

DA 18-0690

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 238N

IN RE THE MARRIAGE OF:

BETTINA MALLOY,

Petitioner and Appellee,

v.

PATRICK A. MALLOY, III,

Respondent and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DR-17-532
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jami L. Rebsom, Jami Rebsom Law Firm, PLLC, Livingston, Montana

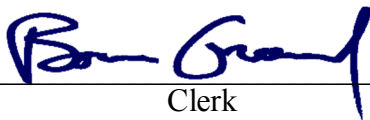
For Appellee:

Jami Prins, Jones & Cook, Missoula, Montana

Submitted on Briefs: August 28, 2019

Decided: October 8, 2019

Filed:


Clerk

Justice Dirk M. 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 Patrick A. Malloy III (Patrick) appeals the November 2018 judgments of the Montana Fourth Judicial District Court dividing the parties' marital estate, denying his request for spousal maintenance, and denying his request for attorney fees. We affirm.

¶3 Patrick and Bettina Malloy (Tina) were married in Missoula, Montana, on August 4, 1990. Two children were subsequently born as issue of the marriage and became adults prior to this action. With help from Tina's parents, both parties were actively involved in raising their children.

¶4 Patrick was serving in the United States Air Force when the parties were married, later served in the United States Army for two years, and then served in the Air Force Reserves until 1994. He thereafter worked as a manager in a Missoula paint store until injured in a work-related car accident in or about 1997. After obtaining a \$250,000 workers' compensation insurance settlement in 1999, Patrick studied computer technology at the University of Montana (UM) from 1999-2001 but did not ultimately obtain a degree.¹ From 2000 forward, Patrick worked as an equipment repair technician for Diamond

¹ Patrick apparently returned to UM several years later to pursue a teaching degree but ultimately did not obtain a degree.

Products, Inc., in Missoula until fired in 2009. Patrick attributed the firing to his inability to adequately function due to injury-related pain and prescription drug use. The District Court noted that he testified that he had no further issues with prescription drug use after undergoing chemical dependency treatment in Michigan in 2012.² Though he has not worked full-time since 2009, Patrick has been capable of performing some degree of physical work. He does not dispute that he acknowledged at trial that he is able to work at the “right job.”³ The District Court further noted that he anticipates being eligible for Veterans Administration health and disability benefits in the wake of the divorce.

¶5 Tina worked at Community Medical Center (CMC) in Missoula from 1992-2007. She obtained an Associate Degree in Licensed Practical Nursing in 2007 and later obtained a Bachelor of Science degree in Nursing. Since 2015, she has been employed as a registered nurse with Providence Medical Systems (St. Patrick’s Hospital) in Missoula. As of 2018, she also works in the Neonatal Intensive Care Unit at CMC. Tina has been the primary wage earner for the family since 2009. The District Court found that, over the last several years, she has generally worked 60-70 hours per week, at \$33.14 per hour, with insurance and benefits.

² On appeal, Patrick asserts that he testified that he has had six back surgeries between 1997 and 2015, the most recent being a lumbar fusion in December 2015. He asserts that he further testified that he needs another lumbar/sacral fusion but is trying to avoid surgery as long as possible.

³ After the parties separated in 2017, Patrick worked briefly as an investigator for a lawyer but testified that he did not continue due to pain after grossing only \$1,800. It is unclear from the District Court’s findings whether Patrick currently works as a private investigator—the Court found both that he “works as a part-time private investigator” and that he “intends to work as an investigator in the future.” If not yet working, the record indicates that the lawyer is ready, willing, and able to put him back to work.

¶6 The parties separated in or about July 2017. On August 2, 2017, Tina filed a district court petition for dissolution of their marriage and division of their marital estate. Patrick counter-petitioned for spousal maintenance and attorney fees. After extensive pretrial litigation, the matter came on for bench trial on October 11, 2018.

¶7 At the time of trial, Patrick and Tina were approximately 49 and 46 years old, respectively. Their Missoula home was the primary marital asset with an estimated value of \$210,000-\$215,000.⁴ They had approximately \$14,802 in net equity in the home upon separation. Tina had a 401(k) retirement account valued at \$29,000.⁵ The parties owned three vehicles at the time of separation—a 2012 Jeep Liberty encumbered by a \$12,950 loan, a 2009 Kia Rio,⁶ and a 2007 Pontiac Vibe. Both parties had significant outstanding student loan debt—Tina \$46,000 and Patrick \$57,000. The parties also had various other outstanding debts including income tax debt, credit card debt, medical bills, and legal bills, *inter alia*. The District Court found that they had financial difficulty during the marriage due to overspending, medical costs, federal tax liability, and legal bills.

¶8 The District Court issued detailed post-trial findings of fact, conclusions of law, and judgment dissolving the parties' marriage, valuing and apportioning their marital estate, and denying Patrick's requests for spousal maintenance. The Court valued the marital

⁴ Patrick asserted that the value of the home was \$250,000. Tina's property disclosure listed its value as \$215,000. An independent market analysis presented at trial, and adopted by the District Court, estimated its value as \$210,000.

⁵ The District Court also stated that the vested retirement account was valued at \$24,000 but consistently used the \$29,000 figure in valuing and apportioning the marital estate.

⁶ The District Court also refers to the vehicle as a 2000 Kia Rio in the spreadsheet included with its findings of fact.

estate as of the date of separation and apportioned it in accordance with its findings of fact and an attached spreadsheet.

¶9 Tina received the family home with the net marital equity (\$14,802). Each party received half of Tina's 401(k) retirement account. Tina received the 2012 Jeep Liberty with equity and debt. Patrick received the 2009 Kia and 2007 Pontiac.⁷ Each kept their own student loan debt. Each party received half of the outstanding credit card debt (\$3,953.58 each), 2015 federal tax audit/penalty (\$3,579.58 each), pre-dissolution legal bills (\$6,902.88 each),⁸ and delinquent taxes (\$3,549.10 each). The Court did not value and credit Patrick for any claimed household furnishings or jewelry because he listed none in his preliminary financial disclosure statement and did not present any evidence substantiating those claims at trial. Without elaboration, the Court noted that Patrick had a pending application for Social Security Administration disability benefits "which, if he is successful, may relieve [him] of his remaining student loan obligation."

¶10 The Court further noted that Patrick had a football card collection prior to separation, unspecified "tools and other property in a shed" at the marital home, and "some [other] remaining items" of personal property in the parties' storage facility. Adopting Patrick's valuation, the Court valued the tools at \$5,000 and apportioned them to him. Without elaboration, the Court similarly apportioned to Patrick "his other personal property

⁷ The parties also owned other vehicles in the possession of their children and which they stipulated to exclude from the marital estate.

⁸ Without elaboration, the District Court found that the parties owed the "Smith Law firm . . . \$13,805.77 . . . for three collection accounts dating back to 2011."

currently remaining in the [parties'] home,” in the storage unit, and the shed. The Court’s findings indicate, however, that it was unable to particularly resolve the ongoing dispute regarding the disposition of various outstanding items of personal property apportioned to Patrick.⁹ The Court ultimately attributed no value to his football card collection because “there was no evidence presented to substantiate its value.” The Court similarly found that disputed items of “jewelry and household furnishings shall not be considered” in the marital estate¹⁰ division because “no jewelry or household furnishings were listed in Patrick’s Preliminary Financial Disclosure Statement nor did he provide any evidence of the value of jewelry or household furnishings” at trial.

¶11 The Court denied Patrick’s request for spousal maintenance (\$2,500 per month for seventeen years). The Court found that he “is able to be self-supporting through” employment and “access to” Veterans Administration benefits “that will adequately cover his healthcare expenses after the date of dissolution.” The Court further found that he “has been able to work at meaningful employment since 2009 but has voluntarily chosen not to do so.” Having noted Patrick’s prior military service, the Court further noted that he testified that he: (1) anticipates being “entitled to Veterans Administration benefits, including health care and monthly disability benefit checks” in the wake of the divorce; (2) “is able to work at the ‘right job’”; and (3) “intends to work as [a private] investigator

⁹ Patrick continues to assert on appeal that Tina withheld, concealed, or otherwise disposed of various items of the personal property apportioned to him.

¹⁰ Exhibit B to Patrick’s proposed findings of fact, conclusions of law, and judgment asserted that the marital estate included \$10,000 worth of jewelry and \$10,000 in household furnishings.

in the future.” The Court did not specifically address Patrick’s request for attorney fees. Patrick timely appeals.

¶12 Patrick asserts that the District Court erroneously valued and apportioned the marital estate based on factual matters not in evidence at trial and further failing to consider: (1) his disability and related lack of income and earning potential; (2) his financial contribution to the family, including Tina’s education, over the course of the marriage; and (3) his nine year non-monetary contribution as a homemaker and stay-at-home father. Patrick asserts that the Court erroneously denied him maintenance by failing to “properly analyze the factors set forth in § 40-4-203, MCA,” and “improperly attributed income to him that he is not currently earning.” He asserts further that the Court erroneously denied him attorney fees by failing to adequately consider “each party’s ability to pay” their respective attorney fees and Tina’s alleged “frustrat[ion of] the litigation process at every turn so as to preclude [him] from obtaining any of his property or information concerning the parties’ financial situation.” Based on alleged errors in application of §§ 40-4-110, -202, and -203, MCA, Patrick further asserts that the Court denied him due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

¶13 We review marital estate divisions, grants or denials of spousal maintenance, and grants or denials of attorney fees under § 40-4-110, MCA, for an abuse of discretion under the applicable statutory criteria. *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151; *In re Marriage of Tahija*, 253 Mont. 505, 511–12, 833 P.2d 1095, 1099 (1992); *In re Marriage of Manus*, 225 Mont. 457, 465, 733 P.2d 1275, 1279 (1987). A court abuses its discretion if it exercises granted discretion based on a clearly erroneous

finding of material fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894. Findings of fact are clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. We review conclusions and applications of law de novo for correctness. *Bessette*, ¶ 13.

¶14 Lower 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). The appellant has the burden of demonstrating error on appeal. *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. The appellant’s burden includes, *inter alia*, the duty to provide this Court with a record of the proceedings below “sufficient” to allow us to “rule upon the issues” raised on appeal. M. R. App. P. 8(2).

¶15 As a threshold matter, Patrick has not provided us with a trial transcript. He has thus failed to provide a sufficient record to allow full review of his various record-dependent assertions of error regarding the court’s marital estate division and denial of maintenance.

¶16 District courts must inventory, value, and “equitably apportion” the marital estate. Section 40-4-202, MCA. Courts have broad discretion in determining what apportionment is equitable based on the criteria enumerated in § 40-4-202, MCA, and any other consideration pertinent under the facts and circumstances of each case. *In re Marriage of*

Bartsch, 2007 MT 136, ¶ 9, 337 Mont. 386, 162 P.3d 72. An equitable apportionment is not necessarily an equal apportionment. *Richards v. Trusler*, 2015 MT 314, ¶ 11, 381 Mont. 357, 360 P.3d 1126.

¶17 Here, the District Court made detailed findings of fact based on the evidence presented at trial. 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 trial. *See Foreman*, ¶ 37; *Downs*, 181 Mont. at 165, 592 P.2d at 939. In the absence of more particular or sufficient evidence specifically identifying and valuing asserted marital estate assets and liabilities, we will not fault district courts for reasonable, common-sense-based apportionments of the marital estate based on the evidence presented. *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.

¶18 Here, as clearly manifest in its findings and conclusions, the District Court carefully considered, to the extent of the evidence presented at trial, Patrick's disabilities, current income, ability to work/immediate income potential, and contributions as a father and homemaker in balance with all other relevant factors. Aside from some ambiguity and imprecision in isolated findings, Patrick has not shown that the District Court's pertinent findings of fact are not supported by substantial evidence when read as a whole, in context of the limited record presented on appeal, and in a light favorable to the judgment. At

most, Patrick asserts conflicts in the evidence, the resolution of which lie in the broad discretion of the district court to resolve based on its assessment of relative weight and credibility. We hold that Patrick has not met his burden of showing that the District Court erroneously inventoried, valued, or apportioned the marital estate based on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or an abuse of discretion under § 40-4-202, MCA.

¶19 Upon equitably dividing the marital estate, district courts have discretion to require a party to pay maintenance to the other, but “only if” the other, as pertinent here, “lacks sufficient property to provide for the spouse’s reasonable needs” and “is unable to be self-supporting through appropriate employment.” Section 40-4-203(1), MCA.¹¹ Here, the District Court specifically found that Patrick “is able to be self-supporting through” employment and “access to Veterans Health benefits that will adequately cover his healthcare expenses after the date of dissolution.” In that regard, Patrick’s prior military service is undisputed as is his noted trial testimony that he anticipates being eligible for Veterans Administration benefits (including health care and monthly disability benefit checks) in the wake of the divorce. Similarly undisputed on appeal is his noted testimony

¹¹ If maintenance is appropriate under those criteria, the court must then determine a “just” amount and period of time for such maintenance based on “all relevant facts” including, *inter alia*, as pertinent: (1) “the financial resources of the party seeking maintenance, including marital property apportioned to that party”; (2) “the party’s ability to meet the party’s needs independently”; (3) “the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment”; (4) “the standard of living established during the marriage”; (5) “the duration of the marriage”; (6) “the age and the physical and emotional condition of the spouse seeking maintenance”; and (7) “the ability of the spouse from whom maintenance is sought to meet the spouse’s own needs while meeting those of the spouse seeking maintenance.” Section 40-4-203(2), MCA.

that he is able to work in the “right job,” has recently been gainfully employed as an investigator for a lawyer, and intends to again work in that capacity after the divorce. Aside from some ambiguity and imprecision in isolated findings of fact, Patrick has not met his burden of showing that District Court erroneously denied him maintenance based on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or an abuse of discretion under § 40-4-203, MCA.

¶20 District courts have broad discretion in marital dissolution proceedings to equitably allocate the costs of related attorney fees among the parties upon consideration of their relative financial resources, burdens, and necessities as indicated by substantial competent evidence. Section 40-4-110, MCA; *In re Marriage of Gingerich*, 269 Mont. 161, 167-68, 887 P.2d 714, 718 (1994). A court’s failure to explicitly rule on an attorney fees request is an implicit denial but is not necessarily an abuse of discretion in every case. Here, though its pertinent findings indicate a present income disparity between the parties, that fact is not necessarily sufficient alone to render a denial of attorney fees an abuse of discretion. Aside from pointing out the parties’ present income disparity, Patrick has not shown that he presented evidence demonstrating that he is in fact unable to pay his own attorney fees. Moreover, his assertion that Tina’s alleged frustration of his efforts to obtain “any of his property or information concerning the parties’ financial situation” warrants an attorney fees award is a one-sided characterization of the limited record presented. It overlooks that the District Court found the limited record presented insufficient to resolve the ongoing dispute regarding the disposition of various items of personal property apportioned to Patrick and in regard to which he presented no evidence upon which to value that property.

It further overlooks that, to the extent not addressed in the court's findings, the additional financial information sought pertained to the property and finances of third-parties—Tina's parents. Patrick's assertion finally overlooks the District Court's unchallenged August 2018 order prohibiting any further motion practice absent prior leave of court based on the court's finding that his extensive pretrial motion practice unnecessarily multiplied litigation in this case.¹² Under these circumstances, we hold that Patrick has not met his burden of showing the District Court abused its discretion in denying him attorney fees under § 40-4-110, MCA.

¶21 Patrick has failed to substantiate his various assertions of error under §§ 40-4-110, -202, and -203, MCA, and has further failed to show any independent due process violation. We affirm.

¶22 We decide this case by memorandum opinion pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

/S/ DIRK M. SANDEFUR

We concur:

/S/ INGRID GUSTAFSON

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

¹² In disregard of the court's order, Patrick filed additional requests for sanctions without prior leave of court on October 15 and October 24, 2018. Under these circumstances, we decline to address his additional claim for attorney fees under § 37-61-421, MCA (sanction for unreasonable and vexatious multiplication of proceedings).