STATE OF MINNESOTA
IN COURT OF APPEALS
A10-952

In re the Marriage of:

Jean D. Berlinerblau, petitioner,
Appellant,

vs.

Maria Carmen Berlinerblau,
Respondent.

Filed May 9, 2011
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Anoka County District Court
File No. 02-FA-07-878

Sheridan Hawley, Hawley Law & Mediation, Coon Rapids, Minnesota; and

Jeffrey P. Hicken, Hicken, Scott, Howard & Anderson, P.A., Anoka, Minnesota (for appellant)

William D. Siegel, Beverly K. Dodge, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

In this marital-dissolution appeal, appellant Jean D. Berlinerblau argues that the district court (1) understated his reasonable monthly expenses in determining his ability to pay permanent spousal maintenance to respondent Maria Carmen Berlinerblau; (2) improperly characterized the parties' credit-card debts as nonmarital; (3) improperly awarded conduct- and need-based attorney fees to respondent; (4) made clearly erroneous findings of fact; and (5) abused its discretion by denying his motion for a new trial. By notice of related appeal, respondent challenges the district court's finding that appellant did not dissipate marital assets. We affirm in part, reverse in part, and remand.

D E C I S I O N

I.

Appellant argues that he lacks the ability to pay permanent spousal maintenance in the ordered amount of $5,000 per month. Specifically, appellant contends that the district court understated his reasonable monthly expenses by (1) failing to consider that appellant must pay federal taxes on his income; (2) failing to include his retirement-plan contribution as a reasonable monthly expense; and (3) improperly reducing his mortgage expense. We disagree.

In making an award of spousal maintenance, the district court weighs the particular facts and circumstances of the case to determine whether maintenance is appropriate and, if so, the proper amount and duration. *Kampf v. Kampf*, 732 N.W.2d 630, 633-34 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). We review a

district court's spousal-maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Id.* at 202 & n.3. Findings of fact, including the determination of income for maintenance purposes, must be upheld unless they are clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004); *Gressner v. Gressner*, 487 N.W.2d 921, 923 (Minn. App. 1992). We review questions of law related to spousal maintenance de novo. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009).

Appellant argues that he owes 35% of his income to the federal government as income tax and that this percentage should be excluded from his income available to pay spousal maintenance. Appellant further contends that after this percentage is subtracted from his income, the remaining amount is insufficient to meet his personal expenses, child-support obligation, and maintenance obligation.

We conclude that appellant has waived consideration of this issue because he did not raise it at trial or in his posttrial motion. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court generally does not consider issues not argued to and considered by the district court); *Frank v. Ill. Farmers Ins. Co.*, 336 N.W.2d 307, 311 (Minn. 1983) (stating that there is no ruling for an appellate court to review where the district court's failure to address an issue was not raised in a motion for a new trial). Moreover, appellant's argument erroneously equates a district court's

determination of his income for purposes of determining spousal maintenance with his federal taxable income.

Appellant also argues that the district court overstated his ability to pay spousal maintenance by failing to include his monthly retirement-plan contribution of $1,402.52 as a reasonable expense and by improperly reducing his monthly mortgage expense by $1,267. Assuming but not deciding that this constitutes error, even if these two figures are subtracted from appellant's monthly income, the record indicates that appellant can meet his child-support obligation, spousal-maintenance obligation, and reasonable expenses as found by the district court and still have a monthly surplus. Therefore, we reject appellant's argument that he lacks the ability to pay the ordered amount of maintenance and conclude that the district court did not abuse its discretion by ordering appellant to pay permanent spousal maintenance in the amount of $5,000 per month.

II.

Appellant challenges the district court's characterization of the parties' credit-card debts and its allocation of these debts. Whether a debt is marital or nonmarital is a question of law, subject to de novo review; we review the findings supporting the characterization of a debt for clear error. *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008); *Burns v. Burns*, 466 N.W.2d 421, 423 (Minn. App. 1991).

Here, the district court found that the parties had credit-card debts totaling $249,954 as of the valuation date. In the dissolution decree, the district court allocated $241,653 of this total to appellant and $8,301 to respondent. The district court later

amended the dissolution decree to add the word "nonmarital" to describe the credit-card debts.

Appellant contends that the district court failed to support its classification of the credit-card debts as nonmarital property. We agree. Under Minnesota law, property—including debt—is presumed to be marital unless a party can show by a preponderance of the evidence that the property is nonmarital. Minn. Stat. § 518.003, subd. 3b (2010); *Dahlberg v. Dahlberg*, 358 N.W.2d 76, 80 (Minn. App. 1984) (holding that debts are to be treated the same as assets in division of marital property); *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 696 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Nonmarital property

> means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse; (b) is acquired before the marriage; (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e); (d) is acquired by a spouse after the valuation date; or (e) is excluded by a valid antenuptial contract.

Minn. Stat. § 518.003, subd. 3b.

Here, none of the statutory definitions of nonmarital property applies to the parties' credit-card debts. The district court made no findings that the credit-card debts were incurred either before the marriage or after the valuation date. We therefore conclude that the district court erred by characterizing the presumptively marital credit-card debts as nonmarital property.

Because the district court erred by characterizing the credit-card debt as nonmarital property, we reverse the allocation of the credit-card debts and other marital property and remand for the district court to re-divide the marital property. In so doing, we note that the district court has broad discretion regarding the division of property and that an equitable division of marital property is not required to be mathematically equal. *Sirek v. Sirek*, 693 N.W.2d 896, 900 (Minn. App. 2005). And because a factor to be considered when addressing whether to award maintenance, as well as the amount and duration of any maintenance award, is the amount of property awarded to the parties, we also remand the maintenance award. *See* Minn. Stat. § 518.552, subds. 1(a), 2(a) (2010).

III.

Appellant next challenges the district court's awards of need-based and conduct-based attorney fees to respondent. An award of need-based and conduct-based attorney fees is discretionary with the district court. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (stating standard of review for award of need-based attorney fees); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) (stating standard of review for award of conduct-based attorney fees).

Need-based attorney fees

Appellant challenges the district court's award of $20,000 in need-based attorney fees to respondent, arguing that the district court failed to make the statutorily required findings to support the award and that respondent is able to pay her own fees.

Minnesota law provides that the district court "shall award attorney fees, costs, and disbursements" in a dissolution proceeding

> in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds: (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding; (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2010).

Here, the district court did not make specific findings on the statutory factors. But a lack of specific findings on the statutory factors "is not fatal to an award where review of the order reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case and had access to the parties' financial records." *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001) (quotations omitted). The district court was familiar with the history of the case, had access to the parties' financial records, and made detailed findings about the parties' relative financial situations. The record indicates that respondent has struggled to pay her attorney fees. And the district court found that appellant has "much greater earnings and earnings potential." We conclude that the district court therefore did not abuse its discretion in making the need-based award.

Conduct-based attorney fees

Appellant challenges the district court's award of $20,000 in conduct-based attorney fees to respondent, arguing that the award was improperly based on conduct that occurred before the dissolution action commenced. We agree.

A district court may award, "in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1. Here, the district court stated that it was awarding conduct-based attorney fees based on appellant's liquidation of assets in May and June 2007—conduct that occurred before appellant served the summons and dissolution petition on respondent in July 2007. Because conduct-based attorney fees cannot be awarded for conduct that does not occur during litigation, the district court abused its discretion in making the conduct-based award. *See Geske*, 624 N.W.2d at 819 (holding that a proceeding "must exist" before its length or expense can be unreasonably increased by a party's conduct and that no fees can be awarded for "behavior occurring outside the litigation process"); *see also Doerr v. Warner*, 247 Minn. 98, 103, 76 N.W.2d 505, 511 (1956) (stating that a civil action commences when personal service is made). We therefore reverse the award of $20,000 for conduct-based attorney fees.

IV.

Appellant contends that the district court made several clearly erroneous findings related to his financial behavior during the period of separation. But appellant fails to explain how these alleged errors prejudiced him. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored); *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that appellant must show both error and prejudice resulting from error to prevail on appeal); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that appellant bears the burden of demonstrating that an error is prejudicial), *review denied* (Minn. June 28, 1993). Thus,

appellant has not adequately briefed his contentions about the allegedly erroneous findings and we decline to give them further consideration.

V.

Appellant next argues that the district court abused its discretion by denying his motion for a new trial under Minn. R. Civ. P. 59.01(d). We disagree.

Minn. R. Civ. P. 59.01(d) provides that a district court may grant a new trial on the ground of "[m]aterial evidence newly discovered, which with reasonable diligence could not have been found and produced at trial." We review a district court's decision whether to grant a new trial under rule 59.01 for a clear abuse of discretion. *200 Levee Drive Ass'n v. Cnty. of Scott*, 532 N.W.2d 574, 577-78 (Minn. 1995).

Appellant argues that he is entitled to a new trial based on the following events that occurred after the close of evidence: (1) the year 2009 ended, allowing for a more accurate determination of appellant's total income for that year and (2) appellant's employer notified him of additional changes to appellant's compensation that would take effect in late 2009 and in 2010. Appellant concedes that this "new evidence" did not exist at the time of trial.

But "newly discovered evidence" within the meaning of rule 59.01(d) generally "must have been in existence at the time of trial but not known to the party at that time." *Swanson v. Williams*, 303 Minn. 433, 436, 228 N.W.2d 860, 862 (1975); *see also Gau v. J. Borgerding & Co.*, 177 Minn. 276, 278, 225 N.W. 22, 22 (1929) (affirming denial of posttrial motion because there is "special need for caution" in granting new trial where

"new evidence consists solely of happenings subsequent to the trial"). Therefore, the district court did not abuse its discretion by denying appellant's motion for a new trial.

VI.

Respondent argues that the district court erroneously found that she had failed to prove that appellant dissipated marital assets. We disagree.

> If the [district] court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed or disposed of marital assets except in the usual course of business or for the necessities of life, the [district] court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

Minn. Stat. § 518.58, subd. 1a (2010). The burden of proof is on the party claiming a violation of the statute. *Id.* A district court's findings as to whether a party violated section 518.58, subdivision 1a, are reviewed for clear error. *Stark*, 787 N.W.2d at 698.

Here, the district court rejected respondent's argument that appellant violated section 518.58, subdivision 1a, by liquidating assets in May and June 2007 and by using the parties' credit cards for nonmarital purposes. Respondent cites evidence in the record that might support a finding that appellant violated the statute. But the record also contains evidence supporting the district court's findings on this matter, including (1) appellant's testimony that he incurred credit-card debts and liquidated assets to pay down marital debt and (2) appellant's denial that he took these actions in anticipation of

the dissolution action. On this record, we cannot conclude that the district court's findings regarding dissipation are clearly erroneous.

VII.

In sum we (1) affirm the district court's determination that appellant has the ability to pay permanent spousal maintenance in the amount of $5,000 per month; (2) reverse and remand the allocation of the parties' credit-card debts and other marital property; (3) remand the maintenance award in light of the remand of the property division; (4) reverse the award of conduct-based attorney fees; and (5) affirm the judgment of the district court in all other aspects.

Affirmed in part, reversed in part, and remanded.