20CA1666 Marriage of Geiler 12-02-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA1666
Arapahoe County District Court No. 18DR2341
Honorable Echo D. Ryan, Magistrate

In re the Marriage of

Jeffrey Dewane Geiler,

Appellant,

and

Tracy Anne Geiler,

Appellee.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE PAWAR
Navarro and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 2, 2021

Anne Whalen Gill, L.L.C., Anne Whalen Gill, Castle Rock, Colorado, for Appellant

Griffiths Law PC, Joseph Maher, Lone Tree, Colorado, for Appellee

¶ 1 Jeffrey Dewane Geiler (husband) appeals the permanent orders entered on the dissolution of his marriage to Tracy Ann Geiler (wife). We affirm.

I. Background

¶ 2 After a two-day hearing, a district court magistrate entered a decree dissolving the parties' nearly twelve-year marriage and permanent orders dividing their marital property and awarding wife maintenance and child support. Husband appeals the magistrate's findings as to the value of his business and the determination of his income.

II. Business Valuation

¶ 3 Husband contends that the magistrate erred in valuing his business, Geiler & Associates, LLC (Geiler). We conclude that the alleged error, if any, is harmless and does not require reversal.

A. Legal Standards

¶ 4 When dividing marital property, the district court values the property as of the date of the decree or of the hearing on disposition, whichever is earlier. *See* § 14-10-113(5), C.R.S. 2021; *In re Marriage of Nevarez*, 170 P.3d 808, 813 (Colo. App. 2007).

¶ 5 Property valuation, including of a spouse's business interest, is a question of fact for the district court to determine. *See In re Marriage of Huff*, 834 P.2d 244, 255 (Colo. 1992)*; see also In re Marriage of Bookout*, 833 P.2d 800, 804 (Colo. App. 1991) ("The weight to be accorded to the valuation techniques of an expert is for the trial court's determination, depending upon the court's assessment of the reliability of the data . . . .").

¶ 6 Errors in property division amount to reversible error only when the parties' substantial rights are affected when viewed in relation to the overall property division. *In re Marriage of Balanson*, 25 P.3d 28, 36 (Colo. 2001); *In re Marriage of Zappanti*, 80 P.3d 889, 893 (Colo. App. 2003); *see also* C.A.R. 35(c) (appellate court may disregard any error not affecting the parties' substantial rights). Errors affecting only a small percentage of the marital estate are harmless, but errors affecting a large percentage require reversal. *Balanson*, 25 P.3d at 36; *Zappanti*, 80 P.3d at 893.

B. Analysis

¶ 7 Contrary to husband's argument, the magistrate did not rely solely on his valuation expert's methodology in determining that the marital portion of Geiler was worth $169,272. Instead, the

magistrate considered both experts' methodologies, accepting and rejecting portions of each, and also relied on Geiler's 2019 tax return, in determining value.

¶ 8 Husband argues that the magistrate erred when normalizing Geiler's officer compensation for 2015 through 2019 by adding additional compensation to operating expenses for years that he was overcompensated and subtracting from operating expenses for years that he was undercompensated. He argues, based on his expert's testimony and reports, that proper normalization requires the opposite — in overcompensated years, excess compensation is subtracted from operating expenses and added to the company's earnings, and in undercompensated years, compensation is added to operating expenses and subtracted from earnings.

¶ 9 Husband argues that the magistrate's error resulted in an overvaluation of Geiler by $25,115 under the capitalization of cash flow analysis. Thus, he argues, weighting the capitalization of cash flow method at 25% and the excess earnings method at 75%, as the magistrate did, results in a total value of $298,429.64 and a marital value of $126,713.77, which is $42,558.42 less than the $169,272 the magistrate found. According to husband, this means that the

equalization amount he was required to pay wife was $21,279.21 more than it should have been.

¶ 10 Assuming without deciding the magistrate erred, we conclude the error is harmless and does not compel reversal of the permanent orders. The amount overpaid to wife represents only 2.6% of the parties' adjusted marital estate.[1] Because the alleged error does not affect the parties' substantial rights in relation to the overall value of their marital estate, *cf. Balanson*, 25 P.3d at 38 (errors affecting over 20% of the value of the marital estate were not harmless); *In re Marriage of Morton*, 2016 COA 1, ¶ 8 (error affecting one-third of the value of the marital estate required reversal), we disregard it. *See* C.A.R. 35(c).

III. Husband's Income

¶ 11 Husband also contends that the magistrate erred in determining his income for purposes of calculating maintenance and child support by

[1] $860,262.31- $42,558.42 = $817,703.89

(1) averaging his income "based on the highest, nonrepresentative years" and without considering the effect of the COVID-19 pandemic; and

(2) not deducting, from his self-employment income, the principal portion of the mortgage payment that his business, Tortuga Isle Enterprises, LLC (Tortuga), pays.

We disagree.

A. Legal Standards

¶ 12 When determining maintenance and child support, the court must determine each party's gross income. *See* § 14-10-114(3)(a)(I)(A), (8)(a)(I), (8)(c), C.R.S. 2021; § 14-10-115(3)(a)(I), (3)(c), (5)(a), (7)(a)(I), C.R.S. 2021. A spouse's income for child support and maintenance purposes includes income from self-employment. *See* § 14-10-114(8)(c)(I)(D), (W); § 14-10-115(5)(a)(I)(D), (W). Such income is reduced, however, by the ordinary and necessary expenses incurred to produce it. § 14-10-114(8)(c)(III)(A); § 14-10-115(5)(a)(III)(A). "Ordinary and necessary expenses" do not include any "business expenses determined by the court to be inappropriate" when determining gross income. § 14-10-114(8)(c)(III)(B); § 14-10-115(5)(a)(III)(B). *Cf. In re Marriage of*

Crowley, 663 P.2d 267, 269 (Colo. App. 1983) (noting district court's discretion to determine which business expenses a parent must reasonably pay before paying child support).

¶ 13 When there is substantial fluctuation or conflicting evidence regarding a spouse's income, the district court may calculate an average of past earnings. *See In re Marriage of Salby*, 126 P.3d 291, 299-300 (Colo. App. 2005); *In re Marriage of Rice*, 987 P.2d 947, 950 (Colo. App. 1999).

B. Averaging Husband's 2017, 2018, and 2019 Incomes

¶ 14 The record reflects that husband stated in the joint trial management certificate that "as a business owner," his income was not fixed but rather varied from year to year, and he provided his income amounts for 2017, 2018, and 2019. In closing argument at the hearing, his attorney then argued the incomes for these same years as the basis "for determining his income." Husband did not argue before or during the hearing that 2018 should be excluded from consideration because it was an outlier year. Nor did he present evidence or argue that the COVID-19 pandemic adversely affected his income. Accordingly, we do not address his arguments on these issues for the first time on appeal. *See In re Marriage of*

Ensminger, 209 P.3d 1163, 1167 (Colo. App. 2008); *see also Briargate at Seventeenth Ave. Owners Ass'n v. Nelson*, 2021 COA 78M, ¶ 66 ("Arguments made . . . for the first time in a post-trial motion are too late and, consequently, are deemed waived for purposes of appeal."); *Fid. Nat'l Title Co. v. First Am. Title Ins. Co.*, 2013 COA 80, ¶ 51 (argument raised for the first time in post-trial motion was not preserved for appellate review).

¶ 15 Because we do not disturb the magistrate's income averaging or the resulting $17,311 per month in income the magistrate found for husband, we do not consider husband's analysis of his finances based on the lower income amount from his sworn financial statement, which does not include the Tortuga income or account for the personal expenses Geiler pays on his behalf.

C. Ordinary and Necessary Business Expenses

¶ 16 In determining husband's self-employment income from Geiler and Tortuga, the magistrate deducted ordinary and necessary expenses of the businesses, including the mortgage interest Tortuga pays on the building it owns where Geiler operates and for which it pays Tortuga rent. However, the magistrate found that the principal portion of the mortgage payments did not qualify as

ordinary and necessary expenses to be deducted. In so ruling, the magistrate looked to two out-of-state cases — *Schubert v. Tolivar*, 905 S.W.2d 924, 929 (Mo. Ct. App. 1995) and *Lawrence v. Tise*, 419 S.E.2d 176, 182 (N.C. Ct. App. 1992) — holding that mortgage principal payments should not be deducted from self-employment income as a business expense because a party should not be allowed to shield income by building equity in real estate that is not considered in calculating child support. We perceive no abuse of discretion by the magistrate in determining that the principal portion of the mortgage payment should not be deducted from husband's Tortuga income as an ordinary and necessary business expense.

¶ 17 Section 14-10-115(5) sets forth the guidelines for a court to determine a party's income. It expressly includes "rents" as includable gross income. §14-10-115(5)(a)(I)(J). Section 14-10-115(5)(II) list those funds *not* included in gross income. Notably, a principal mortgage payment is not expressly identified. However, gross income from rent may be reduced by "ordinary and necessary expenses" required to produce such income. §14-10-115(5(a)(III)(A). Under this statutory framework, the court has discretion to

determine whether to deduct a mortgage payment from rental income. *See* § 14-10-115(5)(III)(B) ("ordinary and necessary business expenses" does not include any other business expenses determined by the court to be inappropriate for determining gross income). This discretion is confirmed in our case law as well. *See In re Marriage of Gibbs*, 2019 COA 104, ¶¶ 9, 14-15; *see also Crowley,* 663 P.2d at 269. The court considered the statutory principles and, drawing its reasoning from other jurisdictions, reasonably exercised its discretion.

¶ 18 Husband relies on *Fleenor v. Fleenor*, 992 P.2d 1065, 1069-70 (Wyo. 1999), in support of his position. But *Fleenor* does not provide the succor husband contends. *Fleenor*, like *Crowley*, reinforces that a district court has discretion to determine this issue.

IV. Appellate Attorney Fees

¶ 19 Wife requests her attorney fees incurred on appeal under C.A.R. 38, contending that the appeal is frivolous. However, appellate attorney fees are only awardable if the party seeking them explains the legal and factual basis for such an award, and wife has failed to adequately state the basis for her request. *See* C.A.R. 39.1;

see also In re Marriage of Roddy, 2014 COA 96, ¶ 32 (merely citing the appellate rule without explaining the specific grounds for the fee request is insufficient). Therefore, we deny the request.

V. Conclusion

¶ 20 The judgment is affirmed.

JUDGE NAVARRO and JUDGE GROVE concur.