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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-531**

In re the Marriage of:
Patrick Connery, petitioner,
Respondent,

vs.

Michelle Connery,
Appellant.

**Filed January 25, 2011
Reversed
Toussaint, Judge**

Ramsey County District Court
File No. FA-08-1093

Patrick Connery, Mounds View, Minnesota (pro se respondent)

Elizabeth J. Richards, Beverly Balos, Minnesota Coalition for Battered Women, St. Paul,
Minnesota (for appellant)

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Project)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Appellant Michelle Connery challenges the district court's award of joint legal custody and termination of appellant's receipt of marital property upon her death or remarriage. Because respondent Patrick Connery did not rebut the presumption that joint legal custody was not in the best interests of the children and the district court abused its discretion by terminating payments upon appellant's death or remarriage, we reverse.

DECISION

I.

Appellant argues that the district court abused its discretion by awarding respondent joint legal custody of the parties' minor children when domestic abuse had occurred between the parties. A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

As a general rule, upon a request for joint legal custody by either or both of the parents, the district court shall use a rebuttable presumption that such custody is in the best interests of the child. Minn. Stat. § 518.17, subd. 2 (2010). In cases where domestic abuse has occurred between the parents, however, there is a rebuttable presumption that

joint legal or joint physical custody is not in the best interests of the child.¹ *Id.*

Under the Minnesota Rules of Evidence,

a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Minn. R. Evid. 301. “Once the basic facts that give rise to the presumption are established the opponent must produce evidence to rebut the assumed fact or a verdict will be directed on the issue.” *Id.*, cmt. “If sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact the presumption is rebutted and has no further function at the trial.” *Id.*

The controlling principle in child-custody determinations is the best interests of the child. *Pikula*, 374 N.W.2d at 711. When determining the best interests of the child, the district court must consider thirteen statutory factors. Minn. Stat. § 518.17, subd. 1 (2010). In cases where joint legal or joint physical custody is sought, the district court must also consider (a) the ability of the parents to cooperate in the rearing of their children, (b) methods for resolving disputes regarding any major decision concerning the life of the child and the parents’ willingness to use such methods, (c) whether it would be detrimental to the child if one parent were to have sole authority over the child’s upbringing, and (d) whether domestic abuse has occurred between the parents. *Id.*, subd.

¹ For purposes of the presumption, domestic abuse means physical harm; bodily injury; assault; the infliction of fear of imminent physical harm, bodily injury, or assault; terroristic threats; criminal sexual conduct; or interference with an emergency call committed against a family or household member by a family or household member. Minn. Stat. § 518B.01, subd. 2(a) (2010).

2. The district court must make written findings that reflect consideration of all of the custody factors set out by the statute. *Id.*, subd. 1(a).

In the present case, the district court found that domestic abuse had occurred between the parties, and this finding was not challenged on appeal. This finding therefore triggers the statutory presumption that joint legal custody is not in the best interests of the children. *See id.*, subd. 2 (establishing the rebuttable presumption when domestic abuse has occurred between the parties); Minn. R. Evid. 301, cmt. (stating that a presumption is triggered “[o]nce the basic facts that give rise to the presumption are established”). In order to rebut this presumption, respondent had to present sufficient evidence to justify a finding that joint custody is in the children’s best interests. *See* Minn. R. Evid. 301, cmt. (“If sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact the presumption is rebutted and has no further function at the trial.”).

The only evidence offered by respondent on the issue of custody was the following exchange he had with the district court:

RESPONDENT: . . . I don’t know if that’s by law, but just, you know, be a couple adults about it, play it by ear and, you know, communication, that’s all it is.

DISTRICT COURT: Doesn’t seem to me like you’ve got that at this point.

RESPONDENT: I have it, ma’am. Somebody else doesn’t—

DISTRICT COURT: I don’t think the two of you have it.

RESPONDENT: Yes, exactly.

DISTRICT COURT: So it doesn’t sound like that’s going to be something that’s going to be workable in the future. If it hasn’t—

RESPONDENT: On my part it’s workable, ma’am.

DISTRICT COURT: If I can just finish.

RESPONDENT: Sure.

DISTRICT COURT: If it hasn't worked for the last—how long have you been separated?

RESPONDENT: Two years, ma'am.

DISTRICT COURT: If it hasn't worked for two years, why is it going to change now?

RESPONDENT: I have no idea. I mean, I'm there. I'm willing to do it. I don't think I've ever been given the chance, and I think that's what it was.

The fact that respondent was willing to try to cooperate with appellant at most addresses one portion of one of the four factors that a district court must consider when joint custody is a possibility. It does not address the parties' ability to cooperate in the rearing of the children, the methods for resolving any disputes that may occur, or whether it would be detrimental to the children for only one parent to have authority over their upbringing. *See* Minn. Stat. § 518.17, subd. 2 (identifying factors the district court must consider when joint legal or joint physical custody is sought).

Because respondent has not produced any evidence on the remaining best-interests factors, we cannot say, on this record, that he has satisfied his burden of production in rebutting the presumption that joint legal custody is not in the best interests of the children. The district court therefore abused its discretion by awarding the parties joint legal custody, and we reverse this determination.

Because we reverse on this ground, we do not address appellant's contention that the district court abused its discretion by concluding that the balance of the best-interest factors support an award of joint legal custody.

II.

Appellant argues that the district court abused its discretion by terminating payment of her share of the marital property in respondent's military retirement benefits upon her death or remarriage. Because of his service in the United States Armed Forces, respondent receives a monthly retirement payment. The district court found that approximately 19.4% (55/283) of respondent's military retirement account—and therefore a corresponding portion of each monthly check—was marital property and ordered respondent to pay appellant one-half of the marital share each month. This determination is not challenged on appeal. The district court additionally ordered that “[t]he monthly payments herein shall be paid to [appellant] until [appellant] dies or remarries.”

In a marriage-dissolution proceeding, all marital property is subject to an equitable—though not necessarily equal—division between the former spouses. Minn. Stat. § 518.58, subd. 1 (2010); *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). Division of a party's pension is generally within the discretion of the district court. *Faus v. Faus*, 319 N.W.2d 408, 413 (Minn. 1982). A district court's property division during a dissolution action will not be reversed unless it constitutes an abuse of discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn. 1989).

“[An appellate court] will affirm the [district] court's division of property if it had an acceptable basis in fact and principle even though [the appellate court] might have taken a different approach.” *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). But if the division of property is “against logic and the facts on record . . . [an appellate] court

will find that the [district] court abused its discretion.” *Rutten*, 347 N.W.2d at 50. Detailed findings regarding the division of property are not necessary, but the findings must demonstrate consideration of the relevant statutory factors, express a rationale for the chosen division of assets, and allow for effective appellate review. *Dick v. Dick*, 438 N.W.2d 435, 437 (Minn. App. 1989); *Vinnes v. Vinnes*, 384 N.W.2d 589, 592 (Minn. App. 1986).

The supreme court, in addressing a district court order establishing a spousal-maintenance obligation to be paid from a husband’s vested pension benefits classified as marital property, held that the district court’s treatment of the husband’s pension rights as a source for the future payment of spousal maintenance “[was] not ‘just and equitable’ because it has the effect of awarding him all his pension benefits if [wife] remarries or if either she or [husband] dies before [husband] actually begins to receive the payments.” *Taylor v. Taylor*, 329 N.W.2d 795, 798 (Minn. 1983). The supreme court noted that the district court’s division of the marital property “reflects its intention to divide the assets equally between the parties,” and if the husband were awarded the entire value of his pension benefits he would receive “far in excess of one-half of the marital assets.” *Id.* The court concluded that doing so “would not be a just and equitable division of marital property.” *Id.*

Just as in *Taylor*, there is nothing in the record to indicate that the district court in the present case intended anything other than an equal distribution of the marital property. However, by ordering that appellant’s receipt of her interest in the marital share of respondent’s military retirement benefits terminate upon her death or remarriage,

the district court's marital-property distribution has the effect of awarding respondent the *entire* marital share of his retirement pay if appellant dies or remarries. Such a property distribution is neither just nor equitable, especially in the absence of findings by the district court explaining the termination clause. *See Dick*, 438 N.W.2d at 437-38 (reversing and remanding a property award that was nearly three times greater for one party when district court did not explain rationale for the unequal distribution).

It appears that the district court inadvertently treated respondent's retirement payments as spousal maintenance, instead of marital property. *See Minn. Stat. § 518A.39, subd. 3* (2010) (providing that, unless otherwise ordered, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the recipient spouse). While a district court may order that spousal maintenance be paid from a spouse's future pension payments, that is not what happened in the present case. The district court in fact explicitly found that neither party was entitled to maintenance.

Furthermore, the termination clause of the district court's order could recalculate the distribution of marital property at some unknown point in the future. In marital-dissolution proceedings, "all divisions of real and personal property . . . shall be final, and may be revoked or modified only where the court finds the existence of conditions that justify reopening a judgment under the laws of this state." *Id.*, subd. 2(f) (2010); *see also Lee v. Lee*, 775 N.W.2d 631, 640 (Minn. 2009) ("[A]bsent mistake, fraud, newly discovered evidence, or other extraordinary circumstances, courts may not upset the division of marital property made at dissolution in the course of modifying a maintenance order." (citation omitted)). Because death or remarriage of a spouse is not a condition

that justifies reopening the judgment, the distribution of marital property may not be altered upon such an occurrence. Because the district court's order potentially has the effect of disturbing the property distribution after it has become final, it constitutes an abuse of discretion.

The provision in the district court's order terminating appellant's receipt of payments from respondent's military retirement account upon her death or remarriage is neither a just nor an equitable division of marital property. We therefore reverse that provision of the district court's order.

Reversed.