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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1683**

In re the Marriage of:
George Jacobs, petitioner,
Respondent,

vs.

Diane Laverne Jacobs,
Appellant.

**Filed July 16, 2012
Reversed and remanded
Chutich, Judge**

Dakota County District Court
File No. 19AV-FA-10-2256

Christine J. Cassellius, Jessica L. Sanborn, Dougherty, Molenda, Solfest, Hills & Bauer, P.A., Apple Valley, Minnesota (for respondent)

Deborah N. Dewalt, Dewalt Law Office, Burnsville, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Diane Jacobs contends that the district court erred in dividing property between her and her ex-husband, respondent George Jacobs, when it characterized most of the money in two contested accounts as “nonmarital” property. She also claims that

the court abused its discretion in failing to require security for her spousal maintenance award. Because we conclude that the district court misapplied the law in determining whether funds in the two accounts were marital or nonmarital, we reverse and remand for further proceedings.

FACTS

George and Diane Jacobs were married on December 6, 1990. George was 61 years old and Diane was 51 years old when they married; it was a second marriage for both. Before and during the marriage, George owned his own business working as a labor arbitrator and mediator, retiring in 1999. Diane owned a modeling school and later worked as a cosmetic consultant, retiring in 2004.

After nearly 20 years of marriage, George filed for divorce in July 2010. The parties' unresolved issues relating to division and distribution of assets and spousal maintenance were tried to the district court. At the time of trial, George was 81 years old and Diane was 71. Diane's main arguments relate to the tracing and characterization of marital and nonmarital interests in two accounts at Edward Jones, an investment firm, which hold most of the assets at issue in the dissolution.

The best evidence of George's assets at the time of marriage is a 1988 loan application he completed in anticipation of purchasing the home that he and Diane lived in during the marriage. On this application, George's assets amounted to approximately \$750,000, made up primarily of contracts for deed, mutual funds, municipal bonds, a Certificate of Deposit (CD), his defined benefit pension plan, a Keogh account, and an Individual Retirement Account (IRA). No documents were available showing George's

net worth or specific assets as of the date of the marriage, December 6, 1990. Through testimony and evidence at trial, the disputed accounts were described as follows.

Individual Retirement Account

George testified that he opened the IRA account in approximately 1992, funded primarily with his defined benefit pension plan from his labor arbitration business. Extrapolating from tax returns, corporate minutes, other documents, the testimony of George's expert, and George's own testimony, the district court found that the beginning balance of the IRA account was nonmarital but that George made contributions to the plan during the marriage. The account had a balance at the valuation date of \$457,444, and the district court found it contained \$109,695 in marital equity; accordingly, it awarded Diane half that amount, \$54,848.

Diane argues that George did not properly trace the funds in this account to his nonmarital assets, and that he actively managed the account during the marriage. Thus, she contends that a larger portion, if not all, of the IRA account balance is marital property.

Investment Account

George also has a second account, an investment account that he opened in 1998. This investment account had a value of \$235,205 as of December 31, 1998. George offered no evidence or documentation of precisely where the money came from to fund that account, but testified vaguely that it was "a rollover from all the other investments that I had." According to George, this account included premarital mutual funds and municipal bonds held at other investment firms, CDs, stock, and other similar

investments. He also testified that he invested his premarital real estate assets into stocks and bonds, which were eventually moved to this account. When asked whether any of the assets listed in the 1988 loan application went into the investment account, George testified “[t]hat’s probably where it all came from; yes, a good portion of it.” He was unable to further trace any of the specific assets into the investment account.

The account showed no other deposits from 1998 through 2005, and George testified that the increase in the account was due solely to interest and reinvestment of dividends. Besides income earned on the balance, assets totaling approximately \$84,000 were added to the account from 2005 through 2009. George testified that he did not know the source of these deposits. He also withdrew substantial amounts from this investment account, which he testified he used solely for improvements to the parties’ home.

Mark Lundberg, George’s financial advisor at Edward Jones, testified as an expert witness at trial. Lundberg reviewed George’s 1988 loan application, tax returns, and other financial documents, but acknowledged that there was “some lack of historical documentation.” He generated a report opining that the IRA account was primarily nonmarital except for the amounts directly contributed during the marriage, and that the second investment account was completely nonmarital. Assuming a 5.32% rate of return, he stated that the amounts in the two accounts are what would be expected on the value of George’s premarital assets listed in the 1988 loan application. Lundberg also suggested that the approximately \$84,000 added to the investment account could reflect in-house transfers from the IRA account, a different account that George held with Diane,

an account George had with his daughter, or outside securities that George bought from other firms. He did not offer any documentary evidence to support this opinion.

The district court found that the entirety of the investment account, valued at \$711,546 at the time of trial, was nonmarital. The court found the account was funded with nonmarital assets, and the increases in the account were passive and therefore nonmarital.

The district court awarded Diane the following assets in addition to her own nonmarital IRA account worth \$118,064: \$2,400 per month in spousal maintenance; \$6,661 representing half of the marital equity in the homestead; \$54,848 representing half of the marital equity in the IRA account; \$100,000 lump-sum distribution from George's nonmarital property; \$25,000 in need-based attorney fees; any and all bank accounts, investment accounts, and retirement interests currently in her name; and household goods and furnishings. Diane introduced evidence at trial showing that this award would not be enough for her to meet her reasonable expenses.

Diane brought a motion for post-trial relief, requesting a new trial or amended findings and conclusions. The district court denied her motion, and this appeal followed.

D E C I S I O N

Whether property is marital or nonmarital is a question of law, which we review de novo. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997); *Wopata v. Wopata*, 498 N.W.2d 478, 484 (Minn. App. 1993). We review the underlying findings of fact, however, for clear error. *Olsen*, 562 N.W.2d at 800; *see also Baker v. Baker*, 753

N.W.2d 644, 649 (Minn. 2008) (“We independently review the issue of whether property is marital or nonmarital, giving deference to the district court’s findings of fact.”).

Marital property includes any real or personal property acquired by the parties during the marriage. Minn. Stat. § 518.003, subd. 3b (2010). Nonmarital property includes property acquired by either spouse before the marriage, and property that is “acquired in exchange for or is the increase in value of property” acquired before the marriage. *Id.* All property acquired by either spouse after the date of the marriage and before the valuation date is presumed to be marital, and the proponent of a nonmarital claim can overcome this presumption by showing, by a preponderance of the evidence, that the property is nonmarital. *Id.*; *see Baker*, 753 N.W.2d at 649–50.

Tracing of Nonmarital Property

Diane first argues that George did not sufficiently trace his premarital assets to the two accounts. “Whether a nonmarital interest has been traced is . . . a question of fact,” *Kerr v. Kerr*, 770 N.W.2d 567, 571 (Minn. App. 2009), which we review for clear error. Minn. R. Civ. P. 52.01.

“In order to maintain its nonmarital character, nonmarital property must be kept separate from marital property or, if commingled, must be readily traceable.” *Wopata*, 498 N.W.2d at 484. The proponent of a nonmarital claim must “show by a preponderance of the evidence that the asset is readily traceable to a nonmarital source.” *Hafner v. Hafner*, 406 N.W.2d 590, 593 (Minn. App. 1987); *see also Olsen*, 562 N.W.2d at 800. Strict tracing is not required, however, and credible testimony otherwise unsupported by documentation can be sufficient to trace a nonmarital asset. *See Doering*

v. Doering, 385 N.W.2d 387, 390–91 (Minn. App. 1986); *see also Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 697 (Minn. App. 2010) (“[T]racing property to its nonmarital source does not require intricate detail.”), *review denied* (Minn. Nov. 16, 2010).

The district court found that George properly traced his premarital interest in the two accounts. George testified that all of the money used to fund the two accounts came from assets he owned before the marriage. While acknowledging the lack of historical documentation, Lundberg testified that the amounts listed on the 1988 loan application were consistent with the amounts that initially funded the accounts. Diane did not present any evidence to refute this testimony; nor did she offer any other theory on the origin of the money.¹

The district court did not clearly err in its determination of the beginning balances in George’s claimed nonmarital accounts. The district court found credible George’s testimony that the accounts were funded through his premarital pension plan and other premarital assets. Further, the court credited Lundberg’s testimony that the parties did not earn significant salaries during the marriage that could have funded these accounts; nor was there any other evidence of any deposits of marital assets into the accounts. *See Doering*, 385 N.W.2d at 391 (affirming the district court’s finding that tracing was

¹ Diane argues that the district court, instead of requiring George to prove the nonmarital character of the funds, shifted the burden of proving the marital character of those funds to her when it found that she “did not contradict [George’s] testimony and acknowledged she knew little about [George’s] assets.” This argument does not have merit. The district court’s findings regarding tracing are supported by the evidence and suggest that it implicitly found George’s testimony credible. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (noting that the district court “implicitly indicate[d]” that it found certain evidence credible). Here, the court simply noted that no evidence contradicted that credible testimony.

sufficient based on the respondent's credible testimony). Viewing the evidence in the light most favorable to the district court's findings, we conclude that its ruling on the tracing issue is not clearly erroneous, and the beginning balances of the two accounts are \$267,402 (IRA account) and \$235,205 (investment account).

Increase in Value from Interest and Dividends

Minnesota courts have generally held that income produced during the marriage from a nonmarital investment, such as interest and dividends, is marital property. *See Gottsacker v. Gottsacker*, 664 N.W.2d 848, 854 (Minn. 2003); *Nardini v. Nardini*, 414 N.W.2d 184, 194 (Minn. 1987); *Swick v. Swick*, 467 N.W.2d 328, 331 (Minn. App. 1991), *review denied* (Minn. May 16, 1991); *Moore v. Moore*, 391 N.W.2d 42, 44 (Minn. App. 1986). The appreciation in value of a nonmarital investment, however, may be marital or nonmarital depending on why the appreciation occurred:

[T]he increase in value of nonmarital property attributable to the efforts of one or both spouses during their marriage, like the increase resulting from the application of marital funds, is marital property. Conversely, an increase in the value of nonmarital property attributable to inflation or to market forces or conditions, retains its nonmarital character.

Nardini, 414 N.W.2d at 192. Thus, “[i]n determining whether the appreciation in the value of a nonmarital investment is marital or nonmarital, we look to whether or not the appreciation is the result of active management of the investment, classifying active appreciation as marital property and passive appreciation as nonmarital property.” *Baker*, 753 N.W.2d at 650.

While we affirm the district court's finding that George properly traced his premarital interest to the beginning balances of the two accounts, we agree with Diane that the court erred in determining that the total increase in value of the accounts was nonmarital. Specifically, the district court failed to distinguish between income produced by the accounts in the form of interest and reinvestment of dividends, and the increase due to appreciation of the value of assets held in the accounts.

The district court properly found that the investment account was opened with a nonmarital balance of \$235,205 and had a balance on the valuation date of \$711,546. In addition, the court correctly found that George's nonmarital interest in the IRA account was \$267,402; \$84,333 was contributed during the marriage; and the balance of the account on the valuation date was \$457,444. The court erred, however, in concluding that the total increase in the two accounts—\$476,341 in the investment account and \$105,709 in the IRA account—is all George's nonmarital property.

The court made no findings as to the nature of the increase in the IRA account, with the exception of designating the \$84,333 marital contribution. Concerning the investment account, the court found that “[t]he only money added were dividends for reinvestment” and “[a]ny deposits into this account were reinvestments only.” The district court clearly misapplied the law when it did not treat the reinvestment of dividends as marital property. *See Prahl v. Prahl*, 627 N.W.2d 698, 706 (Minn. App. 2001) (holding that “shares acquired by dividend reinvestment are marital property”). The court made no findings as to whether and to what extent the increase in either

account came from accrued interest, which is also marital property. *See, e.g., Wiegers v. Wiegers*, 467 N.W.2d 342, 344–45 (Minn. App. 1991).

The court found that any increase in the account was a passive increase in George’s nonmarital property. This passive/active distinction, however, only applies to the portion of an increase due to appreciation of the actual value of the assets in the accounts, that is, an increase in value because of market forces, and not to the portion of an increase due to interest and reinvestment of dividends. *See Baker*, 753 N.W.2d at 646 n.2, 650. We therefore remand the case to the district court for further findings apportioning the increase in the accounts between interest, reinvestment of dividends, and appreciation.²

If, on this record, the district court finds that a portion of the increased value of the accounts is due to appreciation, its previous finding that George’s management and involvement with the accounts was passive, rather than active, is not clearly erroneous. The question is whether George put in “significant effort that otherwise could have been devoted to the generation of marital property[, but] was diverted and applied toward nonmarital property instead.” *Id.* at 651; *see also id.* at 652 (“[T]he single test for whether appreciation in the value of nonmarital property is marital or nonmarital is the extent to which marital effort—the financial or nonfinancial efforts of one or both spouses during the marriage—generated the increase.”).

² Once the district court makes findings as to the character of the increase of the accounts, the *Schmitz* formula applies to apportion the marital and nonmarital components of the accounts. *See Schmitz v. Schmitz*, 309 N.W.2d 748, 750 (Minn. 1981); *see also Baker*, 753 N.W.2d at 652; *Nardini*, 414 N.W.2d at 193–94.

While George monitored his accounts on an almost daily basis, often spoke with his broker, and made decisions regarding the accounts several times a year, we conclude that his actions do not amount to significant effort that contributed to the appreciation of the account. Rather, the facts are similar enough to those in *Baker* to cause us to conclude that George did not engage in “active marital efforts.” *See id.* (concluding that selecting and occasionally changing investment advisors, authorizing money managers to make discretionary decisions, rarely exercising discretion to direct investments, and declining to withdraw liquid assets from the funds, was not active marital effort). Therefore, should the district court find on remand that a portion of the increase in the investment and IRA accounts was due to appreciation, that appreciation was passive and should be treated as George’s nonmarital property.

George still bears the burden of showing, by a preponderance of the evidence, what portion of the increase in the accounts is due to marital interest and dividends, and what portion is due to nonmarital appreciation. *See* Minn. Stat. § 518.003, subd. 3b; *Antone v. Antone*, 645 N.W.2d 96, 101 (Minn. 2002). If, on this record, George is unable to make this showing, and the court finds that the marital and nonmarital components of the increases are inextricably commingled, the district court may conclude that the total increase in the two accounts is marital and divide the assets accordingly. *See Wieggers*, 467 N.W.2d at 344 (“When nonmarital and marital property are commingled, the nonmarital investment may lose that character unless it can be readily traced.”).

Homestead Improvements

Because George funded the improvements to the parties' homestead with withdrawals from the investment account, the district court should also re-evaluate its findings as to the nonmarital character of the increase in value of the parties' homestead. If the court finds that the amounts George withdrew from the account for home improvements came from interest or dividends and were therefore marital property, it should determine what portion of the increase in the value of the homestead during the marriage was therefore marital. *See Nardini*, 414 N.W.2d at 193 (stating that "the increase in value attributable to the physical improvement of the property through the application of marital funds and marital effort" is marital property).

Security for Spousal Maintenance Award

On remand, in light of any modified property division, the district court should revisit its decision concerning security for Diane's spousal maintenance award. To be sure, the district court has discretion to consider whether security for a maintenance award is appropriate. *Laumann v. Laumann*, 400 N.W.2d 355, 360 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987); *see also* Minn. Stat. § 518A.71 (2010) (permitting the court to require security for the payment of spousal maintenance). We note, however, that if we were to affirm the current property division, we would likely conclude that the district court abused its discretion in not requiring security, given Diane's "age, education, vocational experience, and employment prospects." *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

We recognize that on remand the district court may conclude that Diane is entitled to a significantly larger award of marital property, which could make security for the spousal maintenance award unnecessary. We decline therefore to expressly direct the district court to require that George provide security for the maintenance award, but urge the district court to reconsider the need for security in light of any modified property division.

In sum, the district court misapplied the law in determining that all of the increase in the value of the two accounts was nonmarital property. Specifically, it erred in failing to recognize that, during the marriage, any increase in value of the accounts attributable to accruing interest and reinvestment of dividends was marital property. We therefore reverse the judgment and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.