STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0499

In re the Marriage of:
Erica Hopper McMullen, petitioner,
Respondent,

vs.

James Jason McMullen,
Appellant.

Filed February 6, 2023
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-FA-20-504

Kathryn M. Lammers, Georgie K. Riebel, Heimerl & Lammers, LLC, Minnetonka, Minnesota (for respondent)

Suzanne M. Remington, Jonathan R. Engel, Hellmuth & Johnson, P.L.L.C., Edina, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

In this dissolution appeal, appellant-husband argues that the district court: (1) clearly erred when calculating the parties' gross incomes; (2) miscalculated child support; (3) should have awarded husband spousal maintenance; (4) should not have

ordered the parties to enter a noncompete agreement; (5) should not have awarded respondent-wife conduct-based attorney fees; and (6) should not have adopted wife's proposed judgment verbatim. We affirm.

FACTS

Appellant-husband James Jason McMullen and respondent-wife Erica Hopper McMullen were married in 1996. The parties have three children between the ages of 11 and 15 at the time of dissolution. In January 2020, wife petitioned for dissolution of the marriage.

While married, the parties jointly owned four businesses (the businesses), collectively valued at $3,717,000 for the purposes of this proceeding. Both parties were employed by and received salaries from the businesses during the marriage. And both parties initially requested ownership interests in the businesses during the dissolution proceeding.

The district court held a three-day bench trial, at which the parties presented their own testimony and other evidence, including testimony on the value of the businesses by wife's expert witness. After this expert testimony, husband abruptly withdrew and waived his request to be awarded the businesses in the equitable division of the marital property. Husband acknowledged that his withdrawal of any award of the businesses would allow the district court to make appropriate findings related to their value. Husband agreed that the district court could adopt wife's expert's valuation of the businesses.

During wife's testimony, she expressed concern that husband would undermine the businesses if wife received them because of husband's sudden reversal and his prior actions

and communications related to subverting wife's ownership of the businesses. But husband testified that he would sign a noncompete agreement regarding the businesses wife received "as long as it's a fair deal." Husband agreed "not to interfere" with wife's running of the businesses, not to take any clients from the businesses, and not to disparage wife in connection with the businesses. Further, husband testified that he would not try taking employees from the businesses.

In its April 2022 judgment and decree, the district court awarded wife the businesses pending her buyout of husband's share of the businesses for $1,858,000 "no later than" September 1, 2022. The district court ordered the parties to draft a "standard two-year noncompete agreement" and incorporate it into the buyout agreement, reasoning that the valuation of the businesses might otherwise "not be valid" because of husband's potential interference. The district court ordered husband to pay wife $1,677 in monthly child support and declined to order any spousal maintenance.

The district court recognized that due to husband's waiver of his interest in the businesses, its findings related to the parties' gross-income, spousal-maintenance, and child-support decisions would be "based on assumptions that are no longer accurate." As a remedy, the district court allowed the parties to submit updated evidence regarding the parties' gross income within 60 days of entering the judgment and decree for redetermination of spousal maintenance and child support, if necessary. In so doing, the district court reserved a de novo review of the parties' updated evidence to determine support obligations based on adjusted incomes after the transfer of the businesses and completion of the buyout. The district court then awarded wife over $42,000 in conduct-

based attorney fees, for husband's unreasonable contributions to the length and expense of the proceeding and initiating an ancillary harassment-restraining-order (HRO) proceeding. This appeal followed.

DECISION

Gross-income calculations

Husband argues that the district court erred when calculating the parties' gross monthly incomes for purposes of determining child support.

We review a district court's determination regarding a party's income for clear error. *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015), *rev. denied* (Minn. Dec. 15, 2015). Under clear-error review, we view the evidence in the light most favorable to the district court's findings and do not weigh evidence, reconcile conflicting evidence, judge witness credibility, or find facts. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 222 (Minn. 2021); *see also Vangsness v. Vangsness*, 607 N.W.2d 468, 472-75 (Minn. App. 2000) (applying clear-error principles in dissolution context). "When the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Kenney*, 963 N.W.2d at 223 (quotation omitted).

When calculating a party's gross income, the district court "shall" include, among other forms of periodic payments, the party's salaries, wages, self-employment income, and potential income. Minn. Stat. § 518A.29(a) (2022). A district court's potential-income determination may be based on "the [husband]'s probable earnings level based on employment potential, recent work history, and occupational qualifications in light of

prevailing job opportunities and earning level in the community." Minn. Stat. § 518A.32, subd. 2(1) (2022).

Here, both parties commissioned expert projections of their incomes under several scenarios. Each scenario assumed that husband would receive some or all of the businesses. The experts' projections were undermined when husband suddenly withdrew and waived his request for any business interest. Instead of relying on these projections, the district court relied on "the parties' paystubs and 2020 business distributions" to calculate the parties' gross incomes. The district court calculated wife's gross annual income to be approximately $651,800 and husband's gross annual income to be $599,200.

Husband contends that these income calculations are clearly erroneous because wife received the businesses as part of the judgment and decree, and the calculation of his income was based, in part, on the assumption that he would receive income from the businesses. But the district court could reasonably rely on the parties' past incomes from the businesses to calculate the parties' potential incomes, especially after determining that husband can obtain "gainful employment, as he is healthy, able-bodied, and has strong experience in many different areas." *See* Minn. Stat. §§ 518A.29(a), .32 subd. 2(1). To not base the finding of husband's income on his income from the businesses would run afoul of the requirement that a finding of potential income be based on, among other things, a person's recent work history. Moreover, the district court gave the parties a timely opportunity to submit updated income evidence and reserved a postbuyout review of income and child support de novo. Given the change in father's position regarding whether he should be awarded an interest in the businesses on which the projection of his income

was based, the income information that was presented to the district court, and the district court's solicitation of additional information, as well as its willingness to review the support question de novo, we reject father's argument on this point.

Finally, we note that, while the record support for the income figure attributed to the parties is not conclusive, a major reason for the limited support here is husband's failure to provide any credible evidence regarding either party's financial status. A party cannot complain about a district court's failure to make findings of fact when one of the reasons it failed to do so was that it was not presented with the evidence necessary for it to address the question. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *rev. denied* (Minn. Nov. 25, 2003); *see also Doering v. Doering*, 629 N.W.2d 124, 132 (Minn. App. 2001) (discussing affirmative duty to disclose information that is present for parties to dissolution), *rev. denied* (Minn. Sept. 11, 2001). We cannot say that the district court clearly erred when calculating the parties' gross incomes for the period following the judgment and decree through the buyout—even if that period has gone on longer than intended.

Child-support obligations

Husband argues that the district court miscalculated child support. The district court ordered husband to pay $1,677 in monthly child support consisting of $1,102 in basic support and $575 in medical support.

The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion if its findings of fact are unsupported by the record, if it improperly applies the

law, or if it resolves the question in a manner that is contrary to logic and the facts on record. *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted).

Basic support

To determine a parent's basic-support obligation, the district court must: (1) determine each parent's gross income under section 518A.29; (2) calculate the parental income for determining child support (PICS) for each parent by subtracting any nonjoint-child credit from each parent's gross income; (3) "determine the percentage contribution of each parent to the combined PICS by dividing the combined PICS into each parent's PICS"; (4) apply the guidelines in section 518A.35 to determine the presumptively appropriate combined basic-support obligation; (5) multiply the figure from step three by the figure from step four; and (6) apply the parenting-expense-adjustment formula in section 518A.36. Minn. Stat. § 518A.34(b) (2020).[1]

Based on the determinations that husband's gross annual income is approximately $599,200 and that wife's gross annual income is approximately $651,800, each party's gross income is the same as his or her PICS and the combined PICS is $1,251,000 ($104,250 monthly). Therefore, husband's PICS share is 48%.

Parents with three children and a present combined monthly PICS above $15,000 have a combined basic-support obligation of $3,186 per month. *See* Minn. Stat. § 518A.35, subds. 1(e), 2 (2020). Multiplying husband's PICS share by $3,186 results in his basic-

[1] We apply the 2020 child-support guidelines because the legislature substantially amended the guidelines in 2021, and these amendments were not effective until January 1, 2023. 2021 Minn. Laws Reg. Sess. ch. 30, art. 10, §§ 64-65, at 561-72.

support obligation being approximately $1,530 before applying the parenting-expense adjustment. By applying the parenting-expense adjustment based on the district court granting 35% of the parenting time to husband and 65% to wife, the district court properly set husband's monthly basic-support obligation at $1,102. Minn. Stat. § 518A.36, subd. 2(b)-(c) (2020). Any error in this calculation is de minimis and does not merit reversal. *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985).

Medical support

To calculate medical support, the district court must divide the cost of health care coverage and "all unreimbursed and uninsured medical expenses . . . based on" the parties' "proportionate share" of the "combined monthly PICS." Minn. Stat. § 518A.41, subd. 5(a) (2020). If the obligor with respect to the other child support "is ordered to contribute to the other party's cost for carrying health care coverage," the obligor's "child support payment must be increased by the amount of the [ordered] contribution." *Id.*, subd. 5(c) (2020). Here, the district court ordered wife to continue carrying the children's medical and dental insurance, the combined monthly cost of which is approximately $1,195. Based on husband's 48% PICS share, the district court properly set his monthly medical-support obligation at $575. Adding $575 to husband's $1,102 monthly basic-support obligation, the district court properly set husband's monthly child-support obligation at $1,677. Again, any error in this calculation is de minimis and does not merit reversal. *Wibbens*, 379 N.W.2d at 227. We therefore affirm the district court's child-support order.

Spousal maintenance

Husband argues that the district court abused its discretion by denying him spousal maintenance.

We review spousal-maintenance rulings for an abuse of discretion. *Honke v. Honke*, 960 N.W.2d 261, 265 (Minn. 2021). To obtain spousal maintenance, a party must show that they need it. *Id.* at 266. A party shows need by showing that—based on the living standard "during the marriage and all relevant circumstances"—they cannot reasonably support themselves through "sufficient property, including marital property apportioned to" them, or through "appropriate employment." Minn. Stat. § 518.522, subd. 1 (2022).

Here, the district court determined that husband does not need spousal maintenance. The district court noted that husband failed to present evidence to show: (1) his estimated budget, (2) an ability, or lack thereof, to seek employment, or (3) an accurate cash-flow estimate. Despite this lack of evidence, the district court concluded that "[h]usband is clearly able to seek gainful employment, as he is healthy, able-bodied, and has strong experience in many different areas." We agree with the district court's determination. Therefore, the district court did not abuse its discretion by denying spousal maintenance to husband.

Noncompete agreement

Husband challenges the district court's order for the parties to draft and enter a noncompete agreement.

Husband's challenge relates to the district court's property division, over which "the district court has broad discretion." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). We will not reverse unless the district court abused its discretion. *Id.*

Instructive here is *Sweere v. Gilbert-Sweere*, where the dissolution decree provided that if the husband sold his interest in the company, the wife would receive a certain percentage of the proceeds. 534 N.W.2d 294, 296 (Minn. App. 1995). In *Sweere*, the husband resigned and sold his interest back to the company. *Id.* In the buyback agreement, the husband agreed to a noncompete provision in exchange for additional payment from the company. *Id.*

On appeal, the issue was whether any portion of the noncompete payment was divisible as marital property. *Id.* at 297. We held that any portion of the noncompete payment intended to secure the transfer of goodwill, clientele, and other corporate assets back to the company would be divisible as marital property. *Id.* at 297-99. But we noted that "[i]t . . . is improper to value a marital asset using any method that gives one spouse a forced share of the other spouse's income from postmarital employment." *Id.* 297. Thus, "one spouse should not benefit from a valuation method that denies or restricts the other spouse's future employment options" and "in effect . . . capitalize[s]" that spouse. *Id.* at 298 (quotation omitted). We therefore held that any portion of the noncompete payment intended to compensate the husband for restricting him "from providing personal services after the marriage" was not divisible as marital property. *Id.* at 299.

Under *Sweere*, the district court here permissibly concluded that a noncompete is necessary to secure the full-value transfer of the businesses' assets to wife, not to

compensate husband for any restriction on future employment. The district court's conclusion is supported by the record. For example, wife's expert interviewed husband and testified that husband said he would "take the [businesses] to his grave." Documentary evidence, wife's testimony, and the testimony of her business counsel showed husband's "past and continuing misappropriation, theft, and personal use of the businesses' funds." Other evidence, including numerous text messages from husband to wife, established husband's repeated threats and insinuations to wife about disrupting the businesses and wife's relationships with employees and customers. Further, the district court concluded that husband "was not forthcoming" about his bad-faith conduct and "has left [w]ife in an unfavorable position financially."

Husband offered no evidence that the unknown scope of the prospective noncompete agreement would restrict his employment options. We do not assume that it would. *Id.* at 298 (ruling that record did not support the husband's assertion that he "lost postmarital income and employment opportunities due to" the noncompete when he "said he turned down employment offers from [his former employer's] competitors, but he introduced no evidence corroborating these offers or showing that the" noncompete "prompted his decision to reject the offers").

Here, the district court determined that in husband's testimony, he "assented to what is essentially a non-compete agreement."[2] A noncompete agreement is a "restrictive

[2] The parties misdirect their arguments at whether the parameters of the district court's noncompete order established the elements of a contract. We note that husband is entitled to $1,858,000 as consideration for the businesses and the noncompete agreement. But any

covenant[]" that "partially restrain[s] trade" to, among other potential purposes, protect a business "against the deflection of trade or customers." *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 898-99 (Minn. 1965) (noting "distinction between" noncompete agreements "involving business or property transfers and those" involving "employment contracts"). From this understanding, we conclude that the district court's interpretation of husband's testimony was reasonable and defer to this interpretation. *Kenney*, 963 N.W.2d at 221-23. Ordering the parties to draft and enter a noncompete agreement to secure the businesses' value therefore did not contradict logic and the facts on record.

Husband cites no authority suggesting that the district court lacked the discretion to so order under these circumstances. And we do not presume error on appeal. *Kroona v. Dunbar*, 868 N.W.2d 728, 735 (Minn. App. 2015). "[T]he burden of showing error rests upon the one who relies upon it." *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997). Thus, we conclude that the district court did not abuse its discretion by ordering the parties to draft and enter a noncompete agreement to secure the businesses' value.

Conduct-based attorney fees

Husband argues that the district court abused its discretion by awarding wife conduct-based attorney fees.

In a dissolution proceeding, the district court may, "in its discretion," award attorney fees "against a party who unreasonably contributes to the length or expense of the

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contract-related issues regarding any noncompete agreement resulting from the district court's order is not before us.

proceeding." Minn. Stat. § 518.14, subd. 1 (2022). The district court may also award attorney fees "incurred in an ancillary proceeding" if: (1) the ancillary proceeding is "sufficiently related to the marital dissolution to be more than merely coincidental"; (2) "the fees in the ancillary proceeding" were "necessary to protect some interest awarded to the fee-seeking party in the dissolution"; and (3) the other party's conduct in the ancillary proceeding, "if it occurred in the dissolution, would satisfy the requirements for a conduct-based fee award under Minn. Stat. § 518.14, subd. 1." *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). "The district court must make findings to explain an award of conduct-based attorney fees," whether incurred in the dissolution proceeding or the ancillary proceeding. *Id.* We review awards of conduct-based attorney fees for an abuse of discretion. *Schallinger v. Schallinger*, 699 N.W.2d 15, 24 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005).

Here, the district court concluded that wife incurred $14,077 in attorney fees for her dissolution counsel. And that some of these fees were generated by unnecessary discovery "due to [h]usband's lack of financial disclosure, requiring additional investigation into pocketed cash, side[] deals, barters, and fraud" by husband. Supporting this conclusion are an affidavit and billing statements from wife's counsel and, as discussed above, record evidence showing husband's financial misconduct. The record likewise supports that wife incurred an additional $999 in attorney fees due to husband's midtrial position switch regarding the businesses.

The district court also concluded that wife incurred $9,470 in attorney fees because her business counsel investigated husband's self-dealing, corresponded with husband's

counsel, and gave testimony. Supporting this conclusion are the affidavit and billing statements of wife's business counsel and the counsel's testimony attributing wife's need for his services to husband's misconduct.

Finally, the district court awarded wife $18,078 in conduct-based attorney fees incurred in connection with the HRO proceeding. The district court properly determined the HRO proceeding sufficiently related to the dissolution proceeding because much of husband's harassing conduct—including repeated overt and veiled threats—stemmed from and was at issue in the dissolution proceeding. *Brodsky*, 733 N.W.2d at 477. The district court determined that this harassing conduct "necessarily contributed to the length and expenses of" the dissolution proceeding and that the HRO proceeding resulted "solely" from "[h]usband's bad-faith conduct" in the dissolution proceeding. *Id.* The record supports these findings given our discussion of husband's relevant misconduct in relation to the noncompete agreement. The district court also determined that husband's misconduct made the HRO proceeding necessary, albeit without identifying an interest awarded to wife in the dissolution proceeding that wife needed to protect through the HRO proceeding. *Id.* But based on "the files, the record, and the court's findings," if we were to remand the point, "on remand the [district] court would undoubtedly" find that the HRO proceeding was necessary to protect wife's interests in and running of the businesses. *Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985). We therefore affirm the district court's award of conduct-based attorney fees and costs to wife.

Proposed judgment and decree

Husband argues that the district court erred by adopting wife's proposed judgment and decree.

The "wholesale adoption" of proposed findings could "raise[] the question of whether the trial court independently evaluated each party's testimony and evidence." *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *rev. denied* (Minn. Feb. 12, 1993). But "the verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se." *Id.* Courts are cautioned against this practice because it "raises the question of whether the [district] court independently evaluated each party's testimony and evidence." *Id.* To determine whether the district court independently examined the evidence, appellate courts review those findings to determine whether they are clearly erroneous. Minn. R. Civ. P. 52.01 (requiring the district court, as the finder of fact, to "find the facts specially and state separately its conclusions of law thereon"); *Kohn v. Minneapolis Fire Dep't*, 583 N.W.2d 7,14 (Minn. App. 1998), *rev. denied* (Minn. Oct. 1998).

Husband contends that because the proposed judgment and decree contained remedies that no longer applied posttrial and contained typographical and mathematical errors, the district court failed to adequately consider all the issues. As husband suggests, the district court directly adopted much of wife's proposed judgment and decree, but our review of the record shows no reversible error in those findings. Given the circumstances

created by husband's shift in position midway through the proceedings, we conclude that the district court did not err in adopting wife's proposed order.

Affirmed.