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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0394**

In re the Marriage of: Jonathon Henry Ortner, petitioner,
Appellant,

vs.

Margaret Eleanor Ortner,
Respondent.

**Filed March 16, 2020
Affirmed
Larkin, Judge**

Carver County District Court
File No. 10-FA-17-13

Patrick W. Ledray, Brooklyn Park, Minnesota (for appellant)

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Considered and decided by Cleary, Chief Judge; Larkin, Judge; and Florey, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this appeal from the district court's judgment and decree dissolving the parties' marriage, appellant-husband challenges several of the district court's findings of fact, its

division of the parties' assets and liabilities, and its award of conduct-based attorney fees to respondent-wife. We affirm.

FACTS

In November 2016, appellant Jonathan Henry Ortner (husband)¹ petitioned for dissolution of his 11-year marriage to respondent Margaret Eleanor Ortner (wife). The case was tried in May 2018. The main issue at trial was the division of the parties' assets and liabilities. The testimony established that husband had an ownership interest in several businesses, along with his brother, K.O., and his father, M.O.

In October 2018, the district court issued its findings of fact, conclusions of law, order for judgment, and judgment and decree dissolving the parties' marriage. The district court divided the parties' assets and liabilities and ordered husband to pay wife \$400,851.24 within 30 days of entry of the judgment and decree, to "equalize the marital estate." In addition, the district court authorized an award of conduct-based attorney fees to wife because "[h]usband's behavior and actions . . . directly impacted the duration, expense, and complexity of this matter." The district court ultimately awarded wife \$19,140.84 in conduct-based attorney fees.

Husband appeals.

¹ The case caption in the district court identifies husband as "Jonathon Henry Ortner" and that name is used in the caption on appeal. See Minn. R. Civ. App. P. 143.01 ("The title of the action shall not be changed in consequence of the appeal."). However, the parties' briefs and the district court's findings of fact identify husband as "Jonathan Henry Ortner." We use that spelling in the body of this opinion.

DECISION

I.

Husband challenges several of the district court's findings of fact. Findings of fact "must be upheld unless clearly erroneous." *Nolan v. Nolan*, 354 N.W.2d 509, 512 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). "Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009) (quotation omitted), *review granted* (Minn. Sept. 29, 2009) and *appeal dismissed* (Minn. Feb. 1, 2010). "When determining whether findings are clearly erroneous, [appellate courts] view[] the record in the light most favorable to the [district] court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). "Also, appellate courts defer to [district] court credibility determinations." *Id.* "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Id.* at 474.

We address each of husband's assertions of factual error in turn, limiting our analysis to husband's framing of the issues.

A.

The district court found that the parties' homestead was sold during the dissolution proceedings and that the property was subject to a judgment against husband in the amount of \$32,755.50. The district court found that "[n]o evidence was presented indicating that the funds resulting in the judgment were used for marital expenses."

Husband asserts that the district court erred when it found that “no evidence was presented indicating that the funds resulting in a judgment . . . of \$32,755.50 were used for marital expenses.” Husband points to his trial testimony that the “lien reflected funds needed to cover marital expenses,” that the underlying funds were “to help with household expenses and try to get [husband’s business] kind of up and off the ground,” and that the money was “spent on whatever [husband and wife] needed at the time, so mortgage payments, some business tools, [and] supplies.”

Husband’s trial testimony was the only support for his assertion that the loan was used for marital expenses. By finding that there was “[n]o evidence” to support husband’s assertion, the district court functionally appears to have made a determination that husband’s testimony was not credible. Because we defer to that credibility determination, the resulting finding regarding the use of the funds is not clearly erroneous. *See id.* at 472 (“[A]ppellate courts defer to [district] court credibility determinations.”).

B.

The district court found that husband and M.O. testified that M.O. loaned husband money “for household expenses and missed mortgage payments with the understanding that [M.O.] would be repaid when the [parties’ homestead] sold.” The district court also found that “[n]o evidence was presented supporting the amount of [M.O.’s] alleged loans nor any written agreements with regards to repayment of those loans upon the sale of the homestead.”

Husband asserts that the district court erred by finding “that no evidence was presented supporting either the amount of [the] purported loans or the repayment

agreement.” Husband argues that “testimony from [husband] and his father showed that the loans were for marital debt, and the agreement was that repayment of the \$30,000.00 loan was to come from the sale of the homestead.”

Husband testified that M.O. loaned him and wife money to purchase their home. But husband acknowledged that there was no note memorializing the purported loan, and he testified that he anticipated paying back the loan “whenever [he] would be able to.” M.O. testified that he loaned husband money for mortgage payments and expected to be repaid when the property sold, but he could not recall exactly how much money he loaned husband. Again, the district court appears to have made a credibility determination and rejected the testimony supporting the alleged loan. The resulting finding regarding the purported loan is not clearly erroneous. *See id.*

C.

As to the parties’ business assets, the district court found:

On December 31, 2015, Husband owned 100% of Oculus. On January 3, 2017, Husband, [K.O.], and [M.O.] fraudulently attempted to transfer 75% of Oculus out of the marital estate, backdating transfer documents to January 2016. Husband, [K.O.], and [M.O.] testified that this was done to convert a loan [M.O.] had made to Oculus into equity. No other evidence of that loan nor any prior agreement that [M.O.] would have an equity interest in the company was submitted at trial. Based upon the testimony and evidence presented, for purposes of this proceeding, the Court finds Husband owns 100% of Oculus, which is a holding company with 382,685 Common Units of Renters Warehouse-National. As of May 30, 2018, each share of Renters Warehouse-National was worth \$1.70

according to Renters Warehouse's CEO, [K.O.], making the total marital value of Oculus \$650,565.²

The district court also found that husband owns one-third of Illuminated Investments, which has a marital value of \$123,148.11, and 50% of Total Trash Out Services, which has a marital value of \$800.

Husband asserts that the district court erred by finding that “no evidence was presented concerning a transfer of 75% of Oculus stock out of the marital estate” because testimony and evidence presented at trial showed that husband owned only 25% of that stock, “which would have resulted in a marital value of \$162,641.25.” Husband argues that testimony and other evidence showed that he actually owned only 25% of the stock and that he only temporarily owned 100% of the shares “to allow business transactions concerning Oculus.”

At trial, husband testified that on the date he filed for dissolution, he owned 100% of Oculus “[o]n paper.” Husband explained that in 2016, his ownership interest in Oculus was reduced to 25%. The remaining 75% was transferred to K.O. and M.O. The agreement reducing husband's ownership interest in Oculus was not signed until January 2017, after husband had filed for dissolution of the parties' marriage. Even though the document was not signed until January 2017, the documents were backdated to January 1, 2016, indicating that husband's interest in Oculus was reduced before husband petitioned for dissolution.

² Although the district court stated that the marital value of Oculus is \$650,565 in its findings of fact, it used \$650,564.50 as the marital value of Oculus when it calculated the parties' distribution of assets and liabilities.

At trial, K.O. acknowledged that when husband petitioned for dissolution in November 2016, husband owned 100% of Oculus on paper. K.O. also testified that the documents transferring 75% of the Oculus shares from husband were executed on or about January 3, 2017 and backdated to an effective date of January 1, 2016. K.O. explained that the documents were backdated because K.O., M.O., and husband had verbally discussed the transfer on an earlier date.

Although there was some testimony that husband owned less than 100% of Oculus when husband filed for dissolution, wife argues that such evidence was largely “self-serving,” “fully impeached,” and “non-credible.”

The district court appears to have rejected the testimony supporting husband’s claim that he owned only 25% of the Oculus stock when he petitioned for dissolution. The district court’s resulting findings that husband “fraudulently attempted to transfer 75% of Oculus out of the marital estate [by] backdating transfer documents to January 2016” and that husband owns 100% of Oculus are not clearly erroneous.

D.

The district court found that the parties had debts in their individual names, including husband’s promissory notes to R.M. and M.L. The district court found that “[n]o evidence was presented indicating those loan proceeds were used for marital expenses.”

Husband asserts that the district court erred by finding that “no evidence was presented [that the] loans from [R.M.] and [M.L.] were used for marital expenses.” Husband’s contention is based on his testimony that he paid for the parties’ housing expenses, car payments, and other miscellaneous expenses, and that he borrowed money

from R.M. and M.L. to pay for those marital expenses. Once again, the district court's finding on this issue appears to have been based on a credibility determination, to which we defer, and the resulting finding is not erroneous. See *Vangsness*, 607 N.W.2d at 472.

Perhaps the district court could have used more precise language in rejecting husband's evidence and stated that there was no *credible* evidence, but it is apparent to us that the district court did in fact reject husband's evidence. Husband's arguments therefore invite us to reassess credibility and reweigh the evidence. That is not our role. See *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (explaining that this court exceeds its scope of review if it "usurp[s] the role of the [district] court by reweighing the evidence and finding its own facts"); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979) (noting that an appellate court's responsibility is to correct errors, not to retry the case). In sum, husband has not established a basis for us to conclude that the challenged findings of fact are clearly erroneous.

II.

Husband challenges the district court's division of the parties' assets and liabilities. "Upon a dissolution of a marriage . . . the [district] court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property." Minn. Stat. § 518.58, subd. 1 (2018). The district court has broad discretion in evaluating and dividing property, and its determinations will not be overturned except for abuse of discretion. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). A district court abuses its discretion by making findings unsupported by the evidence, misapplying the law, resolving the matter in a manner that is

contrary to logic and the facts on record. *Johnson v. Johnson*, 902 N.W.2d 79, 84 (Minn. App. 2017). If the district court's division of property has an acceptable basis in fact and principle, this court will affirm, even though we might have taken a different approach. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984).

We address each of husband's assertions of error in turn, once again limiting our analysis to husband's framing of the issues.

A.

Husband asserts that the district court's award to wife of "all funds from the sale of the [parties'] homestead," was "an unequitable, unfair and unreasonable property division." The district court determined that the total marital value of the parties' real estate, including the net proceeds from the sale of the parties' homestead, was \$70,619.04. The district court awarded \$32,755.50 of the value of the real estate to husband and the remaining \$37,863.54 of the value to wife. As a result, wife was assigned \$5,108.04 more of the value of the parties' real estate than husband.

An equitable division of marital property does not require an equal division. *Sirek v. Sirek*, 693 N.W.2d 896, 900 (Minn. App. 2005); *see also Johns v. Johns*, 354 N.W.2d 564, 566 (Minn. App. 1984) ("A [district] court's division of marital property need not be mathematically equal."). Husband does not support his assertion that the district court's division of the sale proceeds from the marital homestead is inequitable with any law or analysis. In fact, he does not even explain why he believes it is inequitable.

"An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless

prejudicial error is obvious on mere inspection.” *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted); *see also Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) (citing *Modern Recycling* and concluding that because party’s argument on appeal was not specific, he waived the issue). Because we discern no obvious prejudicial error, husband’s challenge to the district court’s division of the sales proceeds from the parties’ homestead is waived.

B.

Husband asserts that the district court abused its discretion in holding him “solely responsible for the payment of taxes, and promissory notes payable to [R.M.] and [M.L.]” because that decision is not “supported by findings of fact” and is not a “fair and reasonable division[] of marital debt.” Although husband mentions taxes in the relevant argument heading in his appellate brief, he does not otherwise address the district court’s decision regarding the parties’ tax liability in his briefing. Because we discern no obvious prejudicial error stemming from that decision, any related assignment of error is waived. *See Modern Recycling, Inc.*, 558 N.W.2d at 772; *see also Szarzynski*, 732 N.W.2d at 295.

As to husband’s assignment of error regarding the promissory notes to R.M. and M.L., husband once again relies on his trial testimony, which the district court did not credit. Moreover, husband once again does not offer legal argument or authority to explain his assertion that the district court erred in its treatment of those liabilities. Because prejudicial error is not obvious on inspection, husband’s assertion of error is waived. *See Modern Recycling, Inc.*, 558 N.W.2d at 772; *see also Szarzynski*, 732 N.W.2d at 295.

C.

Lastly, husband asserts that the district court's cash property settlement requiring him to pay \$400,851.24 to wife within 30 days "was not supported by findings of fact in that [he] had no assets to pay that amount, and his business interests were not liquid assets that could be sold." Husband also asserts that the district court erred by not awarding husband and wife "equal stock or units (shares) in the various business entities." Specifically, husband argues that the district court "clearly abused its discretion in not simply dividing the stock in Oculus equally between" husband and wife. Husband further argues that "[a]n award of one-half of the stock to each party by the trial court would not have resulted in an impossibility for [husband] to satisfy the majority of the [equalizer payment]," which he attributes to one half of the district court's valuation of Oculus.

As support for the latter argument, husband asserted for the first time at oral argument to this court that the district court erred by not analyzing certain factors set forth in *Nardini v. Nardini*, 414 N.W.2d 184, 188-89 (Minn. 1987). Husband acknowledged that he did not cite *Nardini*, or rely on the factors listed therein, in support of his requests for relief in district court or in his briefing to this court. Moreover, although wife's responsive brief to this court cited *Nardini* in support of the district court's division of Oculus, husband did not file a reply brief addressing wife's reliance on *Nardini*.

Because husband did not ask the district court to apply *Nardini*, did not cite *Nardini* as a basis for relief in his brief to this court, and did not file a reply brief addressing wife's reliance on *Nardini*, husband's argument that the district court erred by not applying the *Nardini* factors is not properly before us. See *Brodsky v. Brodsky*, 733 N.W.2d 471, 478

(Minn. App. 2007) (noting that this court will not consider issues raised for the first time on appeal that were not raised in the district court and will not consider arguments not addressed in briefing); *see also Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (“[T]his court does not consider matters not argued to and considered by the district court or issues not raised or argued in an appellant’s principal brief . . .”).

We nonetheless note that husband’s reliance on *Nardini* is unavailing. In *Nardini*, the Minnesota Supreme Court explained that a “just and equitable division of an asset included in the marital property of the parties” can be accomplished in one of the following three ways: (1) “[i]f the asset is readily divisible, the court can divide the asset and order just and equitable distribution in kind,” (2) “the court can order the sale or liquidation of the asset and make a just and equitable division of the proceeds of sale or liquidation,” or (3) “the court can determine the value of the asset, order distribution of the entire asset to one of the parties, and order the recipient to pay to the other spouse a just and equitable share of the value of the asset.” 414 N.W.2d at 188.

As to the third method, the supreme court listed eight factors that must be considered *when determining the value of a closely-held business*. *Id.* at 190. Even though those factors govern asset valuation, husband pointed to the district court’s failure to address those factors as support for his argument that the district court should have divided the Oculus stock between the parties, instead of awarding wife a portion of Oculus’s value.³

³ As to the district court’s valuation of Oculus, husband’s brief makes an unsupported and undeveloped reference to the valuation, asserting that “[t]here was no evidence presented that . . . the market value [of Oculus] is \$1.70 per share.” But Husband’s own witness—his brother K.O., who is the C.E.O. of Renter’s Warehouse—testified that Oculus holds

As to the method of dividing Oculus, the district court used the third *Nardini* method: it determined the value of the asset, ordered distribution of the entire asset to husband, and ordered husband to pay wife “a just and equitable share of the value of the asset.” *See id.* at 188. That choice was consistent with the supreme court’s statement in *Nardini* that although “the first method [(i.e., division in kind)] may be an eminently suitable way to divide the shares of a publicly owned corporation, it is an unlikely choice if the corporation is closely held.” *Id.*

Wife argues that the district court properly exercised its discretion in awarding her a portion of the monetary value of Oculus because the “closely held corporation was completely controlled by Husband, Brother (the CEO), and Father” and they “could manipulate the corporation’s books to say whatever would best serve the Ortner’s personal interests.” Wife further argues that the cash award allowed wife to retain her marital share of Oculus without having to be thrown into “corporate ownership positions in any of the businesses.” Wife’s arguments are consistent with the supreme court’s statements in *Nardini* that a distribution in kind “is an unlikely choice if the corporation is closely held” and that “[w]hatever the method, the goal is to place *both* parties in the optimum position.” *Id.* The district court did not abuse its discretion by awarding wife a portion of the value of Oculus.

As to husband’s argument that he could not afford the equalizer payment or comply with the payment deadline, the district court received detailed evidence regarding

382,685 shares of Renters Warehouse National and that each share is worth \$1.70. That testimony was the basis for the district court’s valuation of \$650,564.50.

husband's business dealings and finances. We discern no basis to conclude that the district court's decision regarding the amount or the timing of the equalizer payment was an abuse of discretion. *See Swanstrom v. Swanstrom*, 359 N.W.2d 634, 636 (Minn. App. 1984) (stating that an abuse of discretion will be found only if there is a "conclusion that is against logic and the facts on record").

In sum, error on appeal is never presumed. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). It "must be made to appear affirmatively before there can be reversal" and "the burden of showing error rests upon the one who relies upon it." *Id.* Husband has not met his burden to establish reversible error in the district court's division of the parties' assets and liabilities.

III.

Husband challenges the district court's award of \$19,140.84 in conduct-based attorney fees to wife. Conduct-based attorney fees may be imposed "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2018). Conduct-based attorney fees may be "based on the impact a party's behavior has had 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). "While bad faith could unnecessarily increase the length or expense of a proceeding, it is *not* required for an award of conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1." *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). The requesting party bears the burden of establishing that the other party's conduct unreasonably contributed to the length or expense of the proceeding. *Id.* at 818. This court reviews a

district court's award of conduct-based attorney fees for an abuse of discretion. *Brotsky*, 733 N.W.2d at 476.

Husband argues that the district court's findings do not support an award of conduct-based attorney fees because "his conduct on which the fee award is based was reasonable" and there is nothing in the record to indicate that husband's conduct contributed to the length or expense of the proceeding in a way that caused wife to incur an additional \$19,140.84 in attorney fees.

The district court found that "[h]usband's behavior and actions have directly impacted the duration, expense and complexity of this matter" and concluded that it was "appropriate that Husband pay conduct-based attorney fees." Wife's attorney submitted an affidavit in support of the attorney-fee award. The affidavit stated that husband's failure to respond to questions related to his business interests and to provide documentation promptly "not only caused delay, but caused great and repeated expense to Wife." Wife's attorney pointed to examples of discovery delay caused by husband, noting that the process "took well over a year due to [his] delays and incomplete disclosures."

The district court found that wife's counsel "spent considerable time addressing discovery." The district court noted that "[t]here is no requirement for parties to participate in informal discovery," but it also noted that because "[t]he business entities involved in this proceeding were complex and significant, discovery was necessary." The district court found that "there was an attempt to provide incomplete or misleading information that contributed to the delay and expense of this proceeding." The district court denied some of wife's requests for reimbursement. But it agreed that four "depositions were necessary

due to the incomplete or possibly misleading discovery responses” and therefore “included the fees for preparing for and conducting [those] depositions and for obtaining the transcripts” in the attorney-fee award.

The district court was familiar with the underlying litigation and the discovery process. It was therefore in the best position to evaluate the extent to which husband’s conduct unreasonably contributed to the length and expense of the proceeding. See *Vangsness*, 607 N.W.2d at 472 (noting that “the [district] court has the feel of the trial” (quotation omitted)). The district court concluded that an award of conduct-based attorney fees was appropriate because the need for discovery was due in part to husband’s provision of incomplete or misleading information. That conclusion was likely influenced by the district court’s finding that husband “fraudulently attempted to transfer 75% of Oculus out of the marital estate.” On this record, we cannot say that the district court abused its discretion in awarding conduct-based attorney fees.

Affirmed.