

DA 18-0417

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 139N

IN THE MARRIAGE OF:

CHERYL L. SMITH,

Petitioner and Appellant,

and

RANDALL B. SMITH,

Respondent and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Broadwater, Cause No. DR-2014-09
Honorable James P. Reynolds, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Cheryl L. Smith, Self-Represented, Townsend, Montana

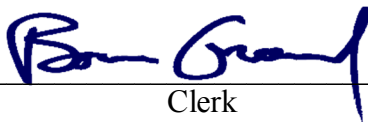
For Appellee:

Randall B. Smith, Self-Represented, Townsend, Montana

Submitted on Briefs: April 3, 2019

Decided: June 18, 2019

Filed:


Clerk

Justice Jim Rice 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 Cheryl L. Smith (Cheri) appeals from the Findings of Fact, Conclusions of Law, and Decree of Dissolution issued by the First Judicial District Court, Broadwater County, dissolving the marriage between Cheri and Randall B. Smith (Randy). Both parties were represented by counsel in the District Court, but are self-represented in the appeal. Regrettably, especially for a case that has been pending for over five years, we conclude it is necessary to reverse and remand for further proceedings due to errors in the District Court's distribution of the marital estate, which may have been contributed to by unfortunate mistakes in the processing of the case.

¶3 The parties were married on January 19, 2008, in Broadwater County. Cheri and Randy each owned a home and real property prior to their marriage. No children were born to the marriage. The principal assets of the marital estate include real property, tools, and vehicles. In March 2014, Cheri petitioned for dissolution. After Randy's default for failing to appear was set aside, the case proceeded and the parties filed various motions, including Cheri's motion to compel discovery.

¶4 On August 21, 2015, the District Court held a hearing on case status and scheduling, and on pending motions. Regarding Cheri's motion to compel discovery, the court ordered Randy to produce his 2014 receipts and other requested documents within thirty days, and directed Cheri's counsel to prepare an order compelling Randy's response to those requests. Correspondingly, the court granted Randy's motion to quash Cheri's request to depose Randy about non-produced documents. The court set the merits hearing for Tuesday, October 27, 2015, in the Broadwater County District Court.

¶5 On September 11, 2015, Cheri filed a brief in response to a September 9, 2015 letter Randy's counsel had sent to the court, and stated therein that the court needed to enter the Order to Compel, which had been provided by Cheri's counsel. The merits hearing was rescheduled to November 13, 2015, due to a criminal case setting, and the court conducted a status conference on November 6, 2015. The court acknowledged a proposed order compelling Randy to answer discovery had been submitted, and stated it had been signed by the court. The court explained the main task for trial was to address an equitable property division. Lastly, the court discussed exchange of the parties' proposed findings of fact and conclusions of law, and requested the court be provided with hard copies the day before the trial, when the parties' counsel were scheduled to exchange their versions. The Clerk of District Court stated it would be fine to submit them by either hard copy or email, "as long as you have them in the file." The court stated that counsel should file the originals in Broadwater County and send him courtesy copies to his office in Helena.

¶6 The District Court conducted the trial on November 13, 2015. Cheri and Randy testified and submitted exhibits. There was no indication that the parties had not submitted or exchanged their proposed findings and conclusions as intended. Cheri called Dennis Williams (Williams), an expert witness concerning valuations of the real property, but Randy objected, asserting Williams had not been disclosed. The court sustained the objection, but granted Cheri’s counsel the opportunity to file a brief on her position that the court should hear the testimony and take further evidence regarding the property values. Cheri’s counsel filed a brief on December 7, 2015, and Randy’s counsel filed a response on December 24, 2015.¹

¶7 On February 16, 2017, fourteen months later, the District Court held a hearing on this issue, ruled exclusion of Cheri’s witness had been error, and took additional testimony. Unlike the trial, the hearing was conducted in Lewis and Clark County. Williams testified about the twenty acres associated with the home at 41 Grandview Loop, explaining it was a non-conforming lot with dimensions of approximately 220 feet wide by a mile long, running along a section line. Because of its non-conforming nature, Williams testified it would be difficult to obtain financing from a bank or other lender for the lot. He explained a 2008 appraisal prepared by Matt Dalton for Wells Fargo Bank included only the home and a ten-acre portion of the lot, while a 2014 Dalton appraisal had considered all twenty acres, both shops, and the house. Following this hearing, the court and counsel agreed that no additional proposed findings would be filed by counsel.

¹ The District Court, in its response upon remand, explained there was also an issue concerning whether Cheri could impeach her own expert, and that after Cheri later moved for leave to sell the subject property, the court was unsure whether the evidentiary issue “was still live.”

¶8 On June 19, 2018, the court entered its decree, finding that Cheri and Randy could support themselves, neither required maintenance, and each party would receive the property and corresponding debt with which they entered the marriage. By then, the attorneys for both parties had ceased practicing law for reasons of retirement and relocation outside the State. Cheri filed a notice of appeal on July 19, 2018, and her counsel moved to withdraw on July 23, 2018.

¶9 In her initial briefing, Cheri argued the record was not properly constituted, explaining that “certain pleadings, exhibits and orders [are] not included in the District Court records and therefore [are] not available for the Court’s consideration in making [its] rulings.” Cheri argued that, consequently, the focus of her appeal had changed from challenging the merits of the decree to addressing “questions of missing pleadings, records and exhibits” Specifically, the Order to Compel discovery from Randy, which had included an award of Cheri’s attorney’s fees in the amount of \$7,500, was not included in the record, except for a partial copy of what appeared to be page 4 of the Order, and was not entered into the record or apparently served upon the parties. Cheri’s proposed findings of fact and conclusions of law, presenting her view of the evidence, were also missing. The trial exhibits had not been transferred with the record. Further, the court’s decree did not address Cheri’s request to restore her name, or the evidence, as Cheri argued, of her substantial financial contributions to the parties’ properties and business, and did not further mention the \$7,500 award of attorney’s fees, under the earlier Order, in seeking discovery from Randy.

¶10 Upon review of the parties' briefing and the record, we remanded the case on January 9, 2019, for clarification of the record, including the absence of the trial exhibits and the order on discovery, and for restoration of Cheri's maiden name. We further granted the parties the opportunity to file supplemental briefs following remand. The District Court proceeded accordingly and apologized for the condition of the record in its response. The Clerk of Court provided the exhibits admitted during the November 13, 2015 trial, which the District Court explained had apparently been overlooked. The court stated it was unsure why only the last page of the Order to Compel appeared in the file. It advised it obtained, following remand, an unsigned copy of the order from Mr. Olney's law office, and appended it to its response. The court stated it had signed the original Order to Compel as prepared by Cheri's counsel, and that it was unsure why the order had not been entered upon the case register or served upon the parties. The court entered an Order restoring Cheri's name to her former name. Regarding the missing documents, the court stated that "[s]ome items were presented to the [c]ourt while the file was in Helena and other items were sent to Townsend for filing[,]" and that the court had "carried this file back and forth between Helena and Townsend."² The court theorized that Cheri's counsel failed to submit his proposed findings due to his move from the State, but volunteered it was "open to a full remand to this [c]ourt for a further review of

² Similarly, Cheri offers that, "[t]hroughout the proceedings in the District Court, some of the pleadings filed by Mr. Olney were signed, served on Mr. Bobinski in his Helena office and then delivered to the Lewis and Clark Clerk of District Court in Helena. The Lewis and Clark Clerk would determine if the filings were intended for their office or for Broadwater County. Those filings intended for Broadwater County were sent to Townsend with the Judge [who] was serving in Broadwater County at the time."

its findings, conclusions, and decree, to make any other changes as may be necessary in light of the aforementioned deficiencies.” Thereafter, Cheri filed a supplemental brief and attachments. Randy did not file a supplemental brief.

¶11 Cheri raises issues on appeal we have restated as follows:

1. Whether the partial Order to Compel in the District Court record awarding attorney’s expenses and fees incurred during discovery is enforceable.

2. Whether the Broadwater County District Court record supports the court’s Findings of Fact, Conclusions of Law, and Decree of Dissolution.

¶12 Cheri also contests the District Court’s comment upon remand that her counsel may have failed to submit her proposed findings of fact and conclusions of law, which she asserts was prepared and submitted in accordance with the court’s instructions at the time of trial. She argues the misplacing of her proposed findings and conclusions, which presented her summarization of the evidence and her entitlement to further credit for her contributions to the marriage, contributed to errors in the District Court’s findings of fact entered two and a half years after trial. She includes copies of her proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution, as well as the Order to Compel, prepared by her trial counsel, with her supplemental appellate briefing.

¶13 “We review the district court’s findings of fact in a dissolution proceeding to determine whether they are clearly erroneous.” *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151. “A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence or our review of the record convinces us that the district court made a mistake.” *Crilly*, ¶ 10 (citing *Bock v. Smith*, 2005 MT 40, ¶ 14, 326 Mont. 123, 107 P.3d 488). “We review a

district court's conclusions of law regarding a division of marital assets to determine whether they are correct.” *In re Marriage of Bushnell*, 2014 MT 130, ¶ 7, 375 Mont. 125, 328 P.3d 608. “The district court’s apportionment of the marital estate will stand unless there has been a clear abuse of discretion as manifested by a substantially inequitable division of the marital assets resulting in substantial injustice.” *Richards v. Trusler*, 2015 MT 314, ¶ 11, 381 Mont. 357, 360 P.3d 1126.

¶14 *1. Whether the partial Order to Compel in the District Court record awarding attorney’s expenses and fees incurred during discovery is enforceable.*

¶15 Cheri argues the record as corrected demonstrates the District Court issued the order compelling discovery from Randy, which included an award of attorney’s fees in the amount of \$7,500, and is enforceable. Randy argues in his original brief that “[t]here is no proof a ‘missing’ district court record exists[,]” that the District Court did not issue an order compelling discovery, and that the docket sheet reflects that. He argues that Cheri should not be allowed to amend or supplement the record.

¶16 In contrast to Randy’s argument, we conclude Cheri has established the record was incomplete. In addition to the items mentioned above, we have observed other minor anomalies in the record.³ Considering together the various parts of the document record and the District Court’s statements made contemporaneously and upon remand, as noted above, we conclude the Order to Compel was properly entered and is enforceable as part

³ For example, there are two items marked in the court file, but not reflected in the docket, as item number 40—a June 10, 2015 Minute Entry for a June 5, 2015 hearing, and a faxed copy of an August 11, 2015 motion filed by Cheri’s counsel to compel discovery, continue a hearing, and grant attorney’s fees and costs. This and other similar errors result in incorrect docket numbering thereafter. The docket corrects itself at item number 45.

of the decree. Two signature pages, one faxed with a post-it note stating that “Judge has record,” and an original found between docket items number 51 and 52 in the physical court record, were both signed by the court and dated November 3, 2015. Upon remand, the District Court provided a copy of the complete order, albeit without signature, along with an explanation that the order had been issued, despite it having never been served upon the parties. Section 25-4-111, MCA, provides that, “[i]f an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.” Pursuant to this provision, we conclude the Order to Compel was issued on November 3, 2015, and is enforceable against Randy, including the \$7,500 attorney’s fee award.

¶17 2. *Whether the Broadwater County District Court record supports the court’s Findings of Fact, Conclusions of Law, and Decree of Dissolution.*

¶18 Cheri argues the distribution of the marital estate was not fair or equitable. Specifically, she contends the errors in the administrative handling of the court record contributed to the inequitable distribution because the District Court, long after trial, did not have her proposed findings of fact and conclusions of law summarizing her evidence, leading it not to mention or apparently consider significant financial contributions she made to the marital estate. She argues the trial exhibits support her testimony about her financial contributions to the marital homes and business. A longtime bookkeeper, Cheri submitted spreadsheets as exhibits detailing the parties’ expenditure of marital funds. She argues other findings of fact are also clearly erroneous. In response, Randy argues Cheri has not met her burden of showing any error in the District Court’s Findings of

Fact, Conclusions of Law, and Decree of Dissolution. He contends Cheri should not be allowed to re-submit her proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution because they were not filed and are not in the record. He concludes the judgment should be affirmed as entered.

¶19 Our review of the record “convinces us that the district court made a mistake[]” and entered clearly erroneous findings of fact. *Bock*, ¶ 14 (citations omitted). First, Finding #4 found the parties physically separated in December 2011, then lived together for some time, and permanently separated in December 2012. This date affects the length of the parties’ relationship and associated financial transactions during that time. Cheri testified she permanently moved out of the Grandview Loop property on January 21, 2014. On cross-examination, Cheri testified as follows about a loan taken out in 2013:

Q. Did you -- you took that out after you and Randy separated, didn’t you?

A. No, I separated -- I left the house January 21st, 2014.

Q. So if Randy says you moved out in December -- before December 2012, he’s mistaken?

A. That’s extremely mistaken.

Q. Okay.

A. Randy had his surgery. I was in the hospital. We went and picked up his children in January of ’13. I lived there all year long. I paid the bills. We have the receipts to show all of the checks on his program because I was taking care of his books. How is that possible if I wasn’t there?

Randy testified that Cheri moved out in December 2013, but under further questioning by his counsel, changed his testimony and stated she moved out in December 2012. After review, we conclude the finding the parties permanently separated in December 2012 was erroneous and should have been January 2014.

¶20 Finding #17 uses incorrect monetary figures in describing the parties' individual debts. It states:

17. Both parties have personal loans taken out for personal debts. Randall owes his mother \$33,750 and Cheryl owes Dennis Williams \$26,300. These are non-marital debts for which each party should be separately responsible.

As indicated by trial exhibits, Randy owes his mother the amount of \$15,000, to which he also testified. It is Cheri who owes her mother the amount of \$33,750, in addition to owing Williams the amount of \$26,300. This would alter the findings on each party's indebtedness.

¶21 The court did not enter findings addressing Cheri's contributions of money and labor during the marriage. Cheri testified at trial that she did the bookkeeping from 2007 to 2014 for Randy's business, North Country Construction, for which she was not compensated, as Randy acknowledged. She testified about assisting him in organizing and paying his taxes and organizing his accounts. She introduced exhibits explaining how their money was expended. Cheri helped Randy adopt his two children from a previous marriage. She explained that Randy was hospitalized for surgery in August 2012 and that her insurance paid most of the medical bills. She demonstrated the expense for Randy and the two children to be on her insurance through her employment with the Forest Service.

¶22 Cheri came into the marriage with a home situated on more than twenty-two acres, located at 518 Ray Creek Road. Randy then owned twenty acres with an incomplete home located at 41 Grandview Loop in Townsend. Cheri testified that Randy's

Grandview Loop home was not complete in January 2008 and offered exhibits, including a picture of an incomplete structure attached to the Broadwater County Sanitarian's letter, dated January 7, 2008. The parties took out a \$70,000 loan, secured by a mortgage on Cheri's Ray Creek Road property. The parties disputed the expenditure of these funds, with Randy testifying that all of the funds went into Cheri's house, although he did not offer documentary evidence in support of this position. He further testified that he and his oldest son gave an entire summer to working on the Ray Creek Road house. In response, Cheri introduced a spreadsheet, Exhibit 28, that indicated \$38,169.17 of the loan proceeds went for work on her house on Ray Creek Road, for which Randy's construction company was paid, while \$31,831.83 was spent on completing Randy's house on Grandview Loop, again paid to Randy's company. Randy claimed he had paid for cabinets in Cheri's house, but did not offer documentary evidence in support. Cheri offered an exhibit showing she paid \$6,651 for the cabinets at the Grandview Loop property. Cheri stated they intended for the Grandview Loop house to be their marital home, about which there was much testimony. The District Court noted other contributions the parties made to these properties, but, in awarding the parties the respective properties they brought to the marriage, did not address these evidentiary conflicts, including what could be significant financial contributions by Cheri in the Grandview Loop property, depending upon resolution of the evidence she offered. For example, a \$31,000 investment in the Grandview Loop property financed by a loan attached to the Ray Creek Road property would result in a significant swap of equity for debt, to Randy's benefit and Cheri's expense. Resolution of this issue could dramatically

alter the values of the marital estate awarded to the parties. The District Court may have considered other contributions by the parties to cure such an imbalance, but we cannot make that determination from the District Court's findings.

¶23 Cheri introduced evidence that the parties expended more than \$20,000 in the process of dividing the twenty acres of the Grandview Loop property into two ten-acre parcels, and offered exhibits showing the expenditures and a subdivision plat map. Randy testified the property could not be divided because of access and road requirements in the Grandview subdivision, and the parties disagreed on the viability of that division. Randy did not provide documentary evidence to support his contention, and the District Court did not address the question, but awarded the entire property to Randy. Cheri continues to maintain that division of the property is viable, and argues she should be awarded the "front 10 acres" in exchange for the value of her contributions that the District Court did not address.

¶24 As an appellate court, we are not in a position to either resolve evidentiary conflicts or to thereafter make an equitable division of property in consideration of evidence deemed credible. However, we are convinced from a review of the record that significant evidence was either not fully considered or sufficiently addressed within what is otherwise detailed findings of fact and conclusions of law entered by the District Court. It may be that the difficulties experienced in filing some of the pleadings, and the delays in the processing of the case, contributed to this deficiency.

¶25 We reverse the judgment and remand for further proceedings in accordance with this Opinion. We appreciate the District Court's stated willingness, as noted above, to

entertain a remand for further review of the findings and conclusions. The District Court may enter an amended judgment after conducting such further review, or further proceedings, if any, that it deems necessary to address the issues discussed herein. The District Court may order such further submissions from the parties as it deems necessary. Cheri has not argued that additional evidence should have been introduced; we are not ordering a new trial. Thus, the remand is for the purpose of correcting Findings of Fact #4 and #17, and to enter such additional findings that are necessary to ensure that the parties' contributions to the marriage, as reflected in the record, have been properly considered in the equitable division of the marital estate.

¶26 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's ruling resulted in an abuse of discretion because it rested upon certain findings of fact that were clearly erroneous.

¶27 Reversed and remanded.

/S/ JIM RICE

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

/S/ INGRID GUSTAFSON