STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0980

In re the Marriage of: Amy Alyssa Post, petitioner,
Respondent,

vs.

Samuel Morton Post, III,
Appellant.

Filed May 6, 2019
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hubbard County District Court
File No. 29-FA-17-126

Elizabeth A. Walker, E. Walker Law, PLLC, Detroit Lakes, Minnesota (for respondent)

George L. Duranske, III, Duranske Law Firm, Bemidji, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's judgment dissolving his marriage, arguing that the district court erred in its custody and parenting-time determinations and in its division of the parties' property. We affirm in part, reverse in part, and remand.

FACTS

Appellant-husband Samuel Morton Post III and respondent-wife Amy Alyssa Post were married on June 30, 2001. They are the parents of one adult child, born in 1998, and five minor children, born in 2002, 2006, 2008, 2011, and 2015. In December 2016, wife petitioned to dissolve the parties' marriage. Wife requested that the district court award her (1) sole legal and sole physical custody of the parties' minor children, (2) child support, (3) an equitable share of the parties' personal property, and (4) the parties' real estate including the homestead.

A court trial was held on February 1 and 2, 2018. Wife's testimony and evidence showed that in September 2016, wife obtained an order for protection (OFP) against husband based on an incident in which husband grabbed and squeezed her wrists, leaving a bruise, and shoved her into a door. In February 2017, husband pleaded guilty to violating the OFP.

Husband testified and requested that the district court award joint legal and joint physical custody. As to parenting time, husband testified that he "would like to exchange the children every week at 5 o'clock on Sundays." He also requested an equitable share of certain personal property. Husband did not make any specific requests at trial regarding division of the parties' real property.

A custody evaluator testified regarding her observations of, and interviews with, wife, husband, and their children. She recommended granting sole legal and sole physical custody of the children to wife with supervised visitation for husband every other weekend.

She also recommended that husband undergo a psychological evaluation based on concerns of wife and others regarding husband's mental health.

Wife submitted a written closing argument, proposing that husband "have the children every other weekend from Saturday morning to Sunday afternoon" during the school year, as well as "two additional weekday visits, for a three hour length of time," during the summer. Husband did not submit a written closing argument or propose a parenting-time plan beyond his testimony. Nor did he move for amended findings or a new trial.

The district court awarded wife sole legal and sole physical custody of the minor children and awarded wife the homestead with the requirement that she make an equalization payment of $62,500 to husband. The district court rejected the custody evaluator's recommendation for supervised parenting time for husband, reasoning that although "the record reveals that [husband] has some 'dysfunctional attitudes and ineffectual social habits,' the evidence does not support the [parenting-time] restrictions recommended by the Custody Evaluator." The district court awarded husband unsupervised parenting time as follows: during the school year, every other weekend from 7:00 a.m. Saturday to 5:00 p.m. Sunday; during the summer, every other weekend from 7:00 a.m. Saturday to 5:00 p.m. Monday and every Wednesday and Friday from 5:00 p.m. to 8:00 p.m.; and one continuous week in June or July. The district court also ordered that husband "shall pay child support as established by the administrative process." Lastly, the district court found that wife "is reasonably still in fear of" husband and stated that "the OFP shall be extended (and modified) consistent with this decree."

Husband appeals, arguing that the district court erred in its custody and parenting-time determinations and in its division of the parties' property.

D E C I S I O N

I.

Husband contends that the district court "failed to properly award custody and parenting time" and "utterly failed to consider both the law in Minnesota and the equities of the individual relationships of the parents with the children." Specifically, husband argues that the district court erred in its evaluation of the statutory best-interest factors, erred by failing to find that he successfully rebutted the presumption against joint custody where domestic abuse has occurred, erred by failing to award him at least 25% parenting time, and erred by relying on the recommendations of the custody evaluator.

Best-Interest Factors and the Presumption Against Joint Custody

"In evaluating the best interests of the child for purposes of determining issues of custody and parenting time, the court must consider and evaluate all relevant factors, including" 12 statutory best-interest factors. Minn. Stat. § 518.17, subd. 1(a) (2018). There is a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse has occurred between the parents. *Id.*, subd. 1(b)(9) (2018). "In determining whether the presumption is rebutted, the [district] court shall consider the nature and context of the domestic abuse and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs." *Id.*

"The district court has broad discretion in making child custody . . . determinations . . . ." *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or rendering a decision that is against logic and the facts on record." *Knapp v. Knapp*, 883 N.W.2d 833, 835 (Minn. App. 2016) (quotation omitted). This court defers to the district court's findings of fact unless they are clearly erroneous. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). A finding of fact is clearly erroneous if we are "left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). That an appellant's version of the facts might lead another trier of fact to make different findings does not render the district court's findings clearly erroneous when there is sufficient contradictory evidence to reasonably support the district court's findings. *Crosby v. Crosby*, 587 N.W.2d 292, 296 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

This court also defers to the district court's credibility determinations. *Sefkow*, 427 N.W.2d at 210. A district court is in a superior position to determine the credibility of witnesses, and such determinations merit considerable deference. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

Husband does not indicate how the district court failed to apply the governing law, nor does he expressly allege that any of the district court's findings of fact are clearly

erroneous.[1] Instead, he explains his assessment of each of the best-interest factors and why he thinks that the record rebuts the presumption against joint custody, without specifically assigning error to the district court's application of law or findings of fact. In sum, husband appears to seek a trial de novo on appeal, in which this court would substitute its consideration of the best-interest factors and domestic-abuse presumption for that of the district court and award him joint custody. He also makes arguments that invite us to reweigh the evidence.[2]

As an appellate court, this court's responsibility is to correct errors, and not to retry the case. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979). This court does not reweigh the evidence on appeal and does not substitute its judgment for that of the district court when reviewing an award of child custody. *See Sefkow*, 427 N.W.2d at 210 (stating that appellate courts do not retry the case, weigh the evidence, or assess witness credibility on appeal). The district court's order shows that it considered each of the best-interest factors and the domestic abuse that had occurred. The district court's order

[1] For example, husband challenges the district court's best-interest finding that "[t]he trial record reveals some chemical use but not to the point where it has any negative effect on [husband's] ability to parent" noting that it is "slightly different" than the district court's on-the-record statement at trial that "I don't think there is any evidence of record that either parent is currently using illegal drugs." But husband does not assert that the district court's finding on this issue is clearly erroneous.

[2] For example, husband argues that "nothing was presented to support [domestic] abuse in the divorce trial." However, wife testified that an OFP had been granted against husband, and husband testified that he was aware of the OFP and had been convicted of violating it. This testimony regarding the OFP was adequate to establish that there had been domestic abuse between the parties. *See* Minn. Stat. § 518B.01, subd. 4(b) (2018) (providing for "an order for protection in cases of domestic abuse" and requiring that petitions for such relief "allege the existence of domestic abuse").

explains the district court's reasoning and why the district court ultimately decided that the children's best interests favored an award of sole legal and sole physical custody to wife, including that husband's "inability to place the needs of the children ahead of his own impairs his ability to meet the emotional needs of the children." The district court addressed the impact of the domestic abuse on the children and the deterioration of the relationship between husband and the oldest minor child. In sum, on this record, husband does not persuade us that the district court did not correctly apply the law or otherwise erred in its custody determination.

25% Parenting-Time Presumption

Husband argues that the district court erred by failing to address Minn. Stat. § 518.175, subd. 1(g) (2018), which provides:

> In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child. For purposes of this paragraph, the percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent or by using a method other than overnights if the parent has significant time periods on separate days when the child is in the parent's physical custody but does not stay overnight. The court may consider the age of the child in determining whether a child is with a parent for a significant period of time.

District courts must "demonstrate an awareness and application of the 25% presumption when the issue is *appropriately raised* and the court awards less than 25% parenting time." *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (emphasis added). When the presumption is raised, the district court must identify both its decision and the reasons for that decision. *Id.* The 25% presumption "is a legislatively imposed

benchmark," which "would be stripped of its purpose if appellate courts could, after the fact, calculate parenting time in a light most favorable to the decision and supply findings as a basis to conclude that the presumption, if considered, would have been overcome." *Id.* at 218. Thus, this court will not extrapolate findings from the record supporting a decision to award less than 25% parenting time.

The district court's parenting-time award indicates that husband received approximately 11% parenting time.[3] Yet, the district court did not mention the 25% presumption or explain why its award of parenting time was significantly less than the amount provided under the presumption.

Wife argues that although the district court "did not explicitly state that [husband] did not deserve the 25% of [parenting] time, the findings were very direct and clear that the District Court was taking the best interests of the children into consideration." *See id.* (stating that parenting-time allocations that "fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what is feasible given the circumstances of the parties"). Wife also notes that husband did not

[3] The district court awarded husband parenting time as follows: during the school year, every other weekend from 7:00 a.m. Saturday to 5:00 p.m. Sunday; during the summer, every other weekend from 7:00 a.m. Saturday to 5:00 p.m. Monday and every Wednesday and Friday from 5:00 p.m. to 8:00 p.m.; and one continuous week in June or July. Assuming the school year includes 38 weekends and the summer includes 14 weekends, husband's total parenting time is approximately 39 overnights:

- 19 school-year weekends x 1 overnight = 19 overnights
- 7 summer weekends x 2 overnights = 14 overnights
- One continuous week in June or July x 6 overnights = 6 overnights

39 overnights divided by 365 overnights is equal to approximately 10.68%. *See* Minn. Stat. § 518.175, subd. 1(g) ("[T]he percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent.").

expressly cite the 25% presumption in district court. Husband concedes that a question remains "as to whether the issue was raised or not." But husband argues that "when 50% parenting time is requested, the [district court] is on notice that the 25% presumption of parenting time is being invoked and that no further pleading need be done."

In sum, this case raises the question whether the presumption was "appropriately raised." *See id.* at 217. We are not aware of precedent explaining the phrase "appropriately raised." And the parties do not address the phrase in their briefs. On one hand, husband did not cite the statutory 25% parenting-time presumption in district court. Nor did husband file a posttrial motion for a new trial or amended findings and judgment alleging that the district court failed to apply the statutory 25% parenting-time presumption. On the other hand, the district court found that husband proposed "to equally share time with the children, alternating on a weekly basis," and wife acknowledges that husband's "most compelling argument" is that the district court did not address the parenting-time presumption.

For the reasons that follow, it is not necessary to determine whether husband "appropriately raised" the parenting-time presumption or to define that phrase here. Our decision in *Hagen* that the 25% parenting-time presumption must be appropriately raised was influenced by the rule of *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), that we generally do not consider matters not argued to and considered by the district court. 783 N.W.2d at 219 & n.4 (noting that it was "important" that the 25% parenting-time presumption was brought to the attention of the district court in that case because appellate courts do not consider matters not argued to and considered by the district court). However,

the rule that issues raised for the first time on appeal will not be addressed is not "ironclad." *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (quotation omitted); *see* Minn. R. Civ. App. P. 103.04 (noting that appellate courts may address issues as justice requires). For example, in *Putz*, the supreme court concluded that justice required consideration of a child-support issue raised by the county for the first time on appeal because the state's interest in protecting the well-being of children was at stake. 645 N.W.2d at 350.

Here, the best interests of the children are at stake: "the court shall, upon the request of either parent, grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2018). Under the particular circumstances of this case, we exercise our discretion to address the parenting-time presumption. Those circumstances include the facts that husband requested 50% parenting time, the district court awarded an amount of parenting time well below the 25% statutory presumption, the district court did not acknowledge or address its deviation from the presumption, and the district court found that one of the children, who was 11 years old, "expressed that she wished that [she] had more time at visits with her father" and that the two youngest children appeared "to be comfortable with both parents." On this particular record, reversal and remand of the district court's parenting-time determination is appropriate.[4]

[4] We recognize that the district court also found that the oldest minor child had chosen not to attend some of the scheduled parenting time with husband and that the child who was nine years old reported being afraid and unsafe when husband "yells." But the parenting-time determination should take each child's individualized best interests into account. *See*

We do not fault the district court for not addressing an issue that was not expressly raised, but the circumstances here warrant a remand. On remand, the district court shall (1) determine parenting time for each child with due regard for the rebuttable presumption that husband receive 25% parenting time, (2) make findings supporting its determination, and (3) state the basis for any departure from the statutory presumption.

Custody Evaluator's Report

Husband argues that "[t]he custody evaluator's report should [have been] rejected by the [district] court as biased and unethical and no reliance should [have been] placed on the report." Husband generally argues that the district court should have rejected the custody evaluator's report and recommendations without assigning clear error to any of the district court's related findings. Again, this court does not retry the case, weigh the evidence, or assess witness credibility on appeal. *Sefkow*, 427 N.W.2d at 210. We therefore do not assess the reliability of the custody evaluator's report and recommendations.

Moreover, we note that the district court did not completely defer to the custody evaluator's recommendations. The district court rejected the custody evaluator's recommendation that husband's parenting time be supervised, and it awarded husband unsupervised overnight parenting time. The extent to which the district court relied on the

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Minn. Stat. § 518.175, subd. 1(a) ("[T]he court shall, upon the request of either parent, grant such parenting time on behalf of *the* child and a parent as will enable *the* child and the parent to maintain a child to parent relationship that will be in the best interests of *the* child." (emphasis added)).

remainder of the report and how the district court weighed it are matters entrusted to the district court's discretion in this custody matter.

Husband also argues that the custody evaluator's report "was received at the very last minute before trial" and that the district court denied his motion for a continuance to scrutinize the report. The dissolution trial was held on February 1 and 2, 2018. The record indicates that the custody evaluator's report was filed with the district court on January 17, 2018, approximately two weeks before trial. The trial transcript does not indicate that husband objected to the report as untimely or that he requested a continuance based on the report, and husband did not provide this court with transcripts of any pretrial hearings. Even if the district court denied a request for a continuance based on the timing of the report, husband does not explain why such denial constitutes reversible error.

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). And mere assertions of error without supporting legal authority or argument are waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because husband's assertion of error related to the district court's alleged denial of a continuance based on the timing of the custody evaluator's report is supported neither by the record nor by legal argument, it does not provide a basis for relief.

II.

Husband contends that "[t]he parties' real and personal property was not equitably divided by the court." He argues that the district court erred in its valuation of the parties' homestead, that the property division should reflect his contribution of nonmarital funds to the parties' equity in the homestead, and that the district court erred in dividing miscellaneous personal property.

The district court "shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property." Minn. Stat. § 518.58, subd. 1 (2018); *Sirek v. Sirek*, 693 N.W.2d 896, 899 (Minn. App. 2005). "District courts have broad discretion over the division of marital property and appellate courts will not alter a district court's property division absent a clear abuse of discretion or an erroneous application of the law." *Sirek*, 693 N.W.2d at 898. An appellate court "will affirm the [district] court's division of property if it had an acceptable basis in fact and principle even though [the appellate court] might have taken a different approach." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). Appellate courts "defer to the [district] court's findings of fact and will not set them aside unless they are clearly erroneous." *Id.* A district court abuses its discretion in dividing property if it resolves the matter in a manner "that is against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

Valuation of the Homestead

The district court found that the parties' homestead had a value of $125,000. Husband seems to challenge that valuation, asserting that it should have been valued "at a minimum of $135,000.00."

A district court's valuation of an asset is a finding of fact that will not be set aside unless it is clearly erroneous. *Hertz v. Hertz*, 229 N.W.2d 42, 44 (Minn. 1975). "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Goldman*, 748 N.W.2d at 284 (quotation omitted). "[V]aluation is necessarily an approximation in many cases, and it is only necessary that the value arrived at lies within a reasonable range of figures." *Hertz*, 229 N.W.2d at 44.

At trial, wife testified regarding two valuations of the homestead: the first valued the home at $117,900, based on the homestead's tax-assessed value, and the second valued the home between $129,000 and $134,900, based on a professional appraisal. Wife introduced exhibits documenting those valuations. Wife testified that she thought $125,000 was a fair value for the home as the "median figure" between the two valuations. Wife also testified that husband wanted another appraisal, but she refused that request.

Husband did not refute wife's statements about the valuations, contest her valuation of the homestead, or offer his own valuation. Again, an appellate court generally will not consider matters not argued to and considered by the district court. *Thiele*, 425 N.W.2d at 582. Moreover, although husband asserts that the value of the homestead was "at a minimum" $135,000, he does not assert that the district court's valuation was clearly

erroneous. In sum, husband's arguments regarding the valuation of the homestead do not provide a basis for relief.

Nonmarital Property

Husband argues that the district court erred in determining that his worker's compensation settlement was marital property. Specifically, husband argues that "$21,000.00 of the equity in the homestead was created by [the settlement] for an injury that predated the parties' marriage" and that this nonmarital property should have been taken into account when the court granted wife the homestead and ordered her to make an equalization payment to husband. Husband later argues that "[b]asically about $30,000.00 of the homestead equity was created through" his nonmarital property.

Property acquired by either spouse during the marriage is presumed to be marital property. Minn. Stat. § 518.003, subd. 3b (2018). Nonmarital property includes property acquired by one spouse before the marriage and any property acquired in exchange for such property. *Id.* The party asserting that property is nonmarital has the burden of proving that assertion by a preponderance of the evidence. *Crosby*, 587 N.W.2d at 296-97. When marital and nonmarital assets have been commingled, the party asserting the nonmarital claim must adequately trace the nonmarital funds in order to establish their nonmarital character and meet the burden of proof. *Id.* "[M]oney obtained for injuries personal to a spouse is nonmarital property." *Gerlich v. Gerlich*, 379 N.W.2d 689, 691 (Minn. App. 1986), *review denied* (Minn. Mar. 21, 1986). "Money obtained to compensate for wages lost during a marriage, on the other hand, is marital property." *Id.*

Appellate courts "independently review the issue of whether property is marital or nonmarital, giving deference to the district court's findings of fact." *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008). Characterization of personal injury awards is a question of law this court reviews de novo. *Van de Loo v. Van de Loo*, 346 N.W.2d 173, 175 (Minn. App. 1984).

At trial, husband testified that he had received a "premarital settlement" of $21,000 as compensation for an injury that he sustained at work. He testified that the money was not used to pay any medical bills, but rather was "to compensate [him] for the retraining it would take to find a new profession." Husband also testified that the money was used to pay down part of the mortgage on the parties' homestead. In support of this argument, husband submitted a copy of the settlement agreement, dated November 29, 2002, which stated that husband would receive $27,000 as compensation. Of that payment, $23,000 was for all expenses and benefits that husband was entitled to "arising out of the accident and injury," including any expenses related to temporary or permanent disability, and the remaining $4,000 was for "any and all past, present or future rehabilitation and/or retraining, rehabilitation and/or retraining benefits and attendant expenses." The settlement stated that after deducting fees, husband's total payment would be $19,200.

Husband also submitted a letter from a bank to wife stating that in July 2002, the parties had taken out two mortgages on the homestead for a total of $80,000. The letter further stated that in July 2003 the parties refinanced their mortgages in the amount of $59,000. Husband argues that "[t]he $21,000.00 difference in the mortgage balance

. . . verifies the accuracy of the testimony of [husband] that his settlement was applied to reduce the mortgage debt" on the homestead.

The district court found that "[n]either party sustained their burden of proof to establish any non-marital interest in the [homestead]." On appeal, husband argues that "[t]he [settlement] money was recovered for health reasons so it is non-marital." Husband states, "With nothing before the court to show a breakdown of the components of the Worker's Compensation settlement, it would be speculative to conclude that it was anything other than a recovery for health reasons."

But the settlement agreement itself provides a breakdown of the settlement components. And husband's testimony regarding the amount of his alleged nonmarital contribution to the homestead is inconsistent with the documentary evidence: he testified that he used $21,000 of the settlement funds to pay down the mortgage, but the settlement agreement indicates that he was to receive only $19,200, a portion of which was arguably marital because it was for retraining. Lastly, husband does not cite to any evidence to support his alternative claim that he contributed $30,000 of nonmarital funds to the homestead's equity.

Although the record shows that the parties' mortgage decreased by $21,000 between July 2002 and July 2003, husband did not adequately document that the $21,000 reduction resulted from his use of nonmarital funds. On this record, in which husband's testimony regarding the amount of his nonmarital contribution to the homestead is inconsistent with his documentary evidence, and the documentary evidence does not trace any nonmarital

portion of husband's settlement funds to the homestead's equity, husband has not met his burden to prove a nonmarital share of the equity in the parties' homestead.

Personal Property

Husband argues that the district court should have awarded him certain personal property that he identified in a trial exhibit, as well as "[t]he remainder of [his] personal items . . . including tools, presents and furniture," and other personal property. The district court awarded each party the personal property in his or her possession. Husband does not explain why the district court's personal-property division is erroneous; he simply disagrees with it. Such disagreement is not a basis for relief.

Affirmed in part, reversed in part, and remanded.