STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1651

In re the Marriage of: Thomas M. Dillahunt, petitioner,
Respondent,

vs.

Tami L. Mitchell, f/k/a Tami L. Dillahunt,
Appellant.

Filed June 24, 2019
Affirmed; motion denied
Klaphake, Judge*

Hennepin County District Court
File No. 27-FA-06-4968

Kathleen E. Rusler O'Connor, O'Connor Law and Mediation PLLC, Burnsville, Minnesota (for respondent)

Chris Zewiske, Ormond & Zewiske, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Tami L. Mitchell, f/k/a Tami L. Dillahunt, filed this appeal from the district court's division of marital property following the dissolution of her marriage to respondent Thomas M. Dillahunt. She argues that the district court erred in its division of her military retired pay and in denying her request for attorney fees. Because the district court's findings of fact were not clearly erroneous and because it did not otherwise abuse its discretion in dividing the military retired pay and in denying Mitchell's request for attorney fees, we affirm. We also deny Dillahunt's motion to strike or, in the alternative, for permission to file a surreply brief.

DECISION

I.

Mitchell advances several arguments challenging the district court's division of her military retired pay. She argues that the district court erroneously included the nonmarital portion of her retired pay in the property division, applied the wrong valuation date, failed to use the correct formula when determining the amount of the parties' share of the retired pay, and failed to address her alternative formula proposal.

The district court has "broad discretion regarding the division of property," and its division of property "will only be reversed on appeal if the [district] court abused its discretion." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). A district court abuses its discretion in dividing property if it resolves the matter in a manner "that is against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Division of

retired pay is generally discretionary with the district court. *Faus v. Faus*, 319 N.W.2d 408, 413 (Minn. 1982). "Appellate [courts] set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility. Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotations and citations omitted).

Military personnel who serve for a set number of years may retire with pay. *See* 10 U.S.C.A. §§ 3911-14, 3929 (2012) (Army officers and enlisted members). The amount of retired pay is determined by the number of years served and the rank at which the member retires. *See* 10 U.S.C.A. §§ 1409, 3961 (2012) (Army). Federal statutes carve out a portion of a veteran's retired pay that may be treated as marital property and is divisible between spouses in a dissolution, providing that state courts "may treat disposable retired pay" as marital property. 10 U.S.C. § 1408(c)(1) (2012). The term "disposable retired pay" includes gross retired pay minus certain deductions. 10 U.S.C. § 1408(a)(4)(A) (2012).

The district court used the coverture formula found in *Janssen v. Janssen*, 331 N.W.2d 752, 756 (Minn. 1983), to divide Mitchell's retired pay. In *Janssen*, the supreme court held that "a nonvested, unmatured pension [like the one at issue in this appeal] is marital property which can be divided in a marital dissolution proceeding." 331 N.W.2d at 753, 756. To calculate the marital portion of such retired pay, the supreme court adopted an approach that awards each spouse a percentage of the retired pay "only if and when" the benefits are paid. *Id.* at 756. The supreme court held that the marital portion of a benefits payment "will be a fraction of that payment, the numerator of the fraction being the number

of years (or months) of marriage during which benefits were being accumulated, the denominator being the total number of years (or months) during which benefits were accumulated prior to when paid." *Id.* (quotation omitted).

In this case, the parties were married in 1997, and dissolved the marriage in 2008. The parties entered into a Stipulation and Order Regarding Property Issues and agreed that Dillahunt should be awarded "one-half of the marital portion" of Mitchell's retired pay, but did not agree on how to determine the value of the marital portion. The district court concluded that the valuation date for the pension was the date of the Initial Case Management Conference, August 24, 2006, and applied the *Janssen* formula to Mitchell's retired pay as follows:

> To be sure, the parties were married from August 1997 to March 2008. That is 127 months. But, to determine the number of months of marriage accumulating the pension, the Court should use the valuation date—in August 2006—instead of the date of dissolution. So, the numerator of the *Janssen* formula is 108 months. The total number of months during which the benefits were accumulated prior to when paid is 240 months—or twenty years. [Mitchell] served in the U.S. Army for twenty years before retiring. So, the marital interest in the military pension is 108 over 240 or 45%. Under the Stipulated Order, [Dillahunt] is entitled to half of the marital interest of the military pension. Accordingly, [Dillahunt] is entitled to 22.5% of the military pension.

The district court then applied Dillahunt's 22.5% share to Mitchell's monthly retired pay of $3,696 and awarded him $831.60 per month.

Mitchell argues that, instead of applying the *Janssen* formula, the district court should have applied the "hypothetical retired pay" formula. The "hypothetical retired pay" formula that Mitchell proffers is identical to the *Janssen* formula except that, rather than

using the value of the benefits when they are paid, it uses a hypothetical value calculated at some date prior to when the benefits are paid. Mitchell argues that the value of the pension should be that calculated as of the Initial Case Management Conference held on August 24, 2006, with a cost of living adjustment. Applying the "hypothetical retired pay" formula, Mitchell calculates Dillahunt's share of the retired pay at $317.90 per month, based on a value of $1,412.90 as of August 24, 2006.

In support of this argument, Mitchell cites an unpublished opinion from this court. That opinion is factually distinguishable from this case because the original judgment there included a non-*Janssen* formula for dividing military pension benefits, and that formula was never challenged. *Guggisberg v. Guggisberg*, No. A10-0562, 2011 WL 891026, at *1-5 (Minn. App. Mar. 15, 2011), *review denied* (Minn. May 25, 2011). No such formula is found in the judgment at issue here. Further, not only is the method for dividing military retirement pay espoused by Mitchell found only in that unpublished opinion, unpublished opinions are not precedential. Minn. Stat. § 480A.08, subd. 3 (2018); *see Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (stating that "unpublished opinions are not precedential" and at best "can be of persuasive value").

Moreover, the relevant federal statute was amended after the unpublished opinion was filed. National Defense Authorization Act of 2018, Pub. L. No. 115-91, Title VI, § 624, 131 Stat. 1283, 1429-30 (2017). The amended statute states that it "shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation . . . that becomes final after December 23, 2016." § 624(c), 131 Stat. at 1430. Thus, if the parties' dissolution was final in 2008, the 2017 amendment

to the statute would not apply. Here, however, while the dissolution was final in 2008, the division of the marital property was not finalized until 2018.

Finally, we note that the district court carefully reviewed both proposed formulas before deciding to apply the *Janssen* formula, and Mitchell has not established that any of the district court's underlying findings of fact were clearly erroneous or that the district court otherwise abused its discretion in its division of the retired pay.

II.

Mitchell contends that "[t]he District Court erred in denying [her] request for attorney fees based on [Dillahunt's] conduct and the parties' agreement."[1]

"A refusal to award attorney fees will not be reversed absent a clear abuse of discretion." *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Conduct-based attorney fees may be imposed "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2018). Conduct-based fees may be based on the impact that a party's behavior has had on the costs of the litigation regardless of the relative financial resources of the parties. *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). "While bad faith could unnecessarily increase the length or expense of a proceeding, it is *not* required

[1] Minn. Stat. § 518.14, subd. 1 (2018), provides for the awarding of attorney fees that are "necessary to enable a party to carry on or contest the proceeding." Neither party has questioned whether section 518.14 also provides a substantive basis for an award of conduct-based attorney fees. *See Anderson v. Anderson*, No. A16-2006, (Minn. Aug. 6, 2018) (order) (questioning whether section 518.14 creates a substantive basis for an award of conduct-based attorney fees). For purposes of this appeal, we will assume without deciding that the statute does so.

represented "reasonable disagreements between acrimonious parties during civil litigation."

The district court was familiar with the parties and their continuing conflict and was in the best position to evaluate whether Dillahunt's conduct unreasonably contributed to the time and expense of the proceeding. *See 650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 494 (Minn. App. 2016) ("Because the district court is the most familiar with all aspects of the action from its inception through post trial motions, it is in the best position to evaluate the reasonableness of requested attorney fees." (quotation omitted)), *review denied* (Minn. Nov. 23, 2016). The district court made adequate findings and concluded that, although Dillahunt could have been more diligent in bringing his motion to divide the military retired pay, the parties' opposing positions and need to agree before submitting such a motion excused his delay.

Moreover, Mitchell has not established that the attorney-fees provision of the 2008 Stipulation and Order Regarding Property Issues applies. Because Dillahunt brought the motion to divide the military retired pay, he would be the party seeking enforcement of that provision and would not be required to pay attorney fees under the terms of the property stipulation. To the extent that Mitchell is seeking to enforce the prior judgments requiring that Dillahunt pay attorney fees, that action is not covered by the stipulation, which applies to costs incurred in enforcing the terms of that judgment and decree, and not subsequent judgments. In sum, the district court's denial of attorney fees was within its discretion.

Mitchell also requests that this court award her "attorney fees and costs incurred in this appeal." "A party seeking attorneys' fees on appeal shall submit such a request by

motion under Rule 127." Minn. R. Civ. App. P. 139.06, subd. 1. We deny Mitchell's current request because she did not file a Rule 127 motion and her request is therefore not properly before this court.

III.

Dillahunt filed a motion requesting that this court strike Mitchell's reply brief because it alleged new facts, raised new arguments that were not responsive to his brief, and attached in an addendum incomplete, misleading exhibits. In the alternative, Dillahunt requested permission to file a surreply brief.

The arguments raised in Mitchell's reply brief do not exceed the scope of Dillahunt's responsive brief and constitute permissible rebuttal, and the documents included in her addendum are part of the record on appeal. Moreover, because Dillahunt addressed the issues raised in Mitchell's reply brief in his motion to strike and his reply to Mitchell's response to the motion to strike, and because Dillahunt had an opportunity at oral argument to address the reply brief, a surreply brief was not necessary. Dillahunt's motion to strike and for permission to file a surreply brief are therefore denied.

IV.

Mitchell raises two additional arguments. She contends that the district court "erred in finding it had subject matter jurisdiction [under the relevant federal statute] to order a division of the nonmarital portion of [her] military retired pay." Mitchell also contends that "[t]he District Court abused its discretion in considering [Dillahunt's] June 12, 2018 post-hearing letter without giving [her] an opportunity to submit responsive correspondence." We disagree. Our review of the record indicates that Mitchell consented

to the district court's jurisdiction, and consent is one method of establishing jurisdiction under the federal statute. See 10 U.S.C. § 1408(c)(4) (2012). Moreover, she was not prejudiced by the posthearing letter. Mitchell has not established that the district court's findings of fact regarding jurisdiction were clearly erroneous or that the district court abused its discretion regarding the letter.

Affirmed; motion denied.

ATTACHMENT 2

STATE OF MINNESOTA

IN SUPREME COURT

A18-1651

In re the Marriage of:

Thomas M. Dillahunt,

Respondent,

vs.

Tami L. Mitchell, f/k/a Tami L. Dillahunt,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Tami L. Mitchell for further review be, and the same is, denied.

Dated: September 17, 2019

BY THE COURT:

Lorie S. Gildea
Chief Justice