

DA 19-0282

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 41N

IN RE THE MARRIAGE OF:

JEFFERY HAMLING,

Petitioner and Appellant,

and

MELANIE HAMLING,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DR 13-401(C)
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

P. Mars Scott, P. Mars Scott Law Offices, Missoula, Montana

For Appellee:

Dennis Munson, Kasting, Kauffman & Mersen, P.C., Bozeman, Montana

Submitted on Briefs: January 15, 2020

Decided: February 18, 2020

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant Jeffery Hamling (Jeffery) appeals from findings of fact, conclusions of law, and final decree of dissolution entered by the Eighteenth Judicial District Court, Gallatin County.

¶3 Jeffery and Melanie Hamling (Melanie) met in September of 1989 while both were attending college, and married shortly thereafter. From the beginning of their marriage, the couple determined they would have different roles: Jeffery would graduate from school, obtain employment, and be the family breadwinner, while Melanie would quit school and work for a few years until the couple had children, at which time she would devote her time to caring for the children and household.

¶4 Over the next ten years, the couple had four children and moved to four different states so Jeffery could complete dental school and obtain an endodontics specialty. During this time, Jeffery went to school and worked part time, while Melanie took care of the children and worked as she could. The family eventually settled in Bozeman, Montana, where Jeffery opened an endodontics practice, Big Sky Endodontics, Inc. (BSE).

¶5 Melanie continued her role as caretaker for the children, which presented increasing challenges. One child exhibited significant behavioral problems, leading Melanie to seek care from several specialists, which Jeffery did not support. The child was eventually diagnosed with Tourette's Syndrome. Additionally, the parties' youngest child stopped eating at the age of 6 months due to undiagnosed Celiac's Disease, which led her to be hospitalized and diagnosed with failure to thrive, and necessitated feeding her through a feeding tube. During this proceeding, Jeffery maintained he would have been able to complete his advanced education without Melanie's assistance, and that her help was not necessary for maintaining his practice. Throughout the marriage, Jeffery exercised complete control of the parties' finances and granted Melanie a monthly allowance. The parties maintained a high standard of living.

¶6 While tending the children, Melanie also suffered with her own health problems. She required eight surgeries, including two shoulder surgeries and a knee surgery. As part of her care, Melanie was prescribed opioid pain relievers, to which she became addicted. In 2006, she entered treatment to address her addiction, although she left early because Jeffery insisted she was needed at home. Melanie testified that, upon her return home, Jeffery was not supportive of her treatment, telling her she needed to sign a contract providing, upon any relapse, she would be cut off from the family. Although working on her sobriety, Melanie eventually relapsed and thereafter entered treatment again. Jeffery continued to be unsupportive of her treatment, calling her often and asking her to return home. Melanie's treatment specialist testified that when Jeffery visited her in person, he

made demeaning comments and asserted he knew more about addiction than the treatment facility.

¶7 After Melanie completed treatment and again returned to Bozeman, she moved into an apartment in the marital home. Jeffery and the children continued to reside in the marital home. Melanie has been sober since attending her second treatment program in July of 2013. In November of 2013, Jeffery petitioned for dissolution, and in 2016, Standing Master Magdalena Bowen conducted a six-day trial, receiving extensive testimony from both sides, including multiple expert witnesses.

¶8 Although the parties disagreed on multiple issues, a large dispute involved the value of Jeffery's practice and the determination of his actual income. The parties' joint federal income tax returns for 2011, 2012, and 2013 reported gross incomes of \$687,000, \$725,000, and \$717,000, respectively. Jeffery's individually filed tax return in 2014 stated a gross income of \$802,585. However, considerable testimony addressed inaccuracies in Jeffery's reported income. Melanie's expert testified Jeffery was inaccurately reporting his personal expenses as business expenses, rendering his reported income far less than what he was actually netting. Indeed, neither Jeffery nor his accountants could verify that his personal and business expenses were accurately calculated. When asked, Jeffery acknowledged the inaccurate reporting:

Q. Well, you have no personal bank account, correct?

A. Right.

Q. So, is it correct that what you had been doing is writing off 100 percent of your personal charges as business?

A. I think that's correct.

Jeffery maintained these reporting inaccuracies “[didn’t] change anything,” because “[i]t doesn’t change the bottom line of what I have available to pay each month for the obligations that I have.” However, his accountant admitted that false incorporation of personal expenses into business expenses would result in an inaccurate calculation of Jeffery’s take-home pay.

¶9 On October 25, 2017, the Standing Master entered findings of fact, conclusions of law and final decree of dissolution. Jeffery filed objections and Melanie filed a response. The District Court heard oral argument and on April 22, 2019, pursuant to § 3-5-126(2), MCA, entered its order substantially adopting and affirming the Standing Master’s findings and conclusions, from which Jeffery appeals.

¶10 This Court reviews a district court’s division of marital property and maintenance awards to determine whether its findings of fact are clearly erroneous and whether its conclusions of law are correct. *Patton v. Patton*, 2015 MT 7, ¶ 18, 378 Mont. 22, 340 P.3d 1242. Likewise, “[i]n a case tried before a standing master, ‘we apply the same standard of review to an adopted master’s report that we do to any other district court order.’” *Patton*, ¶ 17 (citing *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 28, 298 Mont. 213, 994 P.2d 1124). A finding is clearly erroneous if it is not supported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record indicates a mistake has been committed. *In re Marriage of Baide*, 2004 MT 260, ¶ 7, 323 Mont. 104, 99 P.3d 178. An abuse of discretion occurs when the district court “acts arbitrarily without

conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Schwartz v. Harris*, 2013 MT 145, ¶ 15, 370 Mont. 294, 308 P.3d 949 (citations omitted).

¶11 A district court is “in the best position to judge the credibility of the testimony proffered by the parties and witnesses” and, therefore, “we will defer to its resolution of any conflicting evidence.” *In re Marriage of Hedges*, 2002 MT 204, ¶ 22, 311 Mont. 230, 53 P.3d 1273 (citations omitted). However, “as a general rule, if contested evidence is presented to the trial court regarding the existence or valuation of marital assets and no findings are made regarding that asset or no explanation is provided as to why the District Court accepted one party’s valuation over that of the other, the District Court has abused its discretion.” *Deist v. Wachholz*, 208 Mont. 207, 222, 678 P.2d 188, 196 (1984) (quoting *Larson v. Larson*, 200 Mont. 134, 139, 649 P.2d 1351, 1354 (1982)) (internal citations omitted).

¶12 Jeffery raises seven issues on appeal, but his primary contention is that the District Court erred in crediting the testimony of Melanie and her experts regarding the value of Jeffery’s property, practice, and income. Melanie counters that the record reflects, and the District Court provided, substantial evidence for its findings and conclusions, and therefore did not err. We address Jeffery’s individual arguments in turn.

a. The valuation of Big Sky Endodontics (BSE)

¶13 The District Court, via the Standing Master, entered several findings concerning the credibility of both parties’ expert witnesses in regard to the value of BSE. It considered that Melanie’s expert “used numbers for a dental practice, not a specialty endodontic

practice.” However, it also noted the extensive testimony presented by Melanie’s expert regarding Jeffery’s actual income, including the “serious inaccuracies in Husband’s financial records . . . due to Husband’s failure to properly categorize business versus personal expenditures.” Based on this testimony, the District Court determined that “the business valuations prepared by each party’s expert have both strengths and weaknesses as argued by the parties and the most accurate fair market value of [BSE] for the purposes of this dissolution proceeding is determined to be an average of the two valuations.” We have held that “averaging of values given by experts to arrive at an equitable distribution is within the discretion of the district court.” *In re Marriage of Sacry*, 253 Mont. 378, 385, 833 P.2d 1035, 1039 (citing *In re Marriage of Goodmundson*, 201 Mont. 535, 539, 655 P.2d 509, 511 (1982)). The competing valuations offered by the expert witnesses were difficult to reconcile and we conclude, based upon this record, that the District Court did not err in the approach it took to value Jeffery’s practice.

b. Proceeds of Jeffery’s 401(k)

¶14 Jeffery withdrew \$7,500 per month from his 401(k) to pay maintenance to Melanie during the proceeding, despite the caution against doing so provided by the Standing Master. Thereafter, the Master found:

under the circumstances presented it was unreasonable for Husband to liquidate the 401(k) Husband generated sufficient income, had access to other saleable assets, or could have reduced his discretionary expenses. Instead, he chose to pay expenses he determined were more important to him, including three mortgages on the marital home, a sportscar, and continued church tithing (among other numerous personal expenditures).

This finding relates to the Master's acceptance of the expert witnesses' opinions that Jeffery was likely inaccurately reporting the amount of money he was receiving. Indeed, there exists ample evidence in the trial record to support the conclusion that Jeffery was earning more than he reported. His witnesses conceded the false incorporation of personal expenses into business expenses would invalidate their conclusions regarding his take home pay. Therefore, we conclude the District Court did not err by determining that Jeffery acted unreasonably in depleting his 401(k) to pay temporary maintenance to Melanie. Additionally, because Melanie had no retirement fund and was to receive the entirety of the 401(k) from the marital estate, the District Court did not err in subtracting from Jeffery's distribution of the estate the funds he improperly removed from the 401(k).

c. Child support

¶15 Jeffery contends the District Court abused its discretion in not awarding him or crediting back child support from Melanie during the time he resided with and provided care for the children, even though it determined under the Montana Child Support Guidelines that Melanie owed Jeffery retroactive support. Melanie responds that, while the District Court strayed from the Guidelines, it entered sufficient findings to explain why Melanie should not pay support to Jeffery.

¶16 Under § 40-4-204(3)(a), MCA, a court must determine child support obligations by applying the guidelines adopted by the Montana Department of Public Health and Human Services, and “[t]he amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that

the application of the standards and guidelines is unjust to the child or to any of the parties or that it is inappropriate in that particular case.” If the court finds the guideline amount to be inappropriate, it must state its reasons for that finding. Likewise, if the court does not order a parent owing a duty of support to pay, the court must state its reasons for not ordering support. Section 40-4-204(3)(b), (c), MCA.

¶17 Here, the District Court determined under the Guidelines that Melanie owed \$1,284 per month in child support for the Parties’ minor child for the period of the child’s minority. However, it concluded “there is significant disparity in Mother’s ability to generate income and in the financial circumstances of the parties” and that the parties’ only minor child was almost of the age of majority. It further concluded Jeffery had “been the sole financial provider for the family since the four children were born and Mother became a fulltime homemaker,” and that Jeffery made sufficient monthly income to support the child. These conclusions were further supported by the District Court’s findings that Melanie was 50 years old, had significant chronic pain issues, spent 10-20 hours a week working on her aftercare program, had only a high school education with no “specific education or work-related skills that will allow her to be employed and acquire future assets[,]” and had only been able to obtain employment at \$8-\$10 an hour. In contrast, Jeffery was in relatively good health, was a practicing endodontist with a successful business, and earned approximately \$70,000 in monthly net income. The District Court concluded that:

there has been clear and convincing evidence that it would be unjust to Mother for her to pay Father his requested . . . child support arrearages and make payments of \$1,284 per month in additional child support. The Court

concludes a variance in child support should be granted specific to the facts in this case. It is in the best interest of the child that Father continue to provide for the child's needs as he has done throughout the parties' marriage, without monetary contribution from Mother, and neither party shall owe a child support obligation to the other.

We conclude that, because the District Court provided sufficient reasons for departing from the Guidelines, it did not err by concluding that Melanie should not owe past or future child support to Jeffery.

d. Personal property

¶18 Here, Jeffery argues that the District Court erred in allocating \$25,000 to him for the value of the marital home's furnishings, because "[t]he furnishings/household items in the marital home were sold with the marital home[.]" and therefore "the \$25,000 value of the furnishings listed in the allocation table should be removed[.]" The buy/sell agreement for the marital home indicates that some personal property was included in the sale, but Jeffery points to no evidence in the record demonstrating *all* of the furnishings were sold with the home. Jeffery's contention that Melanie cannot provide evidence that all of the furnishings were *not* sold is unpersuasive given that he had sole access to the household and the furnishings and refused to allow Melanie to inspect the home prior to the trial. Additionally, Jeffery argued unsuccessfully in the District Court that the value of furnishings retained by him should be reduced from \$25,000 to \$5,200, rendering dubious his current contention he should not have been allocated *any* of the furnishings because they were sold with the house. We conclude there was no error.

¶19 Jeffery also argues the District Court erred in valuing other items he received in the property division, because it accepted Melanie’s valuation without sufficient explanation, citing *Deist*. *Deist* does require a court to enter findings or an explanation when contested evidence of value is presented, but “item-by-item findings are not required.” *Deist*, 208 Mont. at 222, 678 P.2d at 196. In *Larson*, this Court rejected the district court’s conclusions regarding the total value of marital assets because the district court failed to enter any finding as to why it chose to disregard the balance of certain assets in its calculation. *Larson*, 200 Mont. at 139, 649 P.2d at 1354. This is not the circumstance here, where the District Court entered findings regarding each individual piece of property at issue. Jeffery simply disagrees with the amount the District Court chose to assign to those pieces. “A district court has discretion to adopt any reasonable valuation of marital property supported by the evidence.” *Schwartz*, ¶ 23 (citing *Hedges*, ¶ 21). We conclude there was no error.

e. Maintenance

¶20 Jeffery argues the District Court erred in calculating the amount of maintenance Melanie should receive, and for how long she should receive it, based on her expenses and future earning capacity. As referenced above, the District Court went into considerable detail about Melanie’s current and potential future income, including consideration of her physical and educational limitations. Additionally, the District Court reduced the monthly expenses Melanie claimed by more than half, finding her claimed expenses were “not reasonable in light of the property to be awarded to her.” The District Court determined Melanie’s monthly expenses were approximately \$9,985, and that

She will have little income to offset these expenses, perhaps being able to earn \$15,000 - \$20,000 per year due to her poor physical condition, need to participate in aftercare, and her lack of education/employment skills. The Court finds that it is reasonable that Wife could generate a gross monthly income of approximately \$1,386 per month if she works part time and continues with her [current job] and \$693 per month if she works part time and continues with her after care needs.

Although Melanie requested maintenance of \$25,000 per month, the court awarded her \$12,000, an amount calculated to provide necessary support after taxes on the award. This conclusion, combined with the previously referenced findings and conclusions regarding true nature of Jeffery's earnings and the limitations on Melanie's future income, provides a sufficient basis for the maintenance determination, including duration, and was not error.

f. Attorney's fees

¶21 Under § 40-4-110, MCA, a district court may award attorney fees for the cost of maintaining representation in dissolution proceedings. Likewise, "this Court has held that an award of attorney fees under this statute must be based on necessity, must be reasonable, and must be based on competent evidence. . . . The award will not be disturbed by this Court if it is supported by substantial evidence." *In re Marriage of Barnard*, 241 Mont. 147, 154, 785 P.2d 1387, 1392 (1990) (internal quotations and citations omitted). Finally, "written findings are required to establish both the need and reasonableness of an award of attorneys fees." *Duffey v. Duffey*, 193 Mont. 241, 244, 631 P.2d 697, 699 (1981).

¶22 Here, the District Court found,

[e]ach party has incurred substantial attorney's fees/expert fees and out-of-pocket costs in connection with this case. Wife testified she is unable to fully pay this obligation without utilizing her minimal savings . . . Husband objects

to the payment of Wife’s attorney fees The Court notes that Husband has been able to pay significant fees and costs through his business. The Court considers the financial disparity between the parties and Wife’s inability to generate sufficient income now or in the future to meet her own needs as well as pay the substantial fees and costs generated in this case. The court also notes the complexity of the case and the size of the estate. Under these circumstances, the Court finds that Wife’s latest attorney fees and cost amounts should be paid from the proceeds from the sale of the marital home[.]

The Standing Master thus entered findings that considered the parties’ fees, the complexity of the legal work involved in the case, the parties’ relative ability to pay the fees now and in the future, the fact that Jeffery had paid his attorney out of the marital estate, and the other evidence in the case. We conclude it did not err by ordering Melanie’s attorney fees to be paid out of the marital estate.

g. Home repair expenses

¶23 Although the District Court found “from a review of the expenditures it appears costly repairs were made primarily due to mold mitigation from leaking water and other failures of routine maintenance/oversight,” we conclude from a review of the record that substantial evidence does not exist to support this finding. The itemization Jeffery provided to Melanie regarding the cost of the repairs necessary to sell the marital home stated the following:

Radon Mitigation	\$5,200
Mold Mitigation	\$12,275
Replaced three water heaters (one half of total cost)	\$2,135
Williams Plumbing and Heating (master heat pump)	\$8,287
Replaced Pressure Tank	\$4,916

Jeffery also informed Melanie of additional home repair costs, including the second half of the water heaters and the assistance of handymen, which brought the total cost of the repairs to \$42,026.94, and Melanie does not contest this figure. Neither the sale documents nor the invoices for repair work provide any indication—nor does Melanie point to any evidence—that the mold mitigation or the other repairs were the result of any malfeasance or negligence by Jeffery while he resided in the home. Nor is there evidence that Melanie lacked input in addressing the repairs, in light of her approval of the individual pages of the buy/sell agreement indicating the work that needed to be done on the home prior to sale, including the page that provided that she and Jeffery may be responsible for up to \$25,000 in repairs that could not be completed in time. We conclude that, because of an absence of any evidence to support the conclusion reached, the District Court erred by determining Melanie should not be responsible for one half of the cost of repairs necessary to sell the marital home. The listed expenses for the home repair should have been divided equally between the parties.

¶24 We reverse only the portion of the judgment related to the division of repair costs for sale of the marital home, as discussed above, and remand for entry of an amended judgment reflecting that change in the division of the marital estate. The District Court need not, in its discretion, conduct any further proceedings to enter the amended judgment. We affirm the entirety of the remainder of the judgment.

¶25 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents

no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶26 Affirmed in part, reversed in part, and remanded for entry of an amended judgment.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON