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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0007**

In re the Marriage of:
Stephen L. Persons, petitioner,
Appellant,

vs.

Mary Persons,
Respondent.

**Filed January 13, 2009
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-FA-300079

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Considered and decided by Connolly, Presiding Judge; Ross, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this appeal from a judgment and decree, appellant challenges the district court's division of the parties' property. Because the district court did not abuse its discretion in dividing the property, we affirm.

FACTS

Appellant husband Stephen Persons and respondent wife Mary Persons were married in November 1985. They separated in December 2004, and husband petitioned for dissolution of the marriage in April 2005. At the time, the parties had one minor child, born in February 1988.

The parties resolved several issues by stipulation and submitted the remaining issues to a referee for trial in April 2007. The referee issued findings of fact, conclusions of law, and judgment and decree, which the district court adopted. Both parties moved for amended findings. The referee conducted a hearing and the district court adopted the proposed amended judgment. This appeal follows.

DECISION

Husband challenges several aspects of the district court's division of the parties' property. "District courts have broad discretion over the division of marital property and appellate courts will not alter a district court's property division absent a clear abuse of discretion or an erroneous application of the law." *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). We will affirm a division of property "if it has an acceptable basis in

fact and principle,” even if we might have resolved the matter differently. *Rohling v. Rohling*, 379 N.W.2d 519, 522 (Minn. 1986) (quotation omitted).

I. Wife’s nonmarital property

Husband challenges the district court’s determination that wife has a nonmarital interest in (1) a portion of the value of the parties’ homestead, and (2) an annuity wife received as part of a personal-injury settlement. We review the district court’s determination of whether property is marital or nonmarital as a question of law but defer to the district court’s findings of fact unless they are clearly erroneous. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Findings are clearly erroneous if “the reviewing court is left with the definite and firm conviction that a mistake has been made.” *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, we will not disturb them.” *Id.* We review the record “in the light most favorable to the [district] court’s findings.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

“Nonmarital property” includes property acquired by one spouse before the marriage and any property acquired in exchange for such property. Minn. Stat. § 518.003, subd. 3b(b), (c) (2008). When a spouse is injured during the marriage, any recovery for pain and suffering is the nonmarital property of the injured spouse. *Ward v. Ward*, 453 N.W.2d 729, 731 (Minn. App. 1990), *review denied* (Minn. June 6, 1990).

The party asserting that property is nonmarital has the burden of proving it by a preponderance of the evidence. *Crosby v. Crosby*, 587 N.W.2d 292, 296 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). When marital and nonmarital assets have

been commingled, the party asserting the nonmarital claim must adequately trace the nonmarital funds in order to establish their nonmarital character. *Id.* at 296-97.

A. Wife's interest in homestead

Husband argues that there is insufficient evidence to support the district court's finding that wife had a 6.76% nonmarital interest in the parties' homestead because wife presented no documentary evidence to support her claim. But no particular form of evidence is necessary to meet the burden of proof. A nonmarital interest in property may be established on the basis of credible testimony. *See Doering v. Doering*, 385 N.W.2d 387, 390 (Minn. App. 1986) (affirming district court's resolution of conflicting testimony regarding the degree of party's nonmarital interest in the parties' homestead). And we defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). "Where evidence relevant to a factual issue consists entirely of conflicting oral testimony, an appellate court will disturb the [district] court's ultimate finding only in the most unusual circumstances." *Doering*, 385 N.W.2d at 390 (quotation omitted); *see also Wehner v. Wehner*, 374 N.W.2d 569, 572 (Minn. App. 1985) (recognizing that "in such situations the [district] court's finding must necessarily have been based on the credibility of the witnesses").

Wife testified that she received a workers' compensation settlement shortly after the marriage and believed that she spent approximately \$35,000 of the settlement on remodeling the parties' homestead. She conceded that she had no documentation to support her claim. However, husband acknowledged in a handwritten document he produced during discovery that wife "may have spent 5,000" on the homestead. Husband

contends that the district court improperly relied on this document because it did not link this amount of money to a workers' compensation settlement. But the record reflects that husband wrote the document in response to questioning regarding wife's nonmarital interest claim. Because the district court apparently credited wife's testimony, and because husband's representation may reasonably be viewed as an admission against interest, there is sufficient evidence to support the district court's finding that wife had a 6.76% nonmarital interest in the parties' homestead based on a \$5,000 nonmarital contribution to home improvements.

B. Wife's annuity

Husband argues that the district court erred by awarding wife the full value of an annuity she received from the settlement of a personal-injury lawsuit. Husband concedes that the principal portion of the settlement is nonmarital property because it compensates wife for her pain and suffering. But he maintains that because the parties jointly decided to put a portion of the settlement proceeds into an annuity the interest component of that annuity should be considered marital property. *See Baker v. Baker*, 753 N.W.2d 644, 652 (Minn. 2008) (holding appreciation of nonmarital property may be considered marital property if it is the result of "marital effort—the financial or nonfinancial efforts of one or both spouses during the marriage").

The district court rejected husband's argument, finding that the parties had

no legal right to determine the form of the annuity, how it is funded, where the funds are invested, or any other management decisions. In other words, there is no active management of the annuity and there is no gain or loss associated with it as it relates to the recipient.

Because husband concedes that the principal is wife's nonmarital property and the record supports the district court's finding that there was no marital effort toward increasing that principal, the district court did not err by deciding that the annuity is exclusively wife's nonmarital property.

II. Transfer or disposal of marital assets

Husband challenges the district court's decision to award wife a marital interest in (1) the proceeds from husband's October 2005 sale of a car that the parties owned, and (2) funds husband withdrew from his deferred-compensation and investment accounts shortly before and during the pendency of the dissolution action.

"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 (2008). If the district court finds

that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the [district] court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

Id. The party claiming improper disposition of a marital asset has the burden of proof.

Id.

Whether Minn. Stat. § 518.58, subd. 1a, is violated presents a fact question. *See* Minn. Stat. § 518.58, subd. 1a (stating that “[i]f the court finds that a party to a marriage . . . [violated the statute], the court shall compensate the other party”). Therefore, we review the finding that husband violated the statute for clear error. Minn. R. Civ. P. 52.01.

A. Car sale and purchase

Husband argues that the district court erred by ordering him to reimburse wife for one-half of the proceeds from the sale of a car the parties owned and had given to their minor daughter for her exclusive use. It is undisputed that husband sold the car in October 2005, during the pendency of the action, and the district court found that the car was marital property. The district court further found:

[Husband] received \$4,200 from the sale and used it to purchase a 2004 Pontiac which is driven exclusively by the parties’ adult daughter.

. . . [Husband] requested that the Court not include the \$4,200 in the division of property but rather deem the use of the proceeds as his ordinary and necessary living expenses. There is no statutory or case law that permits the Court to diminish one party’s share of the marital estate in favor of expenses paid on behalf of an adult child, no matter how honorable that parent has been. Nor does one party have the right to use more than one-half of marital property for that party’s ordinary and necessary living expenses. [Wife] has a marital interest in one-half of the proceeds from the sale of the 1988 Pontiac.

Based on this record, the district court reasonably considered the sale of the car to be a transfer or disposition of marital assets. Husband now concedes that “it can be presumed that because the child [who was given use of the car] was a minor the vehicle

remained titled to the parties—or one of them.” Similarly, husband does not suggest that the sale did not constitute transfer or disposition of assets. Nor does he contend that wife consented to the October 2005 sale or the subsequent purchase of a different vehicle. Consequently, the sale violated Minn. Stat. § 518.58, subd. 1a, unless husband sold the vehicle “in the usual course of business or for the necessities of life.”

Husband asserts that his use of the funds to purchase a different car for the parties’ daughter constitutes use of funds for a “necessity.” The district court did not expressly address this argument but implicitly rejected it by finding that husband sold the car to purchase a newer car for “an adult child.” The record supports this finding. Although the parties’ daughter was not an adult at the time of the sale, she turned 18 in February 2006, no more than four months later. Viewing the record in the light most favorable to the district court’s findings, the district court did not err by awarding wife a marital interest in the sale proceeds.

B. Liquidation of deferred-compensation and investment accounts

Husband argues that the district court erred by awarding wife a marital interest in the funds he withdrew from his deferred-compensation and investment accounts between February 2005 and July 2006. Husband concedes that the funds in the accounts were marital but again relies on the “necessities of life” exception under Minn. Stat. § 518.58, subd. 1a, because he used the funds to purchase and furnish a home for himself and the parties’ daughter¹ and to pay the taxes associated with the withdrawal of the funds.

¹ The daughter’s therapist recommended that the daughter not live with wife.

After specifically discussing the unilateral nature of husband's conduct and his stated reason for withdrawing the funds, the district court decided that the funds, minus those spent on mortgage payments and expenses for the parties' condominium and homestead, were subject to wife's marital interest. In doing so, the district court emphasized that husband used a substantial portion of the funds to purchase new furniture, finding such an expenditure unnecessary under the circumstances. The district court did not abuse its discretion in determining that undisputed marital assets may not be expended disproportionately without both parties' consent.²

Finally, husband argues that the district court erred in its consideration of the tax consequences attendant to his withdrawals. Husband ties his argument with respect to the taxes to his claim that he withdrew the deferred-compensation and investment funds to cover the "necessities of life." Because this argument is contingent on the success of his primary argument, it fails as well.

Moreover, the district court specifically considered the tax consequences of the withdrawals, finding that husband had "incurred a taxable event to which [wife] is now subject. It is possible that she may have elected not to withdraw her share of that marital account and withdraw it at a time when her income was less and therefore the tax consequences could have been less." The district court is required to effect an equitable division of the parties' property, not necessarily an equal one. *See* Minn. Stat. § 518.58,

² At oral argument, husband's counsel suggested that section 518.58 does not apply to the funds husband withdrew and spent prior to his commencing of this action in April 2005. But the statute specifically applies to action taken "in contemplation of commencing" a dissolution action. Minn. Stat. § 518.58, subd. 1a.

subd. 1 (2008) (requiring district court to “make a just and equitable division” of the parties’ marital property); *Crosby*, 587 N.W.2d at 297 (“An equitable division of marital property is not necessarily an equal division.”). The district court did not abuse its discretion by placing the tax burden on husband, who chose to incur the tax consequences.

III. Inherited property

Husband argues that the district court erred by awarding to wife a painting that the parties jointly inherited from husband’s mother. He asserts that the painting should have been awarded to him, the natural son of the donor. But the district court’s decision to award the painting to wife “who directly and explicitly requested it and to whom it was promised by the owner” is supported by the evidence. The record indicates wife told husband’s mother that she loved the painting and that, in response, husband’s mother specifically promised to leave the painting to wife. Although the opposite result may have been justified, the district court’s decision to award the painting to wife was not an abuse of discretion. *See Rohling*, 379 N.W.2d at 522 (“[District] courts [have] considerable discretion to divide the marital assets between the parties.”).

IV. Husband’s pension

Husband argues that the district court failed to apply the parties’ stipulation that one-half of his pension received during the pendency of the case was nonmarital. Husband suggests that the district court’s order awards wife a marital interest in his pension prior to the dissolution. The tasks of valuing and dividing a party’s pension fall within the district court’s exercise of discretion in dividing the parties’ property. *Johnson*

v. Johnson, 627 N.W.2d 359, 362 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001).

Husband's argument misconstrues the district court's decision. The district court specifically took notice of the parties' stipulation. It then discussed and rejected wife's request "to be awarded her marital interest (one-half of one-half) as of the date when [husband] began to receive the pension payments." However, the district court also found: "Once the parties separated and [husband] received and used all of the pension payments for himself, he was then using 25% of the total that is deemed [wife]'s marital share of this asset." Accordingly, the district court awarded wife "her marital share of this pension (25%) commencing as of the date of separation." The district court awarded "[t]he remainder of the pension . . . solely to [husband]." Since husband agrees with the district court's finding that the parties separated in December 2004, the district court did not abuse its discretion by applying the parties' stipulation regarding husband's pension to pension payments husband received between January 2005 and April 2007, when the trial was held.

V. Ability to pay property-settlement equalizer

Although he did not present the issue, husband argues that the district court erred by failing to recognize, *sua sponte*, that he would have insufficient funds to satisfy the property-settlement equalizer. He asserts that he should be given sufficient time and ability to pay the property settlement. Because we do not consider issues raised for the

first time on appeal, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we decline to address this argument.

Affirmed.