STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1749

In re the Marriage of:
Carolynn Bitker, petitioner,
Appellant,

vs.

David Bitker,
Respondent.

Filed November 5, 2018
Affirmed
Bjorkman, Judge

Hubbard County District Court
File No. 29-FA-16-1281

Michael R. Ruffenach, Ruffenach Law Office, Laporte, Minnesota (for appellant)

Steven R. Peloquin, Alicia N. Norby, Peloquin Law Office, Park Rapids, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

On appeal from a dissolution judgment based on the parties' mediated settlement agreement, wife argues that the district court erred by enforcing the mediated settlement

agreement over wife's objections and declining to reopen the resulting judgment for fraud, and abused its discretion by awarding husband attorney fees. We affirm.

FACTS

Appellant-wife Carolynn Bitker and respondent-husband David Bitker were married on September 5, 1998. On October 13, 2016, wife filed a petition for dissolution of the marriage. On February 16, 2017, the parties participated in mediation. Both parties were represented by an attorney. Wife was also accompanied by a mental-health worker and a friend. The mediation session lasted approximately four hours. After reaching agreement on all issues, the parties signed a document titled Mediated Agreement Property Settlement (agreement), which indicated it was "binding" and that both parties had "fully disclosed the nature of all assets and liabilities." Wife received three real properties, a vehicle, a trailer, two scooters, listed personal-property items, and $15,000 cash. Husband received all real and personal property items in his possession that were not awarded to wife. Husband also received all real estate not awarded to wife. The parties also agreed that neither was responsible to the other for "temporary or permanent maintenance."

On March 20, husband's attorney forwarded proposed stipulated findings of fact, conclusions of law, and order for judgment incorporating the terms of the agreement to wife's attorney.[1] One month later, wife's mental-health worker advised husband's attorney that wife would not sign the proposed stipulation. The same day, wife discharged her attorney and hired a new attorney.

[1] Wife has never asserted that the proposed stipulated findings, conclusions, and order for judgment differed in any material way from the agreement.

Husband moved the district court to enforce the terms of the agreement and to impose conduct-based attorney fees. Wife filed her own motion, an opposing memorandum, and an affidavit explaining that she refused to sign the proposed stipulation because she was on narcotic pain medication during the mediation, did not understand what was happening, and husband failed to accurately disclose his assets. Wife did not request an evidentiary hearing. Husband filed a responsive affidavit. The district court declined to consider wife's motion and husband's affidavit because they were untimely. But, in granting husband's motion, the district court considered wife's two arguments. The district court found that the parties were aware of wife's medical situation at the time of the mediation, but there is no evidence that wife was impaired or did not understand the proceeding. And in the dissolution judgment, the court expressly found that each party fully disclosed his or her assets, income, financial circumstances, and other relevant information. The district court awarded husband $772 in attorney fees and costs associated with husband's motion.

Wife moved for a new trial, averring in her supporting affidavit that husband "failed to accurately disclose his assets and that failure is tantamount to fraud on the mediator, the mediation process, and resulted in a fraud upon the court." Husband interposed an affidavit stating that he never concealed his assets, he discussed all of his assets with the mediator, and wife knew of all husband's assets during the mediation. Husband also moved the district court for an order directing wife to vacate real property assigned to him and to award him an additional $750 in attorney fees.

At the motion hearing, husband argued that wife did not seek appropriate relief because there had never been a trial. Husband also asserted that, although the agreement was drafted to award specific interests in specific properties and did not "itemize every little detail," everything was disclosed during the mediation. The district court permitted wife to file a posthearing supplemental brief, in which she recharacterized her motion as "a motion to reopen under Minn. Stat. § 518.145, subd. 2(3) [(2016)]." The district court denied wife's motion, reasoning that relief was not available under Minn. R. Civ. P. 59.01 as no trial had ever occurred. Wife appeals.

D E C I S I O N

I. The district court did not err by enforcing the parties' agreement.

In a marriage dissolution proceeding, "[t]he question of whether a mediated settlement agreement is enforceable presents a question of law, which we review de novo." *Tornstrom v. Tornstrom*, 887 N.W.2d 680, 684 (Minn. App. 2016), *review denied* (Minn. Feb. 14, 2017). Such agreements are governed by principles of contract law, including the requirements that there is a meeting of the minds and consideration. *Id.* at 686 (upholding a mediated settlement that satisfied the required contractual elements). And a mediated dissolution agreement must contain a provision stating that the agreement is binding and a provision stating that

> the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.

Minn. Stat. § 572.35, subd. 1 (2016). Wife does not challenge the agreement's compliance with the statutory requirements. And she does not argue, as she did in the district court, that her use of pain medication affected her ability to enter into the agreement.

Wife argues that the district court erred by enforcing the agreement because it did not effectuate a just and equitable division of assets as required by Minn. Stat. § 518.58, subd. 1 (2016). She contends that husband failed to fully disclose the existence and value of his assets, and the "true nature of the outstanding liabilities." And she criticizes the district court's failure to make findings regarding the parties' assets, liabilities, income, and expenses. These arguments are unavailing.

All of the cases wife relies on involve property or spousal-maintenance awards following contested hearings—not enforcement of a settlement agreement.[2] "Courts favor stipulations in dissolution cases as a means of simplifying and expediting litigation, and to bring resolution to what frequently has become an acrimonious relationship between the parties." *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). It would defeat the very

[2] Relying on *Videen v. Peters*, wife asserts that "[e]ven when the record supports the [district] court's decision, the failure to make specific findings of fact compels a remand." 438 N.W.2d 721, 723 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). This argument is misplaced. *Videen* involved modification of child support and spousal maintenance based on changed financial circumstances. This court remanded because the district court did not make particularized findings regarding the parties' changed financial and other circumstances. *Id.* at 724. Two other cases cited by wife, both of which discuss specific findings, likewise lend no support for her argument. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (noting that the district court's findings were insufficient to enable an appellate court to determine whether the district court had properly considered statutory requirements for awarding spousal maintenance); *Dougherty v. Dougherty*, 443 N.W.2d 193, 194-95 (Minn. App. 1989) (noting that a district court's order must contain particularized findings of fact to support a maintenance determination).

purpose of a stipulation to require a district court, when entering a stipulated judgment, to make findings of fact regarding an agreed-to property division.

Moreover, wife did not request an evidentiary hearing on the issue of nondisclosure under Minn. R. Gen. Prac. 303.03(d)(2). Accordingly, the district court applied contract principles, looking to the agreement itself—which specifically stated the "parties mutually agree that they have fully disclosed the nature of all assets"—and the parties' affidavits and legal arguments. Wife does not contest the findings the district court made in its order enforcing the agreement. Indeed, she specifically challenges only one finding of fact in the dissolution judgment—that DLI Rentals, a storage and moving business husband received, had no independent value. We will set aside a district court's findings of fact only if clearly erroneous, viewing the record in the light most favorable to the district court's findings. *Tornstrom*, 887 N.W.2d at 683. As wife fails to cite any record evidence demonstrating clear error, her challenge to this finding fails.

Wife next contends the agreement "was so one sided it hardly fulfills the requirements of a fair agreement." We disagree. The agreement awards assets and debts to both parties, resulting in benefits and detriments to both. Husband received a majority of the real estate and vehicles, but also a majority of the debt. Wife received three real properties, a vehicle, a trailer, two scooters, and a number of personal-property items

including jewelry, a golf cart, a bedroom set, and a refrigerator. Additionally, husband was required to pay wife $15,000.[3]

Finally, wife argues that the district court failed to exercise its independent duty to fully and fairly review the agreement to protect the interests of both parties, ensure taxpayers are adequately protected, and that one party is not dependent on public assistance to survive. She cites *Karon v. Karon*, 435 N.W.2d 501, 504 (Minn. 1989), for the principle that a district court must ensure that a stipulation is "fair and reasonable to all." While we agree that parties cannot, by stipulation, divest a district court of its authority to evaluate the fairness of an agreement, we are convinced that the district court properly exercised that authority here. The district court reviewed the agreement and concluded that it is "fair and equitable." The record amply supports this conclusion. The parties reached their agreement after four hours of mediator-led negotiations. Both were represented by counsel, and wife was accompanied by two additional support persons. The agreement clearly expresses its terms and states that both parties had "fully disclosed the nature of all assets and liabilities." After reviewing all of wife's arguments, we conclude that the district court did not err by enforcing the agreement.

In her reply brief, wife argues that the agreement does not reflect a meeting of the minds and is not supported by adequate consideration. We generally do not consider issues presented for the first time in a reply brief. *See Wood v. Diamonds Sports Bar & Grill,*

[3] On this record, we are able to conduct only a gross comparison of the assets distributed to each party in accordance with the agreement because some assets are not valued. On its face, the agreement does not demonstrate an inequitable division of assets.

Inc., 654 N.W.2d 704, 707 (Minn. App. 2002) ("If an argument is raised in a reply brief but not raised in an appellant's main brief, and it exceeds the scope of the respondent's brief, it is not properly before this court and may be stricken from the reply brief."), *review denied* (Minn. Feb. 26, 2003). Even if we consider wife's arguments on their merits, they essentially boil down to one point—that the agreement is not enforceable because husband misrepresented his assets during the mediation. We fully address this issue below.

II. The district court did not abuse its discretion by denying wife's motion to reopen the dissolution judgment due to fraud.

A district court may relieve a party from a dissolution judgment and order a new trial if the other party committed fraud. Minn. Stat. § 518.145, subd. 2(3). If relief is requested within one year after entry of judgment, a party need only show ordinary fraud, not fraud upon the court. *Doering v. Doering*, 629 N.W.2d 124, 129-30 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). Ordinary fraud, in a dissolution context, does not require an affirmative misrepresentation or an intentional course of concealment because parties to a marriage dissolution have a duty to disclose all assets and liabilities completely and accurately. *Id.* We review a district court's decision whether to reopen a dissolution judgment based on fraud for an abuse of discretion. *Thompson v. Thompson*, 739 N.W.2d 424, 428 (Minn. App. 2007). "If there is evidence to support the district court's decision, an abuse of discretion will not be found." *Id.*

Wife moved the district court for a new trial and, in her supplemental submission, to reopen the judgment under Minn. Stat. § 518.145. She asserted, among other things, that the order enforcing the agreement "was a result of fraud upon the court." Wife

submitted affidavits averring that husband committed fraud by failing to disclose his assets. Husband filed a responsive affidavit generally asserting that wife knew about all of the marital assets, he did not conceal any assets, and he discussed all of his assets with the mediator.

The district court denied wife's motion on the ground it was not proper as there was no trial. *See Shirk*, 561 N.W.2d at 522-23 (stating that the sole relief from the judgment and decree is Minn. Stat. § 518.145, subd. 2). The court did not explicitly address the merits of wife's fraud argument.

On appeal, error is not presumed. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). Rather, a party seeking reversal must affirmatively establish that error occurred. *Id.* And if a district court fails to explicitly address an argument that it knew or should have known needed to be addressed, we generally assume that the district court implicitly rejected the argument. *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) ("Appellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion."), *review denied* (Minn. Jan. 27, 2010). Here, the record indicates that the question of reopening the judgment for fraud was adequately presented to the district court. Accordingly, we assume that the district court implicitly rejected wife's fraud argument on its merits.

As noted above, the parties filed conflicting affidavits regarding husband's disclosures of asset and income information before and during the mediation. Wife's affidavit states that husband failed to disclose 28 acres of land, a six-bedroom home,

several vehicles, scooters, a 445 Minneapolis Moline tractor, 96 storage units, tools, a toy tractor, and a collector's business with $2.5 million in assets. Husband's affidavit avers, among other things, that he does not own a six-bedroom home or 28 acres of land, and that many of the other assets wife claims he did not disclose are listed in the proposed stipulated facts his attorney prepared following the mediation. And husband alleges wife was aware of such items as the storage units and tools that he used in his business. "We defer to the district court's credibility determinations as to conflicting affidavits." *Knapp v. Knapp*, 883 N.W.2d 833, 837 (Minn. App. 2016).

Other aspects of the record lend further support to the district court's implicit finding that husband did not materially misrepresent or fail to disclose marital assets. The agreement, signed by both parties, expressly acknowledges that the parties fully disclosed their assets during the mediation. The agreement awards husband all real estate not awarded to wife and all real and personal property in his possession except for a very specific list of personal property items awarded to wife. Review of wife's affidavit demonstrates that almost all of the items she claims husband failed to disclose were awarded to him as personal or real property. Indeed, husband disputed ownership of the few items wife lists that were not awarded to him. On this record, giving due deference to the district court's credibility determinations, we discern no abuse of discretion by the district court in denying wife's motion to reopen the dissolution judgment based on fraud.

III. The district court did not abuse its discretion by awarding conduct-based attorney fees to husband.

A district court may award attorney fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of a dissolution proceeding. Minn. Stat. § 518.14, subd. 1 (2016); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) ("Conduct-based fee awards may be awarded against a party who unreasonably contributes to the length or expense of the proceeding and are discretionary with the district court."). We will not disturb an award of attorney fees absent a clear abuse of discretion. *Bogen v. Bogen*, 261 N.W.2d 606, 611 (Minn. 1977).

Wife argues that the district court abused its discretion because the $772[4] award does not include the findings required under Minn. R. Civ. P. 11 or Minn. Stat. § 549.21 (2016). This argument is misplaced. As noted above, the district court based the attorney-fee award on Minn. Stat. § 518.14, subd. 1. Wife makes no argument regarding this statute or the amount of the award. And our careful review of the record reveals no abuse of discretion by the district court in its attorney-fee award.

Affirmed.

[4] Wife incorrectly states the amount of the award as $500. Husband requested and the district court ordered wife to pay $772 in attorney fees and costs related to the motion to enforce the agreement.