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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0757**

In re the Marriage of:  
Anna M. Mailatyar, petitioner,  
Respondent,

vs.

Najibullah Mailatyar,  
Appellant.

**Filed May 13, 2008  
Affirmed  
Crippen, Judge\***

Dakota County District Court  
File No. F6-05-15666

Karen I. Linder, Clugg, Linder & Dittberner, Ltd., 3205 West 76th Street, Edina, MN  
55435-5244 (for respondent)

Matthew L. Fling, 4018 West 65th Street, Suite 100, Edina, MN 55435 (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Crippen,  
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## UNPUBLISHED OPINION

**CRIPPEN**, Judge

Appellant Najibullah Mailatyar disputes the adequacy of evidence to permit the district court's award of nonmarital assets to respondent Anna Mailatyar. Because there is adequate evidence to permit the district court's finding on nonmarital assets and there is no merit to additional issues raised by appellant, other property-distribution topics and an award of fees, we affirm.

### FACTS

The parties were married in 1980. In June 2000, respondent received an award of \$36,209.54 for a personal-injury settlement related to injuries she suffered while riding her bicycle. The parties separated four years later, and in 2005 respondent filed a petition requesting marriage dissolution. Both parties waived spousal maintenance. After a trial, the parties' marriage was dissolved in 2006 and their property divided. In addition to their homestead in Rosemount, they owned two properties in Burnsville. Prior to their separation, a Lakeville home was sold on a contract for deed,<sup>1</sup> and after their separation, the parties sold a home they owned in Nevada.

Of the parties' substantial assets, appellant was awarded the homestead and other property totaling approximately \$340,000, and respondent was awarded a Burnsville

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<sup>1</sup> With the assistance of appellant, and without notifying respondent, the contract-for-deed vendee obtained alternative financing and paid the balance owed on the Lakeville property in November 2005. But at the time of trial, the funds were still being held for the parties' benefit by the title company because respondent's signature was required to release the funds and appellant refused to allow the funds to be held in escrow pending their marriage dissolution.

home and other property totaling approximately \$300,000. Respondent was also awarded \$15,000 in attorney fees based on appellant's conduct. The district court subsequently denied appellant's motion for a new trial and amended findings.

## **D E C I S I O N**

### *1. Respondent's Nonmarital Award*

Appellant argues that the district court erred by classifying the \$36,209.54 personal-injury settlement as respondent's nonmarital property.

All property acquired by either spouse during the marriage is presumptively marital property. Minn. Stat. § 518.003, subd. 3b (2006). The marital or nonmarital classification of personal-injury settlements turns on the purpose of recovery. *Van de Loo v. Van de Loo*, 346 N.W.2d 173, 176 (Minn. App. 1984) (adopting the analytic approach in Minnesota). Recovery for the spouse's pain and suffering is considered the nonmarital property of the injured spouse, recovery for loss of wages and medical expenses incurred during the marriage is considered marital property, and recovery for economic loss after the marriage dissolution is considered the injured spouse's nonmarital property. *Ward v. Ward*, 453 N.W.2d 729, 731 (Minn. App. 1990), *review denied* (Minn. June 6, 1990). Payment for loss of consortium is the non-injured spouse's nonmarital property. *Id.* A party seeking nonmarital classification of all or part of a personal injury settlement bears the burden of proving its nonmarital characterization by a preponderance of the evidence. *Id.* at 732. "The preponderance of the evidence standard requires that to establish a fact, it must be more probable that the fact exists than

that the contrary exists.” *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004).

We review the district court’s determination of whether property is marital or nonmarital as a question of law, but defer to the court’s findings of fact unless clearly erroneous. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Findings are clearly erroneous if “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (quotation omitted). “If there is reasonable evidence to support the district court’s findings, [the reviewing court] will not disturb them.” *Id.* An appellate court reviews the record in the light most favorable to the district court’s findings. *Vangness v. Vangness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

Respondent sustained her burden to show that the settlement was her nonmarital property by describing the nature and severity of her personal injuries, the understanding on her part that recovery was compensation for those injuries, and the showing of the settlement check from the personal-injury lawyer singularly addressed to her. Appellant claimed some of the settlement was to compensate him for loss of consortium—his nonmarital property. But appellant, who had the burden of proof on this question, produced no documents supporting his claim, and the district court did not find his testimony credible. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations).

Appellant next argues that the district court erred in tracing the nonmarital funds to one of the Burnsville properties and the Lakeville home. And if tracing was done

appropriately, appellant argues, the district court erred by including the properties' active appreciation in its nonmarital calculations. But these arguments are not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that this court will generally not consider matters not argued and considered by the district court). Moreover, with respect to the tracing argument presented here, in his motion for a new trial and amended findings appellant agreed to the amount paid toward the two properties and that its source was the personal-injury settlement. We decline to address these newly presented arguments.

Appellant also argues that the district court erred in granting respondent leave to submit additional evidence, post-trial, of her nonmarital interest in the Lakeville property. And if the submission was appropriate, the submission did not properly establish the value of respondent's nonmarital interest. This evidentiary decision was within the district court's discretion because the record indicates that respondent was permitted to submit evidence post-trial based on appellant's failure to cooperate with respondent's requests for discovery. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (stating that the district court has broad discretion regarding evidentiary decisions). And because valuations are normally an approximation, and the calculation here had a rational basis, the district court's determination was not clearly erroneous. *See Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001) (explaining that because it is a finding of fact, this court will uphold a district court's determination of an asset's value unless it is clearly erroneous).

## 2. *Other Property Issues*

Appellant argues that the district court erred in classifying a \$79,050 home equity line of credit, extended after the parties' separation, as his nonmarital debt.

The determination of whether a debt is marital or nonmarital property is a legal conclusion reviewed de novo, but the findings supporting the conclusion are reviewed for clear error. *Burns v. Burns*, 466 N.W.2d 421, 423 (Minn. App. 1991). During the pendency of a marriage dissolution "each party owes a fiduciary duty to the other for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets." Minn. Stat. § 518.58, subd. 1a (2006). But a party may liquidate marital assets without the other spouse's consent for "necessities of life." *Id.*

Appellant's testimony is sufficiently vague and inconsistent to make it impossible to find clear error. Some of these funds may have been used for legitimate marital purposes, but this was not clearly documented. There was evidence of luxury purchases made by appellant and poor accounting. Lastly, to the extent appellant claims that he explained the reasons for his expenditures, we defer to the district court's credibility determinations. *See Sefkow*, 427 N.W.2d at 210.

Appellant also argues that the district court erred in awarding respondent \$2,600.32 in imputed interest on the proceeds from the sale of the Lakeville property because he insists that the court may have awarded interest on more than her portion of the hidden asset. But the record permits a calculation showing that, because respondent also had a nonmarital interest in the property, if there was a mistake, it involved less than

\$1,000. Given the substantial estate at issue, and the district court's sufficient equitable jurisdiction, any miscalculation can be characterized as de minimus error. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (holding that remand is unnecessary when an error is de minimus); *see also* Minn. R. Civ. P. 61 (“No error or defect . . . is ground[s] for . . . modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.”).

Appellant argues that the district court erred in determining that \$49,808.30 in proceeds from the 2004 sale of the parties' Nevada home was an advance property distribution to him because he used the funds to pay his legal fees and to invest in his business.

A party may not deplete marital funds to pay attorney fees without compensating the other party in the subsequent property distribution. *Thomas v. Thomas*, 407 N.W.2d 124, 127-28 (Minn. App. 1987). Appellant admitted that \$25,000 of the transfers were used to pay his legal fees. Money expended for legal expenses was correctly determined to be an advance property distribution to appellant.

A party may utilize marital assets “in the usual course of business.” Minn. Stat. § 518.58, subd. 1a. But factual findings supporting the district court's conclusion are reviewed for clear error. *Burns*, 466 N.W.2d at 423. The record contains evidence consistent with appellant's argument that a portion of the proceeds was used in a legitimate business enterprise that would have had the characteristics of a marital enterprise. But the record does not compel a finding that this is significant, given that the parties agreed earlier that he was to be awarded certain business assets (his business

checking account with a balance of more than \$30,000), in effect treating them as his nonmarital property. The record is sufficiently unclear that it is impossible to determine clear error.

Finally, appellant argues that the district court erred in awarding respondent an equalizer payment regarding a \$5,000 gift made by him to his brother out of marital funds. He argues that respondent essentially received this \$2,500 equalizer twice, once in the equalizer regarding the Nevada property sale proceeds, and separately, here. The record does not require or permit this conclusion and does not permit a finding of clear error. *See Burns*, 466 N.W.2d at 423 (stating that the district court’s factual findings are sustained unless it clearly erred).

### 3. Attorney Fees

Appellant argues that the district court erred in awarding respondent \$15,000 in attorney fees based on his conduct.

Where a party “unreasonably contributes to the length or expense of the proceeding,” the district court may grant an attorney fee award in favor of the other party. Minn. Stat. § 518.14, subd. 1(3) (2006). An award of these “conduct-based” attorney fees under Minn. Stat. § 518.14, subd. 1(3), “rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion.” *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999).

The district court made detailed findings regarding appellant’s conduct, which “delayed and contributed to the length and complexity of these proceedings.” These

findings are not clearly erroneous and the conduct-based attorney fee award was well within the district court's discretion.

**Affirmed.**