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**STATE OF MINNESOTA
IN COURT OF APPEALS
A05-2094**

In re the Marriage of:
Jeremy James Zander, petitioner,
Respondent,

vs.

Melinda Alice Zander,
Appellant.

**Filed August 22, 2006
Affirmed
Willis, Judge
Dissenting, Minge, Judge**

Scott County District Court
File No. F04-00178

Anne Heimkes Tuttle, Tuttle & Bergeson, 1275 Ramsey Street, Suite 600, Shakopee. respondent)

Kevin J. Wetherille, Jaspers, Moriarty & Walburg, P.A., 206 Scott Street, Shakopee, MN 5537

Considered and decided by Randall, Presiding Judge; Willis, Judge; and Minge, Judge.

SYLLABUS

The monthly payments that a tribal member receives from the Shakopee Mdewakant Community fall within the definition of “income” in Minn. Stat. § 518.54, subd. 6 (2004); payments received during a tribal member’s marriage are marital property subject to division u

OPINION

WILLIS, Judge

In this appeal from a dissolution judgment, appellant wife argues that the district court abused its discretion by denying her motion for amended findings or alternatively a new trial because husband's change of residence after the dissolution trial is a sufficient basis for amended findings. (2) the district court abused its discretion by awarding the parties joint legal and physical custody when the record shows that the parties are unable to communicate or cooperate; and (3) the district court abused its discretion by concluding that the per capita payments appellant wife received from the Shakopee Mdewakanton Community during the parties' marriage were marital property. Because the record supports the district court's findings and we agree with the district court's legal conclusions, we affirm.

FACTS

Appellant Melinda Alice Zander (wife) and respondent Jeremy James Zander (husband) have known each other since grade school, began dating in 1999, and were married in September 2001. Wife currently has two children, ages 15 and 12, from two previous relationships. Husband adopted both children in 2001. During the marriage, husband was voluntarily unemployed, and wife did not work but received per capita payments from the Shakopee Mdewakanton (Dakota) Sioux Community (Mdewakanton Community). The parties separated in January 2004. After the separation, husband lived in a trailer home owned by the Mdewakanton reservation, and wife lived in Jordan, Minnesota.

In January 2004, husband petitioned for dissolution. In February 2004, the district court issued a temporary order granting the parties joint legal custody and wife sole physical custody of the children and 43% of husband's parenting time. The district court conducted a trial on the dissolution from March to May 2004 during which the court heard testimony from 13 witnesses, met in camera with the parties' children, and reviewed 43 exhibits. In June 2005, the district court issued its dissolution judgment, granting the parties joint legal custody and ordering a division of the parties' marital property. In July 2005, wife filed a motion for amended findings or, in the alternative, a new trial. The district court denied the motion, and wife's appeal is now before this court.

ISSUE

Did the district court abuse its discretion by denying wife's motion for amended findings?

ANALYSIS

Wife appeals from both the dissolution judgment and the district court's order denying her motion to amend its findings or, in the alternative, for a new trial. A motion to amend findings must be supported by affidavits, exhibits, and minutes of the court, not on evidence that is not a part of the record. *Otte v. Otte*, 299 Minn. App. 299 (Minn. App. 1985) (applying Minn. R. Civ. P. 52.02). When considering a motion for a new trial, a district court "must apply the evidence as submitted during the trial of the case" and "may not consider evidence not in the record, nor consider new evidence." *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 313 (1974). This court reviews denials of such motions under an abuse-of-discretion standard. *Johnson v. Johnson*, 572 N.W.2d 313, 315 (Minn. App. 1997) (noting that the purpose of a motion to amend findings is to correct errors of law, not to review the district court's exercise of discretion), *review denied* (Minn. Feb. 19, 1998).

A district court's findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.02. A finding is "clearly erroneous" when this court has "the definite and firm conviction that a mistake has been committed." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted). In reviewing whether findings are clearly erroneous, this court views the record in the light most favorable to the district court's findings. *Id.*

A party may move for a new trial on the grounds of: (1) mistake, inadvertence, surprise, or neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment and decree or order; (5) a judgment, decree, or order that is inoperative, incomplete, or otherwise defective; (6) a release, or discharge of the judgment. Minn. Stat. § 518.145, subd. 2 (2004). This court reviews a district court's decision whether to order a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baun*, 454 N.W.2d 905, 910 (Minn. 1990).

I.

Wife argues that the district court's findings regarding husband's residence are clearly

Wife argues that the district court abused its discretion by awarding the parties joint custody of their children when the record shows that the parties are unable to cooperate in raising their children and that an intermediary is necessary to facilitate cooperation between the parties. In its motion for amended findings or a new trial, the district court concluded that it was “satisfied that the evidence sufficiently supports the result reached in the Judgment.” Appellate review of a custody determination is limited to determining whether the district court abused its discretion by making findings unsupported by improperly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Patterson v. Patterson*, 543 N.W.2d 705, 710 (Minn. 1985). To assure proper consideration of children’s best interests, the court identified factors that a district court must consider when making a custody determination. Minn. Stat. § 518.17, subd. 3(a) (2004); see Minn. Stat. § 518.17, subd. 1(a) (2004) (enumerating best-interests factors). When a party seeks joint physical custody, the district court is required to consider four additional factors: the ability of the parties to cooperate, their methods of resolving disputes, whether it would be detrimental to the child for a parent to have sole authority over the child’s upbringing, and whether domestic abuse has occurred. Minn. Stat. § 518.17, subd. 2 (2004).

Review of the judgment here shows that the district court made lengthy and detailed findings on each of the best-interests factors and the joint-custody factors to support its award of joint legal and physical custody. Wife challenges the district court’s findings on two of the four joint-custody factors.

When a district court awards joint legal or physical custody over the objection of one party, the court must make detailed findings on each of the statutory joint-custody factors and explain how the factors support its determination that joint custody would be in the best interests of the child. *Id.* “The court shall apply a presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. Here, before trial, husband requested joint legal and sole physical custody of the children, and wife requested joint legal and physical custody. Although at trial wife continued to seek sole physical custody, husband was in agreement with the custody evaluator’s recommendation for joint legal and physical custody. The court would cooperate with an award of joint custody.

A. Ability of Parents to Cooperate

The district court found that “the parties have the ability to cooperate in parenting t argues, however, that the record demonstrates “a clear inability of the parties to cooperate wit their children” and shows that the parties are unable to communicate regarding the children parenting philosophies. In support of her position, wife points to (1) the facts that husband a rent a violent video game and allowed their daughter to get her ears pierced when husba disapproved of both; (2) the fact that husband allowed their daughter to sleep in his bed with testimony that the parties do not agree on parenting styles and do not communicate; an evaluator’s testimony that the parties do not agree on “parenting issues.”

The district court stated that it was “mindful of the fact that the parties have been und pendency of the dissolution proceeding and that this situation has affected their relationshi including their ability to communicate” but that “the parties have a history of effective co- indicated their desire to do what is best for their children.” The district court further found th cooperated since the separation with respect to the temporary parenting time arrangements together with a parenting expeditor and the custody evaluator.” The record supports the distric

The parenting-time expeditor testified that the parties “did a fine job” reaching and fo an agreement regarding a holiday parenting schedule; that wife allowed husband to have extra the children; and that, although the parties needed the parenting-time expeditor’s assistance to time issues during the dissolution, “after divorces are final and things are more resolved that t able to deal with more and more of their issues on their own.”

The custody evaluator testified that despite the fact that she believed this to be “a part dissolution matter,” she recommended joint physical custody because she believes “that the pa to work together despite what ha[d] gone on” during the dissolution because “they have worke parenting-time] expeditor.” The custody evaluator testified that she believes that the parties h and objectives for their children; that “the parties really can agree on . . . big issues”; and

detrimental to the children if one or the other party were to have the children in sole custody. The custody evaluator further testified that she believes that the parties “would learn to co-parent as time goes by when all this is over and done”; that the parties’ different parenting styles create different parenting styles for the children; and that these differences would not cause problems for the parties because they both love their children and would put them first. The custody evaluator recommended that the parties continue to use a parenting-time expeditor after the dissolution.

Although the record shows that both of the parties testified to having difficulties cooperating during the dissolution, the record also shows that both cooperated with the parenting and disciplinary issues during the separation and both acknowledge that the children want equal time with both parents. We conclude that the district court’s finding on this joint-custody factor is supported by the evidence.

B. Methods for Resolving Disputes

The district court found that

[t]he parties have a history of being able to communicate with each other regarding children's needs and best interests. The Court does not expect that the parties always agree with each other regarding parenting decisions, but they demonstrated their ability to talk, seek and follow guidance, and work things out. The custody evaluator recommends that they use the services of a parenting time expeditor for a period of time following the dissolution to assist them in making the transition from adversarial parties to co-parents. Since they have interacted effectively with the expeditor during the pendency of this case, this appears to be an appropriate way for them to learn to communicate and work together following the dissolution.

Wife argues that in this finding the district court “placed emphasis on the use of a parenting time expeditor to resolve actual parenting decisions not just parenting time disputes” and that a parenting-time expeditor is statutorily charged with resolving disputes unrelated to parenting time. The purpose of a parenting time expeditor is “to resolve parenting time disputes by enforcing, interpreting, clarifying, and addressing parenting time issues specifically addressed by an existing parenting time order and, if appropriate, to make a custody determination as to whether the existing parenting time order has been violated.” Minn. Stat. § 518.1751, subd. 1b

We conclude that the district court intended that the parties should continue to use the parenting time expeditor as they did during the dissolution process and that the district court believed that the parties could work together on issues relating to their children. When evidence shows that parties are completely unable to communicate and cooperate, joint legal custody is not appropriate. *Wop*, 2007 Minn. App. LEXIS 1011, 2007 WL 1011 (Minn. App. 1993) (concluding that district court's finding that “parents are unable to agree” and “communication between them is impossible” did not support a joint-custody award).

But here the record shows that the parties were able to agree to and follow through with a parenting time schedule and support each other in matters relating to the discipline of the children. The record shows that the parties live close to each other, allowing the children to transfer between homes with ease; that the children's school and social lives; that both parties are able to provide the children with a safe home; and that the parties have repeatedly stated that they want to spend equal time with each parent. Further, the parties testified that the children would be harmed if either parent were to have sole physical custody.

support the district court's joint-custody award. Although the record could support award, this court may not substitute its judgment for that of the district court when determinations. *McCabe v. McCabe*, 430 N.W.2d 870, 873 (Minn. App. 1988), *review denied* (1988).

Because the district court made findings on the statutory factors relating to custody, including joint custody, and the record supports its findings, we conclude that the district court did not err by awarding the parties joint legal and physical custody of their children.

III.

Wife challenges the district court's characterization of her per capita payments from Community during the parties' marriage as marital property. The district court concluded that Mdwakanton Community's businesses is a non-marital asset, belonging only to her, [but] property received from the asset during the parties' marriage is marital property."

"Whether property is marital or nonmarital is a question of law, but a reviewing court is to review the trial court's underlying findings of fact." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Property acquired by either spouse during a marriage is presumed to be marital. Minn. Stat. § 518.54, subd. 5 (a) rebut this presumption by showing that the property fits into one of the following categories of property listed in Minn. Stat. § 518.54, subd. 5:

- (a) is acquired as a gift, bequest, devise or inheritance made by a third party to or for one spouse and 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 was 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.

See also Robert v. Zygmunt, 652 N.W.2d 537, 541 (Minn. App. 2002) (discussing rebuttal of presumption that property is marital *denied* (Minn. Dec. 30, 2002). A party claiming a nonmarital interest in property "must prove the underlying facts by a preponderance of the evidence." *Wieggers v. Wieggers*, 467 N.W.2d 34 (Minn. 1991).

Wife argues that the per capita payments she received from the Mdwakanton Community during the parties' marriage are nonmarital property because the "payments are unique to her birthright as a member of Mdwakanton Sioux, a sovereign nation." The district court found that as a member of the Mdwakanton Community, wife "receives monthly per capita payments of approximately \$84,000.00, based on her federal income tax form 1099" and that these "payments flow from the revenue generated by the Mdwakanton Community."

casino and other business interests.” The district court concluded, therefore, that such pa
income.

“‘Income’ means any form of periodic payment to an individual.” Minn. Stat. § 518.4
And income acquired from a nonmarital asset during a marriage is marital property that is
parties upon dissolution. *Swick v. Swick*, 467 N.W.2d 328, 331 (Minn. App. 1991) (concludi
that a nonmarital certificate of deposit earned during parties’ marriage was income that sho
marital asset upon dissolution), *review denied* (Minn. May 16, 1991); *see also Gottsacker*
N.W.2d 848, 854 (Minn. 2003) (“Cash dividends . . . [are] income and, therefore, [are]
(quoting *Nardini v. Nardini*, 414 N.W.2d 184, 194 (Minn. 1987)); *cf.* Minn. Stat. § 518.58, sub
“[i]t shall be conclusively presumed that each spouse made a substantial contribution to the ac
and property while they were living together as husband and wife”). Further, wife does not arg
monthly payments she received from the Mdewakanton Community separate from the marita
even if the funds originating with the Mdewakanton Community could have been classified a
property, she failed to show that result to be appropriate here. *Cf. Swick*, 467 N.W.2d at
circumstances, we conclude that wife’s monthly payments from the Mdewakanton Commu
statutory definition of income and, therefore, such payments received during the marriage ar
the funds were not expended during the marriage, marital property subject to division upon dis

Wife argues that this court should conclude that the per capita payments are nonmarit
the “Mdewakanton Sioux Tribal Domestic Relations Code specifically states that all per capita
marital property belonging to the tribal member.” The district court declined to apply this cod
wife provided no legal authority to support her argument that the provision was controlling a
district court. Husband argues that the code provision may apply to dissolutions brought in
does not apply to this matter before the Minnesota state courts. Husband cites 28 U.S.C. § 1
provides:

- (a) Each of the States listed in the following table shall have jurisdiction over
causes of action between Indians or to which Indians are parties which arise i
areas of Indian country listed opposite the name of the State to the same exter

such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property have the same force and effect within such Indian country as they have elsewhere within the State:*

....

Minnesota All Indian country within the State,
except the Red Lake Reservation.

....

(c) *Any tribal ordinance or custom heretofore or hereafter adopted by an Indian band, or community in the exercise of any authority which it may possess shall, inconsistent with any applicable civil law of the State, be given full force and effect to the determination of civil causes of action pursuant to this section.*

(Emphasis added.) Because Minnesota law governs this dissolution and because the Mdewak Domestic Relations Code is inconsistent with Minnesota law, the tribal-code provision relied on does not apply.

Wife relies on *Kucera v. Kucera*, 275 Minn. 252, 146 N.W.2d 181 (1966), to support her claim that her husband should not receive any portion of the per capita payments that she received during their marriage. In *Kucera*, the supreme court affirmed a district court's decision to make no property award when the husband was in name only and lived together for less than a year. 275 Minn. at 256, 146 N.W.2d 181. The court distinguished *Kucera* because here the parties lived together during all of their four-year marriage. Wife's claim that their marriage was one in name only.^[1]

When the district court concluded that "an equal distribution of the marital property was equitable," it considered the factors in Minn. Stat. § 518.58, subd. 1 (2004), and found that the husband obviously contributed most of income, [husband] was at least an equal participant in the marriage, and there was some evidence to suggest that he did more than [wife] in terms of parenting and childcare." 718 F.2d at 1011. This finding. The district court did not, therefore, abuse its discretion by distributing the marital property. *See Swanstrom v. Swanstrom*, 359 N.W.2d 634, 636 (Minn. App. 1984) (providing that in dissolution cases district courts have very broad discretion to determine how income and property are to be distributed).

DECISION

Because the record supports the district court's findings and because we agree with the (1) husband's change of residence after the dissolution trial is insufficient basis for amended trial; (2) the award of joint legal and physical custody to the parties is supported by the record; (3) the per capita payments wife received from the Mdewakanton Community during the parties' marriage therefore are marital property subject to division upon dissolution, we affirm the judgment and the district court did not abuse its discretion by denying wife's motion for amended findings or a new trial.

Affirmed.

MINGE, Judge (dissenting)

I concur in parts I and II of the opinion. I dissent from part III. I would hold that the payments received by appellant were nonmarital property. Minnesota recognizes that a gift, inheritance is nonmarital. *See* Minn. Stat. § 518.54, subd. 5(a) (2004). Although the narrow part III of this case is a matter of first impression, at least one reported decision addresses the gift. *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982). In *Sheppard*, the Idaho court found that the gifts to the name of an enrolled member of the Shoshone-Bannock tribe were community property. *Id.* at 918. However, that court's discussion implies that if the assets had originally been solely from the tribe, they may not have qualified as community property. *See*

In the case before us, the distributions are from the Shakopee Mdewakanton Sioux (Dakota) tribal governmental entity. These distributions are not ordinary dividends from a nonmarital business distribution to a beneficiary from an established trust. Instead, they are being paid to appellant as a member of this particular tribal government. The payments to appellant are not guaranteed. They are made each year by the tribal government. The amount paid is akin to a lump-sum distribution of tribal assets which would be parallel to the principle distribution of a gift under Minnesota law. I believe that the clearly identified proceeds from tribal per capita distributions to appellant are nonmarital property and should be treated accordingly in this dissolution proceeding.

Given my conclusion that the application of Minnesota law to this case would result in treating the distributions as nonmarital property, I would not reach the question of any inconsistency between Minnesota law and the tribal provision in question.

As has been observed, the case before us is apparently a matter of first impression. On appeal, the parties would notify the Shakopee Mdewakanton Sioux (Dakota) Community of the proceedings. If a provision of its code is in question, the Community would have had an opportunity to make its views known in this case. The record does not disclose any such notification or appearance.

[1] Wife also relies on *Coursolle v. Coursolle*, No. C0-02-377, 2002 WL 31501904 (Minn. App. 2002), an unpublished opinion. “Unpublished opinions of the Court of Appeals are not precedential under Minn. Stat. § 480A.08, subd. 3(c) (2004). Nevertheless, we conclude that *Coursolle* is distinguishable from *Kucera*.

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