summarized by the party challenging the findings. When summarizing the evidence supporting a [district] court's findings, the party challenging the findings must cite the portions of the record containing those findings.

Vangsness, 607 N.W.2d at 474 (quotations, ellipses and citations omitted). Therefore,

> [t]o challenge the [district] court's findings of fact successfully, the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court's findings (and accounting for an appellate court's deference to a [district] court's credibility determinations and its inability to resolve conflicts in the evidence), the record still requires the definite and firm conviction that a mistake was made. Only if these conditions are met, that is, only if the findings are "clearly erroneous," does it become relevant that the record might support findings other than those that the [district] court made.

Id. at 474. Because mother has not cited the evidence *supporting* the findings that she challenges and has not explained why, *despite* that evidence, the findings that the district court made are clearly erroneous, she has not shown those findings to be clearly erroneous.

B. The District Court's Findings of Fact

Because mother's mode of argument fails to show the district court's findings are clearly erroneous, we need not review those findings. Moreover, the function of an appellate court "does not require us to discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings," and an appellate

court's "duty is performed when 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 Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004) (applying *Wilson* in a dissolution appeal). We will, however, briefly address some of mother's findings-related arguments here.

Mother's assertions that the district court "did not reference" father's prior marriage and did not address the parties' employability, are incorrect. The district court found that father is "a widower" and has "[a] daughter from his first marriage." It also found that mother is a self-employed clothing designer who is employed by the Subchapter-S corporation that she owns, and that father is a self-employed artist.

We reject mother's arguments that the district court did not address her assertion that father, in bad faith, "intentionally limit[ed] his income" by not producing or selling certain art, and that he did so as an element of his "divorce planning." The district court noted that father "was not producing new work because he did not know whether that new work would be produced for his own benefit or for the benefit of both parties" and stated that it "does not find that [father] has limited his attempts to sell existing work or attempted to limit his income from existing work." To the extent that mother challenges the district court's refusal to find that father acted in bad faith, we reject that challenge. Father testified that his reduced production of art was partially based on his poor health, as well as the advice of counsel. Further, the record indicates that there is a significant difference between father's production of art and his ability to earn income from art that he produces. Also, the district court found that a book contract that is central to mother's

assertions of bad faith is marital, and awarded mother half of its value. Moreover, mother made her bad-faith argument to the district court in her motion for amended findings, but because the district court did not amend its findings accordingly, it rejected the argument. *See Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 271 n.1 (Minn. 2008) (stating that "[w]here the court denies a motion for amended findings of fact, that is equivalent to making findings negativing the facts asked to be found" (quoting *Alsdorf v. Svoboda*, 239 Minn. 1, 11, 57 N.W.2d 824, 830 (1953))). Whether a party acts in good faith is, essentially, a credibility determination. *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985). And appellate courts defer to district court credibility determinations. *Sefkow*, 427 N.W.2d at 210; *see Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 241 (Minn. App. 2003) (citing *Tonka Tours* and *Sefkow* for these propositions). We will not alter the district court's refusal to find that father acted in bad faith.

Mother asserts that the district court did not address the parties' health. But mother admits that her health is "presumed to be good." And father testified that he has had cancer, had a kidney removed, and has significant blood-pressure problems. Because father is more than 16 years older than mother, and substantially less healthy than mother, a closer inquiry into the parties' health by the district court could have weighed in favor of awarding father more property. *See* Minn. Stat. § 518.58, subd. 1 (requiring the district court to base its findings on the relevant factors, including but not limited to the age and health of the parties). Therefore, mother was not prejudiced by the lack of a closer inquiry. *See Midway Ctr. Assocs.*, 306 Minn. at 356, 237 N.W.2d at 78.

Mother also recites values for father's investment account and the marital home. But neither the investment account nor the home is marital property.

Mother argues that the district court failed to make adequate findings regarding her debts; a $30,000 business loan, a $110,000 mortgage on the home in which she currently lives, a $20,000 car loan for a car awarded to her, and a $14,000 business line of credit. The district court acknowledged the business loan and mortgage. In addressing the car loan and the line of credit, the district court found them to be $12,000 and $15,000 respectively. Because the parties stipulated that each would receive the vehicles in his or her possession, as well as responsibility for the associated debts, mother stipulated to her responsibility for the car loan, whatever its amount. Therefore, we discern no car-loan-related prejudice. And because the district court found mother's business line of credit to be $15,000, rather than the $14,000 mother asserts, the district court may have overstated that debt, something that would not prejudice mother in the property division.

Mother argues that the district court did not make findings regarding the parties' needs and abilities to acquire capital assets. After detailing mother's business interests, the district court found that mother "is able to support her current lifestyle with her income, and has done so throughout the time of the separation of the parties." Thus, the district court believed that mother had assets and, consistent with her *Karon* waiver, was able to support herself. Regarding father, the district court found that he "is able to support himself with his income[,]" can, "if necessary, invade his non-marital assets to provide for his own support[,]" and has "substantial nonmarital, as well as marital,

assets[.]" Thus, the district court believed that he can support himself. And, in addition to producing art, sale of his art may allow him to acquire other assets.

Finally, mother argues that the district court failed to adequately weigh her contributions to the marital home, the investment account, and father's art. She also asserts that her contributions as a homemaker were not adequately considered. As noted above, mother has not shown a marital interest in the marital home. Nor has she shown a marital interest in the investment account. Father's art is discussed below.

III

The district court made an in-kind division of the marital art, awarding one-half to each party. Mother challenges this division, arguing that the district court did not explicitly value the marital art. But the marital art consisted of multiple images of the art in question. Because those items were equally divided in kind, any failure to value them is harmless because each party received an equal share of the art, whatever its value. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *McGaughey v. McGaughey*, 363 N.W.2d 881, 883 n.1 (Minn. App. 1985) (noting that, in cases involving an "equal division in kind of a single or fungible asset," appellate review of a property division is possible without finding the value of the divided assets).

Noting that the neutral expert hired by the parties to value father's art stated that the "optimal" situation, for purposes of marketing the art, was for an artist to retain his or her own work, mother also argues that she should have received a cash award for her share of the art. On appeal from a property division including, among other things, a challenge to the district court's in-kind division of certain assets, the supreme court noted

that "the [district] court has broad discretion in dividing property upon dissolution of a marriage; and even though [an appellate] court might have taken a somewhat different approach, we will not overturn the [district] court's decision absent a showing of clear abuse of that discretion." *Miller v. Miller*, 352 N.W.2d 738, 741-42 (Minn. 1984).

When dividing marital property, a district court is to select the method of division that puts the parties in the optimal position. *Nardini*, 414 N.W.2d at 188. In doing so, the district court can consider different ways to divide property, including (a) an in-kind division of a divisible asset, (b) a division of the proceeds of a court-ordered sale of the asset, and (c) awarding one party both the asset and the obligation to pay to the other a just share of its value. *Id*. Here, the district court found:

> [Father] does not have reasonable access to funds sufficient to pay [mother] for her share of marital art inventory. In addition, there are insufficient separate marital assets to allow this court to award marital assets to [mother] equal to the value of said marital art inventory. Given the relatively limited number of sales of [father's] artwork over the last several years, it would be an inequitable windfall to provide [mother] with a large cash award in that it may take many years to sell the [artwork] necessary to fund such an award. Further, it would be pure speculation to attempt to discount any such cash award in an effort to account for the likelihood that the artwork would be sold over a lengthy period of time in the future. Physically awarding one-half the marital art inventory to each party is likely to provide greater value to both parties over time than would forcing an immediate liquidation of the entire marital inventory.

Thus, the district court found that an in-kind division was appropriate because selling the art would require a "lengthy period of time" and because father lacks the ability to pay mother, in cash, property, or a combination of the two, for her share of the art. These

findings are consistent with the illiquid nature of the bulk of the property awarded to father and the expert's testimony describing the process for selling father's art.

To the extent that mother argues that the district court inequitably failed to award her art that is complete or in a salable condition, we reject that argument. The district court noted that some of the art "is not in a completed form and may not be framed[,]" and ruled that it would "not require [father] to put additional time and effort into improving the inventory as it currently exists." But it ordered father to "sign, date and number the existing inventory" and required that the share of the art awarded to mother "contain as many completed images as that awarded to [father]; the images designated for [mother] shall be in the same condition as the images designated for [father.]" Further, the district court stated that if the parties could not agree on a division of the art, a neutral third party would be appointed to divide it. Thus, whatever the effort and cost associated with putting art into salable condition, that effort and cost was equally divided between the parties because the art itself was equally divided between the parties. And the district court ordered father to pay mother $10,000 from his nonmarital investment account to assist mother in making the art salable. On this record, we conclude that the district court went to considerable lengths to assure an equal in-kind division of the marital art. An equal division of marital property is presumptively equitable upon dissolution of a long-term marriage. *Miller*, 352 N.W.2d at 742. Because the parties here were married almost 12 years, their marriage can be deemed "long-term." *See Gales v. Gales*, 553 N.W.2d 416, 421 (Minn. 1996) (stating, in an appeal of maintenance dispute, that the supreme court would not "quibble" with district court's finding of fact that an 11-year marriage

was "long term"). On this record, we cannot say that an equal in-kind division of father's marital art is an abuse of its broad discretion, especially where that illiquid art constituted the bulk of the parties' marital estate.

Affirmed.

Dated:

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Judge Michelle A. Larkin