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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1104**

In re the Marriage of: Sharon Nelson, petitioner,
Respondent,

vs.

Jeffrey Alan Nelson,
Appellant.

**Filed July 1, 2019
Affirmed in part, reversed in part, and remanded
Smith, John, Judge***

Anoka County District Court
File No. 02-FA-16-1611

Beverly K. Dodge, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for respondent)

Patrick C. Burns, Elizabeth M. Cadem, Burns & Hansen P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Smith,
John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We reverse and remand the district court's valuation of ownership interests in two businesses with instructions to determine the date of valuation and value on that date. We affirm the district court's grant of both need-based and conduct-based attorney fees, and leave open the question to the district court of whether additional need-based attorney fees are appropriate.

FACTS

The main issue in this appeal is the valuation and allocation of two businesses that were determined to be marital property, though appellant also challenges the district court's award of attorney fees to respondent. The first of these businesses was S&B Geo Thermal Incorporated (Business 1). The second was SB Mechanical and Geothermal Inc. (Business 2). Both businesses had similar models and organizational structures, and Business 2 was created to purchase assets from Business 1 and take over Business 1's client base because Business 1 was filing for bankruptcy.

The trial was extremely contentious, with agreements being made and rescinded, and the district court putting the proceedings on hold multiple times with orders to the parties to resolve issues between themselves. Furthermore, appellant did not turn over all requested financial information about the businesses he had financial interests in, despite the fact that he was required to do so during discovery. These documents only came to light because appellant finally allowed respondent access to the marital home during the trial, 11 months after appellant had changed the locks on the house to deny her access.

Respondent found the documents on top of a cabinet while she was gathering up personal property at the marital home.

The district court found, based on testimony from the parties' son, that appellant had a new business importing specialized electronics called "Side by Side Parts" that he failed to disclose to either the court or to respondent. The district court did not make explicit findings on how much this new business was worth, and did not allocate any property to respondent to compensate her for the income appellant derives from it.

At the conclusion of the trial, the district court dissolved the marriage and apportioned marital and non-marital property. As part of this order it assigned Business 1 to appellant at a value of \$50,000. It assigned Business 2 to appellant at a value of \$20,000. It assigned other marital property to respondent to compensate her for this portion of the marital estate going to appellant. Appellant does not argue that either business constituted non-marital property.

The district court also awarded \$7,500 in attorney fees to respondent. This consisted of \$4,000 for need-based fees and \$3,500 for conduct-based fees.¹

¹ The parties spend a good deal of the facts sections in their briefs attempting to re-litigate factual issues. Because we apply the deferential clearly-erroneous standard of review to challenges to the district court's finding of fact, most of the facts asserted by the parties are irrelevant.

DECISION

I. We are unable to determine whether the district court abused its discretion in valuing the businesses consisting of marital property because the district court did not set a date of valuation.

Here, the district court did not make a specific finding of what date it used to value Businesses 1 and 2. There is also no agreement by the parties regarding what date the district court used to value the two businesses. At oral argument, respondent's attorney explicitly conceded that there was no way to know what valuation date the district court used.

Without agreement of the parties or specific findings in the record, the district court was required to value the businesses as of April 27, 2017, the date of the first pre-trial hearing. Minn. Stat. § 518.58, subd. 1 (2018). But there is no evidence in the record of what value or profitability either of these businesses had specifically on that date. This omission is made more significant by the fact that both of these businesses fluctuated significantly in value during the relevant period.

Wopata v. Wopata presents a similar case. 498 N.W.2d 478 (Minn. App. 1993). There, we reversed a district court's valuation of a marital account because the district court made no findings on the date of valuation, there was no agreement on the date of valuation, and there was no evidence of the value of the account on the date contemplated by Minn. Stat. § 518.58, subd. 1.² *Id.* at 485. We remanded to the district court with instructions to

² Though this case referred to the 1991 version of the statute, the relevant portion of subdivision one has remained unchanged in the subsequent years.

specify a valuation date, and to make findings on the appropriate valuation for that date.
Id.

We therefore reverse the district court's valuation of Businesses 1 and 2, remand with instructions to determine a date of valuation, value the businesses, and determine how any change in valuation will affect the equalization payment.

Although we remand this matter as directed above, we address the appellant's arguments which we have considered and rejected. Under Minn. Stat. § 518.58, subd. 1, the district 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 unless the court makes specific findings that another date of valuation is fair and equitable." If the district court concludes that another date is fair and equitable, it has broad discretion in setting the marital property valuation date. *Desrosier v. Desrosier*, 551 N.W.2d 507, 510 (Minn. App. 1996).

Here, the district court did not make a specific finding of what date it used to value Businesses 1 and 2. There is also no agreement by the parties regarding what the district court used to value the two businesses. And, at oral argument, respondent's attorney explicitly conceded that there was no way to know what valuation date the district court used. However, "It is well to bear in mind that on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted).

We further note that neither party ever argued that the district court erred when it failed to set a valuation date, and neither party argued that such an error requires reversal. We therefore are able to evaluate most of appellant's arguments without a date of valuation. "An appellate court does not require the trial court to be exact in its valuation of assets, it is only necessary that the value arrived at lies within a reasonable range of figures." *Kitchar v. Kitchar*, 553 N.W.2d 97, 102 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Sept. 10, 1996). We address each of the following arguments in turn, and note that none of these arguments require the date of valuation to effectively review.

A. Business 1 bankruptcy

Appellant first argues that the district court erred by assigning any value to Business 1 because it was in the midst of a Chapter 7 bankruptcy, and as a matter of law, it had no value. This argument is forfeited. Generally, "litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below." *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957). This court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We will also not allow review when a party raises "the same general issue litigated below but under a different theory." *Id.* Generally, if, in a civil case, there is a trial but no motion for a new trial, the scope of review on appeal includes substantive legal issues properly raised at trial, whether the evidence supports the findings of fact, and whether the findings support the conclusions of law. *See Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 308-10 (Minn. 2003).

Appellant argued to the district court and testified that as a matter of fact Business 1 had no value and that it should be apportioned accordingly. But the record below, including briefing and oral arguments, is lacking any argument by appellant that as a matter of law a business going through chapter 7 bankruptcy cannot have any value. And appellant failed to raise this issue in a timely post-trial motion for amended findings or a new trial. We therefore reject as forfeited appellant's argument that Business 1 has no value as a matter of law because it is in the midst of bankruptcy.

And even if this argument were not forfeited it is still clearly meritless. To begin, most of the cases that appellant cites involve chapter 11 bankruptcy, not chapter 7. See *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 976 (2017) (reviewing a bankruptcy ruling in a chapter 11 case); *Schultz Broadway Inn v. United States*, 912 F.2d 230, 231 (8th Cir. 1990) (same). The distinction between the two processes is laid out in *Czyzewski*. "In Chapter 7, a trustee liquidates the debtor's assets and distributes them to creditors. In Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski*, 137 S. Ct. at 978 (citation omitted).

Appellant's argument is that under a chapter 7 bankruptcy the assets of a debtor are liquidated and distributed amongst creditors. He claims that therefore once a business starts the process of a chapter 7 bankruptcy it no longer has any value to the debtor/owner. While this is often true, it is not necessarily so. This is because the owner will only not receive anything when the liquidated assets are less than the business's outstanding debt. And in fact, 11 U.S.C. § 726 (a)(6) (2012) explicitly provides that once assets are collected

into the bankruptcy estate and all creditors are paid what they are owed, any remaining assets of the estate are to be paid back to the debtor. The fact that there is even a possibility that there could be assets remaining in the estate that get distributed back to the debtor means that appellant's argument about the business having no value as a matter of law fails.

B. Finding that Appellant invested in Business 1

Appellant next argues that the district court clearly erred when it found that he had invested \$50,000 into Business 1. Instead, he claims that he loaned Business 1 the \$50,000, and that the payments that he received from Business 1 were to pay off that loan, not payment for services rendered as the district court found. Appellant's argument attempts to re-litigate factual findings of the district court, but the district court's findings were not clearly erroneous.

Business 1 made payments to appellant beginning on April 1, 2013 and ending on September 25, 2015. And as appellant points out, after each payment the "balance" attributed to appellant noted on the check register decreases. But as the district court focused on, the payments made to appellant were from Business 1's "payroll" account. Further, Ms. Temte, appellant's partner in Business 2 and an employee of Business 1, testified that appellant provided "consultation and advice" for Business 1, and worked trade shows on behalf of the company. Because these facts support the district court's finding that the money Business 1 paid appellant was for services rendered, this finding cannot be said to be clearly erroneous, even if the district court could also have found the opposite to be true. *See Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). The district court made credibility determinations and factual findings based on the evidence before it, and

those findings are supported by the record. *See id.* (noting the importance of “broad deference” in valuing marital assets). This argument therefore fails.

C. \$50,000 valuation of Business 1

Appellant makes three distinct arguments about why the district court’s valuation of his investment in Business 1 at \$50,000 was clearly erroneous. First, he argues that the district court was obliged to value Business 1 based on its “fair market value,” and not on what he had invested in it. Second, he argues that district court’s finding that he contributed \$50,000 to Business 1 was also clearly erroneous.

As to appellant’s first argument, he cites to *Hertz v. Hertz* to support his position that the district court was required to value Business 1 according to its fair market value. 229 N.W.2d 42, 44 (Minn. 1975). But this case does not support appellant’s position. The court there noted that, “Assigning a specific value to an asset is a finding of fact; disputes as to asset valuation are to be addressed to the trier of fact, and conflicts are to be resolved in that court.” *Id.* The case does not support a conclusion that assigning value based on investment in a company without consideration of what the asset would sell for on the open market constitutes reversible error.

However, appellant also cites to *Nardini v. Nardini*, in this section. 414 N.W.2d 184, 188 (Minn. 1987). There, the Minnesota Supreme Court reversed a district court’s decision based on its valuation of a corporation, closely held by the husband and wife who were divorcing. *Id.* at 190. Each party had an expert do an analysis of the market value of the corporation, and one of the primary issues was a disagreement about the values each expert reached. *Id.* at 186, 188. In valuing the corporation the district court had allowed

the experts to discount the value of the corporation because the assignment of the interest was effectively a “forced sale.” *Id.* at 188-89. The supreme court reversed, and held that in these situations district courts “must determine the value of the business as if the transaction were a sale of the entire business by a willing seller to a willing buyer.” *Id.* at 189.

However, there is a significant distinction between *Nardini* and this case. There, the supreme court held that the district court abused its discretion when it accepted an expert valuation that was based on an impermissible consideration. *Id.* Here, it appears that there was never *any* expert testimony valuing the business. While appellant and his business partner both testified that Business 1 had no value, the district court found that they were both not credible, and that appellant had tried to hide his investment in Business 1 from respondent entirely. While appellant is correct that the district court should have considered the *Nardini* factors in its valuation of Business 1, it appears that appellant never presented these factors to the district court, and certainly did not present any expert testimony about the fair market value. And as noted, appellant never filed a motion for additional findings or a new trial. We therefore reject this argument as forfeited because appellant did not make it to the district court. *Thiele*, 425 N.W.2d at 582.

Next appellant argues that the district court’s finding that he contributed \$50,000 to Business 1 was clearly erroneous. He argues that the financial records in evidence contradict the district court’s findings. This argument also fails.

On the third day of trial, respondent submitted a check register for Business 1 that appellant had failed to disclose pre-trial. This shows an existing balance of \$18,000

credited to appellant, plus three additional deposits of \$10,000 on February 1, 2013, \$10,000 on February 11, 2013, and \$3,000 on February 26, 2013. This constitutes \$41,000 that was transferred from the parties' marital accounts to Business 1. The district court also found that appellant invested another \$9,000 of marital funds into Business 1 based on a suspicious withdrawal of that amount from a marital account that coincides with the transition from Business 1 to Business 2.

Appellant argues that these records are insufficient to sustain the district court's factual findings because "there was no testimony indicating that *any* of these documents reflected an investment in any business." This argument fails to recognize our standard of review. It is reasonable for the district court to have matched up withdrawals from certain marital accounts that coincided with deposits into Business 1's accounts. The district court examined the evidence before it, made reasonable inferences based on that evidence, and made factual findings that are supported by the record. The lack of witness testimony about an exact chain of custody does not render the district court's findings clearly erroneous.

Appellant next argues that the ledger showing that Business 1 owed appellant \$18,000 is insufficient to support the district court's inclusion of that figure into the money that appellant had invested. He argues that his business partner's testimony that he had not contributed \$18,000 to Business 1 renders the district court's reliance on the register clearly erroneous. But again, the district court found that appellant and his business partner had purposely tried to hide appellant's investment in Business 1 from the court based in part on appellant failing to disclose the existence of the register. When the district court was faced with this conflicting evidence, it made a credibility determination about which was

more accurate. It made the reasonable finding that the written documentation showing that appellant had contributed an initial \$18,000 was more reliable than appellant's self-interested testimony. Because the district court's finding is supported by evidence in the record it is not clearly erroneous.

Appellant next argues that, even assuming the \$41,000 indicated on the register was correct, the district court clearly erred when it assigned the additional \$9,000. In adding in this \$9,000 the district court relied on a suspicious withdrawal from a marital checking account on October 14, 2015, approximately one week before Business 1 went into bankruptcy proceedings and Business 2 started to take over operations. The district court found that this \$9,000, in addition to the original \$41,000, was "rolled into" Business 2 as it began operating and was the basis for appellant's acquisition of a majority ownership of Business 2. While appellant again cries foul about the district court's reasonable inferences, the fact is that all of the district court's inferences have at least some support in the record. We therefore hold that the district court's factual finding that appellant contributed \$50,000 is not clearly erroneous.

II. The district court did not abuse its discretion in awarding attorney fees to respondent.

The district court found that appellant incurred \$69,455 in attorney fees and related expenses, and respondent incurred \$69,081.70 in attorney fees and related expenses. Neither party challenges these findings. On respondent's motion, the district court awarded her \$3,500 in need-based attorney fees, and \$4,000 in conduct-based attorney fees.

A. Need-based attorney fees

Appellant first argues that the district court erred when it awarded respondent \$3,500 in need-based attorney fees. In a marriage dissolution under chapter 518 or chapter 518A of the Minnesota Statutes, a district court “shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding” if certain conditions are present:

- (1) that the fees are necessary for the good faith assertion of the party’s rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2018). The attorney fees described above are typically referred to as “need-based fees.” See *Geske v. Marcolina*, 624 N.W.2d 813, 816-17 (Minn. App. 2001). This court reviews an award of need-based attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). But see *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (stating that Minn. Stat. § 518.14, subd. 1, “requires the court to award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are requested has the means to pay the fees, and the party seeking fees cannot pay the fees”); Minn. Stat. §§ 518.14, subd. 1 (stating that district court “shall” award need-based attorney fees if statutory requirements are met), 645.44, subd. 16 (stating that “shall” is mandatory).

Appellant challenges the second and third elements of this test, i.e., that respondent did not have the ability to pay the fees while appellant did. But the district court’s findings

on these elements are supported by the record. Respondent submitted evidence that her monthly living expenses totaled \$6,515.46, while her monthly income was under \$6,000 per month. And appellant has a monthly income of roughly \$9,323.52 and did not introduce evidence about his monthly expenses. This evidence in the record is sufficient to reject appellant's claim that the district court's findings on the second and third elements were clearly erroneous.

The district court found that appellant was actively trying to conceal other sources of income and there may even be a greater income disparity. Given the amount of respondent's legal fees associated with this proceeding, she will have had to utilize some of the property allocated to her as part of the marriage dissolution to pay the fees. Based on the amounts involved and the broad discretion vested with the district court, we hold that it was not an abuse of discretion for the district court to offset the amount of property that respondent will have to liquidate in order to pay her legal fees by awarding her \$3,500 in need-based fees.

B. Conduct-based attorney fees

Appellant next argues that the district court erred when it awarded respondent \$4,000 in conduct-based attorney fees. The district court awarded respondent these fees based on findings that appellant: (1) intentionally hid his interests in Businesses 1 and 2; (2) failed to disclose his new "Side by Side Parts" business; (3) failed to comply with certain pretrial orders; and (4) repeatedly raised issues that had already been resolved. Appellant challenges each of these findings as clearly erroneous.

A court may, “in its discretion, [award] additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1. These conduct-based fee awards “are discretionary with the district court.” *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). Unlike need-based fees, conduct-based fees may be “based on the impact a party’s behavior has on the costs of the litigation regardless of the relative financial resources of the parties.” *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). We review a district court’s award of conduct-based attorney fees for an abuse of discretion. *Szarzynski*, 732 N.W.2d at 295.

Taking each of appellant’s claims in turn, the first finding is supported by the financial documents that appellant failed to turn over during discovery that only came to light during trial when the district court ordered appellant to grant respondent access to the marital home. These documents show that Business 2 received a net income of \$182,688.19 in 2015, and yet respondent asserted in his answer and counter-petition that Business 2 had a 2015 income of minus \$6,268.00. The fact that appellant did not turn over these documents and the conflict between the financial documents and appellant’s assertion about the financial status of Business 2 both support the district court’s findings that appellant intentionally hid his income from Businesses 1 and 2, and thus renders the finding not clearly erroneous.

Appellant’s claim that the district court clearly erred because he did not fail to disclose income from his new “Side by Side Parts” business lacks merit. While the district court never made an explicit finding about how much income appellant received from the

business, it was clearly reasonable for the district court to find that appellant was likely receiving *some* income from this new business. The parties' son testified that he had a business importing, manufacturing, and selling parts for two-seater vehicles. The son testified about his "extremely high" profit margins, and that appellant helped him with this business from time to time. The parties' son also testified that he recently became aware that appellant had started his own business, importing and selling similar parts as his son, from the same manufacturers that his son had been purchasing from for years. He discovered this because appellant had a box of electronics shipped to the same address that his son often had items shipped to under the company name "Side by Side Parts," and the company sent him a shipping confirmation intended for his father by mistake. The parties' son testified that based on the source and weight of the package, this one delivery could generate a profit for appellant of somewhere between \$15,000 and \$40,000.

Appellant does not dispute the fact that he failed to disclose income from "Side by Side Parts," but instead claims that the district court clearly erred because "there is no evidence . . . that [appellant] derives any income from it." But as above, the parties' son testified under oath about the income that appellant could and probably did derive income from even just this one shipment of parts for his new business. This testimony is sufficient to render the district court's finding that appellant had some income from "Side by Side Parts" was not clearly erroneous.

Appellant argues that the district court's third and fourth findings, that he failed to comply with pretrial orders and raised issues that had already been resolved, are "vague and conclusory." Appellant appears to be correct with regard to the third finding. The

district court did not identify any specific pretrial orders that appellant failed to comply with, and respondent does not identify any either, and our review of the record also did not reveal any specific pretrial orders that appellant violated. Therefore the record does not support this finding.

However, the fourth finding, that appellant raised issues that had already been resolved, is clearly supported by the record. One example relates to the equity in the house that the parties lived in during the marriage. On November 15, the parties had agreed on a valuation of the house for the purpose of allocation. After coming to an agreement, and reading that agreement into the record, the next day appellant decided that he was no longer happy about the amount that he was going to be compensated and so he attempted to withdraw from the agreement. Respondent had to order a copy of the transcript from the day that the agreement was read into the record in order to enforce the agreement that the parties had already worked out and submitted to the court. This is a clear example of appellant raising an issue that had already been resolved.

Because three out of the four district court's findings in support of an award of conduct-based attorney fees are supported by the record, we affirm the district court's award of conduct-based attorney fees.

Affirmed in part, reversed in part, and remanded.