STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2149

In re the Marriage of:
Geraldine Ann Gallagher f/k/a Geraldine Ann Ramsay, petitioner,
Respondent,

vs.

Gerald David Ramsay, Jr.,
Appellant.

Filed January 17, 2012
Affirmed as modified; motions granted
Peterson, Judge

Anoka County District Court
File No. 02-F1-06-010405

Anne M. Honsa, Deborah M. Gallenberg, Honsa and Associates, P.A., Minneapolis, Minnesota (for respondent)

Amy L. Helsene, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

PETERSON, Judge

In this appeal from a district court order that denies a motion to vacate an amended qualified domestic relations order (QDRO) and awards respondent-wife attorney fees,

appellant-husband argues that (a) the district court should have vacated the amended QDRO based on newly discovered evidence and the fact that prospective application of the judgment is not equitable because the amended QDRO altered the otherwise-final property distribution by using the wrong date to value the retirement plan, (b) he was not afforded procedural due process of law and was not given an adequate hearing before entry of the amended QDRO, (c) the district court failed to make adequate findings of fact, and (d) the conduct-based attorney-fee award is not supported by sufficient findings and is excessive. We affirm as modified and grant wife's motion to strike portions of husband's brief and addendum.

FACTS

The parties' stipulated dissolution decree was entered on April 10, 2008. At the time of dissolution, husband held a retirement account that included a 401(k) account and a pension. On May 18, 2007, the valuation date, the retirement account had a marital value of $589,703.76. Conclusion of law 17(B) of the dissolution decree provided for division of the 401(k) as follows:

> (i) [Wife] shall be and hereby is awarded an amount equal to $275,435.00 plus/minus investment results on said amount since *May 18, 2007*. To the extent that [husband] has amounts held in different investment funds, sub-accounts or tax status accounts, then a "pro-rata" portion of the total amount of [wife's] benefit shall come from each such fund or sub-account of [husband].
>
> (ii) . . . [Husband] may request to transfer a portion of the 401(K) account that [husband] was awarded to [wife] so that [wife] may withdraw the funds without penalty. No later than thirty (30) days from entry of the Judgment and Decree herein, [husband] shall provide [wife] with written notice of

> the amount. . . . Said amount shall not be increased/decreased by investment results. Immediately upon receipt of approval of the QDRO by the plan administrator, [wife] shall . . . withdraw the sum requested by [husband.] . . . [Husband] shall retain an amount sufficient to cover . . . tax liability. . . .

(Emphasis added.)

Husband exercised his right under paragraph (B)(ii) and requested that wife withdraw a net amount of $75,000 from the 401(k), or $128,243 inclusive of the estimated tax liability. Wife's counsel prepared the first draft QDRO and sent it to the plan administrator for review. The plan administrator rejected the draft because one amount in it ($275,435) was subject to investment results and another amount ($128,243) was not.

Wife's counsel calculated the earnings and/or losses on the $275,435 awarded to wife from the valuation date until September 5, 2008, in combination with the $128,243, which was not subject to earnings and/or losses, and composed a second draft QDRO. In doing so, wife's counsel learned that, several months earlier, husband had taken out a loan against the 401(k), without wife's consent or authorization by the court.

Husband later requested that the parties use percentages to describe their shares of the retirement account, rather than fixed dollar amounts, "due to the drastic downturn in the market since the end of September." Wife's counsel prepared a third draft QDRO, using percentages rather than fixed dollar amounts, and, on February 6, 2009, the third draft QDRO became the order of the district court. The QDRO stated the valuation date as specified in the dissolution decree, May 18, 2007.

The third draft QDRO was rejected by the plan administrator, a different entity from the previous plan administrator. The new plan administrator indicated that it was not able to calculate earnings and losses from the May 18, 2007 valuation date because it did not hold the accounts until December 15, 2008. The new plan administrator directed the parties to "modify the language in the QDRO that either provides [wife] with a fixed dollar amount or a percentage of [husband's] total account balance as of the date on or after December 15, 2008."

In order to calculate the earnings and losses between May 18, 2007, and December 15, 2008, wife's counsel several times requested the account statements from husband, but husband did not produce them. Wife's counsel tried to get the statements directly from the plan administrator by using an authorization that husband had previously executed, but husband had revoked the authorization, and counsel was not able to get the statements. Husband's counsel withdrew on May 5, 2009, and husband retained another attorney by May 28, 2009.

In an August 21, 2009 letter to the district court, wife's counsel explained:

> We have attempted to secure statements for the two (2) accounts so that we can calculate any earnings/losses but despite repeated requests, [husband] has failed to produce the statements; we are requesting that you sign the enclosed Amended QDRO.
>
> . . . .
>
> Since the Plan Administrator . . . has informed us that they cannot calculate any earnings and/or losses relating to the plans prior to December 15, 2008, the enclosed document reflects that the award to [wife] would be subject to earnings and/or losses only after December 15, 2008.

The district court signed the fourth draft QDRO, and it became the amended QDRO on September 10, 2009. The Amended QDRO specifies December 15, 2008, as the valuation date.

On September 16, 2009, wife served the amended QDRO on husband. Husband stated in an affidavit that he obtained new counsel in October 2009. Soon after, husband filed an appeal with the plan administrator. On November 18, 2009, the period to file an appeal to this court from the amended QDRO expired.

After learning that the plan administrator had gained the ability to calculate investment results back to May 18, 2007, husband brought a motion to vacate the amended QDRO under Minn. Stat. § 518.145, subd. 2(2), (5) (2010). Husband argued that the amended QDRO should be vacated because: (1) the plan administrator's ability to calculate investment results back to May 18, 2007, was "newly discovered evidence"; and (2) the amended QDRO altered the property division in the stipulated dissolution decree, thus rendering prospective application of the amended QDRO inequitable. Wife brought a motion for conduct-based attorney fees, arguing that husband had a history of dilatory tactics that contributed to the length and expense of the proceeding and resulted in the entry of the amended QDRO.

The district court rejected husband's argument that the plan administrator's ability to calculate investment results back to May 18, 2007 was newly discovered evidence, finding that

> [t]he parties have always had the ability to calculate gains and losses prior to December 15, 2008 by using retirement

> account statements to do so. . . . The fact that the plan administrator can now calculate earnings and losses before December 15, 2008 is a convenient way for [husband] to claim that there is newly discovered evidence when in fact the evidence has been in his possession all along.

The district court also rejected husband's argument that prospective application was inequitable, finding that "[husband's] failure to cooperate with requests for information from [wife's] counsel and his own counsel prevented the drafting and implementation of an Amended QDRO prior to September 2009."

The district court found that husband contributed to the length and expense of the proceeding and awarded wife $12,511.87 in conduct-based attorney fees. Minn. Stat. § 518.14 (2010). The district court awarded all of the fees that wife requested. Wife's counsel's affidavit stated that wife incurred attorney fees of $8,925.23[1] "in drafting and attempting to implement the QDRO," $1,535.75 "in preparation of these documents requesting an award of conduct-based attorney's fees," $855 "in reviewing and preparing responsive papers to [husband's motion to vacate]," and $712.50 "to prepare for and attend the [hearing on the motion to vacate]."

D E C I S I O N

I.

The district court's determination whether to vacate an order will not be disturbed absent an abuse of discretion. *See Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn.

[1] Respondent broke down this amount with respect to husband's dilatory tactics as follows: $2,293.65 (taking out loan, failing to respond for two months), $1,773.25 (failing to produce statements when requested), and $2,019.50 (failing to file an appeal and trying to get amended QDRO invalidated). Respondent requested the full $8,925.23, and the district court awarded that amount.

1989) (stating standard of review applicable to determination whether to vacate stipulation and noting district court's broad discretion in dividing property in marital dissolution). Husband argues that the district court abused its discretion in denying the motion to vacate the amended QDRO because (1) the plan administrator's ability to calculate investment results back to May 18, 2007 is "newly discovered evidence" and (2) the amended QDRO, which was entered without notice and a hearing, altered the stipulated property division and renders prospective application of the amended QDRO inequitable. Minn. Stat. § 518.145, subd. 2 (2), (5) (2010).

"Generally, newly discovered evidence must have been in existence at the time of trial but not known to the party at that time." *Zander v. Zander*, 720 N.W.2d 360, 365 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006). The evidence regarding the gains and losses before December 15, 2008, existed when the amended QDRO was entered. The retirement-account statements contained the evidence regarding the gains and losses, and the parties knew that the statements existed. Thus, the district court did not abuse its discretion in concluding that the plan administrator's ability to calculate gains and losses back to May 18, 2007, was not "newly discovered evidence" that required the district court to vacate the amended QDRO.

> [T]o reopen a [QDRO] because prospective application is no longer equitable, the inequity must result from the development of circumstances substantially altering the information known when the [QDRO] was entered. The moving party must present more than merely a new set of circumstances or an unforeseen change of a known circumstance to reopen a [QDRO].

See Thompson v. Thompson, 739 N.W.2d 424, 430-31 (Minn. App. 2007) (quotation omitted) (standard applicable to reopening dissolution judgment).

Husband argues that prospective application of the amended QDRO is inequitable because it altered the parties' stipulated property division. But the property division was set forth in the dissolution decree, and any alterations occurred when the amended QDRO was entered. At the time the amended QDRO was entered, husband possessed or easily could have obtained the account statements, which contained the information needed to understand the amended QDRO's effect on the property division. After the amended QDRO was entered, there was no change in the parties' circumstances that substantially altered the information known when the amended QDRO was entered.

Husband was properly served with the amended QDRO, and received it, as evidenced by the fact that he filed an appeal with the plan administrator. Also, husband admitted that he obtained new counsel in October, well before the time to appeal the amended QDRO expired. But husband failed to appeal the amended QDRO. Bringing a motion to vacate does not extend the time to appeal the underlying order or judgment. *Sammons v. Sammons*, 642 N.W.2d 450, 455 (Minn. App. 2002). The order on review here is the order denying husband's motion to vacate the amended QDRO, not the order amending the QDRO.

Husband's argument that reversal is warranted because the entry of the amended QDRO did not comply with due process is similarly unpersuasive. Husband was properly served with the amended QDRO, and he could have filed an appeal with this court challenging the alleged violation of his due-process rights, but he did not. The

record supports the district court's finding that the period to appeal the amended QDRO expired on November 18, 2009. Husband's motion to vacate did not extend the time to appeal the underlying amended QDRO. Consequently, the alleged due-process violation is not properly before us and is not a basis for reversal.

II.

A district court may award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2010). "An award of attorney fees rests almost entirely within the discretion of the [district] 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). Attorney fees awarded under Minn. R. Civ. P. 11 for misconduct must be reasonably based on the expenses a party incurs by opposing the misconduct. *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 426 N.W.2d 214, 219-20 (Minn. App. 1988). Applying this principle, we conclude that the district court abused its discretion in awarding the full $12,511.87 requested by wife for conduct-based attorney fees.

Wife's counsel's affidavit requests $12,511.87 in attorney fees and costs, but the sum of the itemized amounts requested in the affidavit is $12,028.48. Because we have not found any basis for awarding the $483.39 difference between these two amounts, we reduce the attorney-fee award by $483.39.

Also, the district court's findings identify the misconduct that contributed unreasonably to the length and delay of the proceeding. But the record does not support a

conclusion that wife incurred the full $12,511.87 awarded opposing the identified misconduct. Wife's counsel's affidavit attributes to husband's dilatory tactics only $6,086.40 of the $8,925.23 incurred in "drafting and attempting to implement the QDRO." The district court did not make findings regarding the $2,838.83 difference between these amounts, and the record does not support awarding the $2,838.83 for conduct-based attorney fees.

Awarding the full $8,925.23 in attorney fees incurred in drafting the QDROs, does not address the additional "length and expense" of the proceeding that was due to the plan administrator's rejection of the draft amended QDROs. When "no one party [is] solely responsible for the complex and protracted procedural history of [a] case so as to justify attorney fees as a recourse for bad faith" an award of conduct-based attorney fees is an abuse of discretion. *Nazar v. Nazar*, 505 N.W.2d 628, 636 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993). Because the record does not support awarding the $2,838.83 for conduct-based attorney fees, the district court abused its discretion, and we reduce the fee award by an additional $2,838.83, which makes the total reduction $3,322.22.

III.

Wife moves to strike husband's argument that the district court's issuance of the amended QDRO without a motion by wife or a hearing violated husband's due-process rights. Husband did not raise this due-process claim in the district court. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425

N.W.2d 580, 582 (Minn. 1988) (quotation omitted). As we have already explained, the alleged due-process violations occurred before the amended QDRO was entered, and husband failed to appeal the amended QDRO. Because the alleged due-process violations should have been raised in an appeal from the amended QDRO and were not presented to the district court in connection with husband's motion to vacate the amended QDRO, we have not considered the merits of husband's due-process argument, and we grant wife's motion to strike.

Wife also moves to strike from the addendum to husband's brief a copy of a February 7, 2011 letter to husband from the plan administrator regarding the division of husband's retirement account under the amended QDRO and a December 31, 2010 printout from the Deluxe Corporation retirement program regarding husband's retirement account. Husband acknowledges that these documents are not part of the record on appeal. The general rule is that an appellate court may not base its decision on matters outside the record on appeal and may not consider matters not produced and received in evidence by the district court. *Thiele*, 425 N.W.2d at 582-83. An exception to the general rule allows an appellate court to consider new uncontroverted documentary evidence of a conclusive nature that supports the result obtained in the district court. *Vill. Apartments v. State* (*In re Real Property Taxes for 1980 Assessment*), 335 N.W.2d 717,718 n.3 (Minn. 1983). This exception does not apply to the extra-record documents included in husband's addendum, because the documents are offered to reverse, rather than to affirm, the district court's decision. Production of new "evidence is never allowed in an appellate court for the purpose of reversing a judgment." *Plowman v.*

Copeland, Buhl & Co., 261 N.W.2d 581, 584 (Minn. 1977). Wife's motion to strike is granted.

Affirmed as modified; motion granted.