STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1509

In re the Marriage of:
Jamie Louise Toomire, petitioner,
Respondent,

vs.

John Scott Toomire, Sr.,
Appellant.

Filed September 4, 2012
Affirmed in part as modified, reversed in part, and remanded
Muehlberg, Judge[*]

Dakota County District Court
File No. 19AV-FA-09-2046

Susan M. Gallagher, Gallgher Law Office, L.L.C., Eagan, Minnesota (for respondent)

Ronald B. Sieloff, Sieloff and Associates, P.A., Eagan, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant-husband challenges the district court's custody determination; award of parenting time; child-support order; award of child tax exemptions; award of guardianship over the children's trust accounts; division of property; denial of his motion to continue trial and exclude evidence; award of attorney fees; and sequestration of his assets. Husband also requests a new trial before a different district court judge on the basis that the district court was biased and failed to exercise independent judgment. We conclude that the record does not establish that the district court was biased, and husband is not entitled to a new trial. We affirm in part as modified, reverse in part, and remand for further proceedings.

FACTS

Appellant-husband John Toomire and respondent-wife Jamie Toomire were married in 1998 and separated in 2009. They have two minor children: a daughter, E.T., and a son, J.T. After a five-day trial spanning three and a half months, the parties' marriage was dissolved by judgment dated April 27, 2011. The district court subsequently amended the judgment to correct minor technical errors. This appeal follows.

D E C I S I O N

Before addressing husband's specific assertions of error, we make several general observations about civil appeals. First, to be properly before an appellate court for decision, an issue must be properly preserved for review in the district court. *See, e.g.*,

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts do not address questions not presented to and considered by the district court, and that even if an issue is preserved for appeal, an appellate court will not address that issue on a theory other than the theory on which the issue was addressed to the district court). Second, regarding issues that are properly before an appellate court for decision, it is the complaining party's duty to show that the district court erred: "[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464-65 (1944); *see Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quoting *Waters* in a family-law appeal); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth* in a family-law appeal); *see also Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (quoting *Waters*). Third, even if a complaining party shows that the district court committed an error, the mere existence of that error is, by itself, insufficient to require a reversal. The complaining party must also show that the error prejudiced the complaining party. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (stating that "[a]lthough error may exist, unless the error is prejudicial, no grounds exist for reversal") (citing *Midway Ctr. Assocs.*, 306 Minn. at 356, 237 N.W.2d at 78); *Loth*, 227 Minn. at 392, 35 N.W.2d at 546 (stating that 'error without prejudice is not ground for reversal' (quoting *Waters*, 216 Minn. at 495, 13 N.W.2d at 465)); *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that a district court will not be reversed if it reached an affirmable result for the

wrong reason). Further, to obtain reversal, any prejudice must be significant. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis error in setting child support). Finally, the result of the obligations of the complaining party to show both that the district court erred and that any error the district court committed significantly prejudiced the complaining party is that, in a civil appeal, there is no obligation on an appellate court to demonstrate or otherwise show that a challenged ruling is, in fact, correct. *See Engquist v. Wirtjes*, 243 Minn. 502, 503, 68 N.W.2d 412, 414 (1955) (stating that "[t]he function of an appellate court is that of review. It does not exist for the purpose of demonstrating to the litigants through a detailed statement of the evidence that its decision is right"). As set out below, a significant number of husband's arguments in this appeal run afoul of one or more of these basic tenets of appellate practice.

I. Custody

The district court awarded wife sole legal custody and (implicitly) sole physical custody. "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

A. Failure to Award Physical Custody

Husband challenges the district court's failure to award physical custody to either parent. This omission was clearly a clerical error: the district court made findings supporting only the conclusion that wife should receive sole legal and physical custody yet awarded "sole legal custody" to wife twice in its conclusions of law. In context, it is

apparent that one of those conclusions inadvertently stated "legal" rather than "physical." We therefore direct the district court to modify the amended judgment to award sole physical custody to wife. *See State v. Briard*, 784 N.W.2d 421, 423 n.1 (Minn. App. 2010) (interpreting a typographical error in light of its context).

B. Evaluation of Children's Emotional Health and Relationship to Husband

Husband asserts that the district court failed to make findings regarding the children's emotional health or their relationship with husband, as required by Minn. Stat. § 518.17, subd. 1(4), (5), (9) (2010).[1] Husband is incorrect. The district court made express findings about the children's mental health: the children are adversely affected by husband's expressions of anger; they are afraid of husband; and they have symptoms of anxiety, according to their therapist. And the district court made numerous findings about husband's relationship with the children: husband touches E.T. in a sexual manner that makes her uncomfortable; makes physical threats to J.T.; expects both children to meet his emotional needs; forces them to sleep with, hug, and kiss him; prohibits them from having friends at the house; frequently yells in their presence; and refuses to speak to them when they make him angry.

[1] Husband has waived many of his challenges by failing to raise them in his posttrial motion, *see Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986), or by failing to provide any supporting law or analysis. *See In re Irwin*, 529 N.W.2d 366, 373 (Minn. App. 1995), *review denied* (Minn. May 16, 1995). We address these arguments, however, insofar as they relate to custody, parenting time, child support, or child tax exemptions. *See* Minn. R. Civ. App. P. 103.04 (explaining that appellate courts may review any matter "as the interest of justice may require").

Husband appears to challenge the district court's reliance on the children's therapist's hearsay statement, presented through the custody evaluator's testimony, that the children suffer from anxiety. But because husband failed to object to this testimony at trial, he has waived this challenge. *See Koehnle v. M.W. Ettinger, Inc.*, 353 N.W.2d 612, 614 (Minn. App. 1984). Further, we find no prejudice to husband by the admission of this testimony because it was only one of many reasons the district court concluded that husband has a poor relationship with the children that negatively impacts their emotional health.

Husband also appears to argue that the district court's reliance on the custody evaluator's report violates Minn. R. Evid. 703(b). But because husband fails to identify which of the district court's findings are based on the report, he has waived this challenge. *See Irwin*, 529 N.W.2d at 373.

C. Evaluation of Children's Custody Preferences

Husband challenges the district court's refusal to interview the children regarding their custody preferences. In determining custody, the district court must make findings regarding the children's reasonable preferences if the children are old enough to express such a preference. Minn. Stat. § 518.17, subd. 1(2) (2010). In doing so, the court "may interview the child in chambers." Minn. Stat. § 518.166 (2010). But "the decision to interview a child is a discretionary choice for the trial judge" because "[a]n interview is not the only way to determine a child's preference." *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). Given the custody evaluator's testimony that the children preferred to live with wife, the hostile nature of the proceedings, and wife's objection to

the interview, the district court did not abuse its discretion by declining to interview the children.

Husband also challenges the district court's reliance on the custody evaluator's testimony regarding the children's preferences, arguing that it was inadmissible hearsay that the district court agreed to disregard. The district court acted inconsistently with its own ruling that the children's out-of-court statements would be disregarded. But because not a single factor weighed in favor of husband receiving custody and many weighed heavily in favor of wife receiving sole custody, the children's stated preferences did not affect the ultimate custody determination. The district court's error was harmless.

Husband further argues that the district court erred by relying on the custody evaluator's report because it contains the children's expressions of their *temporary* preferences at the time of the 2009 interview. Husband mischaracterizes the report. It indicates that the children did not wish to spend any more time with him than they already did at the time of the interviews. Since husband provides no evidence that those preferences are outdated, his argument fails.

D. Evaluation of Children's Primary Caretaker

Husband protests the district court's finding that wife was the primary caretaker absent an express finding that she was the primary caretaker *prior* to the separation. In determining custody, the district court must identify the children's primary caretaker based on "facts and circumstances at the time of the separation." *Smith v. Smith*, 425 N.W.2d 854, 857 (Minn. App. 1988); *see* Minn. Stat. § 518.17, subd. 1(3) (2010). Here, the district court used the past tense to describe the parties' roles in the children's lives.

And it relied on the custody evaluator's report, which specifically evaluates each party's caregiving in the six months prior to their separation. Husband's claim of error is therefore unpersuasive.

II. Parenting Time

The district court awarded husband parenting time every Wednesday night, every other weekend, and half of all holidays. The district court has broad discretion in determining parenting time, and this court will not reverse absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995).

Husband argues that the parenting-time award is insufficient for him to monitor wife's drinking habits. The district court must "grant such parenting time . . . 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) (2010) (emphasis added). Parenting time is not awarded to allow one parent to check up on the other parent. *See id.* The district court did not abuse its discretion by declining to award husband more parenting time to monitor wife's drinking.

Without any supporting argument, husband asserts more generally that he was awarded insufficient parenting time to maintain a relationship with his children. But without any basis for husband's assertion, appellate review of the award is impossible.

III. Child Support

Using husband's employment income and wife's unemployment benefits, the district court calculated each party's share of parental income for determining child support (PICS) as 50%; ordered husband to pay $554 per month in basic support as of

February 1, 2010, minus $28 per month for wife's 50% share of health-insurance premiums; ordered husband to maintain and pay for the children's health insurance and pay half of all future uninsured medical and dental costs; and ordered husband to reimburse wife for half of past uninsured medical and dental costs and extracurricular and school-activity fees. This court reviews child-support orders for an abuse of discretion and will not reverse unless the district court made clearly erroneous findings of fact or misapplied the law. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

A. Retroactive Child Support

Husband objects that the district court's order to pay retroactive child support constitutes an impermissible modification of the temporary order reserving support. When a court reserves support, the subsequent order for support is not a modification but an initial order for support. *Bennyhoff v. Bennyhoff*, 406 N.W.2d 92, 94 (Minn. App. 1987). Husband's argument therefore fails.

For the first time in his reply brief, husband argues that "the Trial Court erred by retroactively applying the child support guideline's calculation as of the time of the trial when [wife's] gross monthly income was $2,535 . . . to a prior date and period of time when her income was more than twice that." But he has waived this challenge not only by failing to make it in his principal brief, *Zimmerman v. Safeco Ins. Co. of Am.*, 593 N.W.2d 248, 251 (Minn. App. 1999), *aff'd*, 605 N.W.2d 727 (Minn. 2000), but by failing to raise it in his posttrial motion and providing no law to support it. *See Sauter*, 389 N.W.2d at 202; *Irwin*, 529 N.W.2d at 373.

B. Health Insurance

Husband complains that the district court ordered him to pay the entire cost of health insurance for the children should his current insurance plan cease. Husband's objection mischaracterizes the district court's order:

> During the time that any child of the parties is a minor and/or that child support is a continuing obligation, [husband] shall provide major medical, dental, and hospitalization insurance available through his employer for the benefit of the minor children of the parties. [Husband] will maintain in full force and effect all present policies of health, accident, medical, surgical, hospitalization and dental indemnity insurance for the benefit of the parties and the minor children of the parties. Should any such insurance lapse, be canceled or be no longer available to [husband], [husband] will immediately obtain and maintain in effect insurance of comparable coverage and amount . . . ."

This order simply puts the burden of obtaining a new insurance plan on the party who would be aware of the old plan's cessation; it does not preclude a modification of support if the insurance premiums change. *See* Minn. Stat. § 518A.39, subd. 2(a)(6) (2010). The order is not in error.

Husband also argues that the district court erred by failing to deduct past health-insurance premiums that he paid from his support obligation. But husband does not direct this court to any part of the record in which he brought these premiums to the district court's attention. Nor do we find any reference to them in the 52 exhibits comprising husband's "proposed findings and awards."

Finally, husband contends that the district court erred by not ordering wife to pay her share of the health-insurance premiums. This is false. The district court properly

divided the health-insurance premiums for the children between the two parents equally (based on a 50%-50% division of the PICS) and deducted wife's share of the premiums from husband's support obligation.

C. Past Extracurricular and School-Activity Fees

Husband contests the district court's order to reimburse wife for 50% of past extracurricular and school-activity fees pursuant to a temporary order. First, husband argues that the reimbursement order constitutes an upward deviation from the child-support guidelines. But the reimbursement order simply enforces the temporary order, which required the parties to "divide the costs associated with any of the children's activities in which they have traditionally participated" and to "discuss any new activity before signing the children up." Since husband does not allege that the extracurricular fees are for new activities, his argument fails.

Additionally, husband argues that he should have been credited for $10 he paid for Cub Scouts. But wife testified that she paid the $10 for Cub Scouts, and husband points to no evidence that he paid this $10. The district court did not abuse its discretion by not crediting the $10 to husband.

D. Calculation of Wife's Income

Husband argues that the district court should have imputed potential income to wife because she is voluntarily unemployed. "[C]hild support must be calculated based on a determination of [the parent's] potential income" only if the district court determines, as a matter of fact, that the "parent is *voluntarily* unemployed." Minn. Stat. § 518A.32, subd. 1 (2010) (emphasis added); *see Welsh v. Welsh*, 775 N.W.2d 364, 370

(Minn. App. 2009). The district court implicitly found that wife was involuntarily unemployed. First, it found that wife was terminated from her position at the Minneapolis VA Medical Clinic not because she committed any misconduct but because she refused to sign a "Last Chance Agreement," waiving her right to bring discrimination claims before the Equal Employment Opportunity Commission, among other things. Second, the district court found that wife has made a good-faith effort to find new employment, as demonstrated by her continued eligibility for unemployment benefits. These findings are supported by the record and demonstrate that wife's termination and continued unemployment are involuntary. Accordingly, the district court correctly refused to impute potential income to wife.

IV. Tax Exemptions

Husband challenges the district court's award of the child tax exemptions to wife, particularly because the district court made no findings regarding the parties' monthly expenses. "The general rule is that the dependency exemption goes to the custodial parent." *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 472 (Minn. App. 1999). In the absence of a waiver from wife or any other basis justifying the award of the exemption to husband (such as equal parenting time or wife having substantially greater financial resources than husband), the district court did not abuse its discretion by awarding the exemptions to wife. *See id.*

V. Account Guardianship

Husband contends that the district court erroneously named wife the guardian of all of the children's trust accounts, despite an alleged stipulation that husband would be

the guardian of the two Learning Quest Accounts and wife would be the guardian of the Wells Fargo and VanGuard accounts. Husband mischaracterizes the parties' stipulation. The parties stipulated—and the district court agreed—that wife would be the guardian of the accounts established by her family, and husband would be the guardian of the accounts established by his family.

Nevertheless, this stipulation, combined with the evidence presented at trial, does not support the district court's decision. Husband testified that, pursuant to this stipulation, wife would be guardian of E.T's and J.T.'s Wells Fargo accounts and J.T.'s VanGuard account (worth $2,971.83, $2,792.86, and $10,561.77, respectively), and husband would be the guardian of E.T.'s and J.T.'s Learning Quest accounts (worth $16,155.43 and $12,965.85, respectively). Wife's father testified that he gave wife $10,000 at E.T.'s birth and $10,000 at J.T.'s birth to set up college accounts for them, which indicates that he did not merely set up the Wells Fargo and VanGuard accounts. Thus, wife's father and husband offered conflicting testimony, yet neither supports the district court's decision to name wife the guardian of all five accounts. We therefore reverse and remand for the district court to determine which family established each trust account and award guardianship accordingly.

VI. Property Division

Over husband's objection, the district court deemed almost all of the assets in husband's possession marital property and deemed two of husband's debts nonmarital debt. The district court then divided the marital property equally between the parties, awarding most of the marital property to husband but ordering him to pay wife a

$220,669.38 cash equalizer. District courts have broad discretion over property divisions, and this court will not reverse absent a clear abuse of discretion or misapplication of law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005).

A. Marital and Nonmarital Property

Nonmarital property includes property acquired by either spouse prior to the marriage, property acquired in exchange for nonmarital property, and appreciation in the value of nonmarital property. Minn. Stat. § 518.003, subd. 3b (2010). Property acquired by either spouse during the marriage is presumptively marital, but a spouse may defeat the presumption by showing by a preponderance of the evidence that the property is nonmarital. *Baker v. Baker*, 753 N.W.2d 644, 649-50 (Minn. 2008) (citing Minn. Stat. § 518.003, subd. 3b).

"For nonmarital property to maintain its nonmarital status, it must either be kept separate from marital property or, if commingled with marital property, be readily traceable." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). If property is acquired or maintained by both marital and nonmarital property, the party seeking to prove its nonmarital character must trace an identifiable portion of the property to a nonmarital source. *Senske v. Senske*, 644 N.W.2d 838, 841-42 (Minn. App. 2002); *see Prahl v. Prahl*, 627 N.W.2d 698, 705 (Minn. App. 2001) (concluding that a portion of property was nonmarital where party identified the value of the property at the time of the marriage).

Whether property is marital or nonmarital is a question of law subject to de novo review, but a reviewing court must defer to the district court's underlying findings of fact unless they are clearly erroneous. *Baker*, 753 N.W.2d at 649; *Olsen*, 562 N.W.2d at 800.

1. Modern Woodman Annuity

Husband challenges the district court's determination that the Modern Woodman Annuity is marital property. Husband presented documentation and testimony that he bought the annuity prior to the marriage in 1992 and that he paid a total of $18,395 in premiums. But contrary to the assertions in his appellate brief, neither the documentation nor husband's testimony explained when he paid the premiums and whether he used exclusively nonmarital funds to pay the premiums. Nor did husband present evidence of the value of the annuity at the time of the marriage. Because husband failed to identify what portion of the annuity's value is due to pre-marital contributions, he did not meet his burden of proving its nonmarital character.

2. Universal Life Insurance Policy

Husband contests the district court's determination that the Universal Life Insurance Policy is marital property. Husband presented evidence that he bought the policy in 1990, prior to the marriage, and that he paid $666.36 in annual premiums every year. But he presented no evidence of the value of the policy at the time of the marriage. As a result, he failed to show what portion of the policy's value is from a nonmarital source (premiums he paid prior to the marriage) and what value is from a marital source (premiums he paid during the marriage with marital assets). The district court properly treated the policy as marital property.

3. SEP IRA Account

Husband challenges the district court's determination that the SEP IRA account is marital property. Husband provided no pre-marriage documentation of the account. At trial, he testified that he created it before he was married using proceeds from a settlement and that he had not withdrawn any money from it. But he was not entirely clear about when he deposited money into the account:

> COUNSEL: Have you ever made any contributions to the SEP IRA?
> HUSBAND: Yeah, when I was self-employed.
> COUNSEL: Okay. I mean since you change – since you created it.
> HUSBAND: No.
> COUNSEL: I mean, I'm trying to ascertain whether you put money into it after you were married or from current earnings. Do you follow what I'm saying?
> HUSBAND: No, because when I – I don't think so because when I worked up here, I was an employee, so I couldn't contribute.
> COUNSEL: Okay. You were self-employed only –
> HUSBAND: Prior to –
> COUNSEL: Before you were married, do you mean?
> HUSBAND: Yeah.

Due to this ambiguity and husband's admission that he has a memory problem, the district court told counsel that he would not deem the account nonmarital property without supporting documentation. In light of husband's failure to provide documentation, the district court reasonably discredited his testimony and did not clearly

err in finding that husband failed to prove that the SEP IRA account is nonmarital property.[2]

4. Arkansas Timeshare

Husband challenges the district court's determination that the Arkansas timeshare is marital property. Husband testified briefly that he received the timeshare as a gift from his parents prior to the marriage, but he provided no evidence of the source of the annual payments and property taxes he presumably paid on the timeshare. Because husband did not trace an identifiable portion of the current value of the timeshare to a nonmarital source, the district court properly determined that it is marital property.

B. Marital and Nonmarital Debt

"Debt is apportionable as part of the marital property settlement." *Justis v. Justis*, 384 N.W.2d 885, 889 (Minn. App. 1986), *review denied* (Minn. May 29, 1986). "The division of marital debts is treated in the same manner as division of assets." *Id.*

1. Kitchen-Remodeling Loan

Husband contests the district court's determination that the kitchen-remodeling loan is a nonmarital debt, if a debt at all. Husband produced a promissory note, substantiating both parties' testimony that, during the marriage, they borrowed $35,000 from husband's mother to remodel their kitchen but had not yet fully repaid the debt. This loan improved the appraisal value of the home, which wife shared in. The district

[2] Husband points to Exhibits 149 and 150 as evidence of his nonmarital claim. But those exhibits merely show that husband received $164,880.99 from a personal injury settlement in October 1989. They say nothing about the SEP IRA account.

court therefore clearly erred in finding that husband produced no evidence of the parties' continuing obligation to repay the loan and erred in holding that any loan obligation would be husband's nonmarital debt because it contributed to the value of the homestead awarded to husband. We therefore reverse the district court's determination that the kitchen loan is husband's nonmarital debt and conclude that the debt is marital; accordingly, we direct the district court to modify the cash equalizer, reducing the amount that husband must pay to wife by $10,900.05 (half of $21,800.09, the balance of the kitchen debt as of the valuation date).

2. Furnace-Installation Debt

Husband protests the district court's order for him to pay the entire cost of the furnace installation, half of which was charged to wife's credit card. Contrary to the district court's finding that the furnace was installed in March 2010 after wife moved out of the home, wife testified that it was installed in January 2009, before she moved out of the home. And the furnace was part of the valuation of the homestead, which is marital property. The district court therefore erred by effectively treating the cost of the furnace installation as husband's nonmarital debt, and we reverse its order for husband to reimburse wife $2,044.50.

C. Wife's Pension Plans

Marital property includes vested public or private pension-plan benefits or rights acquired by one or both parties during the marriage. Minn. Stat. § 518.003, subd. 3b. "The division of marital property that represents pension plan benefits or rights in the form of future pension plan payments . . . is payable only to the extent of the amount of

the pension plan benefit payable under the terms of the plan . . . ." Minn. Stat. § 518.58, subd. 4(a)(1) (2010). A district court's decisions valuing and dividing marital property are made on the evidence submitted by both parties, but neither party bears an affirmative burden of proof. *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001).

Husband contends that the district court erred by omitting wife's PERA and FERS pension plans from its calculation of marital property. Although husband insists that the district court was aware of the existence of the two plans, he points to nothing in the record that would establish whether wife has any vested benefits or rights under these plans or the value of such benefits and rights. In fact, husband did not list the FERS account on his proposed marital property award. Given this sparse record, the district court *could not* divide the PERA and FERS accounts between the parties. We therefore remand for the district court to determine the amount of the PERA and FERS plans that is payable to wife and to compensate husband for the value of his marital share.

D. Imputation of Impermissibly Transferred Assets

During dissolution proceedings, each party owes a fiduciary duty to the other regarding the use of marital property. Minn. Stat. § 518.58, subd. 1a (2010). If the court finds that a party has transferred or disposed of marital assets without the other party's consent, except in the usual course of business or for the necessities of life, the court may impute the entire value of the asset to the party who transferred or disposed of it. *Id.*; *see also* Minn. Stat. § 518.091, subd. 1(a) (2010).

1. Charles Schwab Account # 4782

Husband challenges the district court's finding that he impermissibly transferred funds out of his Charles Schwab Account #4782 (marital property) and its imputation of the prior balance of that account to husband. Husband testified that a $35,000 certificate of deposit in Account #4782 matured, and its value rolled over into his checking account (also marital property). Indeed, his Account #4782 statement showed a $35,000 withdrawal in March 2010 for "Investments Purchased/Sold," and his checking account statement showed a $35,000 deposit on March 2, 2010 for "Funds Transfer from Brokerage." The district court clearly erred by finding that husband impermissibly transferred the funds, and it therefore double-counted $35,000 in marital property awarded to husband. Accordingly, we direct the district court to modify the cash equalizer by $17,500 (half of $35,000).[3]

2. Fidelity Investment PGR-Schultz 401(K) Account

Husband challenges the district court's finding that he impermissibly transferred funds out of his PGR-Schultz account (marital property) and its imputation of the pre-transfer balance of that account to husband. Husband testified that the entire balance of the PGR-Schultz account had been rolled over into his Charles Schwab SEP IRA account (also marital property). Indeed, the PGR-Schultz statement shows a $30,143.51

[3] Husband asserts that the district court erred by attributing to husband $36,212.63 from Account #4782. But he gives no explanation of what happened to the remaining $1,212.63 in Account #4782. To the extent that he challenges the division of this $1,212.63, he has waived his challenge due to inadequate briefing. *See Irwin*, 529 N.W.2d at 373.

withdrawal in December 2009, which brought the balance to $0; and the SEP IRA account statement shows a $30,143.51 deposit in January 2010. The district court's finding that husband impermissibly transferred funds is clearly erroneous, and accordingly, we direct the district court to modify the cash equalizer by an additional $15,071.76 (half of $30,143.51).[4]

E. Cash Equalizer

Husband contends that technical errors in Exhibit C to the district court's order inflate the cash equalizer that he owes to wife. Each of husband's arguments fails:

1. Husband protests the inclusion and exclusion of certain values in the "Total Value" column. Only one or two of these claimed errors is indeed an error. More importantly, any such error is harmless because the "Total Value" column does not affect the calculation of the cash equalizer.

2. Husband complains that the value of wife's Christmas necklace is listed as $1,063.84 under "Total Value," but $200 under "Allocation of Value – Wife." The "Total Value" is a clerical error, as evidenced by the comment in the margin that wife believes the necklace is valued at $200. Indeed, wife testified that she had the necklace melted down and sold for $200. The value under "Allocation of Value – Wife," which contributed to the calculation of the cash equalizer, is correct.

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[4] Wife argues that she is entitled to an additional $25,502.50 because the district court under-calculated the money in this account by $51,005.01. But because she did not file a notice of related appeal, we decline to review her claim. *See* Minn. R. App. P. 106; *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996).

3. Husband complains that the value of a computer is listed as $25 under "Total Value," yet no value is allocated to either party. Indeed, Exhibit C awards the computer to husband but erroneously does not attribute the $25 value to him, thereby *reducing* husband's cash obligation. The error benefits husband.

Any technical errors in Exhibit C are harmless.

F. 2009 Income-Tax Refunds and Potential Recovery from Class Action and Discrimination Case

Husband argues that the district court erred by dividing the value of un-deposited tax-refund checks between the parties and by omitting wife's potential recoveries from a class action claim and a discrimination/harassment claim from its calculation of marital property. Husband waived these challenges by failing to raise them in his posttrial motion and failing to cite any relevant law in his appellate brief. *See Sauter*, 389 N.W.2d at 202; *Irwin*, 529 N.W.2d at 373.

VII. Motion to Continue Trial and Exclude Evidence

The district court denied husband's motion to continue trial for 30 days and exclude evidence and arguments in wife's late-submitted exhibits and trial brief. When a party violates a discovery order, the district court may "prohibit[] [the disobedient] party from introducing designated matters in evidence." Minn. R. Civ. P. 37.02(b)(2). Such exclusion is appropriate only when prejudice would otherwise result. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977). As an alternative to exclusion, the district court may grant a continuance. *Id.* Whether and what sanctions to order is within the

sound discretion of the district court, and this court will not reverse absent an abuse of discretion. *See id.*

Husband argues that the district court impermissibly modified the pretrial order by not excluding the evidence and arguments in wife's late-submitted exhibits and trial brief. But a district court's exercise of its discretion not to impose discovery sanctions is not a modification of a pretrial order. Indeed, the district court properly exercised its discretion. It found that wife's five-day delay in submitting exhibits and her delay in submitting her trial brief did not prejudice husband because (1) wife timely submitted an exhibit list notifying husband of the exhibits she would present—exhibits that husband was presumably familiar with since he had lived with wife; and (2) the late exhibits and trial brief would present no new evidence or arguments regarding the issue presented on the first day of trial (custody), and the second day of trial would not commence for at least three weeks. The district court further explained that a continuance would be ill-advised because the case had been pending for two years, the case involves child custody, and it was uncertain when trial would commence if the district court ordered a continuance. Husband's challenge therefore fails.

VIII. Attorney Fees

Husband challenges the district court's award of $20,000 in conduct-based—or, alternatively, need-based—attorney fees to wife. A district court may award attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2010). This court reviews an award of attorney fees for abuse of discretion, *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999),

but reviews the underlying factual findings for clear error. *Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004).

Husband first argues that the district court's findings do not meet the statutory prerequisite for conduct-based fees, which is that the party ordered to pay fees "unreasonably contributed to the length or expense of the proceeding." *See* Minn. Stat. § 518.14, subd. 1. This is simply false. The district court made numerous findings regarding specific conduct and ultimately found that "[husband] has clearly engaged in conduct causing delays in this proceeding and additional expense to [wife]."

Second, husband contends that the award of $20,000 "is not related to any specific conduct or additional cost, and is therefore unreviewable." But the district court need not identify the specific costs that arise from a party's misconduct before awarding fees. *See* Minn. Stat. § 518.14, subd. 1; *Gully*, 599 N.W.2d at 818, 826 (affirming the district court's award of $1,500 where party requested a $2,500 award without tracing specific misconduct to specific costs); *Holder v. Holder*, 403 N.W.2d 269, 271 (Minn. App. 1987) (similar).

Third, husband challenges five of the district court's findings of misconduct: (1) husband did not list wife's nonmarital property in his answers to interrogatories; (2) husband falsely claimed that wife merely copied his exhibit list and the documents in his exhibit notebook; (3) husband improperly subpoenaed the Minneapolis VA Medical Center, the River Ridge Treatment Center, and the Minnesota Board of Nursing by mail; (4) husband failed to lay the foundation necessary to admit into evidence exhibits he obtained from the Minneapolis VA Medical Center and Health Professional Services

Program; and (5) husband did not allow wife's appraiser to enter his home. The first and second findings are correct. The third finding is not verifiable because the subpoenas are not in the record. The fourth finding is incorrect; some exhibits from the VA Medical Center and the Health Professional Services Program were admitted. And husband does not point to anything in the record regarding the fifth finding.

But regardless of the accuracy of the above findings, the district court made numerous other findings that show that husband unreasonably contributed to the length and expense of the proceedings:

1. Husband failed to respond to wife's interrogatories, even after receiving a court order to do so.

2. Husband refused to produce documentation of wife's nonmarital accounts (which were delivered to and stored in husband's house) upon wife's request and even upon a subpoena duces tecum. Indeed, husband refused to allow wife to enter the house to retrieve the documentation. And although the district court ordered husband to provide the documentation on October 26, 2010, he did not do so until December 21, 2010, only seven days before trial resumed.

3. Husband frivolously filed a motion to exclude exhibits which wife included on her timely exhibit list but inadvertently produced a few days late.

4. On the first day of trial, wife offered exhibits from *husband's own exhibit notebook*, yet husband's counsel insisted upon reviewing each exhibit in its entirety, indicating that counsel failed to review these documents prior to trial.

5. Husband falsely complained that wife avoided his attempts to serve her with a subpoena duces tecum.

6. Husband offered 187 exhibits, only 46 of which were admissible.

7. Husband submitted 15 exhibits that he failed to include in his exhibit list.

8. Husband's counsel did not respond to wife's counsel's phone calls regarding the appraisal of husband's home, forcing wife's counsel to serve a notice of inspection.

9. Husband falsely claimed that wife refused to allow him to inspect her apartment when, in fact, husband did not request to inspect her apartment.

These findings amply support the district court's determination that wife is entitled to conduct-based attorney fees. Consequently, we need not address the district court's alternative conclusion that wife is entitled to need-based attorney fees.

IX. Sequestration of Assets

The district court issued an emergency order sequestering husband's assets based on his failure to give wife the property, cash equalizer, and attorney fees awarded to her, as well as numerous indications that husband was depleting assets. Husband moved to vacate the order. In opposition to this motion, wife submitted an affidavit asserting that husband had failed to pay the cash equalizer, attorney fees, and reimbursement for the children's health and dental care and extracurricular activities. The district court denied the motion to vacate. This court reviews the sequestration of assets for an abuse of discretion. *Peterson v. Peterson*, 304 Minn. 578, 580-81, 231 N.W.2d 85, 87 (1975).

When maintenance or support payments are ordered, the court may sequester an obligor's assets "upon [the obligor's] failure to pay the maintenance or support." Minn. Stat. § 518A.71 (2010). Although the court may not sequester assets to enforce a division of marital property or an order to pay attorney fees, it may do so to enforce an order to pay child support. *See id*. Child support includes court-ordered reimbursement of costs and expenses related to the child's care. *See* Minn. Stat. § 518A.26, subd. 20 (2010).

Since wife's original affidavit did not assert that husband failed to pay child support or maintenance, the district court's sequestration order was in error. But because wife later submitted an affidavit explaining that husband had failed to reimburse her for the children's past expenses (a fact which husband does not dispute), the district court acted within its discretion by denying husband's motion to vacate the sequestration order.

We reject each of husband's counter-arguments:

1. Husband contends that the district court relied upon hearsay and non-probative evidence that husband was trying to dissipate marital assets. The argument is irrelevant because the district court may sequester assets without finding that the obligor is likely to dissipate assets. Minn. Stat. § 518A.71.

2. Husband complains that he did not receive notice of the ex parte sequestration order. Because he does not provide any law, analysis, or record evidence to support this claim of error, he has waived it. *Irwin*, 529 N.W.2d at 373.

3. Husband maintains that his retirement plans are exempt from sequestration under Minn. Stat. § 550.37 (2010). Section 550.37 exempts certain retirement plans from

"attachment, garnishment, or sale," not from sequestration. Minn. Stat. § 550.37, subds. 1, 24.

4. Husband argues that his home is exempt from sequestration under Minn. Stat. § 510.01 (2010). Section 510.01 exempts the homestead "from seizure or sale under legal process on account of any debt," subject to some inapplicable exceptions. But since the sequestration does not prevent husband from living in the home but merely prohibits him from selling or diminishing the value of it, the sequestration does not constitute a "seizure or sale," nor does it offend the purpose behind the homestead exemption: "to preserve the homestead as a dwelling for the debtor and his or her family." *Eustice v. Jewison*, 413 N.W.2d 114, 121 (Minn. 1987).

We therefore affirm.

X. Judicial Bias and Failure to Exercise Independent Judgment

A. Judicial Bias

Husband alleges that the district court was biased against him due to events that occurred during the proceedings.

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.* Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Byers v. Comm'r of Revenue, 735 N.W.2d 671, 673 (Minn. 2007) (emphasis added) (alteration in original) (quotation omitted).

Husband points to the following as evidence of judicial bias:

1. The district court acknowledged that it ruled in wife's favor on numerous points. But the district court used the fact that it had generally ruled in wife's favor as a reason to consider husband's procedurally deficient posttrial argument. This shows not antagonism but lenience towards husband.

2. The district court did not explicitly find that husband is the father of the two children, even though, in the middle of a 55-page parent history survey, husband reported that wife had once told him that he was not the children's father. Neither party requested a paternity finding, and husband does not point to any evidence in the record regarding paternity. The lack of a finding on a point that the district court was not asked to address does not demonstrate bias.

3. The district court allegedly found husband's ex-girlfriend more credible than the custody evaluator regarding husband's sexualized relationship with E.T. This is false. The district court credited the testimony of both, who agreed that husband touched E.T. in sexual ways.

4. The district court threatened to find husband's counsel in contempt of court when he accused wife and her attorney of engaging in "a conspiracy of falsehood." This threat shows no antagonism toward husband but an appropriate distaste for counsel's behavior.

5. The district court criticized husband's counsel for not cross-examining the custody evaluator and accused him of malpractice. Indeed, the district court pointed out that despite charging his client $65,000-$75,000 in legal fees, husband's counsel was

unwilling to incur $3,000-$4,000 in costs to bring the custody evaluator back to court for cross-examination. The district court went on to say, "[Y]ou're guilty of malpractice in this case . . . He should sue you. You did a horrible job of trying the case and now you're trying to blame it all on me." This comment shows no antagonism toward husband; in fact, it shows the district court's ability to separate its perception about unfavorable conduct of the attorney from its perception of his client.

6. The district court allegedly indicated its unfamiliarity with Minn. R. Evid. 703(b). Unfamiliarity with a law does not demonstrate bias.

7. The district court said that it is "unbecoming a human being to call somebody a faggot," after husband was overheard in the courthouse hallway saying that his father-in-law looked like a "faggot". This comment on husband's rude behavior does not rise to the level of deep-seated antagonism.

None of these facts "display a deep-seated . . . antagonism that would make fair judgment impossible." *See id.*

B. Failure to Exercise Independent Judgment

Husband alleges that the district court failed to exercise independent judgment, as evidenced by its numerous rulings in favor of wife and its verbatim adoption of many of wife's proposed findings of fact and conclusions of law.

> A district court's verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se. Adoption of a party's proposed findings by a district court is generally an accepted practice. But if a court adopts a proposed order, it raises the question of whether the court independently evaluated the evidence.

Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. App. 2005) (citations omitted), *review denied* (Minn. Sept. 28, 2005).

The district court adopted the vast majority of wife's proposed findings of fact and conclusions of law, including clerical and factual errors described in the preceding sections. But the district court added findings, deleted several proposed findings, and made numerous stylistic changes, indicating that it reviewed wife's proposed findings and conclusions so that they comported with the evidence presented at trial. Moreover, the district court's adoption of proposed findings is understandable in this case: the five-day trial spanned three and a half months, the testimony was scattered, husband's exhibits were disorganized and lacked a table of contents, and the proceedings involved numerous legal and factual disputes. Wife provided the district court with comprehensive and organized proposed findings and conclusions, with record citations; husband appears to have merely provided a list of requests and two charts of his proposed property division, with little reference to the evidence presented at trial. Although the verbatim adoption of most of wife's proposed conclusions of law was inadvisable, it does not show that the district court failed to exercise its independent judgment given the circumstances of this case.

XI. Arguments Incorporated From Husband's PostTrial Motion

In an obvious attempt to subvert the page limitation on appellate briefs, husband "incorporate[s]" all of the arguments in his posttrial motion, supporting memorandum, and corresponding affidavit—which total 174 pages and 40 separate challenges—into his 45-page appellate brief. *See* Minn. R. Civ. App. P. 132.01, subd. 3 (limiting principal

briefs to 45 pages with exceptions not relevant here). We decline to address these additional arguments.

In sum, we affirm in part as modified, reverse in part, and remand for further proceedings not inconsistent with this opinion. We affirm the custody determination as modified and direct the district court to award sole physical custody to wife. We reverse the district court's determination that the kitchen loan is a marital debt and its imputation of two former account balances to husband. Therefore, we direct the district court to modify the cash equalizer, reducing the amount that husband must pay to wife by $43,471.81. We also reverse the requirement that husband reimburse wife $2,044.50 for the furnace installation. And we remand for the district court to (1) determine which family established each trust account and award guardianship accordingly and (2) determine the amount of the PERA and FERS plans that is payable to wife and award husband the cash value of his interest in the marital share of each plan. We affirm the remainder of the district court's rulings. On remand, the district court shall have discretion to reopen the record to address the remanded issues.

Affirmed in part as modified, reversed in part, and remanded.