DA 18-0631

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 140N

IN RE THE MARRIAGE OF:

LARAE ANNANETTE ULRICH,

Petitioner and Appellee,

and

DALE ELMER ULRICH,

Respondent and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DR-17-001
Honorable Katherine M. Bidegaray, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Dale Elmer Ulrich, Self-Represented, Shelby, Montana

For Appellee:

Mark Epperson, Attorney at Law, Glendive, Montana

Submitted on Briefs: March 13, 2019

Decided: June 18, 2019

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Dale Elmer Ulrich (Dale) appeals *pro se* from the constituent judgments of the Montana Seventh Judicial District Court, Dawson County, dissolving his marriage with LaRae Annanette Ulrich (LaRae) and apportioning their marital estate. The court's ultimate apportionment of the marital estate is encompassed within its: (1) July 7, 2017 findings of fact, conclusions of law, and decree of dissolution; (2) June 6, 2018 order enforcing and amending the decree; and (3) October 10, 2018 order denying Dale's second motion to compel compliance with the decree. Dale asserts that the court failed to equitably apportion the marital estate as required by § 40-4-202, MCA. We affirm.

¶3 Dale and LaRae were married for approximately 23 years from 1987 until they separated in 2010 following Dale's arrest and incarceration on the offense of incest, a felony. The parties have three children born as issue of their marriage, all of whom reached the age of majority prior to the filing of LaRae's petition for dissolution of marriage on January 3, 2017. In 2017, LaRae and Dale were respectively 47 and 56 years old. LaRae continued to reside in the marital home with one of her adult daughters and her grandchildren. While she worked from time to time in other part-time jobs, LaRae primarily worked as a public school custodian and was still working at the

time of dissolution of the parties' marriage. Dale was convicted of incest in 2011 and was sentenced to 60 years in prison, with 20 suspended, effective December 2011.

¶4 Over the course of their marriage, the parties accumulated various items of real property, personal property, and debt. At the time of dissolution, the marital estate assets primarily included a residential lot in Glendive, Montana, a mobile home, various motor vehicles and trailers of model years between 1973 and 2006, personal bank accounts, LaRae's Montana Public Employees System (PERS) retirement account ($45,000 balance), and other miscellaneous items of personal property (including, *inter alia*, an unspecified number of firearms, knives, tools, camping and hunting gear, and reloading equipment and supplies). The major items of marital debt at the time of dissolution were a $32,000 real estate mortgage and $20,000 in outstanding medical and dental bills.

¶5 At the time of his 2010 arrest, Dale had approximately $71,000 in an employer-maintained 401(k) retirement account. After his arrest and incarceration, Dale gave LaRae an unrestricted general power of attorney to, *inter alia*, give her control and use of his 401(k) account to help provide for family expenses. Dale contemplated that LaRae would make expenditures from the proceeds of his 401(k) account but testified that he did not contemplate that she would spend all of those funds. LaRae testified at trial that she was aware of Dale's contemplation but, as of 2017, needed and spent the entire after-tax balance ($55,000) on outstanding debts and living expenses for her and

their three children.[1] Dale presented no evidence contradicting LaRae's testimony but asserted that he authorized her to make expenditures only for "household" expenses.

¶6 At bench trial on May 30 and June 23, 2017, Dale appeared *pro se* telephonically from prison. Without objection, LaRae presented a marital assets and liabilities spreadsheet, entitled "Financial Settlement of LaRae Ulrich and Dale Ulrich." The spreadsheet set forth a line-item inventory and valuation of the marital estate. The spreadsheet identified and valued various general categories of personal property without further specification (e.g., guns, knives, Dale's family heirlooms, and tools). Not listed on the spreadsheet but acknowledged by the parties at trial as included in the marital estate were otherwise unspecified "camping and hunting gear and reloading equipment and supplies." Neither party assigned values to the off-spreadsheet items.

¶7 At trial, Dale did not dispute the completeness or sufficiency of the spreadsheet and supplemental testimonial reference to the off-spreadsheet items of personal property as the full complement of the marital estate inventory. Nor did he dispute any of the itemized valuations or the tabulated net value of the marital estate inventory. Without specifically identifying the number and types of guns the parties owned, which guns LaRae would keep, and which guns he wanted to keep, Dale stipulated at trial that LaRae could keep the "vast majority" of the parties' guns. Without further specification, Dale further testified that he wanted all of the parties' knives, camping and hunting gear, and reloading equipment and supplies. Though he would later assert that the court should

[1] It is unclear on the record and briefing when the children respectively reached the age of majority.

have required LaRae to account for them, Dale acknowledged at trial without objection or exception that some of the personal property the parties possessed in 2010 may have since been lost, stolen, or depleted due to damage.

¶8 Whether based on the parties' agreement or as indicated on the evidence presented, the District Court found that the spreadsheet valuations presented by LaRae were "reasonable." The court accordingly apportioned the listed assets and debts to the parties as proposed in LaRae's spreadsheet except for the mobile home (apportioned to LaRae instead of Dale) and LaRae's PERS account ($30,000 to LaRae and $15,000 to Dale instead of 100% ($45,000) to LaRae).[2] The court further: (1) allocated all of the unidentified "camping and hunting gear, heirlooms, tools, reloading equipment and supplies" to Dale; (2) ordered LaRae to submit a qualified domestic relations order to effect the ordered division of her PERS account; and (3) ordered LaRae to turn over to Dale's designate within seven days his allocated "share of knives, guns, camping and hunting gear, heirlooms, tools, reloading equipment, and supplies."[3]

¶9 On November 13, 2017, Dale filed a motion to compel LaRae to immediately pay him $15,000 in satisfaction of his allocated share of her PERS account and to further turn over his previously allocated "share of knives, guns, camping equipment, hunting gear, [heirlooms], tools, reloading equipment and supplies." Upon hearing, the District Court

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[2] The court's order did not otherwise value Dale's apportioned share of LaRae's PERS account and, by implication, called for an immediate lump sum disbursement.

[3] In its July 7, 2017 findings of fact, conclusions of law, and decree, the District Court noted that both parties attempted to supplement the evidentiary record by submitting additional documents after trial. In response, the court expressly stated that it gave little or no weight to those documents because they were not subject to cross-examination.

found that LaRae had already turned over "many items on [Dale's] list" including 8 guns, 62 knives, a "substantial portion" of the camping and hunting gear, reloading equipment and supplies, tools, and "nearly all the heirlooms." Except for finding and ordering that LaRae still had to turn over "15 more guns," the court denied further relief, finding that LaRae had otherwise complied with the decree to the extent possible.

¶10 The District Court also denied Dale's motion to compel LaRae to immediately pay him $15,000 to satisfy his allocated share of her PERS account. Based on unrebutted information provided by the Montana Public Employees Retirement Division, the court concluded that, as a matter of law, Dale's apportioned share of LaRae's PERS account was not payable to him until after she retires and then in accordance with the governing plan rules.[4] The court further found that LaRae could not qualify for a loan and was otherwise unable to come up with $15,000 for an offset payment by other reasonable means. However, noting the more favorable "present value" and "time rule" methods for valuation of retirement pensions as specified in *In re Marriage of Spawn*, 2011 MT 284, ¶¶ 10-17, 362 Mont. 457, 269 P.3d 887, the court amended its original decree to value Dale's allocated share of LaRae's PERS account pursuant to the "time rule" method,[5] payable over time pursuant to PERS regulations.

¶11 On July 27, 2018, Dale filed a second motion to compel enforcement of the decree based on the allegations that LaRae had yet to file proper

[4] In contrast to a 401(k) retirement account, LaRae's PERS pension account was a 401(a) account governed by Title 19, chapters 1-3, MCA, and Admin. R. M. 2.43.3008(3)(c).

[5] The time rule method of valuation applies when the pensioner has yet to retire, is thus not yet eligible for pension benefits pursuant to the terms of the pension plan, and resulting uncertainties render present value an unreliable indicator of the value of the pension. *See Spawn*, ¶¶ 10-17.

"documentation . . . naming [him] [eligible] to receive payment" on her PERS account and had yet to turn over outstanding items on the "[p]ersonal [p]roperty list submitted to the [c]ourt and [a]dmitted in its [June 2018] entry of [j]udgment." The District Court denied the motion on the grounds that Dale admitted in his second motion that LaRae had already turned over the additional 15 guns required by the court's June 2018 order and that she had also since submitted a proposed PERS family law order, entered on October 4, 2018, to effect the division specified by the court. Dale appealed.

¶12 On appeal, Dale essentially asserts that the District Court erroneously found that LaRae fully complied with the decree requirement to turn over the "remaining personal property and firearms listed and submitted prior to the [c]ourt." He further asserts that the District Court erroneously failed to hold LaRae "accountable" for the allegedly "lost or stolen items" of personal property "not reported as such to" law enforcement and for sums spent from his 401(k) proceeds without authorization for "alimony," child support, and non-"household" expenses. Dale does not challenge on appeal the District Court's amendment of the decree to more properly value his share of LaRae's PERS account and to conform the decree to the law governing apportionment of those accounts.

¶13 In marital dissolution proceedings, district courts must inventory, value, and "equitably apportion" the marital estate. Section 40-4-202, MCA. Courts have broad discretion in determining an equitable apportionment based on applicable statutory criteria and any other consideration relevant under the facts and circumstances of each case. *In re Marriage of Bartsch*, 2007 MT 136, ¶ 9, 337 Mont. 386, 162 P.3d 72.

The statutory requirement for an "equitable" apportionment does not necessarily require an equal apportionment. *Richards v. Trusler*, 2015 MT 314, ¶ 11, 381 Mont. 357, 360 P.3d 1126. We review apportionments of marital estates for an abuse of discretion. *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151. An abuse of discretion occurred only if a court exercised granted discretion based on a mistake of law or clearly erroneous finding of material fact, or otherwise acted arbitrarily without conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Albrecht v. Albrecht*, 2002 MT 227, ¶ 7, 311 Mont. 412, 56 P.3d 339. We review district court findings of fact only for clear error. *In re Marriage of Swanson*, 2004 MT 124, ¶ 12, 321 Mont. 250, 90 P.3d 418. We review district court conclusions or applications of law de novo for correctness. *Albrecht*, ¶ 8. A finding of fact is clearly erroneous only if: (1) not supported by substantial evidence; (2) the court misapprehended the effect of the evidence; or (3) our review of the record nonetheless leaves us with a definite and firm conviction that the court was mistaken. *Albrecht*, ¶ 8.

¶14 Here, Dale first asserts that the property distribution is inequitable because the District Court erroneously found that LaRae turned over all of the "remaining personal property" and "firearms" apportioned to him by the court. Dale asserts that the court erroneously failed to offset LaRae's share of the marital estate to account for the unspecified discrepancy that he asserts exists between the guns, knives, and other personal property that LaRae turned over in 2017 and what the parties had when he was incarcerated in 2010. However, neither party presented any substantial *evidence*, at trial or upon subsequent hearing on Dale's motion to enforce the decree, particularly showing

the asserted discrepancy, much less indicating why equity would require a resulting offset against LaRae's share of the marital estate. The findings and orders of the court and the limited record presented indicate that the sum total of the evidence presented to and found substantial by the court was that the parties had a large gun collection in 2010, the total value of the gun collection in 2017 was $4,000, Dale stipulated that LaRae should keep the "vast majority" of the gun collection, and LaRae ultimately turned over a total of 23 guns to Dale pursuant to the original decree and subsequent court order.

¶15 As to LaRae's pre-petition depletion of the proceeds of Dale's 401(k) account, the District Court correctly noted that, regardless of how she justified her expenditures after the fact, LaRae obtained and spent the money under an unrestricted power of attorney granted by Dale. Though he testified that he did not contemplate that she would spend all of the money, the District Court found that Dale authorized LaRae to obtain the money and make expenditures "for the family" and that she used the money "to pay outstanding debts and daily expenses for her and [their] three children."

¶16 District court findings of fact, conclusions of law, and exercises of discretion are presumed correct. *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 459, 507 P.2d 523, 525 (1973). On appeal, the appellant has the burden of showing that a challenged conclusion of law was incorrect, that a challenged finding of fact was clearly erroneous viewed in the light most favorable to the prevailing party, and that any challenged exercise of discretion was an abuse of that discretion. *In re Marriage of McMahon*, 2002 MT 198, ¶ 7, 311 Mont. 175, 53 P.3d 1266; *Hellickson*, 161 Mont. at 459, 507 P.2d at 525. Here, based on the evidentiary record presented, Dale has failed to

show that any of the District Court findings of fact challenged or implicated by his assertions of error were not supported by substantial record evidence or that the court otherwise materially misapprehended the effect of the evidence presented.

¶17 To the extent that Dale asserts that the court erroneously failed to consider facts not timely presented at the original bench trial or the hearing on his first motion to compel enforcement of the decree, courts can inventory, value, and equitably apportion marital assets only to the extent of the evidence timely presented by the parties. *See In re Marriage of Foreman*, 1999 MT 89, ¶ 37, 294 Mont. 181, 979 P.2d 193; *Downs v. Downs*, 181 Mont. 163, 165, 592 P.2d 938, 939 (1979). It is the exclusive responsibility and duty of the parties, not the court, to present substantial credible evidence at the time and place set for hearing or trial. *See Foreman*, ¶ 37; *Downs*, 181 Mont. at 165, 592 P.2d at 939. In the absence of more particular evidence specifically identifying or valuing marital property, we will not fault district courts for reasonable, common sense-based apportionments of the marital estate based on the evidence presented. *See In re Marriage of Richards*, 2014 MT 213, ¶ 38, 376 Mont. 188, 330 P.3d 1193; *Foreman*, ¶ 37; *Downs*, 181 Mont. at 165, 592 P.2d at 939. District courts have no duty to act as appraisers, accountants, mathematicians, or clairvoyants to determine facts required for apportionment of marital estates. *Foreman*, ¶ 37. Consequently, the District Court correctly disregarded any evidence untimely submitted or asserted after the original bench trial or the hearing on Dale's first motion to compel enforcement of the decree.

¶18 At the bottom line, Dale has simply failed to demonstrate that any of the district court findings of fact challenged or implicated by his assertions of error are clearly

erroneous. He has further failed to demonstrate that the District Court based its apportionment of the marital estate and subsequent enforcement of the decree on an erroneous conclusion of law or an abuse of discretion. We hold that the District Court correctly apportioned the parties' marital estate and subsequently enforced its decree based on the evidence presented.

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶20 Affirmed.

Justice

We concur:

Justices