

DA 22-0581

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 212N

IN RE THE MARRIAGE OF:

HEATHER M. REMITZ n/k/a CARISCH,

Petitioner and Appellee,

and

RICK REMITZ,

Respondent and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DR-11-147C
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penni L. Chisholm, Dean D. Chisholm, Chisholm & Chisholm, P.C.,
Columbia Falls, Montana

For Appellee:

Christopher J. Gillette, Law Office of Chrstopher J. Gillette, PC,
Bozeman, Montana

Submitted on Briefs: September 6, 2023

Decided: November 7, 2023

Filed:


Clerk

Chief Justice Mike McGrath 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 Rick Remitz (Rick) appeals from a September 9, 2022 order granting Heather Carisch's (Heather) request for relief from judgment pursuant to M. R. Civ. P. 60. We reverse.

¶3 The facts, timeline, and procedural history of this case are long and complex. Rick and Heather were married in 1994. Shortly before their marriage, Rick became a 51% owner of The Comfort Company (TCC), the couple's primary asset. Over the next 15 years, Heather was primarily a homemaker, taking care of their two children and supporting Rick's business career, which allowed TCC to grow. The parties separated in 2009, and Heather filed a Petition for Dissolution of the marriage in 2011. The court issued a temporary restraining order, which prevented the parties from disposing of assets without approval.

¶4 A Standing Master held a trial in March 2014, and the parties submitted evidence of asset valuations. At trial, Rick's expert testified that as of August 2013, TCC's value was roughly \$2.2 million. Although Heather thought the valuation was low due to yearly sales, she presented no evidence of her own. The Standing Master issued its Findings of

Fact, Conclusions of Law, and Final Decree of Dissolution (the Decree) in May 2017—over three years later. The Standing Master found Rick’s expert credible, adopted the valuation, and found that the marital assets (including TCC) should be “equally divided.” Heather filed no objections to the Decree.

¶5 On July 31, 2017, Rick received an offer to buy TCC for \$24.5 million—over ten times the amount it was valued at three years prior. Rick was still bound by the court’s restraining order at this time and could not sell TCC without approval until a final judgment had been entered. On September 8, 2017, Rick withdrew his objections to the Decree and asked the District Court to adopt the Decree. On September 12, the District Court adopted the Decree.

¶6 Rick sold TCC a month later for \$24.5 million, the terms of which were subject to a non-disclosure agreement. Heather learned of the sale price from a third party in November and filed her Rule 60 motion for relief from judgment in December 2017. She argued that Rick’s expert had made an egregious mistake as to the value of the business in 2014 or that he was provided inaccurate or misleading information. Thus, Heather sought to conduct further discovery regarding the value of TCC at the time of trial and the reason for the sale price obtained three years later. After 60 days, that motion was deemed denied and Heather appealed. *See* M. R. Civ. P. 59(f). We remanded for limited discovery “into the circumstances, timing, and terms of the sale process, the cause of the disparity between Rick’s valuation and the actual sale price, and whether it would be fair and equitable that Heather share in the increased value.” *In re Marriage of Remitz*, 2018 MT 298, ¶ 10, 393 Mont. 423, 431 P.3d 338.

¶7 After discovery, the District Court held a hearing where both parties presented expert testimony as to the valuation of TCC. Rick contended that all of the increase was attributable to new products released after trial in 2014, and therefore Heather should not share in the increase. Heather contended that the original valuation was low due to the weight which was given to 2013 and that the growth of the company was relatively flat between 2007 and 2017. Heather further contended that TCC got a premium in the sale above and beyond what it was worth due to “synergistic value,” which arises from two assets combining to create a new asset worth more than the sum of its parts. Almost two-and-a-half years after the hearing, the District Court found that, in this matter, (1) the appropriate date for valuing the business was the date of the Decree (May 2017), (2) that any increase in value from the 2014 valuation to May 2017 was due to synergistic value, which is passive in nature, and (3) that Rick’s interest in TCC should be equally divided as the Decree stated.

¶8 As an initial matter, Rick had an opportunity to object to the Decree. He waived any arguments about the Decree or other asset valuations when he withdrew his objections, urging the court to adopt the Decree. We therefore limit our review to the narrow question of whether the District Court abused its discretion in ruling on Heather’s Rule 60(b) motion for relief from judgment.

Date of Valuation

¶9 The appropriate valuation date for TCC is key in this case. We review a district court’s decision to value assets at a particular date for abuse of discretion. *In re Marriage of Frank*, 2022 MT 179, ¶ 39, 410 Mont. 73, 517 P.3d 188. Generally, property should be

valued at or near the time of divorce (i.e., the date of dissolution). *In re Marriage of Krause*, 200 Mont. 368, 378, 654 P.2d 963, 968 (1982). However, unique circumstances may call for valuation at a different time. *In re Marriage of Frank*, ¶ 39.

¶10 Here, the District Court abused its discretion in valuing TCC as of the date of dissolution (2017) rather than the date of trial (2014). Although the date of dissolution is usually appropriate, the unique circumstances here show that the date of trial is the appropriate date for valuing the assets.

¶11 As an initial matter, Heather’s original Rule 60 motion contended that the valuation at the time of trial must have been inaccurate or misleading. We remanded to consider the limited question of the cause of the disparity between Rick’s valuation at trial and the sale price three years later, and whether it would be fair and equitable for Heather to share in any increase. *In re Marriage of Remitz*, ¶ 10. However, Heather did not actually contend at the hearing on her motion that the original valuation was misleading or inaccurate. Instead, she argued that the general rule for valuation should apply, that the sale price reflects the value at the time of dissolution, and that she is therefore entitled to share in that increase because it was “passive” in nature.

¶12 Moreover, Heather fails to convincingly argue why she should share in that passive increase when she does not dispute the value at trial—in direct contradiction to her Rule 60 motion—and the parties have been separated since 2009. Unlike in *Marriage of Frank* and *Schwartz v. Harris*, the parties here did not continue to function as a family unit after separation. *Cf. In re Marriage of Frank*, ¶ 43; *Schwartz v. Harris*, 2013 MT 145, ¶¶ 19-20, 370 Mont. 294, 308 P.3d 949. There is no dispute that Rick left the marital home in 2009,

took his personal belongings with him, and bought new furnishings for his new home. Further, the parties did not jointly acquire any assets or obligations after separation and even allowed their marital home to go into foreclosure when they could not agree who bore responsibility for the payments.

¶13 Nevertheless, valuing the business at the date of separation would not be equitable either as the parties' interim parenting plan called for Heather to care for their two minor children for more than two-thirds of the year, which allowed Rick to continue growing TCC.

¶14 Rather, the most equitable date to value TCC in these circumstances is the date of trial because one month after trial, their one remaining minor child moved in primarily with Rick and shortly after that Heather moved to California to pursue a relationship. It is clear that near the time of trial, the parties had started living completely separate lives, and Heather was no longer contributing to the growth of TCC as she had been prior to trial.

¶15 Further, the extraordinary circumstances of this case—a three-year delay between trial and formal dissolution caused by the court rather than any of the parties—should not work an injustice on Rick by revaluing an asset to 2017 values when Rick and Heather had separated eight years prior, and Heather had stopped any contribution she was making to TCC. The question then is whether Heather has cleared her hurdle of showing newly discovered evidence under Rule 60 that shows the 2014 valuation of TCC was inaccurate or misleading such that it would be fair and equitable for her to share in the increased value.

Rule 60

¶16 We review a district court’s ruling based on Rule 60(b)(2) for manifest abuse of discretion. *In re Marriage of Remitz*, ¶ 8. A manifest abuse of discretion occurs when a district court obviously, evidently, or unmistakably “acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in a substantial injustice.” *Netzer Law Office, P.C. v. State*, 2022 MT 234, ¶ 9, 410 Mont. 513, 520 P.3d 335.

¶17 A district court must consider four factors when granting a motion for relief from judgment for newly discovered evidence:

1. The alleged “newly discovered” evidence came to a party’s knowledge after the trial;
2. It was not a want of diligence which precluded its earlier discovery;
3. The materiality of the evidence is so great it would probably produce a different result on retrial; and
4. The alleged “new evidence” is not merely cumulative, and not tending to impeach or discredit witnesses in the case.

Fjelstad v. State ex rel. Dep’t of Highways, 267 Mont. 211, 220–21, 883 P.2d 106, 111–12 (1994).

¶18 Given our holding above, and Heather’s Rule 60 petition to the District Court, relevant newly discovered evidence must relate to TCC’s value at the time of trial and whether the increase was due to mistake or inaccurate information given at trial. However, contrary to her motion, Heather argued at the hearing that whether or not there was a mistake in the valuation in 2014, she should share in the value at the date of the Decree.

Heather's own arguments at the hearing belie her Rule 60 motion that there was newly discovered evidence that showed a mistake at the time of trial.

¶19 The record is replete with instances where Heather demurred on whether she was challenging the 2014 valuation. Heather admitted that her goal was not to show that the 2014 valuation was wrong, but rather that it was equitable for her to share in the increased value because that increase came from market conditions rather than Rick's efforts. Heather argued that whether it was a change in value, or just an extraordinary opportunity to sell the company for that much, she should share in the increase. Even Heather's expert testified that a wrong valuation was only one possibility and that he did not evaluate whether that was the issue. Heather's expert would have conducted the 2014 valuation using a different methodology, but testified he was not there to poke holes in it. In fact, given that the valuation at trial was not at issue, Rick chose not to examine a witness he had prepared, and Heather reiterated that they were not there to poke holes in the trial valuation.

¶20 The District Court abused its discretion in revaluing TCC to the date of the dissolution on our limited remand to determine whether the value given at trial "was substantially incorrect." *In re Marriage of Remitz*, ¶ 12. At the hearing, Heather repeatedly did not challenge the valuation given at trial. Thus, the only "newly discovered evidence" Heather asks us to look at is the sale price several years after she stopped having anything to do with Rick's—and thus TCC's—success. Because Heather did not produce any evidence to support her assertion in the Rule 60 motion that the value given at trial was inaccurate or misleading, and because we conclude the appropriate date to value the asset

was the date of trial, we reverse the District Court's Order granting Heather's Rule 60 motion. The 2017 decree is reinstated.

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

¶22 Reversed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ DIRK M. SANDEFUR