STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1056

In re the Marriage of: Suzanne Lea Pham, nka Suzanne Lea Filippi, petitioner,
Respondent,

vs.

Cuong V. Pham,
Appellant.

Filed October 28, 2019
Affirmed in part, reversed in part, and remanded
Peterson, Judge[*]

Hennepin County District Court
File No. 27-FA-15-1615

Beth W. Barbosa, Edina, Minnesota (for respondent)

Cuong V. Pham, Medina, Minnesota (pro se appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Peterson, 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

PETERSON, Judge

In this pro se appeal, appellant challenges the division of property and the attorney-fee award in a marriage-dissolution judgment. We affirm in part, reverse in part, and remand.

FACTS

Appellant-husband Cuong V. Pham and respondent-wife Suzanne Lea Pham (nka Suzanne Lea Filippi) married in 1994. On March 10, 2015, wife filed a petition for dissolution of the marriage. The district court held a bench trial in April and May of 2017. In an October 10, 2017 order, the district court dissolved the parties' marriage, denied both parties an award of spousal maintenance, divided the parties' property and debts, awarded wife $60,000 for attorney fees, ordered husband to pay receiver fees incurred during the proceeding, ordered the receiver discharged upon disbursement of all funds, and ordered judgment entered.

Both parties filed a motion for amended findings, conclusions of law and/or a new trial, and two of husband's attorneys filed motions for attorney liens. In a May 2, 2018 order, the district court amended some findings but otherwise denied the parties' motions, granted the attorney liens, and ordered judgment entered. This appeal follows.[1]

[1] Husband's Notice of Appeal (NOA) states that the appeal is taken from the "Amended Judgement Entered: May 11, 2018." In a July 3, 2018 order, this court concluded that because husband's NOA was "not misleading," the appeal "is construed as taken from the original judgment entered on October 12, 2017, and the amended judgment entered on July 2, 2018."

D E C I S I O N

"Upon a dissolution of a marriage . . . the 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). When dividing property, a district court "shall base its findings on all relevant factors," and "shall also consider the contribution of each [party] in the acquisition, preservation, depreciation or appreciation in the amount or value of marital property." *Id.* An appellate court will not "overturn a district court's evaluation and division of property unless the court abuses its discretion." *Gill v. Gill*, 919 N.W.2d 297, 301 (Minn. 2018). Appellate courts "defer to [a] district court's underlying findings of fact and do not set the findings aside unless they are clearly erroneous." *Id.*

I. Classification of United States Warranty Corporation commissions

Husband argues that the district court erroneously treated commissions he received from United States Warranty Corporation (USWC) as marital property, despite finding that the commissions were husband's income and not a marital asset. The district court, however, did not find that the commissions were husband's income nor did it find that the commissions were not marital property. The district court concluded that the "USWC commissions paid to [husband] during the course of this proceeding are income and not a marital asset."

Whether property of the parties is marital or nonmarital is a question of law subject to de novo review. *Gill*, 919 N.W.2d at 301. "'Marital property' means property, real or personal, . . . acquired by the parties, or either of them, . . . at any time during the existence

of the marriage relation between them, . . . but prior to the date of valuation under section 518.58, subdivision 1." Minn. Stat. § 518.003, subd. 3b (2018). Nonmarital property includes "property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which . . . is acquired by a spouse after the valuation date." *Id.* "[W]hether property is classified as marital depends in large part on timing—when the asset was acquired. If property was acquired by either party during marriage and before the court's valuation date, then that property is presumed to be marital and the court may value and divide that property equitably." *Gill*, 919 N.W.2d at 303 (footnote omitted).

"The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable." Minn. Stat. § 518.58, subd. 1. "The district court has broad discretion in setting the marital property valuation date." *Grigsby v. Grigsby*, 648 N.W.2d 716, 720 (Minn. App. 2002), *review denied* (Minn. Oct. 15, 2002).

A standing order of the Fourth Judicial District Family Court provides that the date for valuing marital assets is the date of the Initial Case-Management Conference (ICMC), but the order permits litigants to request a different date. Husband argues that because the ICMC occurred on April 13, 2015, "[t]he record in this case indicates that the court set the valuation date as April 13, 2015." But the district court specifically found that neither the date of the ICMC nor the date of any settlement conference was an appropriate valuation date. It also ruled that a single valuation date for all of the parties' assets was not appropriate. The court then separately addressed the parties' assets, including the USWC

commissions, and found "that the USWC commissions paid to [husband] during the course of this proceeding are income and not a marital asset."

With respect to the USWC commissions, the district court found that, during the marriage, the parties owned and operated Certified Dealers Process, LLC (CDP), a business that develops and sells software used by car dealerships. In 2012, husband began selling to car dealerships vehicle-related warranties that were underwritten by USWC. USWC paid husband commissions for these sales and each year sent husband a 1099 tax form. From 2012 through 2015, the commissions were reported as business income on schedule C of the parties' joint tax returns. At the time of trial, tax returns for 2016 had not been filed, but husband had received a 1099 tax form from USWC for commissions paid during 2016.

After wife filed her dissolution petition, the district court held a moderated settlement conference. Following the conference, the parties stipulated and agreed[2] that they would continue to manage CDP together; CDP would continue employing a support staff member and an accountant; the parties would deposit "[a]ll business receipts . . . into the business checking account" accessible by both parties; a neutral business evaluator would be appointed; each party would receive $8,500 per month and any excess funds "shall be accumulated in the business . . . and shall be used to pay agreed upon expenses incurred in this proceeding"; both parties would have access to the CDP bank accounts; a

[2] The terms of the parties' agreement were incorporated into a September 22, 2015 stipulated order for temporary relief.

neutral appraiser would be appointed to value the marital homestead; and wife would receive a $5,000 advance on her property settlement.

On January 5, 2016, wife filed a motion that, among other things, sought "sole authority to make decisions regarding [CDP]," the appointment of a receiver over CDP and husband's income from the warranty-sales business, and an order that required husband to place his warranty-sales business account under the control of the receiver. In a March 4, 2016 order, the district court expressly stated that "[a]ll business receipts, including gross receipts received by [husband] from warranty sales through USWC shall be deposited into the CDP business checking account." And in July 2016, the court ordered husband to deposit any and all income received by him into the CDP business checking account.

Husband incorrectly interprets the district court's finding that the USWC commissions are income and not a marital asset as a finding that the commissions earned after the date of the ICMC are not marital property. It is apparent, however, that when the district court stated that the commissions were not a marital asset, it meant that the commissions were not property for which it needed to determine a value. The commissions were paid in specific dollar amounts, and their value was the sum of those amounts; no further valuation was needed.

Husband is also incorrect that the date of the ICMC is the valuation date for the USWC commissions. The district court did not set a valuation date for the commissions and, instead, concluded that the USWC commissions received during the dissolution proceeding are income from managing CDP in the same manner that it had been managed before the dissolution proceeding began, as the parties agreed and stipulated they would

do. Under these circumstances, the district court did not abuse its discretion by not setting a valuation date for the commissions, and, because the commissions were acquired during the marriage, the district court did not err by treating them as marital property.

II. Receiver and attorney fees

Husband argues that he "paid nearly all of the Receiver's fees from his nonmarital USWC commission income and should be credited for that payment," and that he paid wife's "attorney's fees from his nonmarital USWC commission and should be credited for such payment." We reject these arguments because, as we have explained above, husband's premise that the USWC commissions are nonmarital property is incorrect. The parties stipulated that they would continue to manage CDP together, and the district court expressly ordered that gross receipts received from warranty sales through USWC be deposited into the CDP checking account. The commissions were not husband's nonmarital property.

III. Valuation of CDP

Husband argues that the district court overvalued CDP by using the $100,000 amount that he offered to purchase wife's one-half ownership of CDP. He contends that the court should have used the lower amount offered by Del Grande Dealer Group to purchase CDP.

The district court found that the neutral financial expert who was appointed by stipulation to value CDP determined that, on December 31, 2015, the fair market value of CDP was $600,000. Both parties made allegations that the other party had done things that reduced the value of CDP, and husband argued to the district court that wife's conduct had

reduced the value of CDP to $0. The district court found that it was "certainly likely" that the parties' behavior "had a negative impact on the value of [CDP]" and, because much of the behavior occurred after December 31, 2015, valuing the business as of that date was no longer appropriate. The district court, however, also found that

> with the exception of [husband's] allegations and resulting personal opinion, there was no evidence presented as to the actual monetary impact on the value of CDP as the result of either party's actions. For the court to attribute a $0 value to CDP based on [husband's] testimony would be pure and absolute speculation.

The district court then considered other evidence of CDP's value. On January 12, 2017, Del Grande Dealer Group, a business entity, sent a "Letter of Intent" to purchase CDP for a net sales price of $125,000. The district court found that the Del Grande letter of intent was not the best evidence for determining the value of CDP because the letter of intent "was an expression of interest in purchasing CDP only" and did not meet the definition of fair market value because the letter referenced needing to do due diligence and executing a "Definitive Agreement" and stated that it did not constitute or create any binding obligations between Del Grande and CDP.

The district court also found that husband and wife "participated in several hours of negotiation at [a] January 13, 2017 settlement conference," which "included discussion of the Del Grande Letter of Intent that the parties ultimately did not pursue." The parties provided the district court with a document entitled "Purchase Agreement" in which they "agreed [husband] would purchase [wife's] one-half interest in CDP for $100,000 cash" to be paid by January 17, 2017. However, wife ultimately would not agree to the non-

disclosure and non-solicitation provisions in the draft purchase agreement, and no purchase occurred. Instead, wife agreed that husband could be awarded CDP immediately, and operational control of CDP was turned over to husband on January 18, 2017. CDP was removed from the receivership property, and the value of the business remained in dispute.

Husband argues that the Del Grande letter of intent was the best evidence of CDP's value based upon all of the information in the record about wife's harm to CDP. He contends that his $100,000 offer does not reflect the fair market value of CDP because he made the offer without knowledge of the harm that wife had caused to CDP by meeting with a company in Chicago that had expressed interest in purchasing CDP, and, when the district court chose to value CDP based on his offer, it failed to take into account any of the trial testimony about wife's careless actions and self-dealing with the Chicago company.

But, although husband claims that the district court "had substantial information that indicated that the value of CDP was lower than [his] uninformed offer," he does not cite any trial testimony that addresses the actual monetary impact of wife's actions on the value of CDP. Husband simply contends that the obvious reason why wife refused to agree to the non-disclosure and non-solicitation provisions in the draft purchase agreement was that she had revealed CDP's proprietary information and intellectual property to the Chicago company, and he implies that, because wife revealed the confidential information, CDP was worth less than he offered.

Even if husband did not know that wife had met with the company in Chicago when he made his $100,000 offer, he knew about the meeting before trial and, nevertheless, failed

to present evidence about the impact of wife's actions on the value of CDP. It is plausible that wife reduced the value of CDP by revealing confidential information, but, without evidence about the actual monetary effect of wife's actions, the district court was in the same position that it was in with respect to the neutral financial expert's valuation of the company; it could only speculate about the effect, if any, on CDP's value. There are evidentiary shortcomings with both the Del Grande offer and husband's offer, but, in light of the evidence that was presented to the district court, we cannot conclude that the district court's valuation of CDP was clearly erroneous or that the district court abused its discretion by giving greater weight to husband's offer than to the Del Grande offer.

IV. Valuation of the Sallie Mae debt

In 2005, wife obtained two student loans from Sallie Mae. The loans were not repaid, and they were turned over to a debt collector. On June 3, 2015, the combined balance of the two loans with accrued interest was $157,714. Husband argued to the district court that because wife did not accept an offer to settle the debt for $23,000, the debt should be considered to be nonmarital and wife's sole responsibility. The district court concluded that because the loan proceeds were used to develop the parties' business and to pay their personal expenses,[3] the debt was marital. In the property division, the court assigned 100% of the Sallie Mae debt to wife and found that when the amount of the debt was subtracted from the value of the property that wife was awarded, wife received 36% of the marital

[3] The record supports this finding. Wife testified that the Sallie Mae loans were used for living expenses and business expenses, and husband testified that the classes wife paid for with the loans "helped the[ir] company."

property, but, "if [wife] is able [to] negotiate the Sallie Mae student loan down close to the previous offer" and the parties' interest in their cabin sells for the higher end of the anticipated list price, "each party will receive approximately one-half of the marital estate."

Husband argues that the court erred in its arithmetic because, "[r]ather than making the parties' property distribution equal as the court had concluded in its Decree, if [wife] can re-negotiate the $23,000 settlement offer, [wife] will receive 56% while [husband] will receive 44%" of the marital estate. The district court, however, did not conclude in its decree that it was making the property distribution equal, and it did not assume that wife would negotiate a $23,000 settlement offer; it said that the property distribution would be "approximately" equal, and it recognized that there was a possibility that wife could negotiate a settlement "close to the previous offer." Husband's argument is based on an assumption that wife will negotiate a $23,000 settlement.

Minn. Stat. § 518.58 requires an equitable property division; it "does not require an equal division." *Olness v. Olness*, 364 N.W.2d 912, 915 (Minn. App. 1985). Because the district court had no way of knowing the terms of any settlement that wife might negotiate in the future, the property division was equitable even if a future settlement ultimately results in a property division that is not equal. Wife has an opportunity to receive more than half of the marital property, but she also bears the risk of receiving less than half. Given the uncertainty of a settlement, which made it impossible to determine the precise value of the Sallie Mae debt, the district court did not abuse its discretion by assigning to wife both the risk of an unfavorable settlement and the potential reward of a favorable settlement.

V. Need-based and conduct-based attorney fees

Husband argues that the district court's order for him to pay all need-based attorney fees should be reversed because the district court clearly erred when it found that he had the ability to pay the fees. Wife requested both need-based and conduct-based attorney fees.

In a marriage-dissolution proceeding, the district court "shall" award need-based attorney fees in an amount necessary to enable a party to carry on or contest the proceeding if the district court finds that (1) the fees are necessary for a party's good-faith assertion of the party's rights without unnecessarily contributing to the length and expense of the proceeding; (2) the party from whom fees are sought has the means to pay them; and (3) the party who seeks the fees does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2018). The district court may also award conduct-based attorney fees "in its discretion . . . against a party who unreasonably contributes to the length or expense of the proceeding." *Id.* This court has stated that an award of attorney fees under Minn. Stat. § 518.14, subd. 1 "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Schallinger v. Schallinger*, 699 N.W.2d 15, 24 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Sept. 28, 2005).

In a March 4, 2016 order, the district court awarded wife $60,000 in temporary attorney fees; $30,000 were to be paid to wife's attorney for fees that had already been incurred, and $30,000 were to be paid to and held by the receiver for a retainer for future counsel. In the order, the district court found:

> At this time, [wife] has a need for an award of attorney's fees for the good faith assertion of her rights in this proceeding, and [husband] has the means with which to pay them. However, given that there are so many financial unknowns in the matter at this time, the Court will reserve final characterization of the award of attorney's fees as need-based attorney's fees or an advance on [wife's] property settlement.

Husband did not pay either of the amounts ordered.

A July 28, 2016 order required husband to pay $20,000 in temporary attorney fees and, like the March 4 order, reserved the characterization of the payment. When husband did not pay this amount, it was paid from receivership funds. The receiver also paid $40,283 from the homestead sale proceeds to wife's attorney.

In the amended judgment and decree, the district court found that "both parties have engaged in self-help and refused to abide by court orders when it did not suit them. However, . . . [husband] has blatantly ignored the directives of this Court to a much greater extent." The district court then described the parties' behavior during the litigation and stated that it had "appointed a Receiver, in large part, due to [husband's] refusal to abide by court orders" and found husband "in constructive civil contempt for failing to abide by the terms of the March 4, 2016 Order, more specifically, for failing to deposit over $67,000 in USWC warranty commissions into the CDP checking account prior to the appointment of the receiver."

The district court found that the $60,283 that the receiver paid for wife's attorney fees satisfied the fee award in its March 4, 2016 order. The court also found:

> It is appropriate that [the amounts paid by the receiver] be characterized as both need- and conduct-based attorney fees rather [than] an advance on [wife's] property settlement.

> Certain of [husband's] violations of this Court's orders during this proceeding gave him access to a significant amount of funds that could never be fully accounted for at trial. Therefore, [husband] had the ability to contribute to [wife's] attorney fees. The Court will not award any additional attorney fees to [wife]. But because these amounts have already been paid by funds collected by the Receiver from various sources, including certain marital assets ultimately awarded to [wife], it is appropriate that [husband] contribute to [wife's] attorney fees as set forth below.

Later in the amended judgement and decree, the court ordered husband to pay wife $60,000 for attorney fees incurred in the proceeding.

Husband argues that the finding in the March 4, 2016 order that he has the means with which to pay wife's attorney fees is clearly erroneous. He contends that the most significant problem with the finding is that it relies primarily on his USWC commission income and,

> [i]n the very same order that the court finds that [husband] has the resources to pay [wife's] attorney's fees due to his USWC commissions, the court orders [husband] to turn over and deposit the very same USWC commissions into the CDP checking account. Thus, the court is taking from [husband] the very same income the court uses to justify [husband's] ability to pay [wife's] attorney's fees.

But, in the September 20, 2016 order appointing the receiver, the district court found that husband failed to deposit all income he received into the CDP account and also failed to pay the temporary attorney fees as ordered. Because husband failed to comply with the March 4 order to pay commissions into the CDP checking account, the March 4 order did not prevent husband from paying the temporary attorney fees; the commissions remained available to him to pay fees. And when the district court ordered husband to pay attorney

fees at the conclusion of the proceedings, its decision was based on husband's ability to pay at that time, not on his ability more than a year and a half earlier in March 2016.

Furthermore, when the district court finally characterized the attorney-fee award in the judgment, it characterized the fees "as both need- and conduct-based attorney fees." To the extent that the fees were conduct based, a finding that husband had the ability to pay the fees was not required. And to the extent that the fees were need based, the district court found that husband "had the ability to contribute to [wife]'s attorney fees" because his "violations of this Court's order during this proceeding gave him access to a significant amount of funds that could never be fully accounted for at trial." We therefore conclude that the district court did not abuse its discretion when it awarded wife need-based and conduct-based attorney fees.

VI. 2012 and 2013 tax liabilities

Husband argues that the district court "erred when it failed to equally allocate the liability for the parties' outstanding 2012 and 2013 federal and state tax obligations." The district court's October 10, 2017 order did not address the parties' 2012 and 2013 federal and state tax liabilities. The order did, however, identify the following amounts as a "summary of the parties' income and tax liabilities": $6,451 total in federal and state taxes in 2012, and $17,089 total in federal and state taxes in 2013. Husband moved for amended findings, requesting that the district court amend its findings to equally apportion the 2012 and 2013 tax liabilities. In its May 2, 2018 order, the district court denied husband's motion, finding that husband did "not raise[]" the issue at trial. But the following testimony occurred during direct examination of husband at trial:

> COUNSEL: Income taxes. You have income taxes for the years 2012 through 2014 that are still owing, correct?
> HUSBAND: Yes.
> COUNSEL: All right. And that's—that's a joint—that's a marital debt, correct?
> HUSBAND: Yes.
> . . . .
> HUSBAND: We should both be responsible for it.
> . . . .
> COUNSEL: Okay. So however it works out, she should pay her half and you should pay yours?
> HUSBAND: Yes.

Thus, husband raised the issue of the 2012 and 2013 tax liabilities, and the district court failed to exercise its discretion by not apportioning them. We therefore reverse the denial of husband's motion requesting apportionment of the tax liabilities and remand so that the district court can consider the motion. *See Gill*, 919 N.W.2d at 308 (affirming the decision to remand to district court to exercise discretion in dividing payments it erroneously classified as nonmarital property).

Affirmed in part, reversed in part, and remanded.