COLORADO COURT OF APPEALS

DATE FILED: December 12, 2019
CASE NUMBER: 2019CA5

Court of Appeals No. 19CA0005
Arapahoe County District Court No. 17DR30591
Honorable Charles M. Pratt, Judge

In re the Marriage of

Jenna Marie Koch,

Appellant,

and

Corey Lewis Wood,

Appellee.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE GRAHAM*
Webb and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 12, 2019

Griffiths Law PC, Jennifer I. Holt, Lone Tree, Colorado, for Appellant

Frost & Beck PC, Christelle C. Beck, Leslie A. Frost, Centennial, Colorado, for Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 In this dissolution of marriage proceeding, Jenna Marie Koch (mother) appeals from the district court's permanent orders, its amended permanent orders, and permanent orders entered after C.R.C.P. 59 and 60 reconsideration. We affirm the court's property division, but reverse the allocation of parental responsibilities, the child support order, and the maintenance award. We remand the case for the court to reconsider those issues.

I. Background

¶ 2 Mother and Corey Lewis Wood (father) were married in 2004. Father, a Marine, was deployed shortly after the marriage. He returned to California (where mother was living) after his deployment, and the parties moved into a condominium that mother bought with her inheritance and her parents' assistance.

¶ 3 In 2006, father and mother moved to South Carolina. The parties kept the California condominium as a rental and moved into a home that mother's parents purchased for them.

¶ 4 Father left the Marines in 2010, but the parties remained in South Carolina where their first child was born in 2013. The parties then moved to Colorado, where they had their second child. Father moved out of the marital home in 2017.

¶ 5 At the time of the permanent orders hearing, both parties were employed — father worked as an air traffic controller and mother worked at a trucking company and gym. They sold the California and South Carolina properties and placed the net proceeds into escrow.

¶ 6 A court-appointed parental responsibilities evaluation was completed, though the parties continued to share equal parenting time and decision-making responsibilities. The parties' joint trial management certificates and transcripts of the permanent orders hearing show that they disputed nearly every issue presented for the court's resolution.

¶ 7 In its extensive written permanent orders, the district court ordered the parties to continue with equal parenting time and decision-making, the latter over mother's objection. The court divided the parties' marital property equitably, but not equally; ordered father to pay monthly child support; ordered father to pay monthly maintenance for seventy-two months; and required both parties to pay their own attorney fees. The court amended its permanent orders on request of the parties, and again in response to the parties' motions for post-trial relief under C.R.C.P. 59 and 60.

II. Allocation of Parental Responsibilities

¶ 8 We agree with mother's contention that the district court failed to make factual findings in applying section 14-10-124(1.5), C.R.S. 2019, to the facts and remand the court's allocation of parental responsibilities for further findings.

¶ 9 Section 14-10-124(1.5) requires a court to allocate parenting time and decision-making responsibilities in accordance with the children's best interests. *See also* § 14-10-123.4(1)(a), C.R.S. 2019 (children have the right to have parental responsibilities determined based upon their best interests). In doing so, the court must consider all relevant factors including, for parenting time, the nine factors prescribed in section 14-10-124(1.5)(a), and, for decision-making, the three factors prescribed in section 14-10-124(1.5)(b).

¶ 10 An allocation of parental responsibilities is generally a matter within the sound discretion of the district court, and when there is record support for its findings, the court's resolution of conflicting evidence is binding on review. *In re Parental Responsibilities Concerning B.R.D.*, 2012 COA 63, ¶ 15. We exercise every

presumption in favor of upholding its decision. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007).

¶ 11 Here, the court listed all twelve of the statutory factors relevant to an allocation of parental responsibilities and commented that it "wishes to explain its findings and analysis with regard to each statutory factor." However, the court made no factual findings to support these factors or the resulting parenting time and decision-making orders. While it is not necessary that a district court make specific findings on each and every factor included in the statute, there must be sufficient factual findings to enable us to understand the basis of its order and determine which factors the court deemed pertinent. *In re Marriage of Garst*, 955 P.2d 1056, 1058 (Colo. App. 1998). There must also be factual findings which establish that the decision is supported by competent evidence. *In re Marriage of Rodrick*, 176 P.3d 806, 813 (Colo. App. 2007).

¶ 12 Here the absence of any factual findings to support its orders thwarts our ability to review the basis for the court's parenting time and decision-making decisions and, consequently, we are unable to meaningfully resolve mother's specific contentions. We therefore reverse the allocation of parental responsibilities and remand for

the district court to make factual findings and conclusions of law sufficient to support its orders. *See In re Marriage of Goodbinder*, 119 P.3d 584, 587 (Colo. App. 2005) (requiring remand where district court did not include in its order any factual findings or legal conclusions that would enable appellate court to understand the basis of its order and, accordingly, whether the court abused its discretion).

¶ 13 Because the permanent orders were entered more than one year ago, on remand, the district court should receive additional evidence concerning the children's current circumstances. *See In re Parental Responsibilities Concerning M.W.*, 2012 COA 162, ¶ 27.

III. Child Support Order

¶ 14 Having reversed the allocation of parental responsibilities, we must also reverse the child support order and direct the district court to enter a new order based on the parenting time schedule, *See In re Marriage of Emerson*, 77 P.3d 923, 926 (Colo. App. 2003) (child support orders depend on the number of overnights attributed to each parent), allowing the parties to present evidence of their current financial circumstances. *See In re Marriage of Salby*, 126 P.3d 291, 301 (Colo. App. 2005) (requiring the court to

give the parties on remand a full opportunity to present all relevant evidence concerning their incomes for child support); *In re Marriage of Berry*, 660 P.2d 512, 513 (Colo. App. 1983) (court must consider the children's financial needs on remand).

¶ 15 Mother's child support contentions may also arise on remand, so we address those here. Mother is correct that the net child care costs she (or father) may incur due to employment "shall" be added to the basic child support obligation and divided between them in proportion to their adjusted gross incomes. *See* § 14-10-115(9), C.R.S. 2019; *In re Marriage of Connerton*, 260 P.3d 62, 67 (Colo. App. 2010) (child care expenses include only those costs a parent actually incurs).

¶ 16 Although the federal legislation known as the "Tax Cuts and Jobs Act" reduced the child dependency exemption to $0 starting in 2018, section 14-10-115(12) continues to exist as part of the child support statute, and it requires the court to allocate the child tax dependency between the parents in proportion to the costs of raising the children. *See S.F.E. in Interest of T.I.E.*, 981 P.2d 642, 648 (Colo. App. 1998); *see also* 19 Frank L. McGuane, Jr. & Kathleen A. Hogan, *Colorado Practice Series, Family Law & Practice*

§ 26:29, Westlaw (2d ed. database updated May 2019) ("Despite the IRS presumption and regulations it has long been established in Colorado that the district court has the authority to designate the parent who may claim the federal income tax exemption for a child."). The district court has no choice but to apply the provisions of an existing statute. *Huydts v. Dixon*, 199 Colo. 260, 264, 606 P.2d 1303, 1306 (1980).

IV. Property Division

¶ 17 Mother contends that the district court failed to make adequate findings to support its property division, which she contends is inequitable. We disagree.

A. Appellate Standard of Review

¶ 18 A district court has broad discretion to enter a just and equitable division of marital property. *See* § 14-10-113(1), C.R.S. 2019; *In re Marriage of Antuna*, 8 P.3d 589, 594 (Colo. App. 2000). The key consideration in dividing the marital property is fairness, not mathematical precision. *In re Marriage of Gallo*, 752 P.2d 47, 55 (Colo. 1988).

¶ 19 What is equitable depends on the facts and circumstances of each case, *see In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo.

2001), which means the court must consider all relevant factors, including the parties' economic circumstances. *See In re Marriage of Cardona*, 2014 CO 3, ¶ 11.

¶ 20 A property division that is supported by competent evidence will not be disturbed on review absent an abuse of discretion. *See id.*; *see also In re Marriage of Goldin*, 923 P.2d 376, 381 (Colo. App. 1996). An abuse of discretion occurs where the court's decision is manifestly arbitrary, unreasonable, or unfair. *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 53.

B. FERS Defined Benefit Retirement Account

¶ 21 Mother contends that the court erred by failing to value and divide father's FERS defined benefit retirement plan. Given the absence of evidence to establish any FERS valuation, we disagree.

¶ 22 Father testified that he had three retirement accounts: a Thrift Savings Plan FERS 401(k), a Thrift Savings Plan Ready Reserve, and a Thrift Savings Plan FERS defined benefit retirement account. The court awarded father the 401(k), awarded mother the Ready Reserve account, and concluded that the FERS retirement account "shall not be divided." In its post-trial order, the court clarified that this last decision was "intentional" and meant "to achieve a fair and

equitable resolution without the need to divide this particular account."

¶ 23 Father agreed that a FERS retirement contribution was withheld from his paycheck; however, he was unable to place a value on the defined benefit retirement account. Father testified that there was no bank account or monthly statement for the account, and that no one from the Department of Transportation, the Federal Aviation Administration, or his local human resources could provide him with relevant documentation. Mother argued that because father contributed to and would eventually receive a monthly retirement benefit from a FERS defined benefit plan, the court should divide that asset equally, regardless that there was "nothing whatsoever" to show the value of that plan.

¶ 24 A district court is required to find the approximate current value of all property owned by the parties. *In re Marriage of Zappanti*, 80 P.3d 889, 892 (Colo. App. 2003). But when no evidence of the value of a particular asset is presented, there is no error in the court's failure to include that asset in the property division. *Salby*, 126 P.3d at 296; *In re Marriage of Page*, 70 P.3d 579, 582 (Colo. App. 2003). Without any evidence to show the

value of father's FERS defined benefit retirement account, the court did not err in failing to value or divide it. *See Zappanti*, 80 P.3d at 892 (district court fulfills its obligation to value property by relying on the only evidence available to it); *see also Salby*, 126 P.3d at 296.

C. Conflicting Orders

¶ 25 Mother contends that there is a conflict between the court's written orders and property division spreadsheet concerning her share of the Ready Reserve account. Any such conflict presents no basis on which to reverse.

¶ 26 Father testified that the Ready Reserve account was worth $45,352. The district court allocated the account to mother as her property in its written permanent orders. In its spreadsheet calculations, however, the court allocated $32,676 of the account to mother and the remaining $12,676 to father.

¶ 27 We agree that the court's written order and spreadsheet calculations conflict. But it appears from the written order that the court intended for the parties to refer to the spreadsheet for the property division. The court explained that it had created a "modified property division spreadsheet" specifically to resolve the

allocation of marital assets and debts. So while we agree that the allocation of the Ready Reserve account in the written order conflicts with the proportional award reflected in the spreadsheet, we may presume that the court's spreadsheet better reflects its intended property division.

¶ 28 Alternatively, mother argues that the allocation of the Ready Reserve account in the spreadsheet leads to father receiving a "lopsided" share of the overall retirement accounts — $188,692.39 to mother's $82,378. We agree that the division looks inequitable on its face. Yet, the allocation of the retirement accounts does not render the entire property division reversible, because the retirement accounts make up only a portion of the parties' overall marital estate. The court explained that its intention was to effectuate an equitable, but not equal, property division. Its spreadsheet shows that it accomplished that objective, awarding mother forty-eight percent of the overall net marital assets and none of the marital debt.

D. Mother's Contributions to the Marital Estate

¶ 29 Mother contends that the court erred by failing to credit her for the contributions she and her family made to the marital estate.

To be clear, in her brief mother does not dispute that these contributions were a gift to the marital estate, and she does not argue that she is entitled to more marital property or an offset of marital property because of them. She argues only that there is no way to tell from the order whether the court "[gave] consideration to those very substantial gifts."

¶ 30 True, the court did not specifically address "[t]he contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker." § 14-10-113(1)(a). But it did not have to. *See In re Marriage of Powell*, 220 P.3d 952, 959 (Colo. App. 2009) (district court need not make specific findings on each factor relevant to the property division). We may presume that the court considered the evidence mother presented on this issue, *see In re Marriage of Udis*, 780 P.2d 499, 504 (Colo. 1989), but determined that it did not weigh heavily as a factor when determining an equitable property division. *See In re Marriage of Burford*, 26 P.3d 550, 556 (Colo. App. 2001) ("The weighing of the factors listed in § 14-10-113(1) is within the sound discretion of the trial court."); *Rieger v. Christensen*, 529 P.2d 1362, 1364 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) ("The efforts of the

respective parties in accumulating wealth is only one of many factors that are relevant in the division of marital partners' property.").

E. Allocation of Marital Funds Used by Mother

¶ 31 Mother contends that the court erred by allocating to her the $49,547.96 of marital funds she used to repay her parents during the proceedings. She also contends that the court erred by allocating to her the $12,375 escrow account, arguing that the amount had diminished to $2061.40 by the hearing date. We discern no abuse of discretion in either allocation.

1. $49,547.96 for Educational Loans

¶ 32 Maternal grandmother testified that she loaned mother approximately $35,000 for educational expenses and tuition she incurred between 2003 and 2010. Maternal grandmother did not require mother to sign a promissory note contemporaneous with the loan.

¶ 33 Just before serving father with a copy of the dissolution petition, mother withdrew $34,547.96 from a marital account and used it to repay maternal grandmother. Mother testified that she chose to repay this loan during the proceedings because it was

"embarrassing" that her parents had loaned her so much money during the marriage.

¶ 34 The court acknowledged mother's explanation but found that she did not offer credible testimony "with regard to the necessity of the timing and repayment of the student loan." This credibility determination, and the court's conclusion that mother did not demonstrate a need for the $49,547.96, were decisions within the court's broad discretion. *See People in Interest of A.J.L.*, 243 P.3d 244, 249-50 (Colo. 2010) ("The credibility of witnesses, the sufficiency, probative value, and weight of the evidence, and the inferences and conclusions to be drawn from it are within the [district] court's discretion."); *see also In re Marriage of Martinez*, 77 P.3d 827, 831 (Colo. App. 2003) (trial court was free to disbelieve the husband's testimony that his expenditures were legitimate). So too was the court's decision to allocate the entire $49,547.96 to mother, because the court has discretion to consider "economic fault" when dividing a marital estate. *See In re Marriage of Jorgenson*, 143 P.3d 1169, 1173 (Colo. App. 2006) (noting that district court on remand could assign husband sole responsibility

for a lease liability because husband's decision to stop making lease payments constituted economic fault).

¶ 35 We reject mother's argument that the court lacked authority to allocate this amount to her without a dissipation finding, as dissipation is just one form of economic fault. *See In re Marriage of Lockwood*, 971 P.2d 264, 267 (Colo. App. 1998) (concluding that district court could not value property at any date other than the date of decree without "a finding of dissipation *or other economic fault*") (emphasis added).

2. $12,375 for Attorney Fees

¶ 36 Maternal grandmother loaned mother $45,000 for her attorney fees, including the $15,000 retainer that mother charged on a credit card in maternal grandmother's name.

¶ 37 Just before serving the petition on father, mother used $15,000 from a marital account to pay maternal grandmother's credit card account. Mother then repaid maternal grandmother an additional $8500 on two promissory notes she executed one month into the dissolution proceedings. At the hearing, maternal grandmother and father both testified that mother's attorney's

escrow account still held $12,375. Mother did not provide any evidence to the contrary.

¶ 38 Since the escrow funds went to pay mother's attorney, the court's allocation of the escrow account to her was consistent with its decision that each party should pay his or her own attorney fees. To be sure, as the court noted, it could have allocated the escrow account and attorney fees debts separately, but it chose not to because "the end result would have been, at most, a small percentage swing in one direction or the other." *See In re Marriage of Lafaye*, 89 P.3d 455, 462 (Colo. App. 2003) (mechanism to divide property is within the court's discretion). Mother has not persuaded us that this allocation is an abuse of discretion or otherwise requires reversal.

¶ 39 Insofar as mother argues that the account was not worth $12,375 as of the hearing date, she did not offer a different valuation to the court. Thus, we see no abuse of discretion in the court's finding that it was worth $12,375. *See Zappanti*, 80 P.3d at 892.

¶ 40 In sum, we uphold the property division.

V. Maintenance Award

¶ 41 Mother contends that the court failed to make sufficient findings to explain the basis for father's income calculation and the reduction in her maintenance award after the first thirty-six months. In light of the court's amendment to father's income on reconsideration, we are unable to resolve these specific contentions and must reverse and remand the maintenance award for reconsideration.

¶ 42 When addressing a maintenance request, the district court, as relevant here, must make written or oral findings concerning the amount of each party's gross income. § 14-10-114(3)(a)(I)(A), C.R.S. 2019. The court must consider the statutory guideline amount and term of maintenance based on the duration of the marriage and the parties' combined gross incomes. § 14-10-114(3)(a)(II).

¶ 43 Initially, the court calculated father's monthly income at $15,773 and mother's at $3764. "Based on these incomes," the court determined that mother should receive $3000 of monthly maintenance for thirty-six months, followed by $1500 per month for an additional thirty-six months.

¶ 44 However, in response to the parties' post-trial motions, the court reduced father's monthly income from $15,773 to $13,660.23. The court did not thereafter recalculate the maintenance award to account for this $2112 reduction in father's income. Nor did the court make findings to explain why the existing maintenance award "[b]ased on" father's higher income remained appropriate after the income reduction. We are therefore unable to tell whether the existing maintenance award, premised on father's higher income, is "fair and equitable." § 14-10-114(3)(e) (requiring court to make specific written or oral findings in support of the amount and term of maintenance awarded). We reverse the maintenance award and remand for the court to recalculate it based on the parties' incomes.

¶ 45 The court must allow the parties to present additional evidence on remand concerning the parties' respective finances, because maintenance is based on their financial situations when such orders are entered. *See In re Marriage of Kann*, 2017 COA 94, ¶ 79.

VI. Conclusion

¶ 46 Those portions of the judgment allocating parental responsibilities and calculating child support and maintenance are

reversed, and the case is remanded for further proceedings as directed herein. In all other respects, the judgment is affirmed.

¶ 47 The existing parenting time, decision-making, child support, and maintenance orders will remain in place pending entry of new orders.

JUDGE WEBB and JUDGE LIPINSKY concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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