STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1418

In re the Marriage of:
Nadine Veralyn Svetc, petitioner,
Respondent,

vs.

Edward Dean Svetc,
Appellant,

and

Jeffrey Wendt, third party respondent,
Respondent.

Filed March 30, 2010
Affirmed
Randall, Judge[*]

Hennepin County District Court
File No. 27-FA-08-4816

Kathleen M. Newman, Kathleen M. Newman + Associates, P.A., Minneapolis, Minnesota (for respondent Nadine Veralyn Svetc)

Marc G. Kurzman, Kurzman Grant Law Offices, Minneapolis, Minnesota (for appellant)

Todd R. Haugan, Wayzata, Minnesota (for respondent Jeffrey Wendt)

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

Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Randall, Judge.

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

RANDALL, Judge

Appellant-husband argues that the district court erred in its marital-dissolution judgment and decree by awarding respondent-wife an inequitably large share of the property; by divesting itself of jurisdiction to award him future spousal maintenance; and by awarding respondent excessive need-based attorneys' fees. We affirm.

FACTS

Appellant Edward Svetc and respondent Nadine Svetc were married on June 3, 1961. At the time of the dissolution proceedings, appellant was 72 and respondent was 66.

At the time of their separation in November 2007, the parties owned two properties: their homestead and a parcel of vacant land on which they had made some improvements. The parties had a $125,000 home-equity line of credit (HELOC) on their homestead. Aside from their real property, the parties' primary asset was their accounting business, valued by an independent evaluator at $91,000.

Throughout the dissolution hearing, appellant was still employed at the accounting business, though the income received for his work there was indeterminable because his business and personal expenses were extensively comingled. Appellant received a monthly income of $2,680.44 in PERA benefits, $1,493 in Social Security benefits, and $117 in VA benefits.

The district court found that respondent had spent most of the marriage working unpaid for the accounting business and that provision had not been made for her retirement. At the time of dissolution, respondent earned an average monthly income of $115 for caring for their disabled daughter and $629 in Social Security benefits. She had one IRA account containing a total of $4,500.

The district court concluded that though respondent is entitled to spousal maintenance, appellant's income is not sufficient to meet both their needs. Instead, the district court decided that an unequal division of the marital estate would ensure that respondent had the means to meet her monthly budget. The district court found that an equal division of the marital assets would not be equitable because appellant had unequal earning power and because appellant had shown himself unwilling to split the marital estate with respondent through his behavior before and during the trial.

First, appellant had spent substantial marital assets for his personal benefits after the separation but prior to and during the hearing. In September 2008, for example, appellant withdrew $110,000 from the HELOC without respondent's knowledge, even though the parties had signed an agreement that any withdrawal would require two signatures. The district court found that $83,000 of this amount was not spent on legitimate marital expenses and credited it toward appellant in the final property division. Likewise, appellant sold the accounting business to his associate for $1 in the middle of the night on March 14, 2008. The same night, appellant rewrote his will, naming his associate as beneficiary, and filed the papers to remove respondent as the beneficiary on

his life insurance policies. The district court credited respondent with the $91,000 value of the business in the final property division.

In addition, appellant was disruptive and obstructive during the trial. The day before the hearing, appellant withdrew $100,000 from a personal IRA to pay off debts. On the stand the next day, appellant lied about the means by which he did so and attempted to impede the court's efforts to recover the funds. And though appellant claimed to be terminally ill and in hospice, the district court found that his behavior at trial belied his claims: despite his claims of fragility, "[appellant] attended each and every day of this trial and actively participated in the trial, including yelling at the Court for its decisions." Appellant hid records and assets, flouted multiple court orders, and relied on his alleged ill health to protect him from the consequences. The district court therefore judged his credibility to be suspect.

Taking into account all the dissipated assets the district court credited to appellant in the final property division, appellant was awarded approximately $262,000 worth of marital property, and respondent was awarded approximately $397,000. Almost the entirety of respondent's award was the two parcels of property owned by the parties. The actual value of respondent's award, therefore, is conditioned on the price at which she can sell the properties, and she will not have the means with which to support herself until she does so.

The district court accordingly reserved the issue of maintenance for respondent, pending the sale of the properties. The district court found that appellant had waived his right to petition for spousal maintenance in the future.

On respondent's motion, the district court found that respondent was eligible for a grant of attorneys' fees. The court granted respondent $11,000 in one of the parties' bank accounts and an additional $10,000 to be paid by appellant for need-based fees. The district court found that respondent was also eligible for substantial conduct-based fees because of appellant's conduct that had lengthened the time of trial and made discovery more difficult, and ordered respondent to pay $7,500 accordingly.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in dividing the marital property.

A district court has broad discretion in its division of marital property. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). This court will affirm the district court's division of property if it had an acceptable basis in fact and principle even though we might have taken a different approach. *Id.*

"A [district] court's division of marital property need not be mathematically equal; it need only be just and equitable." *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). Factors a district court should consider in making an equitable division of property include: the length of the marriage, the age, health, station, occupation, and sources of income; vocational skills; employability; estate liabilities; needs; opportunity for future acquisition of capital assets; and income of each party. The court must presume that each spouse made a substantial contribution to the acquisition of income and property as husband and wife. Marital misconduct is not to be considered. Minn. Stat. § 518.58, subd. 1 (2008).

If a party to a dissolution proceeding disposes of, transfers, or otherwise conceals a portion of the marital estate, "the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred." *Sirek v. Sirek*, 693 N.W.2d 896, 899 (Minn. App. 2005) (quoting Minn. Stat. § 518.58, subd. 1a). Where a party unilaterally disposes of marital assets, the district court shall compensate for that disposition, potentially by imputing assets to the disposing party. *Id.*

Appellant first argues that respondent was granted nearly all, or 91%, of the marital assets. But appellant fails to take into account the assets credited toward him by the district court under Minn. Stat. § 518.58, subd. 1a. When these assets are considered, the division is a more equitable 60/40 split.

Next, appellant contends that the district court should have valued the accounting business at $1, the actual market value achieved at sale, rather than at $91,000. Assigning a value to an asset is a finding of fact, which will not be set aside unless clearly erroneous based on the record as a whole. *McIntosh v. McIntosh*, 740 N.W.2d 1, 6 (Minn. App. 2007). If the district court's determination "falls within the limits of credible estimates made by competent witnesses, this court must sustain the determination." *Nemmers v. Nemmers*, 409 N.W.2d 225, 227 (Minn. App. 1987) (quotation omitted).

Here, the district court adopted the business value as stated by the parties' jointly chosen expert witness. The parties stipulated to the credentials of the expert who valued the business, and the expert used standard valuation techniques. *See Nardini v.*

Nardini, 414 N.W.2d 184, 190 (Minn. 1987) (explaining how to value a closely held business). The district court did not commit clear error in valuing the business.

Appellant next asserts that the district court erred in holding him responsible for the mortgage payments, HELOC payments, tax payments, and insurance payments on the homestead until it sold, even though the district court granted residency in and the proceeds from the sale of the homestead to respondent. We disagree.

The district court required appellant to make the payments on the properties because

> [i]n contrast to [respondent], [appellant] is still employed at the business and receiving income and in-kind benefits. He receives monthly income [from PERA, SS, and VA]. He has additional income from his accounting business. He has an interest in valuable real property in Florida. He has sufficient income and resources to meet his current needs.

Respondent, by contrast, has little cash flow until the properties are sold. This approach has "an acceptable basis in fact and principle," and thus is not an abuse of discretion.

Finally, appellant argues that the district court was biased against him and penalized him for misconduct in the property award. We disagree.

Part of appellant's complaint is that the district court discounted his credibility and found respondent credible. Witness credibility is the province of the fact-finder. *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009). Appellate courts give great deference to district court determinations of witness credibility. *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009). Here, the district court's credibility determinations are explained in the judgment and have an adequate basis in the record.

The hearing transcript and the judgment do express the court's considerable frustration with appellant's behavior during the trial. But our thorough review of the record satisfies us that the property award is based on the district court's application of Minn. Stat. § 518.18, subd. 1a, and not on inappropriate bias.

II. The district court did not err in foreclosing future requests for spousal maintenance from appellant.

Reservation of maintenance allows the district court to assess and address future changes in one party's situation as those changes arrive without prematurely burdening the other party. *Van De Loo v. Van De Loo*, 346 N.W.2d 173, 178 (Minn. App. 1984). A district court has discretion in deciding whether to reserve jurisdiction over the issue of maintenance, and we will not reverse absent an abuse of that discretion. *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001). The failure to make findings, alone, does not constitute an abuse of discretion, but proper appellate review may be precluded in the absence of specific findings. *Id.* at 704.

One method for waiving spousal maintenance is by agreement of the parties under Minn. Stat. § 518.552, subd. 5 (2008). This statutory waiver requires specific findings by the district court and an express waiver from both parties. *Grachek v. Grachek*, 750 N.W.2d 328, 331 (Minn. App. 2008), *review denied* (Minn. Aug. 19, 2008). There is no statutory waiver in this case.

Another method for waiving spousal maintenance is failing to ask for maintenance. Minnesota law requires that the petition for dissolution contain a request for maintenance if maintenance is sought. *See* Minn. Stat. § 518.10, subd. 1(i) (2008).

Appellant did not request maintenance. In addition, it is unlikely, given respondent's age and the disparity in the parties' monthly incomes, that respondent would ever be compelled to pay appellant maintenance. The district court did not abuse its discretion in finding that appellant had waived maintenance.

III. The district court did not abuse its discretion in awarding attorneys' fees to respondent.

Appellant does not dispute the district court's award of $7,500 for conduct-based fees, but he argues that the district court abused its discretion in requiring him to pay $10,000 in need-based fees and in granting respondent $11,000 from one of the parties' accounts toward her fees.

The discretion to award attorney fees in dissolutions rests almost entirely with the district court. *Burton v. Burton*, 365 N.W.2d 310, 312 (Minn. App. 1985), *review denied* (Minn. May 31, 1985). Minnesota law requires that in dissolution proceedings the district court "shall award attorney fees . . . in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds" three factors: (1) that the fees are necessary for the good-faith assertion of the party's rights; (2) that the party from whom fees are sought has the means to pay them; (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2008). We will not set aside findings of fact unless they are clearly erroneous. *Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001).

The district court found that respondent "does not have sufficient income-producing assets which are adequate to assist her in meeting her monthly expenses." By contrast, the district court found that appellant had "sufficient income and resources to meet his current needs" and that he has secreted money from his wife and the court during the proceedings. The district court noted further that respondent needed to "incur fees to obtain enforcement" of court orders, and that she owes over $81,000 to her attorneys. The evidence in the record is sufficient to support the district court's award of attorney fees to respondent.

Affirmed.