

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0836**

In re the Marriage of:

Kimberley Jane Thomas, petitioner,
Respondent,

vs.

Augustus Conrade Thomas,
Appellant.

**Filed April 19, 2021
Affirmed
Smith, Tracy M., Judge**

Carver County District Court
File No. 10-FA-18-319

Kathryn M. Lammers, Heimerl & Lammers, Minnetonka, Minnesota (for respondent)

Robert J. Hajek, Hajek & Beauclaire LLC, Minnetonka, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this marital-dissolution appeal, appellant Augustus Conrade Thomas (husband) challenges the district court's division of marital property between him and respondent Kimberley Jane Thomas (wife) following a trial. He argues that the district court abused its discretion by (1) failing to determine and account for the value of the parties' marital

interest in husband's litigation against his family's business, (2) valuing the parties' interests in certain receivables without adequate support in the record or explanation, and (3) dividing the marital estate based on marital fault. We affirm.

FACTS

Husband and wife were married in 1994, and remained married for 24 years. They have two children. The parties separated in 2018, and wife petitioned for dissolution of marriage. The parties resolved many of the issues in their dissolution, including some of the issues regarding the division of their property. But, because some division-of-property disputes remained, the district court held a bench trial on those issues in July 2019.

In its judgment following trial, the district court divided the parties' marital property by awarding to each party the assets and debts in each party's name. Two categories of marital property are relevant to this appeal: (1) interests in litigation pursued by husband against his family's business and (2) certain receivables due to each of the parties.

The first category of property—interests in the litigation—involves husband's claims against his family's Canadian nursing care business, Thomas Health Care Corporation (THCC). Husband was previously employed by THCC and owns shares in the company. In 2010, husband and his brother sued THCC, their parents, their two sisters, and a holding company created by THCC. The lawsuit was based on several claims, including dilution of the brothers' common shares, and sought more than \$5 million in damages to be divided equally between the brothers. At the time of trial in the present matter, the THCC litigation had not resulted in any recovery for husband or his brother.

At trial, husband and wife disputed the value of the interests in the litigation. Husband argued that the litigation interests should be valued at \$0 because the litigation is complete and THCC does not have funds to pay husband for his claims or his shares. Husband testified that THCC was sold in 2017 for \$19 million and that the proceeds from the sale were to be used to pay shareholders. But, husband testified, there are no remaining proceeds to pay husband or his brother because THCC and the family used inappropriate financial tactics during the sale. Wife, on the other hand, disputed that the litigation is over. She contended that the value of the litigation interests is at least the value of husband's preferred and common shares, which together total \$371,403.49.

Although husband asserted that the litigation is complete and that he will not receive any proceeds, husband also testified that he has not yet exhausted his legal remedies in the case. The litigation was submitted to arbitration and an award was ordered, but, according to husband's testimony, he is considering whether to appeal that award.

The second category of contested property involves certain receivables owing the parties. One receivable consists of money owed the parties by husband's brother. Because husband's brother did not have sufficient funds to contribute to attorney fees at the start of the litigation against his family's business, husband and wife agreed to pay the brother's fees and costs but expected reimbursement from him at the close of the litigation. The brother's debt for legal fees amounts to \$76,832.69, to be collected at the close of the litigation. Husband's brother also owes the parties an additional \$17,907.24 for a loan unrelated to the litigation. Together, these obligations total \$94,739.93, which is the value the district court assigned to this receivable. Another receivable is money owed to wife,

including for accounting services that she performed but for which she had not been paid. The district court valued that receivable at \$80,000.

At trial, wife testified that the marital estate had incurred around \$267,000 in legal fees on the THCC litigation, which the parties funded by liquidating retirement accounts and putting their incomes toward the litigation. Wife stated that she grew uncomfortable with this arrangement as the litigation grew increasingly expensive. In 2015, wife began to save for retirement in case the lawsuit did not bear fruit. She asked that husband do the same, but he did not.

Wife testified that since 2007, the parties have kept their finances separate. Thus, for the distribution of marital property, wife proposed that the district court award each party the assets and debts in their respective names. Under this proposal, wife did not seek any part of any future recovery that husband might attain in the THCC litigation.

The district court adopted wife's proposal. It found not credible husband's assertions that the litigation is over and that its value is \$0. It also said that it had "no meaningful way to measure the value of this asset." The district court observed that, if it found that the value of the litigation interests to be \$0 as husband claimed, it would result in wife owing husband an equalization payment of \$31,015.14. To pay that equalization payment, the district court observed, wife would have to pull money from her retirement savings. The district court also observed that, if it instead followed wife's proposal, husband would end up with less retirement savings. The district court found that result to be equitable, given the disparity in the parties' income and the respective debt that each party would be allocated.

In the end, the district court did not value the litigation interests. It allocated to each party the marital assets and debts in their respective names. It awarded wife her receivable of \$80,000, among other assets and debts in her name. It awarded husband his receivable of \$94,739.93, any future proceeds from the THCC litigation, as well as other assets and debts in his name. The district court determined that this was an equitable distribution of the marital estate, in part, because any initial financial hardship that husband might face is offset by his income, which is double that of wife's, and because wife testified that she will use her retirement savings to pay down marital debt.

Husband appeals.

DECISION

I. The district court did not err by not determining the value of the THCC litigation interests.

Husband argues that the district court abused its discretion by failing to determine and to consider, in its allocation of marital assets, the value of the litigation against THCC. Specifically, he contends that, if the district court had valued that asset as \$0, as he contends it is worth, it would have led to wife owing him an equalization payment of \$31,015.14. For four reasons, we reject the argument.

Husband's argument faces a threshold barrier: "[o]n appeal, a party cannot complain about a district court's failure to rule in [his] 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." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). While husband's brief

insists that the district court abused its discretion by failing to value the litigation interests, at oral argument to this court, husband candidly admitted that he did not give the district court the information that it would need to value those litigation interests. While we appreciate husband's candor on this point, we will not reverse the district court's failure to make a finding when husband caused that failure. *Id.*

Second, the district court found that husband's assertion that the value of the litigation interests to be \$0 was not credible, and we defer to a district court's credibility determination. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Third, the district court explained that husband "can[not] prove [the value of the interests in] the lawsuit is absolutely zero" when the litigation is ongoing and there is some possibility that husband will obtain a judgment against THCC, and this finding is supported by the record. Husband's testimony established that the litigation is ongoing and that he might receive proceeds from the litigation. While husband testified that the most recent interim arbitration award "could be the end of the road," his actions suggested that it is not yet the end. Husband testified that he had submitted an opinion letter requesting that the arbitrator's award be set aside. Husband had also filed a complaint with a legal board in Canada regarding the arbitrator and arbitration award, including the right to appeal the award to the Supreme Court of Canada. Husband testified that, once he received the results from the board's investigation, he would decide whether to continue the litigation. At the time of trial, husband had not yet received the board's investigation results, and so the district court concluded that, based on husband's testimony that he was still taking some action regarding the litigation, the litigation was ongoing. The district court also found that

husband's assertion that he would not receive any proceeds from the litigation was not credible because husband's Canadian counsel had determined that some claims had not been fully explored or decided by the arbitration award, including a review of the family members' salaries. Husband's Canadian counsel had engaged an accounting firm to conduct this review. The district court's finding that the litigation was ongoing and that the interests therein had a value greater than \$0 is therefore not clearly erroneous.

Fourth, contrary to husband's assertion, valuing the litigation interests at \$0 would not have militated that wife pay husband an equalization payment. While the district court must divide the parties' marital property in a manner that is just and equitable, an equitable division of marital property need not be equal. *Sirek v. Sirek*, 693 N.W.2d 896, 900 (Minn. App. 2005). Here, the district court allocated the parties' marital property, including awarding any and all future proceeds from the litigation to husband, without valuing the interests therein. The district court recognized that, if it had valued the litigation interests at \$0, it would have awarded wife \$62,030.28 more marital property than it awarded husband. But the district court also stated that any such difference would have been equitable, and that such a difference would not have warranted an equalization payment from wife to husband. Thus, even if the litigation interests were valued at \$0, as husband requested, the result would have remained the same. Under this analysis, if the district court did err in failing to value the litigation interest, any error can be ignored as harmless. *See* Minn. R. Civ. P. 61 (requiring courts to ignore harmless error). We therefore turn to issues of whether the district court abused its discretion in dividing the marital property that it did value and in deciding against ordering an equalization payment.

II. The district court did not clearly err in its valuation of the receivables.

Husband argues that the district court abused its discretion in its valuation of his receivable. Husband contends that the value of his receivable should be reduced because payment of part of his receivable is subject to husband and his brother obtaining a recovery from the litigation, which, husband argues, is not possible.

The district court's valuation of an item of property is a finding of fact that an appellate court will not set aside unless it is clearly erroneous on the record as a whole. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). We do not require the district 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." *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979).

Here, the district court found that the value of each party's receivable is the full amount owing to the party. It valued husband's receivable from his brother at \$94,739.93. This valuation is supported by the record. Husband testified that his brother owes him \$76,832.69 for legal fees related to the THCC litigation. Husband argues that the legal fees cannot be collected from his brother because they will not receive any proceeds from the litigation. He asserts that the actual value of his receivable is \$17,907.24—the amount his brother owes for a loan unrelated to the THCC litigation. But, as the district court found, with the support of the record, the THCC litigation is ongoing and thus there is some possibility that husband may collect on his receivable. The district court's valuation of

husband's receivable at \$94,739.93 is within a reasonable range of figures as supported by this record.¹

III. The district court did not abuse its discretion by not awarding husband an equalization payment from wife.

Husband asserts that the district court's determination not to require wife to make an equalization payment to husband was an abuse of discretion because, he contends, it was based in part on marital fault. A district court may not divide property based on marital misconduct, but it may consider factors such as the spouse's contribution to the preservation of the property. *Sirek*, 693 N.W.2d at 900 (citing Minn. Stat. § 518.58, subd. 1 (2004)).

The district court found that, if it valued the litigation interests at \$0, wife would owe husband an equalization payment of \$31,015.14. But to make the \$31,015.14 equalization payment, wife would need to dip into her retirement savings. The district court determined that that outcome was inequitable because wife began making significant contributions to her retirement savings—and husband did not—when wife realized that “she could no longer wait for the lawsuit to settle.” The district court instead divided the marital estate according to the assets and debts each party had in their name. It concluded that, although husband will initially end up with less retirement savings, the division was

¹ Husband also complains that the district court treated wife's receivable differently. He argues that all of wife's receivable might be collected while \$76,832.69 of his receivable can never be collected. As we explained above, though, the district court's determination that the receivable from husband's brother is not uncollectable is supported by the record. The district court treated the receivables in the same manner by assigning each party the receivable in their name, even though it is not certain that either will be collected.

equitable because husband's income is double that of wife's and thus he has the opportunity to allocate more funds toward his retirement. Minn. Stat. § 518.58, subd. 1 (2020) (stating that a party's income is a relevant statutory factor in dividing the marital estate equitably).

Contrary to husband's assertion, the district court's consideration of husband's retirement contributions and withdrawals is not a finding of marital fault. *Cf. Stassen v. Stassen*, 351 N.W.2d 20, 24 (Minn. App. 1984) (“[A] finding of fault . . . includes a finding that one spouse was a habitual consumer of alcoholic beverages.”). Rather, it is a statutory consideration of a party's contribution to the preservation of the marital estate. *Sirek*, 693 N.W.2d at 900. The district court considered whether husband contributed to the preservation of the marital estate and found that he had not because he did not contribute to his retirement in 2015, he contributed less than the employer-match percent in 2016, and he liquidated \$125,000 of his retirement savings to fund the litigation. Thus, the district court did not abuse its discretion by concluding that it is equitable to divide the marital estate according to the assets and debts that each party holds in their name rather than requiring wife to use her retirement savings to pay an equalization payment to husband.

Affirmed.