STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1258

In re the Marriage of:
Tracy Joan Van Steenburgh, petitioner,
Respondent,

vs.

Mark Edward Clyma,
Appellant.

Filed May 4, 2010
Affirmed; motion denied
Toussaint, Chief Judge

Dakota County District Court
File No. 19-F3-07-006475

Kay Nord Hunt, Lommen Abdo, Cole, King, & Stageberg, P.A., Minneapolis, Minnesota; and

Patricia A. O'Gorman, Patricia A. O'Gorman, P.A., Cottage Grove, Minnesota (for respondent)

Edward L. Winer, James J. Vedder, Moss & Barnett, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

TOUSSAINT, Chief Judge

In this marital-dissolution appeal, appellant-obligee Mark Edward Clyma argues he should have received a larger share of marital property, a larger, permanent spousal-maintenance award, and additional need-based attorney fees. Respondent-obligor Tracy Joan Van Steenburgh challenges the existing awards of maintenance and attorney fees. Because we see no abuse of discretion in the property division, the spousal-maintenance award, or the attorney-fees award, we affirm.

D E C I S I O N

I.

When dissolving a marriage, the district court must make a "just and equitable division" of marital property. Minn. Stat. § 518.58, subd. 1 (2008). To be "just and equitable," under Minn. Stat. § 518.58, subd. 1, a property division need not be equal. *See White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). On appeal, a district court's property division will not be set aside absent a "clear abuse" of its "broad discretion," and appellate courts "must" affirm a property division "if it ha[s] an acceptable basis in fact and principle even though [the appellate court] may have taken a different approach." *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984).

Appellant raises two preliminary matters. First, he argues that findings of fact 39 and 44 are inconsistent with finding 43. Findings 39 and 44 address the limited extent to which appellant's homemaking advanced respondent's career. Finding 43 addresses his more substantial homemaking contributions to the family, generally. Because these

findings address different aspects of appellant's homemaking, they are not inconsistent.

Second, he notes that, while the parties agreed on the distribution of much of their property, they did not agree on the distribution of all the property. But this fact does not require a property-equalization payment. It is undisputed that the district court was aware of the parties' stipulation when it divided the assets not covered by that stipulation, and there is no indication that the parties agreed that the ultimate division of their property would be equal.

Based on his analysis of the factors listed in Minn. Stat. § 518.58, subd. 1, appellant argues that he should have been awarded a property-equalization payment. The question on appeal is whether appellant has shown that the record, viewed in the light most favorable to the district court's findings, does not support those findings. Only then does the ability of the record to support other findings become relevant. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000) (addressing challenges to findings of fact).

The district court rejected an equalization payment because the parties stipulated to a property division without an equalization payment, the trial focused on the maintenance dispute, and the equalization payment appellant sought was based on the pre-tax value of the retirement accounts awarded to respondent. The parties did not specify respondent's tax liability on the retirement accounts, but the funds in those accounts will be taxed upon withdrawal. Thus, not only is appellant's proposed equalization payment apparently based on an over-valuation of the accounts, but the district court lacked the tax information necessary to calculate whether an equalization

payment was even necessary. We will not alter the district court's refusal to award an equalization payment. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that party cannot complain about district court's failure to rule in his or her 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).

We reject appellant's argument that the district court acted inconsistently when it did not consider tax consequences to the retirement accounts, because it lacked the necessary evidence, but did consider tax consequences to justify its unequal division of marital property. Whether to consider the tax consequences of a division of marital property is discretionary with the district court. *Maurer v. Maurer*, 623 N.W.2d 604, 608 (Minn. 2001) (noting that it is virtual certainty that retirement accounts will generate tax liability, that only question is what that liability will be, and that it is inequitable to preclude district court from considering tax liability when it has reasonable basis for estimating its amount). Here, while the district court did not accept the tax estimate of appellant's expert, it is undisputed both that respondent's withdrawals from her retirement accounts will be taxed and that appellant's expert estimated those taxes. Thus, while the district court rejected use of the precise figure proposed by appellant's expert, allowing some amount for taxes is not inconsistent with this record.

II.

The district court awarded appellant $10,000 in monthly maintenance for five years. He argues that the award should be both larger and permanent. Although Minn.

Stat. § 518.552 (2008) lists factors that a district court is to consider in addressing the amount and duration of maintenance, the underlying issue is balancing the recipient's ability to meet needs against the obligor's financial condition. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). In addressing the amount and duration of spousal maintenance, the district court has "broad discretion." *Schreifels v. Schreifels*, 450 N.W.2d 372, 373 (Minn. App. 1990). Absent an abuse of that discretion, the district court's decision "is final." *Erlandson*, 318 N.W.2d at 38. A district court abuses its discretion if its decision is based on findings of fact that are unsupported by the record, if it misapplies the law, or if it resolves the question in a manner contrary to logic and the facts on the record. *See Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (making findings unsupported by record or misapplying law); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (resolving the matter in manner contrary to logic and facts on record).

If there is uncertainty about the need for permanent maintenance, the award shall be permanent and open to future modification. Minn. Stat. § 518.552, subd. 3 (2008); *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987). Here, the district court found that appellant's reasonable monthly expenses for himself and the parties' child were $7,691.35. In addition to monthly spousal maintenance of $10,000, the district court awarded appellant $468 in monthly child support. Thus, there is no doubt that appellant is currently able to meet his reasonable needs as found by the district court. Appellant asserts that the predictions of his future income suggest that he may lack sufficient income to meet his needs in five years. But, because the range predicted for his future income could, when combined with child support, exceed his expenses, we will not

require permanent maintenance at this time.

Much of the remainder of appellant's challenge to the maintenance award is his recitation of findings of fact that he claims the district court should have made. But he does not explain why the record, when viewed in the light most favorable to the district court's findings, fails to support the findings that the district court did make. *See Vangsness*, 607 N.W.2d at 474 (addressing challenges to findings of fact). Although appellant's challenges to the findings are unpersuasive, we briefly address some of them. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that appellate court need not "discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings," and that its "duty is performed when [it] consider[s] all the evidence ... and determine[s] that it reasonably supports the findings"); *see also Vangsness*, 607 N.W.2d at 474 n.1 (applying *Wilson* in dissolution case).

We reject appellant's assertion that a statement in the memorandum accompanying the district court's June 16, 2009 order shows that the district court differentiated between the parties' marital standard of living and the current expenses it found for appellant. When read in the context of that order's actual finding of appellant's expenses, it is unambiguous that the finding represents the family's marital standard of living.

Appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Because the district court explicitly found respondent's employment expert credible and because that expert stated that appellant is currently employable, we reject appellant's challenges to the finding of his employability

and to the district court's refusal to include retraining expenses in appellant's expenses. Our deference to the district court's implicit or explicit credibility determinations also defeats appellant's challenges to the finding of his reasonable monthly expenses for himself and the parties' child and what he alleges is the outmoding of his employment skills. Appellant managed the parties' finances during the marriage, but the district court implicitly found respondent's estimate of appellant's expenses, based on check registers and credit card statements for the last three full years that the parties lived together, more credible than appellant's claimed expenses. Regarding employment, the district court found "little evidence that [appellant] sacrificed his career to assist [respondent] in pursuing hers." This finding is consistent with respondent's testimony that there was no agreement between the parties that appellant would stay at home and care for the child, and that the child was put into daycare, and later kindergarten, to allow appellant to work at his at-home business.

Noting that the district court did not find him to be voluntarily unemployed or underemployed in bad faith, appellant argues that the district court violated *Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. App. 1987) (holding that "There is no authority for finding bad faith underemployment at the time of an initial award of maintenance merely because a potential oblige has not yet rehabilitated . . . ."), by assuming that appellant could make $45,000-$55,000 despite his current unemployment. Because appellant's current support and maintenance awards allow him to meet what the district court found to be his reasonable monthly needs without considering that income, any violation of *Carrick* does not merit reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be

ignored).

Citing his financial expert's testimony that the parties' average monthly savings for 2002-05 were $4,543, appellant argues that the district court's finding of his monthly expenses, which allows him $500 for savings, includes an insufficient amount for savings. Respondent's 2005 income was much higher than it was in 2002-04 and the parties separated in March 2005. Under these circumstances, the district court did not abuse its discretion by excluding 2005 from its savings analysis.

Appellant states that he is age 50, has a "heart condition," and lacks self confidence. The district court, aware of appellant's age and that his "heart condition" is a heart murmur, found: "There was no evidence submitted to the Court that [appellant] has health issues that would interfere with full-time work." While respondent's employment expert testified that additional self confidence would help appellant get a job, respondent testified that appellant does not lack self confidence. Nor did appellant's employment expert state that appellant lacks self confidence. While we will not alter this aspect of the district court's analysis, if appellant's physical or mental health creates a need for additional maintenance in the future, he may move to modify his award.

Respondent notes that her maintenance and support obligations exceed what the district court found to be appellant's monthly needs, and argues that, if her obligations exceed appellant's needs to allow him to meet his tax obligations, that award is not supported by this record. Respondent admits that the finding of appellant's monthly expenses is based on her budget for appellant and that her budget for appellant omitted taxes. It is, however, a virtually certainty that appellant will incur a tax liability on his

maintenance award. *See* 26 U.S.C.A. § 71(a) (West 2002) (stating that maintenance is generally taxable to recipient). The district court was not presented with evidence specifically identifying the amount of the tax liability and apparently estimated it. On this record, we conclude that respondent's failure to submit at least some tax-related evidence to the district court precludes her from complaining that the district court's apparent estimate of that liability is unsupported. *See Eisenschenk*, 668 N.W.2d at 243.

Respondent argues that her maintenance obligation is excessive because the district court did not consider appellant's earning ability when setting maintenance. *See* Minn. Stat. § 518.552, subd. 2(a) (2008) (stating that maintenance recipient's earning ability is consideration in setting maintenance). While the district court found that appellant should be able to find a job promptly, under *Carrick*, 560 N.W.2d at 410-11, appellant must be given some time to find the employment described in the judgment. Given the significant range for income from appellant's expected employment, we cannot say that the district court abused its discretion by not attributing all of that income to appellant immediately. When appellant obtains a job and his employment income is certain, that income can then be incorporated into the maintenance calculus.

III.

The district court awarded appellant $18,330 in need-based attorney fees. Appellant argues that this award is insufficient. Respondent argues that it is excessive. In a marital dissolution, a district court "shall" award need-based attorney fees "in an amount necessary to enable a party to carry on or contest the proceeding" if it finds that the fees are necessary for a good faith assertion of the recipient's rights and will not

unnecessarily contribute to the length or expense of the proceeding, the payor has the ability to pay the fees, and the recipient lacks the ability to pay the fees. Minn. Stat. § 518.14, subd. 1 (2008). "[A]n award of attorney fees is committed to the discretion of the district court[.]" *Lee v. Lee*, 775 N.W.2d 631, 643 (Minn. 2009).

The district court awarded appellant none of the fees he incurred through trial, but all of the fees he incurred making his posttrial motion. The crux of appellant's argument is that the district court clearly erred in finding that he had the ability to pay the fees he incurred before making his motion to amend. The district court found that appellant sought $74,807.03 in fees through trial, that he "removed more than $161,000 in marital assets from the parties' joint accounts and deposited them into an account in his own name[,]" and that, from this account, he paid attorney fees "in excess of $64,000 and costs of no less than $12,000." Appellant's reply brief argues that, by the time of trial, he had $30,733.49 left of the $161,000, and that he spent these funds on living expenses for himself and the child. But spending $64,000 on fees, "no less than $12,000" on costs, and $30,733.49 on living expenses leaves $54,266.51 of the $161,000; this is more than five times $10,807.03, which is the difference between the fees appellant claimed to have incurred through trial ($74,807.03) and the $64,000 he paid on that debt. Appellant has not shown that the district court abused its discretion by not awarding him additional fees.

Respondent argues that appellant does not need the award of posttrial fees because his maintenance and support awards exceed his monthly expenses. As noted, above, however, much of the alleged excess will be consumed by appellant's tax obligation.

Therefore, we will not reduce the district court's fee award.

Appellant's motion for need-based attorney fees deferred to the panel considering the merits of this appeal is denied.

Affirmed.