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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2010

In re the Marriage of: Alan Gene Mullenbach, petitioner,
Respondent,

vs.

Michelle Lea Mullenbach,
Appellant.

Filed September 17, 2012
Affirmed in part, reversed in part, and remanded
Willis, Judge[*]

Freeborn County District Court
File No. 24FA101064

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Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and Willis, Judge.

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

WILLIS, Judge

In this dissolution action, appellant challenges the district court's distribution of marital property and the amount and duration of the district court's award of temporary spousal maintenance. Because the district court's property distribution is not an abuse of

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

discretion, we affirm in part. But because the district court's findings regarding the parties' incomes are clearly erroneous, we conclude that the maintenance award is an abuse of discretion, and we reverse in part and remand.

FACTS

Appellant-mother Michelle Lea Mullenbach and respondent-father Alan Gene Mullenbach were married in 1994 and separated in April 2010. In June 2010, father filed for dissolution. Following trial, the district court issued a dissolution decree in July 2011. Mother moved for amended findings or a new trial. The district court granted the motion in part and denied it in part, and issued an amended decree in October 2011. Mother appeals from the property division and maintenance award.

D E C I S I O N

An appellate court will set aside a district court's findings of fact only if they are clearly erroneous, and deference is given to the district court's opportunity to evaluate witness credibility. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). To successfully challenge a district court's factual findings, a party must show that even when the evidence is viewed in the light most favorable to the district court's findings, an appellate court is still left with the definite and firm conviction that a mistake was made. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

I. The district court's division of marital property is not an abuse of discretion.

A district court has broad discretion in dividing property in a dissolution, and the property division will not be overturned absent an abuse of discretion. *Antone v. Antone*,

645 N.W.2d 96, 100 (Minn. 2002). Even if an appellate court may have taken a different approach, a district court's property division will be affirmed if it has an acceptable basis in fact and principle. *Id.*

Here, the district court confirmed the parties' agreement and awarded mother the homestead, which the court found had a fair market value of $192,000 and marital equity of $31,910.38. Mother also received one of the parties' vehicles; one of the parties' checking accounts, with a balance of $808.11; retirement and investment accounts totaling $68,540.52; and a share of the 2010 tax refund and advances on the home-equity line of credit. The district court also assigned all of the parties' liabilities, totaling $7,859.32, to mother. Father received a vehicle; a boat; a go-cart; seven bank accounts totaling $9,267.38; retirement accounts totaling $95,052.31; and a share of the 2010 tax refund and advances on the home-equity line of credit. This division resulted in each party receiving a net property distribution of $127,960.19. Given the parties' long-term marriage, this equal division of assets is presumptively a fair distribution. *See Miller v. Miller*, 352 N.W.2d 738, 742 (Minn. 1984) (stating that an equal division of assets accumulated through joint efforts is appropriate after a long-term marriage).

Mother claims that the property distribution is an abuse of discretion because she is left with all of the parties' liabilities with few or no liquid assets with which to pay the debt. But she ignores the fact that, by the terms of the district court's order, she has almost $32,000 in equity in the homestead that was awarded to her that she may use to pay the approximately $8,000 in debt. We therefore conclude that mother has not established that the district court's property distribution was an abuse of discretion.

But we also note that the equity in the homestead may be greater than is indicated in the district court's decree. The district court found that the homestead had a fair market value of $192,000 and was encumbered by two debts: a first mortgage of $120,235.01 and a home-equity line of credit with a balance of $39,854.61. Based on these figures, the district court found that mother had $31,910.38 in homestead equity. "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 found to be fair and equitable by the district court. Minn. Stat. § 518.58, subd. 1 (2010). The pretrial conference was held on March 10, 2011, but the district court found that the date of the parties' separation, September 16, 2010, was fair and equitable as a date of valuation. Because there was no information before the district court regarding the mortgage balance on that date, however, it found that it had "no choice" but to use "approximately March 9, 2011" as the valuation date for the homestead. The district court found that the mortgage balance on March 9, 2011, was $113,967.46. But in calculating mother's homestead equity, the district court used a mortgage balance of $120,235.01, which was the amount owing as of May 1, 2010, almost a full year before the homestead valuation date. Mother's homestead equity was therefore $38,177.93, or $6,267.55 more than the equity valuation shown in the property-distribution section of the district court's decree.

While we conclude that district court's property distribution was not an abuse of discretion, because we reverse and remand on other issues, we leave to the district court's discretion whether to amend the valuation of mother's equity in the homestead.

II. The district court's award of temporary spousal maintenance is an abuse of discretion.

Mother challenges both the amount and duration of the district court's spousal-maintenance award. An appellate court reviews a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). But findings of fact, including determinations of income for maintenance purposes, must be upheld unless they are clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004); *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992).

The purpose of a spousal-maintenance award is to enable the recipient and the obligor to maintain a standard of living that approximates the marital standard of living to the extent this goal can be equitably achieved. *Peterka*, 675 N.W.2d at 358. Spousal maintenance may be awarded if the district court finds that the recipient lacks sufficient property to provide for reasonable needs when considering the standard of living established during the marriage or "is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment." Minn. Stat. § 518.552, subd. 1 (2010). When the district court awards spousal maintenance, both the recipient's reasonable needs that comport "with the circumstances and living standards of the parties at the time of the divorce" and the obligor's financial capacity must guide the district court's determination of the amount of spousal maintenance and the duration of the obligation.

Botkin v. Botkin, 247 Minn. 25, 29, 77 N.W.2d 172, 175 (1956); *Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009).

Mother challenges the district court's calculations of (1) father's expenses, (2) father's income, and (3) mother's income. Mother therefore claims that the district court's spousal-maintenance award of $500 per month for 12 months is an abuse of discretion. We address each argument in turn.

A. Father's expenses.

The district court found that father's reasonable and necessary monthly expenses were $3,984. Mother argues that the district court abused its discretion by including in father's expenses a $300 monthly retirement contribution without including a corresponding allowance for mother.

Mother relies on *Iskierka v. Iskierka*, No. A09-2350, 2011 WL 781050 (Minn. App. Mar. 8, 2011). But *Iskierka* is unpublished and therefore not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2010) ("Unpublished opinions of the Court of Appeals are not precedential."). Also, the record in *Iskierka* shows that the wife in that case had in fact saved for retirement during the marriage. 2011 WL 781050, at *4. Here, the record shows that mother last worked full time in June 2003 and had no practice of saving for retirement during the marriage.

Furthermore, mother's motion for amended findings did not challenge the district court's inclusion of a $300 retirement contribution in father's reasonable monthly expenses without a corresponding expense allowance for mother. The district court did not, therefore, abuse its discretion on this issue. *See Eisenschenk v. Eisenschenk*, 668

N.W.2d 235, 243 (Minn. App. 2003) ("[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003).

B. Father's income.

The district court found that father had a gross monthly income of $7,433 and a net monthly income of approximately $4,700. Mother argues that father's gross income is understated because the district court did not include the value of various benefits that father receives through his employment. Mother also argues that the district court's calculation of father's net income is understated because it is inconsistent with the evidence in the record, and it does not take into account the tax consequences of father's maintenance obligation.

Mother argues that the value of certain benefits that father receives from his employment—namely use of a company car, a variety of insurance plans, and an expense account—should be included in father's gross income. "[I]n-kind payments received by a parent in the course of employment . . . shall be counted as income if they reduce personal living expenses." Minn. Stat. § 518A.29(c) (2010). In rejecting this argument in mother's motion for amended findings, the district court concluded that the section "provides a mean[s] of calculating [gross] income only for purposes of determining child support, not spousal maintenance." But the supreme court has explicitly held that section 518A.29 also applies to spousal-maintenance determinations. *Lee*, 775 N.W.2d at 635 n.5. The district court's failure to identify which benefits, if any, reduce father's personal

living expenses and include the value of such benefits in determining father's gross income is therefore clearly erroneous.

Father submitted a tax analysis prepared by his accountant. The analysis, which is based on gross annual wages of $90,300, calculated father's tax liability if he filed his taxes as a single person claiming one dependent to be $18,718. Mother argues that father's own analysis, therefore, indicates that father would have a monthly net income of approximately $5,965. The district court rejected this argument in denying that portion of mother's motion for amended findings. The court stated that it declined to adopt what it deemed a "narrow definition" of net income, that is deducting only income taxes from gross income. Instead, the district court found that father had reported a net monthly income of approximately $4,700. This figure appears to be based on the district court's finding that father had a net monthly income of $4,636.60 when he most recently filed his tax returns as a married person, claiming no dependents and claiming a deduction for making a 401(k) contribution.

In rejecting mother's argument, the district court relied on a repealed version of the child-support statute, which allowed for reasonable pension contributions to be deducted from gross income. *See* Minn. Stat. § 518.551, subd. 5(b) (2004). Under the current statute, such deductions are prohibited. *See* Minn. Stat. § 518A.29(a) (2010) ("No deductions shall be allowed for contributions to pensions, 401-K, IRA, or other retirement benefits."); *see also Lee*, 775 N.W.2d at 635 n.5 (holding that the gross-income definition in section 518A.29 applies to chapter 518 spousal maintenance). Given the statute, the district court's finding of father's net income when he had claimed

a deduction for making 401(k) contributions is clearly erroneous. *See Flynn v. Beisel*, 257 Minn. 531, 534, 102 N.W.2d 284, 288 (1960) (stating that appellate courts are not bound by a district court's finding of fact if the finding is "controlled or influenced by errors of law"). The district court appears to have based its finding on father's past net income, when he filed as a married person with zero dependents despite the fact that going forward father was awarded the dependency exemption for one of the joint children. This also renders the district court's finding of father's net income clearly erroneous. *See N. States Power Co. v. Lyon Food Prods., Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975) (stating that "clearly erroneous" means "manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole").

Mother also argues that because the evidence of the economic benefit is undisputed and readily calculated, the district court abused its discretion by refusing to consider the tax consequences to father of his maintenance obligation. But Minnesota law does not require a district court to consider the possible tax consequences of a spousal-maintenance award. *See Maurer v. Maurer*, 623 N.W.2d 604, 607-08 (Minn. 2001) (stating that the district court has the discretion whether to consider the tax consequences of a marital property award). Mother offers no citation of authority to support her proposition that the district court must consider tax consequences when the evidence is "undisputed," and her argument on this issue is, therefore, unavailing.

C. Mother's income.

At the time of the dissolution, mother was unemployed. The district court's initial decree found that mother planned to seek employment when the children returned to

school in the fall of 2011 and expected to earn between $10 and $12 per hour, that she therefore had "the ability to earn between $1,732 and $2,078 per month," and that she would receive $1,374 per month in child support from father. This finding was left unchanged in the amended decree in October 2011, and the record does not indicate whether mother did in fact seek employment when the children returned to school for the 2011-12 school year. The district court also found that mother's live-in boyfriend was not paying rent or contributing to household expenses. The district court concluded that the boyfriend's "payment of rent or contribution towards household expenses is an additional financial resource available to [appellant]" and "[a] payment of at least $600 per month is a reasonable amount towards rent and/or household expenses." Based on these findings, the district court concluded that mother would have available a monthly income of between $3,706 and $4,052. Mother challenges the district court's use of gross-income figures for her, while using net-income figures for father, and the inclusion of the possible rental income from her boyfriend.

The district court found that "any tax liability on [mother's] earnings from employment would be minimal due to [mother] being able to claim as dependents one of the parties' joint children and her non-joint child." The district court therefore found that there would be no difference between mother's gross income and her net income and concluded that mother would "have her entire gross income available to her." But no record evidence supports the district court's finding on mother's potential tax liability, and it is therefore clearly erroneous. *See N. States Power Co.*, 304 Minn. at 201, 229 N.W.2d at 524.

A spousal-maintenance recipient's cohabitation may be considered when evaluating the recipient's overall economic circumstances and need for spousal maintenance. *Mertens v. Mertens*, 285 N.W.2d 490, 491 (Minn. 1979). But the record contains no evidence of the home's fair market rental value, and the district court's finding that it would be "reasonable" for mother's boyfriend to pay monthly rent of $600 is therefore clearly erroneous.

Because the district court's findings regarding the financial resources of both mother and father are clearly erroneous, the district court's award of temporary spousal maintenance of $500 per month for 12 months is an abuse of discretion. *See Lee*, 775 N.W.2d at 642 (stating that a maintenance recipient's reasonable needs and the maintenance obligor's financial capacity guide the district court's determination of amount and duration of a spousal-maintenance award). We therefore reverse both the amount of the award and its duration, and remand to the district court for findings consistent with this opinion on the issues of the parties' incomes and spousal maintenance.

If, in light of any adjustment of the finding of the amount of equity in the home or any alteration of the findings of the parties' incomes, the district court concludes that an equitable distribution of the parties' marital property requires that the property division be adjusted, the district court shall have discretion to adjust the property division accordingly. On remand, in order to accomplish an equitable distribution of the marital

property or to address the remanded questions regarding spousal maintenance, the district court may, in its sole discretion, reopen the record.

Affirmed in part, reversed in part, and remanded.