

Nos. A06-1432 and A06-1444

---

State of Minnesota  
**In Court of Appeals**

---

Kenneth King McIntosh,

*Appellant,*

v.

Marjorie Mary McIntosh,

*Respondent.*

---

**RESPONDENT'S BRIEF AND APPENDIX**

---

Mark A. Olson (#82119)  
2605 East Cliff Road  
Suite 100  
Burnsville, MN 55337  
(952) 894-8893

*Attorney for Appellant  
Kenneth King McIntosh*

Steven A. Sicheneder (#100754)  
20 North Lake Street  
Town Square Building, Suite 302  
Forest Lake, MN 55025  
(651) 464-7815

*Attorney for Respondent  
Marjorie Mary McIntosh*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).

## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| Table of Authorities   | 4           |
| Statement of the Case; Order for Protection  | 5           |
| Statement of the Facts; Order for Protection   | 6           |
| Legal Issues; Order for Protection   | 9           |
| Arguments; Order for Protection  |             |
| I.    There Is No Requirement for a Present Showing<br>of Abuse or Threat of Abuse to Extend an Order<br>for Protection, When The Original Order For<br>Protection Was Stipulated to Without<br>Findings of Abuse. | 10-11       |
| II   Respondent Demonstrated Specific Statutory Grounds<br>to Extend the Order for Protection  | 12-13       |
| Statement of the Case; Dissolution of Marriage   | 14-15       |
| Statement of the Facts; Dissolution of Marriage  | 16-18       |
| Legal Issues; Dissolution of Marriage  | 19          |
| Arguments; Dissolution of Marriage   |             |
| I.    The Trial Court Did Not Err in Treating the<br>Funds in Unidale Insurance Company<br>as Marital Property and Subject to Division   | 20-22       |
| II   The Trial Court Erred When It Determined<br>That The Entire Proceeds From The Sale Of<br>Appellant's Mother's Home Are Appellant's<br>Nonmarital Property   | 22-24       |

|   |       |
|---|-------|
| III. The Trial Court Erred In Crediting Appellant<br>With The Payment Of Federal And<br>State Income Taxes for 2002 | 25-26 |
| Conclusion  | 27-28 |
| Appendix and Index  | 29    |

## TABLE OF AUTHORITIES

| <u>CASES</u>   | <u>PAGE</u> |
|--|-------------|
| <u>Chosa Ex. Rel. Chosa v. Taglient</u> , 693 N.W.2d 487 (Minn. App. 2005) | 12          |
| <u>Crosby v. Crosby</u> , 587 N.W.2d 292 (Minn. Ct. App. 1998)             | 23          |
| <u>Mechtel v. Mechtel</u> , 528 N.W.2d 916 (Minn. App. 1995)               | 12          |
| <u>Olson v. Olson</u> , 562 N.W.2d 797 (Minn. 1997)                        | 23          |
| <u>Ronnkvist v. Ronnkvist</u> , 331 N.W.2d 764 (Minn. 1983)                | 20          |
| <u>Rosenberg v. Rosenberg</u> , 379 N.W.2d 580 (Minn. Ct. App. 1985)       | 20, 22      |
| <u>Van de Loo v. Van de Loo</u> , 346 N.W.2d 173 (Minn. Ct. App. 1984)     | 23          |
| <br><u>STATUTES</u>  |             |
| Minn. Stat. §518.54, Subd. 5   | 21, 23      |
| Minn. Stat. §518.58  | 22          |
| Minn. Stat. §518.58, Subd. 1   | 22          |
| Minnesota Statutes Chapter 518B  | 5, 11       |
| Minn. Stat. §518B.01, Subd. 6a   | 10, 12, 27  |
| Minn. Stat. §645.16  | 11          |
| Minn. Stat. §645.17  | 11          |
| <br><u>RULES</u>   |             |
| Minn. R. Civ. P. 52.01   | 12, 20      |

**STATEMENT OF THE CASE; ORDER FOR PROTECTION**

This is a Domestic Abuse proceeding commenced by Respondent pursuant to Minnesota Statutes Chapter 518B.

Respondent requested an Order for Protection with the filing of Petitioner's Affidavit and Petition for Order for Protection dated the 27<sup>th</sup> day of December, 2002. An Emergency (Ex Parte) Order for Protection was filed on the 30<sup>th</sup> day of December, 2002. A Domestic Abuse Order for Protection Following Hearing was filed January 16, 2003.

On January 20, 2004, Respondent filed an Application for Extension of Order for Protection. The request for an extension came on for hearing on March 22, 2004. A Subsequent or Extended Order for Protection was filed March 22, 2004.

On December 6, 2005 Respondent filed an Affidavit and Motion to Modify Order for Protection.

On February 9, 2006 Respondent filed an Application for Extension of Order for Protection.

A hearing on Respondent's request for an Extension of the Order for Protection was conducted on March 31, 2006. An Order Extending Order for Protection was filed May 25, 2006.

Appellant filed an Appeal on the Trial Court's extension of the Order for Protection on July 31, 2006.

## STATEMENT OF THE FACTS; ORDER FOR PROTECTION

Respondent commenced this proceeding with the filing of Petitioner's Affidavit and Petition for Order for Protection on December 27, 2002. In her Affidavit in support of the Order for Protection, Respondent makes the following allegations:

1. I am afraid that Kenneth will physically hurt me and would like the court to restrain him from coming near me. (Appellant's Appendix, Page 114).
2. At one point, he had his hands in the pockets of his coat. We were standing in the kitchen. Suddenly, he rammed me with his shoulder, causing me to fall to the floor with force. I asked him to leave and threatened to call 911. He wouldn't leave, so I called 911. He followed me all through the house as I spoke to the 911 operator. At one point, I went into the bathroom where our daughter, Kristin, was finishing up a bath. Kenneth forced his way into the bathroom and blocked our exit. (Appellant's Appendix, Page 114).
3. December 24-25, 2002: For several days prior to this, Kenneth has been growling at me, blaming me for all the problems in his life. (Appellant's Appendix, Page 114).
4. On Christmas morning, Kenneth was very angry and raged at me. (Appellant's Appendix, Page 114).
5. She told her father about it on October 15, 2002, and he started beating her - brought on bruises, called her names and degrading her: whore, slut, bitch, like she was ruined and worthless.... (Appellant's Appendix, Page 114).
6. Since October 15, 2002, Kenneth woke me or Rebecca up about ten times to lecture us. He would corner me and lecture me until he was done. (Appellant's Appendix, Page 114).

7. Kenneth has a history of shaking me at the shoulders, starting slowly and then speeding up, then apparently realizing what he is doing, and stopping. Kenneth also has threatened me with his fist as if to hit me. One time, he actually came into the kitchen and hit me on the chin. I saw the blow coming, and turned by head, causing it to be a glancing blow. (Appellant's Appendix, Page 115).

Respondent's request for an Order for Protection came on for hearing on January 16, 2003. Appellant was represented by attorney Janet Goehle at the hearing. Appellant consented to the entry of the Order for Protection. Specifically, the Order for Protection states:

- 4.b. Respondent does not object to an Order for Protection and understands that the Order will be enforced as if there were an admission or finding of domestic abuse. (Appellant's Appendix, Page 117).

Respondent's request for an extension of the Order for Protection came on for hearing on the 22<sup>nd</sup> day of March, 2004. At the hearing Appellant admitted that he entered a plea of guilty to violating the Order for Protection (Transcript, Pages 35-37; Trial Exhibit 1). Following the hearing on the 22<sup>nd</sup> day of March, 2004, the Trial Court filed a Subsequent or Extended Order for Protection on March 22, 2004. (Appellant's Appendix, Pages 130-137).

On the 9<sup>th</sup> day of February, 2006, Respondent requested a second extension of the Order for Protection.(Appellant's Appendix, Page 141). The request to extend the Order for Protection came on for hearing on the 31<sup>st</sup> day of March, 2006. At the hearing, Respondent testified to violations of the Order for Protection as follows:

1. In the spring of 2005 Appellant was at Respondent's residence at a time different than allowed for him to be there for the pickup and/or drop off of the children for parenting time. (Transcript, Page 147).
2. Appellant telephoned Respondent's home on a telephone line not designated for him to call on to speak with the children. (Transcript, Pages 148-149).
3. On December 28, 2005 when Respondent attempted to telephone the children during Appellant's parenting time, Appellant went into a rage at Respondent. (Transcript, Pages 142-143).

At the hearing on the 31<sup>st</sup> day of March, 2006, Respondent testified she still was in fear of Appellant.

Following the hearing on the 31<sup>st</sup> day of March, 2006, the Trial Court filed an Order Extending Order for Protection. (Appellant's Appendix, Pages 144-146). In Finding of Fact 6 of said Order the court specifically found:

- “6. The court finds that Petitioner's testimony was credible and that she evidenced an obvious fear of physical harm from the Respondent. Petitioner indicated that Respondent had violated the previous Order for Protection on two occasions, and although the court does not extend the Order for Protection on the basis of a violation, the prior incidents along with the incidents as recent as December, 2005 taken as a whole, support Petitioner's assertion that she is in reasonable fear of physical harm from Respondent. (Appellant's Appendix, Page 145).”

## LEGAL ISSUES- ORDER FOR PROTECTION

1. WHETHER THERE MUST BE A PRESENT SHOWING OF ABUSE OR THREAT OF ABUSE TO EXTEND AN ORDER FOR PROTECTION, WHEN THE ORIGINAL ORDER FOR PROTECTION WAS STIPULATED TO WITHOUT FINDINGS OF ABUSE

The Trial Court granted Respondent's request to extend the Order for Protection without finding present abuse.

2. WHETHER RESPONDENT DEMONSTRATED ANY OF THE SPECIFIC STATUTORY GROUNDS TO EXTEND THE ORDER FOR PROTECTION

The Trial Court granted Respondent's request to extend the Order for Protection.

## ARGUMENT; ORDER FOR PROTECTION

### I.

#### THERE IS NO REQUIREMENT FOR A PRESENT SHOWING OF ABUSE OR THREAT OF ABUSE TO EXTEND AN ORDER FOR PROTECTION, WHEN THE ORIGINAL ORDER FOR PROTECTION WAS STIPULATED TO WITHOUT FINDINGS OF ABUSE.

An Order for Protection may be extended as set forth in Minn. Stat. §518B.01,

Subd. 6a which reads as follows:

Subd. 6a. Subsequent orders and extensions. Upon application, notice to all parties, and hearing, the court may extend the relief granted in an existing order for protection or, if a petitioner's order for protection is no longer in effect when an application for subsequent relief is made, grant a new order. The court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order upon a showing that:

- (1) the respondent has violated a prior or existing order for protection;
- (2) the petitioner is reasonably in fear of physical harm from the respondent;
- (3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or
- (4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.

A petitioner does not need to show that physical harm is imminent to obtain an extension or a subsequent order under this subdivision.

Appellant is seeking to make a distinction between a initial Order for Protection granted with the consent of a respondent and one where the trial court makes a finding that domestic abuse occurred.

Appellant's argument fails on two (2) accounts.

First, the Domestic Abuse Order for Protection Following Hearing filed January 16, 2003 makes no distinction between an Order entered where there is an admission and one where there is no admission. Paragraph 4b of the Domestic Abuse Order for Protection Following Hearing provides:

4.b. Respondent does not object to an Order for Protection and understands that the Order will be enforced as if there were an admission or finding of domestic abuse.

Second, in his Appellate Brief, Appellant states "In interpreting statutes, it is the goal of the reviewing court is to ascertain and effectuate the intent of the legislature. Minn. Stat. §645.16. In doing so, there is a presumption that the legislature does not intend an absurd result. Minn. Stat. §645.17."<sup>1</sup> In adopting Minnesota Statutes Chapter 518B, it was the legislature's intent to provide protection to victims of domestic abuse. There is nothing in the statutory language of Minnesota Statutes Chapter 518B which provides for a different standard to extend an Order for Protection as advocated by Appellant. If the legislature wanted a different standard to apply, the different standard would have been enacted into the statute. Adopting the interpretation as advocated by Appellant would be an absurd result.

The Trial Court's decision to grant an extension of the Order for Protection must be affirmed.

---

<sup>1</sup>Appellant's Appellate Brief, Page 16

## II.

### **RESPONDENT DEMONSTRATED SPECIFIC STATUTORY GROUNDS TO EXTEND THE ORDER FOR PROTECTION**

The standard of review for an Order for Protection is an abuse of discretion by the trial court. Mechtel v. Mechtel, 528 N.W.2d 916, 920 (Minn. App. 1995). Unless clearly erroneous, a Trial Court's findings of fact will not be set aside on appeal. Chosa Ex. Rel. Chosa v. Tagliente, 693 N.W.2d 487, 489 (Minn. App. 2005); Minn. R. Civ. P. 52.01.

Minn. Stat. §518B.01, Subd. 6a has two (2) separate provisions for the extension of an Order for Protection:

- (1) the respondent has violated a prior existing order for protection; and
- (2) the petitioner is reasonably in fear of physical harm from the respondent.

The Trial Court found Appellant has violated the terms of the Order for Protection. Further, the Trial Court found that Respondent had a reasonable basis for fear of physical harm from Appellant. While the Trial Court did not grant the extension of the Order for Protection on the violations of the Order for Protection, the Trial Court viewed the violations in supporting Respondent's fear of Appellant.

Appellant sets forth the proposition that "violations" means "convictions". There is nothing in Minn. Stat. §518B.01, Subd. 6a which requires convictions for violating an Order for Protection as a basis to grant an extension.

The Trial Court's findings of fact are supported by the evidence. It was not in abuse of the trial court's discretion to extend the Order for Protection.

The Trial Court's decision to grant an extension of the Order for Protection must be affirmed.

## **STATEMENT OF THE CASE; DISSOLUTION OF MARRIAGE**

This is a Dissolution of Marriage proceeding commenced by Respondent. This proceeding was commenced with a Petition for Dissolution of Marriage dated May 14, 2003.

The parties were married to each other on March 5, 1983. The parties separated December 26, 2002.

A Motion for Temporary Relief was heard on August 15, 2003. An Order for Temporary Relief was filed September 2, 2003.

This proceeding came on for Trial before the Honorable Stephen Muehlberg on the 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> days of June, 2005. At the conclusion of the Trial, the Trial Court requested each party to submit proposed Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree as well as Legal Memorandums. After submission of Post-Trial material, the Trial Court issued its decision with the filing of Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on September 12, 2005.

Appellant and Respondent each filed Post-Trial Motions which were heard on the 31<sup>st</sup> day of March, 2006 before the Honorable B. William Ekstrum. After the Motion hearing, Amended Findings of Fact, Conclusions of Law and Order were filed May 25, 2006.

Appellant filed his appeal on the 31<sup>st</sup> day of July, 2006.

Respondent filed her Notice of Review on the 8<sup>th</sup> day of August, 2006.

By its Order dated the 30<sup>th</sup> day of November, 2006, the Court of Appeals dismissed that part of Appellant's Appeal pertaining to past due medical expenses.

## STATEMENT OF THE FACTS; DISSOLUTION OF MARRIAGE

This is a Dissolution of Marriage proceeding commenced by Respondent, Marjorie Mary McIntosh. The Petition for Dissolution of Marriage is dated May 14, 2003.

The parties were married to each other on March 5, 1983. The parties separated on December 26, 2002.

The parties have eight (8) children, of which six (6) were minors at the time this matter came on for Trial.

The parties entered into a Permanent Partial Stipulation pertaining to custody, parenting time and the appointment of a parenting consultant.

The parties stipulated to the value and division of various retirement accounts.

The parties had a substantial marital estate which awarded each party in excess of \$900,000.00.

Appellant owned Unidale Insurance Agency, Inc. Appellant drew a salary from Unidale, and took significant additional disbursements from Unidale. Appellant was generally able to withdraw significant sums from Unidale on an annual basis. A review of Unidale's tax returns would show as follows:

1. Year 1998. Ordinary income \$105,505.00. Distribution other than div. distribution \$106,943.00 (Trial Exhibit #1).
2. Year 1999. Ordinary income \$132,241.00. Distributions other than divd. distributions \$133,916.00 (Trial Exhibit #3).

3. Year 2000. Ordinary income \$117,225.00. Distributions other than div. distributions \$118,799.00 (Trial Exhibit #5).
4. Year 2001. Ordinary income \$49,911.00. Distributions other than div. distributions \$26,583.00 (Trial Exhibit #8).
5. Year 2002. Ordinary income \$170,959.00. Distributions other than div. distributions \$178,730.00 (Trial Exhibit #11).
6. Year 2003. Ordinary income \$105,630.00. Distributions other than dividend distributions \$123,385.00.

Both Appellant and Respondent hired appraisers to value Unidale. Respondent's appraiser placed a value on Unidale in the amount of \$220,861.00, plus the balances in Unidale's two (2) bank accounts (Trial Exhibit #75). Appellant's appraiser placed a value on Unidale in the amount of between \$67,913.00 and \$78,330.00 (Transcript, Page 271). Appellant's appraiser agreed that any cash in Unidale would not be sold with the business (Transcript, Page 266). The Trial Court found Unidale to have a fair market value of \$67,913.00.<sup>2</sup> The Trial Court further found the cash in Unidale on December 31, 2003 was \$101,673.26 at University Bank and \$103,942.12 at Western Bank of which \$102,272.12 was a marital asset.<sup>3</sup>

Appellant kept significant account balances in Unidale. In Western Bank, end of year balances were as follows:

---

<sup>2</sup>Finding of Fact 14a. Appellant's Appendix, Page 7

<sup>3</sup>Finding of Fact 14b. Appellant's Appendix, Pages 8-9

1. 2000 - \$28,075.00 (Trial Exhibit #31)
2. 2001 - \$53,786.00 (Trial Exhibit #31)
3. 2002 - \$79,234.00 (Trial Exhibit #32)
4. 2003 - \$119,748.00 (Trial Exhibit #33)

During the pendency of this proceeding, Appellant moved \$101,619.00 from Unidale's Western Bank account to University Bank (Trial Exhibit #63). The University Bank account was opened August 18, 2003. The existence of this account was not initially disclosed by the Appellant (Transcript, Pages 143-144). Following the parties' separation on December 26, 2002, Appellant took significant funds from the parties' joint bank accounts.<sup>4</sup> Appellant used \$70,000.00 to purchase seven (7) \$10,000.00 each cashier's checks.

Appellant sold his mother's home in September, 2002 (Transcript, Page 146). The parties paid \$5,251.00 in capital gains taxes realized on the sale of this home (Trial Exhibit #12). Appellant received \$47,547.96 from the sale of his mother's home.<sup>5</sup>

Appellant requested Respondent to file joint income tax returns for tax year 2002. Respondent agreed to do so on condition she be held harmless from any liabilities thereon.<sup>6</sup> Appellant paid \$1,387.97 and \$24,443.00 in federal income tax liabilities for 2002 and \$7,029.00 in state income tax liabilities for 2002.<sup>7</sup>

---

<sup>4</sup>Finding of Fact 15. Appellant's Appendix, Pages 9-11

<sup>5</sup>Finding of Fact 31. Appellant's Appendix, Pages 18-19.

<sup>6</sup>Conclusion of Law 21. Appellant's Appendix Page 27.

<sup>7</sup>Appellant's Affidavit. Appellant's Appendix, Pages 63-64.

## LEGAL ISSUES - DISSOLUTION OF MARRIAGE

1. WHETHER THE TRIAL COURT ERRED IN TREATING THE FUNDS IN UNIDALE INSURANCE COMPANY AS MARITAL PROPERTY AND SUBJECT TO DIVISION

The Trial Court found the funds in Unidale Insurance Company to be a marital asset.

2. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE ENTIRE PROCEEDS FROM THE SALE OF APPELLANT'S MOTHER'S HOME ARE APPELLANT'S NONMARITAL PROPERTY

The Trial Court found that the entire proceeds from the sale of Appellant's mother's home were nonmarital property and awarded the proceeds to Appellant.

3. WHETHER THE TRIAL COURT ERRED IN CREDITING APPELLANT WITH THE PAYMENT OF FEDERAL AND STATE INCOME TAXES FOR 2002

The Trial Court credited Appellant with the payments of federal and state income taxes for 2002.

## ARGUMENTS; DISSOLUTION OF MARRIAGE

### I.

#### THE TRIAL COURT DID NOT ERR IN TREATING THE FUNDS IN UNIDALE INSURANCE AS MARITAL PROPERTY AND SUBJECT TO DIVISION

Trial Courts are accorded broad discretion in the valuation of assets, so long as the valuation is “supported by either clear documentary or testimonial evidence or by comprehensive finding issued by the court.” Ronnkvist v. Ronnkvist, 331 N.W.2d 764 (Minn. 1983). Unless clearly erroneous, a Trial Court’s findings of fact will not be set aside on appeal. Rosenberg v. Rosenberg, 379 N.W.2d 580, 582 (Minn. Ct. App. 1985); Minn. R. Civ. P. 52.01.

Appellant challenges the Trial Court’s calculation of the value of the bank accounts owned by Unidale. The Trial Court found Unidale had a value in the amount of \$67,913.00, plus the cash in its bank accounts. As of December 31, 2003, the total funds on hand for Unidale was \$103,942.12 in the Western Bank account and \$101,673.26 in the University Bank account. Appellant is seeking to have these balances reduced for obligations outstanding and owed by Unidale. The Trial Court accepted all of Appellant’s reductions except for Undistributed Sub S earnings in the amount of \$22,630.00 and Rents collected by Unidale but owed to Respondent.<sup>8</sup> The Trial Court found \$102,272.12 to be a marital asset.

---

<sup>8</sup>Finding of Fact 14.b. Appellant’s Appendix, Pages 8-9

The parties agreed to value the marital estate as of December 31, 2003. Appellant had control over all of the funds in Unidale. Appellant could have distributed the funds from Unidale to himself at any time. If the funds had been distributed from Unidale to Appellant, they would have been deposited into a different bank account which then would have been subject to division by the court. Any distribution would have moved the asset from Unidale to a personal asset for Appellant. In dividing the marital estate it does not matter whether the asset is part of Unidale or whether it is part of Appellant's personal estate.<sup>9</sup>

The Trial Court found the bank accounts of Unidale to be Marital Property. "Marital Property" is defined in Minn. Stat. §518.54, Subd. 5. The definition of "Marital Property" as set forth in Minn. Stat. §518.54, Subd. 5 and as it pertains to this proceeding is:

"All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of entry of the decree in a proceeding for dissolution or annulment."

---

<sup>9</sup>The testimony of Stephen Dennis points out the pitfalls which may occur when subtractions are made from corporate accounts for money owed to one of the parties. Transcript, Pages 223-224.

There is no dispute the funds in question were acquired subsequent to the parties' marriage and prior to the date of valuation. The parties agreed to use December 31, 2003 as the valuation date. Appellant is not challenging the valuation date.

Minn. Stat. §518.58 sets forth the standard for the division of Marital Property.

Minn. Stat. §518.58, Subd. 1 in relevant part provides as follows:

**Subdivision 1. General** Upon a dissolution of a marriage, an annulment, or in a proceeding for disposition of property following a dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property and which has since acquired jurisdiction, the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of property.

The Appellant has cited no relevant statutes or case law which defines the rents and/or Undistributed Sub S earnings as nonmarital property and therefore exempt from division by the Trial Court.

The Trial Court's finding that the bank accounts for Unidale in the amount of \$102,272.12 are marital property must be affirmed.

## II.

**THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE ENTIRE PROCEEDS FROM THE SALE OF APPELLANT'S MOTHER'S HOME ARE APPELLANT'S NONMARITAL PROPERTY**

In Rosenberg v. Rosenberg, 379 N.W.2d 580, 583 (Minn. App. 1985) the Minnesota Court of Appeals set forth the standard for reviewing non-marital property awards:

The Trial Court's characterization of property as marital or non-marital is a determination of law Van de Loo v. Van de Loo, 346 N.W.2d 173, 175 (Minn. Ct. App. 1984), but we must defer to the Trial Court findings on underlying facts, such as dates of acquisition, value when acquired, etc.

Nonmarital property is defined in Minn. Stat. §518.54, Subd. 5 as follows:

“Nonmarital property” means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which:

- (a) is acquired as a gift, bequest, devise or inheritance made by a third party to me but 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 is 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.

In a marriage dissolution, all property acquired during the marriage is presumed to be marital property, and the party seeking an award of nonmarital property must prove by a preponderance of the evidence that the property is nonmarital to overcome this presumption. Olson v. Olson, 562 N.W.2d 797, 800 (Minn. 1997). In this proceeding Appellant received a home from his mother. Thereafter, the home was sold and the funds deposited into a bank account owned by both parties. Nonmarital property may lose its nonmarital character if co-mingled with marital funds. Crosby v. Crosby, 587 N.W.2d 292 (Minn. Ct. App. 1998). In the present case there was significant co-mingling. The proceeds from the sale of Appellant's mother's home in the amount of

\$47,547.96 were deposited into Western Bank account #7538049. At the time of the deposit on September 10, 2002, there was already a balance in the amount of \$85,357.24. On September 10, 2002 \$100,000.00 was withdrawn to purchase a Certificate of Deposit in Lino Lakes Bank leaving a balance in the amount of \$32,905.20 (See Trial Exhibit #49). Appellant closed out this account on December 26, 2002 and transferred \$32,005.45 to a checking account only in his name with Western Bank. The parties made no distinction between the funds which had been transferred to Lino Lakes Bank and those which remained in the Western Bank account. Appellant did not trace the proceeds from the sale of his mother's home to the Certificate of Deposit at Lino Lakes Bank

When Appellant's mother's home was sold, the parties incurred an income tax liability. The federal income tax liability was \$5,251.00 on a capital gain of \$26,255.00 (See Trial Exhibit #12). There would also have been a State of Minnesota income tax liability of 7.85% for \$2,061.00. Even if it is determined that Appellant has adequately traced his nonmarital funds, the nonmarital award should be reduced by \$7,312.00 to reflect the federal and state income taxes paid by the parties.

The Trial Court's decision to award Appellant \$47,547.96 in nonmarital funds representing proceeds from the sale of his mother's home should be reversed.

### III.

#### **THE TRIAL COURT ERRED CREDITING APPELLANT WITH THE PAYMENT OF FEDERAL AND STATE INCOME TAXES FOR 2002**

The issue of income tax payments was addressed by both Trial Court Judges. The issue was first addressed in the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree filed September 12, 2005.<sup>10</sup> Respondent agreed to file joint 2002 income tax returns in exchange for Appellant holding her harmless from any liability (Appellant's Appendix, Page 92; Transcript Pages 363-364). By signing the joint income tax return, Appellant's obligation reduced by \$20,000.00. In its decision filed May 25, 2006, the Trial Court amended its previous Finding of Fact 16.c. by the claimed income tax payments.<sup>11</sup>

There are several reasons why credit should not have been given to Appellant for these claimed income tax payments. First, the claimed payments were made prior to the valuation date and therefore would have been reflected in the bank balances as of December 31, 2003. Appellant has not demonstrated that the income tax payments were in fact made from the Lino Lakes Certificate. Appellant attempted to hide funds and moved money from one bank account to another. When the parties separated, Appellant closed accounts and maintained exclusive control over funds in excess of \$131,000.00.

---

<sup>10</sup>Finding of Fact 21. Appellant's Appendix, Page 12; and Conclusion of Law 21, Appellant's Appendix, Page 27.

<sup>11</sup>Paragraph 2 of the Order filed May 25, 2006. Appellant's Appendix, Page 47.

Second, as it pertains to the 2002 federal and state income tax returns, Respondent agreed to sign joint federal and state income tax returns in exchange for Appellant assuming any liability for taxes to be paid. This agreement was set forth in the letter to Appellant's attorney (Appellant's Appendix, Page 92) and was agreed to in open court. The Trial Court accepted the agreement and incorporated it into the Judgment and Decree filed September 12, 2005.<sup>12</sup>

The Trial Court's decision to credit Appellant with income tax payments must be reversed.

---

<sup>12</sup>Finding of Fact 21, Appellant's Appendix, Page 12; and Conclusion of Law 20, Appellant's Appendix, Page 27.

## CONCLUSION

The Trial Court had an opportunity to view the testimony of the witnesses for the extension of the Order for Protection. The Trial Court found Respondent sustained her burden of proof for an extension of the Order for Protection pursuant to Minn. Stat. §518B.01, Subd. 6a. The decision of the Trial Court must be affirmed.

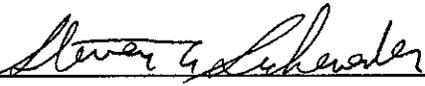
The Trial Court Erred by awarding to Appellant the entire amount of the funds received from the sale of Appellant's mother's home. Appellant failed to trace the funds to a current asset. Further, the Trial Court failed to take into account the federal and state income taxes which the parties paid on the capital gains realized on the sale.

The evidence sets forth fund balances for Unidale as of December 31, 2003. After making deductions for obligations owed, the Trial Court properly determined the remaining balances to be marital property and subject to division between the parties. The Trial Court must be affirmed on this issue.

The Trial Court Erred by crediting Appellant with the payment of federal and state income taxes. The Trial Court's decision in the Amended Judgment and Decree must be reversed.

LAW OFFICE OF STEVEN A. SICHENEDER

Date: 12/29/2006

By: 

Steven A. Sicheneder  
Attorney for Respondent  
Town Square, Suite 302  
20 North Lake Street  
Forest Lake, MN 55025  
Atty.Reg.No. 100754  
(651) 464-7815