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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A09-647

A09-1151

A09-1883

In re the Marriage of:

Gail Ann Larson, petitioner,
Appellant,

vs.

Donald Jay Larson,
Respondent.

Filed July 13, 2010
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Wright County District Court
File No. 86-FA-07-2442

Michelle L. MacDonald, Rebecca R. Kreuser, MacDonald Law Firm, LLC, West St.
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(for respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this consolidated appeal, appellant Gail Ann Larson challenges the judgment and decree dissolving the parties' marriage, arguing that the district court abused its discretion by (1) improperly valuing and dividing the parties' marital property and debt; (2) denying appellant's request for spousal maintenance; and (3) denying appellant's motion for attorney fees. Appellant also challenges the district court's posttrial orders, arguing that the district court abused its discretion by (1) denying appellant's motion for a new trial before a different judge, and (2) ordering sanctions against appellant's attorney for her posttrial motion. We affirm in part, reverse in part, and remand.

DECISION

I.

Appellant contends that the district court abused its discretion when it denied appellant's posttrial motion for a new trial before a new judge. Specifically, appellant argues that because the district court's decision-making process in the dissolution action constituted an irregularity in the proceedings, appellant was deprived of a fair trial. We disagree.

We review a district court's decision whether to grant a new trial for a clear abuse of discretion. *Boschee v. Duevel*, 530 N.W.2d 834, 840 (Minn. App. 1995), *review denied* (Minn. June 14, 1995).

Minn. R. Civ. P. 59.01(a) provides that the district court may grant a new trial when there was an "[i]rregularity in the proceedings of the court, referee, jury, or

prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.” An irregularity in the proceedings, for purposes of rule 59.01(a), is a “failure to adhere to a prescribed rule or method of procedure not amounting to an error in a ruling on a matter of law.” *Boschee*, 530 N.W.2d at 840 (quotation omitted). To succeed on a motion for a new trial on the basis of irregular procedure, the moving party must show: (1) an irregularity occurred, and (2) the party was deprived of a fair trial. *Id.*; *see also Hlubeck v. Beeler*, 214 Minn. 484, 488, 9 N.W.2d 252, 254 (1943) (stating that courts will grant a new trial only when the error materially prejudiced the moving party); *see generally* Minn. R. Civ. P. 61 (requiring courts to disregard harmless errors).

Here, at the end of a two-day trial on the issues of property division and spousal maintenance, the district court asked the parties to submit written arguments, and stated that after considering the parties’ arguments, it would instruct one of the parties to draft the findings of fact and conclusions of law. The district court subsequently issued a three-page letter announcing its decision in 11 numbered provisions and instructing respondent’s attorney to prepare the written findings of fact and conclusions of law. Respondent’s attorney submitted proposed findings of fact and conclusions of law on December 12, 2008, and the district court issued its findings of fact, conclusions of law and order the same day. With some exceptions, the district court’s findings and conclusions were nearly verbatim to those that respondent proposed.

Appellant moved for a new trial pursuant to Minn. R. Civ. P. 59.01(a) on the ground that the district court’s irregular posttrial procedure denied appellant a fair trial.

Appellant challenges the district court's denial of her motion, arguing that it was improper for the district court to (1) announce its decision in 11 "conclusory provisions"; (2) preclude appellant from reviewing and responding to the proposed findings; and (3) adopt respondent's proposed factual findings verbatim on the same day they were submitted.

"[T]he verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se." *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), review denied (Minn. Feb. 12, 1993). But we have strongly cautioned that this practice "raises the question of whether the [district] court independently evaluated each party's testimony and evidence." *Id.*; see also *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 n.1 (Minn. 2006) ("We discourage district courts from adopting proposed findings of fact and conclusions of law verbatim because it does not allow the parties or a reviewing court to determine the extent to which the court's decision was independently made.").

Here, the district court's posttrial procedure may have given the appearance of an improper delegation of the judicial fact-finding function to one party. See Code of Judicial Conduct, Rule 1.2 (2010) (providing that a judge must avoid the appearance of impropriety and bias). But the record indicates that the district court independently evaluated the evidence that both parties presented and made a decision based on the evidence. At the close of trial, the district court stated that it had made "careful notes," and the district court's three-page letter decision indicates that the district court evaluated and weighed the conflicting evidence. For example, with regard to valuation of the homestead, the district court stated that it believed respondent's expert's testimony and

explained why it rejected appellant's expert's testimony. Moreover, as noted in its posttrial order, the district court did make a number of changes to respondent's proposed findings and conclusions of law, including the determination of respondent's monthly income and living expenses.

Further, appellant fails to show that the district court's posttrial procedure prejudiced her. *See Hlubeck*, 214 Minn. at 488, 9 N.W.2d at 254 (stating that courts will grant a new trial only when the error materially prejudiced the moving party). Importantly, the record supports the district court's finding that appellant received a full and fair opportunity to be heard on the issues.

In sum, although the district court's procedure may have given the appearance of an improper delegation of a judicial function, appellant fails to show that the district court's procedure denied appellant a fair trial. Thus, the district court's denial of appellant's motion for a new trial was not an abuse of discretion.

II.

Appellant contends that the district court abused its discretion by ordering sanctions against appellant's attorney in the amount of \$7,426 based on her posttrial motion. Specifically, appellant argues that: (1) the posttrial motion had a basis in law and fact, and (2) respondent failed to serve the motion 21 days before filing or presenting it to the district court as required by Minn. Stat. § 549.211, subd. 4 (2008). Because appellant's posttrial motion was based on valid legal arguments, we reverse the award.

We review an award of sanctions for an abuse of discretion. *Gibson v. Trustees of Minnesota State Basic Bldg. Trades Fringe Benefits Funds*, 703 N.W.2d 864, 869 (Minn.

App. 2005), *vacated in part on other grounds*, A05-39, 2005 WL 6240754 (Minn. Dec. 13, 2005).

In pertinent part, Minn. Stat. § 549.211, subd. 2 (2008), sets forth the following requirements for pleadings and written motions:

- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . .

See also Minn. R. Civ. P. 11.02 (providing that a pleading or written motion must set forth claims that are warranted by existing law and factual contentions that have evidentiary support). If the district court determines that an attorney has violated a provision set forth in subdivision 2, it may impose an appropriate sanction on the submitting attorney. Minn. Stat. § 549.211, subd. 3 (2008); *see also* Minn. R. Civ. P. 11.03 (providing that the district court may impose appropriate sanctions on an attorney for violations of rule 11.02).

Attorney conduct is measured by an objective standard under both section 549.211 and rule 11. *Gibson*, 703 N.W.2d at 869. Sanctions “should not be imposed when counsel has an objectively reasonable basis for pursuing a factual or legal claim or when a competent attorney could form a reasonable belief a pleading is well-grounded in fact and law.” *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990), *superseded by statute on other grounds*, Minn. Stat. § 549.21 (1990) (repealed 1997). In deciding

whether to award sanctions, the district court may consider the presence of bad faith. *Id.* at 145. And because the purpose of sanctions is to deter rather than to punish, the district court should impose the least severe sanction necessary to deter the offending behavior. *Id.*

Here, although appellant's posttrial motion challenging the district court's decision-making process was not successful, the motion had an objectively reasonable basis in fact and law. Appellant's attorney cited a number of cases that discuss the importance of the district court's role as fact-finder and caution against a district court's verbatim adoption of a party's proposed findings and conclusions of law. *See, e.g., Pederson v. State*, 649 N.W.2d 161, 164 (Minn. 2002) (reversing appellant's conviction in part due to the district court's verbatim adoption of the state's proposed findings and conclusions of law without allowing appellant to review or respond to them); *Bliss*, 493 N.W.2d at 590 (strongly cautioning "that wholesale adoption of one party's findings and conclusions raises the question of whether the [district] court independently evaluated each party's testimony and evidence.").

In addition, the district court did not find that appellant's attorney acted in bad faith in making the posttrial motions. *See Gibson*, 703 N.W.2d at 869 (stating that the district court may consider bad faith in ordering sanctions). And although appellant's attorney failed to show prejudice resulting from the district court's posttrial procedure, as required by statute and caselaw, this failure does not justify an order of sanctions. *See In re Application of Mrosak*, 415 N.W.2d 98, 102 (Minn. App. 1987) (stating that conduct amounting to gross negligence does not constitute "bad faith" to justify an award of

attorney fees), *review denied* (Minn. Jan. 28, 1988); *see also Valento v. Ulrich*, 402 N.W.2d 809, 814 (Minn. App. 1987) (stating that the fact that an action is not well-founded in law is not sufficient for an award of attorney fees).

Because we conclude that appellant's attorney had an objectively reasonable basis for pursuing her posttrial motion, we do not reach appellant's claim that respondent violated the safe harbor provisions of section 549.211, subdivision 4, and rule 11.03(a)(1). We conclude that the district court abused its discretion by ordering sanctions against appellant's attorney, and reverse the award of attorney fees in the amount of \$7,426 to respondent.

III.

Appellant contends that the district court erred in dividing the parties' property and debts. Specifically, appellant argues that the district court erred by: (1) failing to make findings on the value of the parties' homestead; (2) crediting certain expenses incurred during the marriage but after separation to respondent's property award; (3) dividing the retirement pension as of August 1, 2008; and (4) failing to address respondent's allegedly improper disposition of marital assets. Because the district court credited certain expenses paid with marital funds to respondent's property award, we agree that the district court erred in equitably dividing the parties' property.

A [district] court has broad discretion in evaluating and dividing property in a marital dissolution and will not be overturned except for abuse of discretion. We will affirm the [district] court's division of property if it had an acceptable basis in fact and principle even though we might have taken a different approach.

Antone v. Antone, 645 N.W.2d 96, 100 (Minn. 2002) (citation omitted). Whether property is marital or nonmarital is a question of law that we review de novo. *Id.*

Minn. Stat. § 518.58, subd. 1 (2008), provides that the district court, after making relevant findings, shall make a “just and equitable” division of marital property without regard to marital misconduct. “An equitable division of marital property, however, is not necessarily an equal division.” *Reynolds v. Reynolds*, 498 N.W.2d 266, 270 (Minn. App. 1993). In making its findings, the district court may consider the “length of the marriage, . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party.” Minn. Stat. § 518.58, subd. 1. Marital debt is treated like marital property, and is apportioned as part of the district court’s property division. *Korf v. Korf*, 553 N.W.2d 706, 712 (Minn. App. 1996).

Valuation of the Homestead

At trial, appellant’s expert testified that he appraised the marital homestead property at \$800,000 using the cost approach, and \$750,000 using the sales approach. Respondent’s expert testified that he appraised the homestead property at \$525,000 using the cost approach. In its letter decision, the district court stated that the homestead’s present value “is difficult to discern” but found that respondent’s appraiser’s valuation was “more realistic [than that of appellant’s appraiser] under current market conditions.” The district court ordered the parties to put the property on the market for \$550,000, with the proceeds of a mutually agreeable sale to be equally divided pursuant to the judgment and decree.

Appellant argues that the district court erred by not making a specific finding on the value of the homestead. But a district court has the discretion to divide marital property by ordering the sale of an asset and making a just and equitable division of the proceeds of the sale. *See Nardini v. Nardini*, 414 N.W.2d 184, 188 (Minn. 1987) (stating that district courts may, among other approaches, divide marital property by ordering the sale and dividing the proceeds). Thus, the district court did not err by declining to assign a specific value to the property. Moreover, the district court's order is supported by respondent's expert's testimony that because of the poor real estate market, placing an exact value on the homestead before it sells may be misleading. And because the sale proceeds are to be equally divided, neither party is prejudiced by the failure to assign a value.

In addition, although the assigned listing price for the home of \$550,000 is not a valuation of the property for purposes of dividing the parties' property, this approximate value is within the range of credible estimates made by the expert witnesses. *See Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975) (providing that a district court's valuation need not be exact and should be sustained if it falls within the range of credible estimates made by competent witnesses); *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (providing that we defer to the district court's credibility determinations and resolution of conflicting evidence). Thus, we conclude that the district court's order to list the homestead for sale at \$550,000 and equally divide the proceeds of the sale was not an abuse of discretion.

Distribution of Homestead Proceeds

The district court ordered that the proceeds of the homestead sale, after paying off two mortgages, were to be placed into a trust account. Before the trust funds were to be divided equally between the parties, however, the district court ordered that respondent be reimbursed for the following expenses: (1) the amount by which respondent reduced the principal on the two mortgages after the parties' separation in October 2006 and before the homestead's sale; (2) improvements and repairs respondent made to the home between separation and sale; and (3) funds advanced to appellant on her share of the property division. Appellant challenges the propriety of ordering these reimbursements.

1. Expenses related to homestead

By ordering that respondent be reimbursed for homestead-related expenses before the remaining proceeds were divided equally, the district court effectively characterized these expenditures as nonmarital. *See generally* Minn. Stat. § 518.58 (2008) (providing that the district court shall equitably divide marital property). Nonmarital property is defined, in relevant part, as real or personal property acquired by a spouse after the "valuation date." Minn. Stat. § 518.003, subd. 3b(d) (2008). Thus, reimbursing respondent for these expenditures was appropriate if respondent acquired and spent the funds after the valuation date.

The "valuation date" for purposes of property division is the day of the initially scheduled prehearing conference, unless the parties agree on a different date or the district court makes specific findings that another valuation date is fair and equitable. Minn. Stat. § 518.58, subd. 1. Here, the parties did not agree on, nor did the district court

make findings regarding a different valuation date for the homestead. But by ordering the homestead sold and its proceeds divided, the judgment and decree adopted the date of sale, or the date the sale price is determined, as a valuation date for the homestead. And it is undisputed that there was no purchase agreement in place as of the parties' October 2006 separation. Thus, the amounts respondent acquired and spent on the homestead after the date of separation but before the marriage was dissolved, or the homestead value determined, are presumptively marital. *See* Minn. Stat. § 518.003, subd. 3b (2008) (stating that all property acquired by either spouse after the marriage but before the valuation date is presumed to be marital); *Fastner v. Fastner*, 427 N.W.2d 691, 699 (Minn. App. 1988) (“Property acquired by the parties after commencing the dissolution, but prior to the final decree, is marital property.”); *Gummow v. Gummow*, 375 N.W.2d 30, 35-36 (Minn. App. 1985) (determining that the district court erred by valuing a pension as of the date of the parties' separation, rather than the date of dissolution). Respondent fails to rebut this presumption. Moreover, the district court treated debt appellant incurred during the separation as marital debt.

2. Other amounts

In May and June 2007, appellant received a distribution in the amount of \$25,186 from respondent's thrift savings plan that was characterized as “an advance against a property settlement.” The record shows that respondent started contributing to the savings account in 1989, after the parties were married. It is undisputed that the funds did not have a nonmarital source. Thus, the funds were marital. Because the funds were

marital, the district court erred in reimbursing respondent for the full value of the distribution, as if the funds were nonmarital.

When the parties separated in October 2006, respondent provided appellant with \$20,000 to move to Oregon. The record shows that respondent borrowed this money from his brother, and that respondent paid back \$10,000 of this loan with marital funds. Thus, it was improper to reimburse respondent for this part of the so-called move-away money. And the record does not indicate whether the district court included the remaining \$10,000 owed on the loan in its division of marital debt. If the district court considered it to be marital debt, and included it in the division of marital debt, then it was improper to reimburse respondent for the \$10,000. But if the district court treated it as respondent's nonmarital debt, then it was proper to reimburse respondent for the \$10,000.

We conclude that it was inequitable for the district court to reimburse respondent for the following expenditures that were made with marital funds: (1) \$41,616.42 for homestead-related expenses incurred during the parties' separation; (2) \$25,186.08 distribution to appellant from respondent's thrift savings account; and (3) at least \$10,000 of the \$20,000 in appellant's move-away money. And because the amounts are substantial in light of the equity in the house, the district court abused its discretion. Thus, we reverse and remand this issue for the district court to make appropriate findings regarding the marital or nonmarital nature of these transactions in such proceedings as the district court deems appropriate, and to make any necessary adjustments in the property distribution.

Distribution of Debts

In dividing the marital debt, the district court ordered appellant to assume \$49,168.94 in credit card debt that she incurred during the parties' separation, and respondent to assume \$95,072.14 in debt. The debt respondent was ordered to assume included money borrowed from respondent's mother to pay down a home equity line of credit, money borrowed from respondent's brother to pay for the parties' daughters' education, a car loan, and credit card debt.

Appellant argues that the evidence supporting respondent's claimed marital debt was not credible. The district court relied on respondent's testimony and documents to summarize the debt. Respondent also submitted into evidence copies of checks written by his brother to the parties' children, and a bank account statement showing deposit of some of the checks. We defer to the district court's credibility determinations, and conclude that the findings regarding the parties' marital debt are not clearly erroneous. *See Sefkow*, 427 N.W.2d at 210.

Retirement Pension Valuation Date

The parties stipulated that the value of respondent's pension on August 1, 2008, was \$893,570.34, as appellant's expert determined. The parties also stipulated that 36.1615% of the pension is respondent's nonmarital property, and that appellant's 50% share of the marital portion paid out while respondent is alive is 23.5341% of each monthly payment, with the rest of her share to be distributed in the form of a survivor annuity. The district court included the stipulated terms in its judgment and decree, but did not specifically find a valuation date. Pursuant to appellant's motion to clarify the

judgment, the district court assigned a valuation date of August 1, 2008, the date appellant's expert used to calculate the value of the pension and the parties' shares of the monthly distributions.

Appellant argues that the district court erred by assigning the August 1, 2008 valuation date. Specifically, appellant argues that she is entitled to part of the monthly pension payments respondent received during the parties' separation. But because the parties stipulated to the terms of appellant's expert's report, based on a valuation date of August 1, 2008, the district court's adoption of this valuation date was appropriate. *See* Minn. Stat. § 518.58, subd. 1 (stating that the valuation date is the date of the prehearing conference unless the parties agree on a different date). Furthermore, in its order clarifying the judgment, the district court made specific findings that the August 1, 2008 date was "supported by the evidence and appropriate." *See id.* (stating that the district court may make specific findings that a different valuation date is fair and equitable). And as the district court noted, appellant failed to offer an alternative valuation date at trial or in posttrial submissions prior to entry of the judgment and decree. *See Antonson v. Ekvall*, 289 Minn. 536, 538-39, 186 N.W.2d 187, 189 (1971) (rejecting theory as too late when raised for the first time in posttrial motion). Thus, we conclude that the district court's finding that the valuation date of the pension is August 1, 2008, is not clearly erroneous.

Dissipation of Assets

The parties invested in two business ventures during the marriage. Respondent was a partner in the partnership KLDJ Investments, LLC (KLDJ), formed to purchase

and re-sell two condominium buildings, but sold his share of the partnership in 2006. In 2004, the parties borrowed \$43,000 from respondent's mother to invest in Viking Development Corporation (Viking), an entity formed to invest in property in Belize. In February 2008, Viking sold the Belize property pursuant to a ten-year contract for deed for \$50,000. Appellant argues that the district court erred by failing to account for respondent's allegedly improper disposition of marital funds received from the sale of the parties' interests in the two businesses. We disagree.

If the district court finds that one party has disposed of marital assets without the consent of the other party, except in the usual course of business or for the necessities of life, during the pendency of a dissolution or separation, the district court shall compensate the other party for the transfer or disposal. Minn. Stat. § 518.58, subd. 1a; *see Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970) (“A party to a marriage subject to severance in divorce proceedings cannot be permitted to subvert the orderly processes of the courts by concealing, dissipating, or misusing his assets in anticipation of divorce so as to reduce the property available for division[.]”).

Here, the record shows that respondent used the proceeds from the sale of his partnership interest in KLJD to pay off marital debt. Of the \$14,000 respondent received for his interest in 2006, respondent paid \$10,000 to his brother toward repayment of a marital loan, and \$2,500 to his mother toward a 2004 marital loan. And, on this record, any error regarding the remaining \$1,500 is de minimis. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for a de minimis error). With regard to the Viking interest, the record shows that monthly payments received pursuant

to the ten-year contract for deed are forwarded directly to respondent's mother as reimbursement for the loan used to invest in Viking and an additional marital loan. Respondent testified that he did not, and will not in the future, receive any part of the contract-for-deed payments. And significantly, the district court released appellant from responsibility for the \$43,000 marital debt owed to respondent's mother for the Viking investment. Thus, the district court's findings that respondent did not improperly dispose of the proceeds of the parties' interests in the two businesses are supported by evidence in the record and are not clearly erroneous.

IV.

Appellant argues that the district court abused its discretion by denying appellant's request for spousal maintenance. Specifically, appellant argues that the district court erred by (1) failing to address the statutory factors, and (2) failing to consider respondent's monthly pension distributions as income for purposes of determining his ability to pay maintenance. We agree that the district court erred by failing to consider the nonmarital part of respondent's monthly pension distributions as income.

We review a district court's spousal maintenance award for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Id.* at 202, 202 n.3.

The district court may award spousal maintenance if it finds that the spouse seeking maintenance lacks sufficient property to provide for reasonable needs or is unable to provide adequate self-support. Minn. Stat. § 518.552, subd. 1 (2008). In

calculating a spousal maintenance award, the district court considers the following factors: (1) the financial resources of the party seeking maintenance and that party's ability to meet needs independently; (2) the time necessary to acquire education or training to enable the party seeking maintenance to find employment; (3) the standard of living established during the marriage; (4) the duration of the marriage and, for a homemaker, the length of absence from employment; (5) the loss of earnings or other employment opportunities foregone by spouse seeking maintenance; (7) the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance; and (8) the contribution of each party in the acquisition and preservation of marital property and the contribution of a spouse as a homemaker or in furtherance of the other spouse's employment. Minn. Stat. § 518.552, subd. 2 (2008). No single factor is dispositive and each case must be determined on its own facts. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39 (Minn. 1982). The essential consideration is the financial needs of the spouse requesting maintenance balanced against the financial condition of the spouse paying the maintenance. *Id.* at 39-40.

Here, the district court found that appellant needed maintenance, but that respondent did not have the ability to pay it. The district court found that respondent's net annual income from his part-time self-employment was \$20,814.41, and that his reasonable monthly living expenses were \$6,264. The district court classified respondent's monthly retirement pension payments as property, and not income.

Findings

Appellant argues that the district court failed to make sufficient findings to support its denial of spousal maintenance because it did not address the factors set forth in section 518.552, subdivision 2. But the findings show that the district court considered appellant's need for maintenance; respondent's ability to pay maintenance; the parties' lifestyle during the marriage; appellant's education, job skills, and employment history; appellant's age and health; appellant's loss of earnings or employment opportunities due to the marriage; and respondent's current income and living expenses. *See* Minn. Stat. § 518.552, subd. 1 (setting forth grounds for an award of spousal maintenance); subd. 2 (listing factors the district court may consider in determining amount and duration of spousal maintenance); *see also Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004) (stating that the district court is not required to make specific findings on every statutory factor). Thus, appellant's argument fails.

Pension Payments as Income

Appellant argues that the district court erred by failing to consider respondent's monthly pension distributions as income for purposes of determining his ability to pay maintenance. In *Lee v. Lee*, the Minnesota Supreme Court determined that marital pension benefits awarded as property in a property division are not considered future income for purposes of determining spousal maintenance. 775 N.W.2d 631, 639 (Minn. 2009). But pension benefits not previously awarded as property, due to their nonmarital character, are properly considered "income" for purposes of spousal maintenance at the time the benefits are received. *Id.*

Here, pursuant to the parties' stipulation, the district court found that 36.1615% of the retirement pension, valued at \$893,570.34, was nonmarital, and awarded appellant 50% of the remaining marital portion. Pursuant to *Lee*, the nonmarital part of each payment is to be considered income to respondent at the time the payment is received. *See* 775 N.W.2d at 639. Therefore, although the supreme court had not yet decided *Lee* when the district court denied appellant's request for maintenance, the district court's ruling is not consistent with the subsequent *Lee* decision because the district court did not consider the nonmarital part of respondent's pension payment as income for purposes of determining his ability to pay spousal maintenance. Therefore, we reverse and remand this issue to the district court to make appropriate findings on respondent's income and to address appellant's request for spousal maintenance in such proceedings as the district court deems appropriate.

V.

Appellant argues that the district court abused its discretion by denying her requests for need-based and conduct-based attorney fees. We disagree.

"On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Minn. Stat. § 518.14, subd. 1 (2008), provides that the district court shall award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are sought has the means to pay the fees, and the party seeking fees cannot pay the fees. Section 518.14 further provides that the district

court has the authority to award additional attorney fees against a party “who unreasonably contributes to the length or expense of the proceeding.”

Here, the district court found that appellant incurred attorney fees in the amount of \$17,140 from January 2008 through October 2008, and that she would incur an additional \$8,500 through trial and posttrial submissions. Respondent incurred \$40,800 through October 2008. The record supports the district court’s determination that although appellant may have the need for an award of attorney fees, respondent does not have the means to pay them. In addition, appellant fails to present evidence supporting an award of conduct-based attorney fees. Thus, we conclude that the district court did not abuse its discretion by denying appellant’s request for attorney fees.

Affirmed in part, reversed in part, remanded.