STATE OF MINNESOTA
IN COURT OF APPEALS
A09-680

In re the Marriage of: Tammy Lynn Duncan, petitioner,
Appellant,

vs.

Bryan George Duncan,
Respondent.

Filed December 15, 2009
Affirmed in part and remanded
Larkin, Judge

Dakota County District Court
File No. 19-F9-07-010014

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Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

LARKIN, Judge

In this marital-dissolution appeal, appellant challenges the division of property and debt, and argues that she should have been awarded permanent spousal maintenance and attorney fees. We affirm the property division and the denial of attorney fees. But we remand the issue of the duration of the maintenance award for the district court to expressly address the likelihood that appellant will become self-supporting.

FACTS

During their marriage, Tammy Karnovsky[1] worked part-time as a cashier and Bryan Duncan worked in real-estate-related jobs, including for his business, Duncan Construction. Also, the parties, particularly Duncan, gambled. Shortly after each of the parties' two sons was born, the parties acquired an investment property. Later, they acquired a third investment property. As their sons grew up, they worked for Duncan Construction, and Duncan often paid them in cash. In 2003, the parties refinanced the mortgage on their home, withdrawing much of its equity.

In 2004, Duncan and the parties' sons started a new business, Willow Tree, LLC, to which the investment properties were conveyed. Those conveyances included, among other things, Karnovsky quitclaiming her interests in the properties. Willow Tree then conveyed the properties and used the proceeds as the down payment on an apartment

[1] Appellant's brief is captioned "Tammy Lynn Karno***f***sky, f.k.a. Tammy Duncan, v. Bryan George Duncan." (Emphasis added.) At trial, appellant spelled her name as "K-a-r-n-o-***v***-s-k-y." (Emphasis added.) This opinion uses the spelling provided by appellant at trial.

complex. Because the parties generated a significant amount of debt, Duncan, in spring 2007, refinanced the mortgage on the apartment complex, using the proceeds to pay debts of Willow Tree and the parties, and to fund work on the apartment complex.

By the time Karnovsky petitioned to dissolve the marriage, both sons were emancipated. Because of the poor condition of the parties' finances, neither party could move out of the marital home. Apparently, however, they removed from the home documents they thought would be useful in litigation. Discovery disputes followed. Also, after being served with the dissolution petition, Duncan removed funds from personal and business accounts, and used most of one line of credit.

After Karnovsky asked to be awarded the apartment complex owned by Willow Tree, which in turn was owned by Duncan and the children, Duncan hired an attorney to represent the children. That attorney made a single appearance. At trial, the district court learned that Karnovsky had not paid the utility bills for the marital home as required by an order for temporary relief, that the gas had been shut off and that despite a lack of gas, heat, and an inability to cook at the home, the parties still lived there. The district court then directed that funds in the trust account of Duncan's attorney be used to pay the utility debts. After entry of a judgment and an amended judgment, Karnovsky appeals.

D E C I S I O N

I

A special-term panel of this court previously denied Duncan's motion to dismiss this appeal as untimely. Duncan's brief, filed three months after the denial of his motion to dismiss, again argues that the appeal is untimely. "No petition for rehearing shall be

allowed in the Court of Appeals." Minn. R. Civ. App. P. 140.01. Because the special-term panel has already ruled this appeal to be timely, Duncan's attempt to reargue the question is functionally a petition for a rehearing and is not properly before this court. *See In re Estate of Sangren*, 504 N.W.2d 786, 788 n.1 (Minn. App. 1993) (concluding that an attempt to reargue an issue decided at special term is equivalent to a motion to reconsider and prohibited by rule 140.01), *review denied* (Minn. Oct. 28, 1993). Moreover, as noted in the special-term panel's order, under Minn. R. Civ. App. P. 104.01, subds. 1, 2 and *Huntsman v. Huntsman*, 633 N.W.2d 852, 855 (Minn. 2001), this appeal is not untimely.

II

Karnovsky challenges the property division.[2] When dissolving a marriage, the district court is to make a "just and equitable" division of marital property. Minn. Stat. § 518.58, subd. 1 (2008). "Just and equitable," however, does not necessarily mean equal. *Ruzic v. Ruzic*, 281 N.W.2d 502, 505 (Minn. 1979). A district court has broad discretion to divide marital property, and its division will be affirmed if it has an acceptable basis in fact and principle even though the appellate court might have divided the property differently. *Rohling v. Rohling*, 379 N.W.2d 519, 522 (Minn. 1986). An equal division of marital property is presumptively equitable upon dissolution of a long-term marriage. *Miller v. Miller*, 352 N.W.2d 738, 742 (Minn. 1984). Because these

[2] Parts of Karnovsky's argument assume or assert that aspects of Duncan's testimony lack credibility. Credibility determinations are "exclusively" the province of the fact-finder. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). And appellate courts defer to district-court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Therefore, we will not alter the district court's credibility determinations.

parties were married for about 24 years, their marriage can be deemed long term. *See Gales v. Gales*, 553 N.W.2d 416, 421 (Minn. 1996) (refusing to "quibble with" a district court's finding that an 11-year marriage was "long-term").

A. Home

Based on what she asserts was Duncan's misuse of credit, Karnovsky argues that the home and its associated debt should have been awarded to Duncan. But the parties previously agreed that the home would be sold with the parties equally dividing any remaining equity or debt. Also, the district court noted that the parties enjoyed a marital standard of living "far exceed[ing] their incomes" that "is no longer financially sustainable," and that the parties "incurred a tremendous amount of debt" during the marriage. Therefore, the district court apparently believed that Karnovsky enjoyed the benefits of any misuse of credit by Duncan, and that it was equitable for her to share the responsibility of repaying the debt associated with the home. This treatment of the home and the associated debt is consistent with the parties' initial agreement and with the idea that, under *Justis v. Justis*, 384 N.W.2d 885, 889 (Minn. App. 1986), *review denied* (Minn. May 29, 1986), debt apportionment is part of the equitable division of property required by Minn. Stat. § 518.58, subd. 1.

Alleging inability to pay, Karnovsky argues that the district court should not have made her responsible for the home's utility expenses and the related debt. Ability to pay can be considered in apportioning debt, but here the district court noted that the fundamental problem with this marital estate is the mismatch between the parties' debts and their ability to pay. And none of the opinions that Karnovsky cites in her argument

involves a case where *neither* party had a verified ability to pay the debt in question. *See O'Donnell v. O'Donnell*, 412 N.W.2d 394, 396-97 (Minn. App. 1987) (not addressing ability to pay); *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987) (same), *review denied* (Minn. Oct. 30, 1987); *Dahlberg v. Dahlberg*, 358 N.W.2d 76, 80 (Minn. App. 1984) (stating only that one party had "considerably greater resources" than the other); *Filkins v. Filkins*, 347 N.W.2d 526, 529 (Minn. App. 1984) (affirming an award of most of the debt to the party who incurred the debts and had a greater ability to repay it). And because the district court made Duncan responsible for $1,593 in monthly mortgage expenses until the home is sold, he is liable for much of the home's ongoing expense. Therefore, we will not alter the district court's treatment of the utility expenses and debts.

B. Apartment Complex

We reject Karnovsky's arguments that she should be awarded the apartment complex. The complex is owned by Willow Tree, and 51 of the 100 ownership units in Willow Tree are titled in Duncan's name, and the remaining 49 units are owned by the children. Because the apartment complex is owned by Willow Tree and because Willow Tree was not joined as a party to the dissolution, the district court could not divide its assets. *See Danielson v. Danielson*, 721 N.W.2d 335, 339 (Minn. App. 2006) (stating that, in a dissolution, a district court "lacks personal jurisdiction over a nonparty and cannot adjudicate a nonparty's property rights"); *Blohm v. Kelly*, 765 N.W.2d 147, 153 (Minn. App. 2009) (noting that corporate assets belong to the corporation, not its shareholders). For similar reasons, we reject Karnovsky's argument that the district court should have refused to recognize the Willow Tree interests ostensibly owned by the

parties' sons. The record shows that the sons were not parties to the dissolution. And Karnovsky's argument that Willow Tree is "a sham company" is not supported by the record, which includes the secretary of state's April 2007 Certificate of Good Standing for Willow Tree, as well as other documents, including tax returns, showing Willow Tree as an independent entity.

Karnovsky quitclaimed her interests in the investment properties as part of the transactions culminating in Willow Tree acquiring the apartment complex. She argues that because she lacked the intent to gift away her interests in the investment properties, she should be compensated for the fact that those properties are not in the marital estate. But the apartment complex owned by Willow Tree is partially the proceeds of the investment properties. Thus, because the marital interest in Willow Tree was divided between the parties, Karnovsky received compensation for whatever interest she had in the investment properties, albeit indirectly. Moreover, questions of intent, here whether Karnovsky intended to convey her interests in the investment properties, are "credibility question[s] on which we defer to the [district] court." *Vangsness v. Vangsness*, 607 N.W.2d 468, 473 (Minn. App. 2000). And the district court's failure to adopt Karnovsky's testimony on the subject shows that it did not find her credible on this point.

Karnovsky also argues, essentially, that the district court's treatment of the apartment complex failed to acknowledge the methods described in *Danielson* for dividing marital property in which third parties may have interests. *Danielson* allows both division of undisputedly marital property in the dissolution judgment and, if other proceedings involving third parties show the existence of an additional marital interest,

the division of that interest when the extent of that interest is known. 721 N.W.2d at 339-40. Here, the only Willow Tree interest divided in the dissolution was the interest that was in Duncan's name. Thus, if future litigation involving third parties shows that Karnovsky or Duncan owns an interest in Willow Tree not divided in the dissolution judgment, that additional interest can be divided between the parties.

C. Assets Not Accounted for at Trial

Karnovsky asserts that the district court should have compensated her for assets that Duncan controlled but for which he did not account at trial, including amounts in an investment account, stock, and horse-sale proceeds. Karnovsky states that the investment account and the stock "appear" to have been acquired as a result of the home refinancing. For a party to be compensated for another party's misuse of a marital asset, the claiming party must show, and the district court must find, that, "in contemplation of commencing, or during the pendency of the current dissolution," the misusing party "transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life." Minn. Stat. § 518.58, subd. 1a (2008). Karnovsky does not cite this statute. Nor did the district court find that Duncan improperly transferred, encumbered, concealed, or disposed of either asset improperly. Because Karnovsky alleges neither that Duncan's acquisition of these assets nor his later disposition of them was "in contemplation of commencing, or during the pendency of the current dissolution," we will not reverse the district court.

On this record, any error in failing to distribute $2,700 in horse-sale proceeds is de minimis. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to

remand for de minimis error). Similarly, we reject Karnovsky's argument that because Duncan's casino card shows that he gambled after the order for temporary relief directed him not to do so, she should be awarded additional property as compensation for Duncan's gambling losses. The record is vague, but apparently he gambled between $501 and $1,169 which, on this record, is also de minimis.

Karnovsky also asserts that Duncan withdrew large sums from casino-related cash machines and that she should be compensated for what she implies is his improper use of those funds. The district court's refusal to rule that Duncan used all or most of these funds for gambling is consistent with his testimony that he "sometimes" used money to gamble, but that (a) he paid his sons cash for their work for Duncan Construction; (b) he often met one son at a casino to pay him because the casino was conveniently located; (c) once at the casino, he would withdraw cash from a machine to pay his son or pay expenses or both; (d) this is the way that he "financed the complete payroll for Duncan Construction"; and (e) he liked meeting at the casino because it had "a great buffet" and he could "eat there for free." On this record, and particularly given the testimony that Duncan financed Duncan Construction's "complete payroll" through cash machines, we will not reverse the district court on this point.

D. Dissipation of Assets

To the extent it indicates that she dissipated marital assets, Karnovsky challenges the finding that the debt generated by both parties "contributed to the dissipation of their marital assets." Because Duncan testified that he had to pay off "over $40,000" of Karnovsky's credit-card debt with funds from the refinancing of the home, the record

contains evidence supporting the finding. And while Karnovsky also argues that she was not compensated for her share of funds that Duncan used to pay for the children's counsel, she is incorrect. The district court acknowledged Karnovsky's entitlement to compensation, but offset that amount against the amount due on the utilities which Karnovsky did not pay, ruling that because the utility payment came out of marital funds, "[n]o additional funds are owing to [Karnovsky] by [Duncan]."

III

Karnovsky argues that her spousal-maintenance award should have been permanent. Maintenance awards are discretionary with the district court. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). If there is uncertainty about a maintenance recipient's ability to become self-supporting, the award "shall" be permanent. Minn. Stat. § 518.552, subd. 3 (2008); *see also* Minn. Stat. § 645.44, subd. 16 (2008) (stating "'[s]hall' is mandatory"). The district court found that Karnovsky "cannot currently meet her monthly expenses" and that she needed "some time to pursue additional education or secure full-time work to meet [her] expenses," but did not expressly address whether she would become self-supporting. Therefore, we remand the duration of Karnovsky's maintenance award for the district court to expressly address whether there is uncertainty about Karnovsky's ability to become self-supporting. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (requiring sufficiently detailed findings of fact to demonstrate the district court's consideration of all factors relevant to an award of spousal maintenance). If the district court believes that the current record is insufficient to address the question,

it may reopen the record or, if necessary, to reserve the issue until sufficient evidence can be garnered to address the question.

IV

Karnovsky argues that she should have received need-based and conduct-based attorney fees. A district court "shall" award need-based attorney fees if, among other things, the payor can pay the fees. Minn. Stat. § 518.14, subd. 1 (2008). Here, the district court did not expressly address Duncan's ability to pay, but it did find that the parties are directly or indirectly responsible for a substantial amount of debt. Because much of the debt was apportioned, directly or indirectly, to Duncan, we will not reverse any implicit finding that he lacks the ability to contribute to Karnovsky's attorney fees.

Conduct-based fees may be awarded against a party who unreasonably contributes to the length or expense of the proceeding, and are discretionary with the district court. Minn. Stat. § 518.14, subd. 1; *Sharp v. Bilbro*, 614 N.W.2d 260, 264 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). Karnovsky argues that Duncan's withdrawal of funds from certain accounts after being served with the dissolution petition shows bad faith, and that he acted improperly in failing to produce discovery in a timely fashion. The district court was aware of both of these problems, and declined to award attorney fees. Moreover, Duncan testified that he withdrew the funds from one account to put the funds in certificates of deposit to obtain a better interest rate. And the district court found that these certificates of deposit are, almost, the parties' only "equity or assets." Also, the district court was very familiar with the parties' discovery disputes, but did not deem

those disputes sufficient to require an award of conduct-based attorney fees. On this record, we will not disturb the district court's exercise of its discretion on this point.

Affirmed in part and remanded.

Dated:

Judge Michelle A. Larkin