

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1963**

In re the Marriage of:
Lyndon Layne Bartell, petitioner,
Respondent,

vs.

Lorelee Ruth Bartell,
Appellant.

**Filed November 25, 2008
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Blue Earth County District Court
File No. 07-FA-06-3521

Jon G. Sarff, Sarff Law Office, 124 East Walnut Street, Suite 210, Mankato, MN 56001
(for respondent)

Mark E. Betters, Manahan & Bluth Law Office, Chartered, 110 South Broad Street, P.O.
Box 287, Mankato, MN 56002-0287 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this marital dissolution matter, appellant challenges the district court's marital property division as inequitable and challenges the denial of need-based attorney fees. At

oral argument on appeal, appellant challenged for the first time the district court's finding that neither party has the current ability to finance appellant's desired educational program. We affirm the district court's marital property division. But we reverse and remand the district court's order that each party shall pay his or her own attorney fees. We will not consider appellant's challenge to the district court's finding regarding financing of the educational program.

FACTS

Appellant Lorelee Bartell and respondent Lyndon Bartell were married on November 27, 1976. In September 2006, respondent petitioned to dissolve the marriage. Following a trial, the district court issued its judgment and decree within which it made the following findings of fact. Appellant was 50-years old at the time of trial and had been a homemaker throughout the parties' marriage. Appellant has a two-year degree, which she earned in 1976. Appellant has a monthly net income of \$700 from part-time employment. Appellant claims \$3,497 in monthly expenses. Appellant had paid \$2,500 in attorney fees and had past-due attorney fees in the amount of \$3,000, which did not include immediate preparation for trial and representation at trial. The district court found that respondent is employed and has a monthly net income of \$2,500.

The district court entered judgment requiring respondent to pay \$750 per month in child support for the parties' minor children (ages 14 and 17) and \$4,700 in past-due child support. The district court denied appellant's request for spousal maintenance, but retained jurisdiction to consider future motions on the issue. The district court ordered

that each party was responsible for his or her own attorney fees. The district court distributed the parties' marital property and debt as follows:

Appellant		Respondent	
Homestead	\$185,000	401K	\$151,000
Retirement Account	\$2,400	Boat/Vehicles	\$4,915
Chevrolet Malibu	\$12,655	Discover Credit Card	(\$95.21)
Studio Equipment	\$17,500	Dental Bills	(\$5,000)
Home Encumbrance	(\$29,621)		
AT&T Credit Card	(\$12,752)		
Citi Bank Credit Card #1	(\$8,594.42)		
Citi Bank Credit Card #2	(\$22,067.97)		
\$144,519.61		\$150,819.79	

The district court explained its property division in a memorandum that was incorporated in its judgment and decree. The district court noted that neither party was in a position to pay off the parties' credit card debt. But the district court awarded appellant assets sufficient to satisfy her share of the marital debt. The district court reasoned that: (1) most of the card debt arose from charges related to the homestead, which was awarded to appellant; (2) the mortgage on the homestead was non-interest bearing and did not require repayment until sale or conveyance; and (3) appellant received recording studio equipment valued at \$17,500, which she could sell to reduce her debt. The district court also suggested that appellant use the \$4,700 payment for past-due child support to pay down the credit card debt. Finally, the district court offset the value of the vehicles awarded to each party with a corresponding debt assignment. The district court acknowledged that its property division was not equal, but stated that the allocation was fair and equitable. The district court denied spousal maintenance because the "parties

just don't have enough money to go around." The court noted that it may reconsider maintenance after respondent's child-support obligation ends.

D E C I S I O N

Standard of Review

"A trial court has broad discretion in dividing marital property upon dissolution of marriage. Its decision will be overturned only for a clear abuse of discretion." *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984). An award of attorney fees is also reviewed for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Marital Property Division

Appellant argues that the district court's marital property distribution is inequitable because (1) appellant's income is substantially less than respondent's, (2) appellant has no education with which to seek employment, (3) the parties were married for 31 years, and (4) the district court awarded no spousal maintenance.

Marital property division is governed by Minn. Stat. § 518.58, subd. 1 (2006), which states:

The court shall base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party.

"Equitable, not equal, division of marital property is required." *Stassen v. Stassen*, 351 N.W.2d 20, 23 (Minn. App. 1984). But, "[i]n cases involving dissolution of a long-term

marriage, an equal division of property is appropriate.” *Weikle v. Weikle*, 403 N.W.2d 682, 686 (Minn. App. 1987), *review denied* (Minn. June 30, 1987).

The judgment and decree and accompanying memorandum demonstrate that the district court gave extensive thought and appropriate consideration to the distribution of marital property. The district court considered all of the factors enumerated within Minn. Stat. § 518.58, subd. 1.¹ While the district court assigned appellant a significant portion of the parties’ marital debt, the district court also awarded appellant assets sufficient to satisfy her obligations. Finally, the district court specifically noted that its distribution scheme was equitable.

Appellant cites a number of cases to support her proposition that a party with fewer employment prospects should receive a larger share of marital property. *See Kaste v. Kaste*, 399 N.W.2d 128, 129-130 (Minn. App. 1987), *review denied* (Minn. Mar. 13, 1987); *Weikle*, 403 N.W.2d at 686-87; *Reynolds v. Reynolds*, 498 N.W.2d 266, 270-71 (Minn. App. 1993). This case is distinguishable from the cases cited by appellant because appellant received the marital homestead, with equity in the amount of \$155,379. Further, the mortgage on the homestead does not bear interest and does not require repayment until sale or conveyance. Moreover, the district court’s award of all of the

¹ Appellant argues that the district court inappropriately considered respondent’s past-due child-support obligations in its property division analysis. The statute governing marital property division was amended in 1982 to eliminate child support as a factor to be considered. *See* 1982 Minn. Laws ch. 464 § 2, at 452-53. “Nevertheless, we do not view that [amendment] as conclusive against the relevance of child support payments to some division of property.” *Weikle*, 403 N.W.2d at 687. We do not believe the district court’s mention of past-due child support constitutes reversible error because the district court merely suggested how appellant might reduce her debt. And the child-support arrears payment did not factor into the district court’s net asset calculations.

parties' marital property to appellant except for a retirement account and a vehicle that were awarded to respondent is consistent with statute. *See* Minn. Stat. § 518.58, subd. 3 (2006) (stating that “[i]f liquid or readily liquidated marital property other than property representing vested pension benefits or rights is available, the court, so far as possible, shall divide the property representing vested pension benefits or rights by the disposition of an equivalent amount of the liquid or readily liquidated property”); *cf.* Minn. Stat. § 645.44, subd. 16 (2006) (stating that “[s]hall’ is mandatory”).

“The trial court has broad discretion in the division of property. Even if a reviewing court might have taken a different approach than the trial court, the trial court’s decision will not be overturned, absent a showing of clear abuse of discretion.” *Olness v. Olness*, 364 N.W.2d 912, 914 (Minn. App. 1985). “[T]he appellate courts should not overrule a property distribution if it has a reasonable and acceptable basis in fact and principle.” *Weikle*, 403 N.W.2d at 686. Given that the district court awarded appellant sufficient assets to satisfy her assigned obligations under the judgment and decree, and preserved jurisdiction for future spousal-maintenance motions, the difference between the parties’ net asset allocation does not amount to an abuse of discretion. Accordingly, we affirm the district court’s property distribution.

Attorney Fees

Appellant asserts that the district court abused its discretion by denying appellant’s request for need-based attorney fees. When determining whether to award need-based attorney fees, the district court must apply Minnesota Statutes, section 518.14, subdivision 1 (2006), which states:

[T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

(1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

The decision whether to award attorney fees under Minn. Stat. § 518.14, subd. 1 “rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion.” *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). When considering a request for need-based attorney fees under Minn. Stat. § 518.14, subd. 1, “there is neither a mandate nor discretion to award such fees without those findings [required by subdivision 1] and the evidence to sustain them.” *Mize v. Kendall*, 621 N.W.2d 804, 810 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). This court will remand to the district court for further findings if there is a failure to make such findings. *Wende v. Wende*, 386 N.W.2d 271, 276 (Minn. App. 1986) (holding “the absence of any findings on each party’s financial position and appellant’s need for financial assistance” warranted remanding).

The district court did not explain its attorney fee decision. The district court did not make specific findings related to section 518.14. The district court’s memorandum does not analyze application of section 518.14 to the existing findings of fact. Because

the record does not indicate that the district court applied Minn. Stat. § 518.14, subd. 1 when determining appellant’s request for attorney fees, we cannot conclude that the evidence supports the district court’s findings, or that the findings support its conclusions. Accordingly, we reverse the district court’s attorney fee order and remand for a determination of appellant’s request for attorney fees under the standard stated in Minn. Stat. § 518.14, subd. 1.

Challenged Findings of Fact

At oral argument, appellant’s counsel assigned error for the first time to the district court’s finding that neither party was able to finance nursing training for appellant. We decline to consider this issue as it was not argued in appellant’s brief and accordingly must be deemed waived. *See In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002) (“It is axiomatic that issues not argued in the briefs are deemed waived on appeal”) (quotation omitted).

Affirmed in part, reversed in part, and remanded.

Dated: _____

The Honorable Michelle A. Larkin
Minnesota Court of Appeals