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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0605**

In re the Marriage of:
Carrie Leigh Kissling, petitioner,
Respondent,

vs.

Daniel Carl Kissling,
Appellant.

**Filed August 27, 2012
Affirmed in part and reversed in part
Hudson, Judge**

Washington County District Court
File No. 82-FA-09-4242

Julie K. Seymour, Lakeville, Minnesota (for respondent)

Harvey N. Jones, Harvey N. Jones, P.A., Hastings, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from a district court judgment finding that multiple assets were marital property, appellant-husband argues that the district court clearly erred because the assets were readily traceable and, therefore, nonmarital. Husband also argues that the district court clearly erred in alternatively finding that, if the property were nonmarital,

respondent-wife would suffer an unfair hardship absent an award of a portion of the nonmarital property. Wife argues that the district court abused its discretion by denying her motion for conduct-based attorney fees. Because stock inherited by husband was clearly traceable and the record establishes that wife would not suffer an unfair hardship absent an award of husband's nonmarital property, the court clearly erred in finding that the stock was marital property and that wife would suffer an unfair hardship. Accordingly, we reverse this portion of the district court's judgment. But we affirm the district court's findings that the remaining assets at issue were marital and conclude that the district court did not abuse its discretion in denying wife's motion for attorney fees.

FACTS

While married to respondent-wife Carrie Kissling, appellant-husband Daniel Kissling inherited funds from the estate of his mother, who died January 1, 2007. He inherited approximately \$220,000 in stock, \$91,666 cash, and a one-third interest in a cabin in Long Lake, Wisconsin. Husband and wife were divorced September 16, 2010.

In January 2007, when husband received the inheritance, husband held an Ameriprise portfolio with a balance of \$9,387.93. At that time, the portfolio was in his name only. Sometime after May 31, 2007, husband added wife to the Ameriprise portfolio so that all accounts within that portfolio were held jointly. The portfolio contained multiple Ameriprise accounts: an account ending in 0511; an account ending in 7926; an account ending in 4909; and an account ending in 5752.

Account ending in 0511

In early 2007, this account contained a mutual fund with a balance of \$9,387.93. Wife additionally deposited into the account \$100 from her paycheck in January, February, March, and April 2007. In 2007, the contents of this account were transferred to the accounts ending in 4909 and 7926.

Account ending in 7926

This account was opened on November 21, 2007 as a joint account with a \$50,000 check by husband from the couple's joint credit union checking account. From December 2007 through September 2010, funds were transferred between this account and the account ending in 5752.

On December 17, 2007, and March 17, 2008, wife deposited into the account \$100 from her paycheck. In 2008 and 2009, multiple payments were made from this account: \$15,000 for the couple's federal income taxes; \$5,000 for the couple's state income taxes; a check for \$3,125, which husband asserts was used to pay for repairs on the Long Lake, Wisconsin property, a portion of which husband inherited; \$19,492 to buy a 2006 Pontiac GTS; \$750 for a portion of property taxes for the Long Lake property; and a payment to Xcel Energy.

Account ending in 4909

In 2007 and 2008, wife made 12 deposits of \$100 from her paycheck to this account, which became inactive in June 2008, with funds transferred to the account ending in 7926.

Account ending in 5752

In February 2007, husband deposited into this account the 73.9260 shares of WalMart de Mexico stock that he inherited. In December 2007, the couple's 120.219 shares of WalMart de Mexico stock were deposited into this account. From December 2007 through September 2010, funds were transferred to and from this account and the account ending in 7926.

In its original judgment, the district court found that the Ameriprise accounts, including the inherited WalMart stock, were marital because husband had commingled his inheritance with joint assets, and the Pontiac GTS and Wisconsin cabin were nonmarital property. Husband moved for amended findings, conclusions of law, and a new trial. Wife also moved for amended findings and for attorney fees of \$3,500 "for being forced to respond to this frivolous motion made by the Petitioner." The district court denied husband's motion for a new trial and issued an order amending judgment, finding that the Ameriprise accounts ending in 5752 and 7926 were marital assets because husband's inheritance was commingled with marital property in those accounts, wife contributed to the accounts, and husband indicated that he intended for the portion of the inheritance deposited in those accounts to be marital property by designating the accounts as joint accounts after depositing the inheritance. The district court also found that the Pontiac and payments for repairs to the Wisconsin home inherited by husband were marital property because marital assets were used to pay for both. The district court denied wife's attorney-fee motion. Husband filed an appeal; by cross-appeal, wife challenges the district court's denial of attorney fees.

DECISION

I

Property acquired by either spouse during marriage is presumed marital. *Riley v. Riley*, 369 N.W.2d 40, 43 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985); *see also* Minn. Stat. § 518.003, subd. 3b (2010) (stating that all property acquired after marriage is presumed marital regardless of whether title is held individually). An inheritance received by one spouse while married may be considered nonmarital property. *Id.*, subd. 3b(a). But the spouse seeking to establish that property acquired during marriage is nonmarital bears the burden of proving the nonmarital character by a preponderance of the evidence. *Pearson v. Pearson*, 363 N.W.2d 337, 339 (Minn. App. 1985). Simply routing funds through a joint account does not transform nonmarital property to marital, but commingling nonmarital and marital assets allows for the marital-property presumption to control. *Nash v. Nash*, 388 N.W.2d 777, 781 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986); *Rudbeck v. Rudbeck*, 365 N.W.2d 330, 334 (Minn. App. 1985). The district court's finding that property is marital is reversed only if clearly erroneous. *Kottke v. Kottke*, 353 N.W.2d 633, 636 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). A finding is clearly erroneous when "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Milbank Ins. Co. v. Johnson*, 544 N.W.2d 56, 59 (Minn. App. 1996) (quotation omitted).

Husband argues that the district court clearly erred by finding that multiple assets were marital because the assets were traceable; specifically, the inherited WalMart de Mexico stock, \$50,000 in cash, a Pontiac vehicle, and \$3,125 in repairs to the Wisconsin

cabin. The district court found that these assets were marital assets because husband's inheritance was commingled with marital property in the accounts, which contained the stock and the cash and which were used to pay for the vehicle and the cabin repairs.

WalMart de Mexico stock

The record shows that the 73.9260 shares of WalMart de Mexico stock inherited by husband were deposited into the couple's joint account ending in 5752 on February 21, 2007. In December 2007, 120.219 shares of WalMart de Mexico stock owned jointly by husband and wife were also transferred into the account ending in 5752. Entries for the WalMart de Mexico stock that was inherited and the WalMart de Mexico stock belonging to the couple are distinct, including the stock split and the market value of each. Because the shares of stock are identifiable as distinct assets despite being deposited into the same account, husband has adequately traced the inherited stock, which makes the 73.9260 shares of WalMart de Mexico stock nonmarital property. *Cf. Kottke*, 353 N.W.2d at 636 (upholding finding that portion of homestead was nonmarital property when readily traceable to inheritance). We conclude that the district court clearly erred by finding that the 73.9260 shares of WalMart de Mexico stock inherited by husband were marital property and reverse this finding.

\$50,000 in cash, the Pontiac vehicle, and \$3,125 in repairs to cabin

Husband also argues that the district court clearly erred by finding that other assets were marital, including \$50,000 in cash he inherited, a Pontiac vehicle, and \$3,125 in repairs to the Wisconsin cabin that comprised a portion of his inheritance. Husband received a check for \$56,666 from his mother's estate and, from that, he deposited

\$50,000 into the joint account ending in 7926 on December 4, 2007. However, the record shows that from December 2007 through May 2010, funds were transferred between the joint account ending in 7926 and the joint account ending in 5752.

Husband asserts that the \$50,000 inheritance deposited into the account ending in 7926 was used to pay for the Pontiac and the cabin repairs and, therefore, those assets should be considered nonmarital. An examination of the record reveals a check paid from the account ending in 7926 on July 25, 2008, for \$3,125, but the payee's name is not decipherable, and the check does not indicate what the money is to be used for. The record also contains a check paid from the account ending in 7926 on August 29, 2008 for \$19,492 to Maplewood Audi. Though the check does not indicate that the \$19,492 was for the purchase of a Pontiac, because it is payable to a car dealership, it is reasonable to attribute payment to the purchase of the Pontiac. But these checks are among several other payments from the account ending in 7926 for various amounts, including federal and state income tax payments and an electronic payment to Xcel Energy. These payments indicate that the funds in the account ending in 7926, which included both husband's inherited funds and other marital funds, were used to make a variety of purchases and therefore dilutes husband's ability to prove by a preponderance of the evidence that the cash inheritance alone was dedicated to payment of the cabin repairs or the Pontiac purchase. *Pearson*, 363 N.W.2d at 339 (stating that party making assertion that property is nonmarital bears burden of proving its nonmarital character by preponderance of the evidence). Furthermore, the checks indicating possible payment for the cabin repairs and to Maplewood Audi were written more than a year after the deposit

of the \$50,000, which also undermines husband's claim that the assets are readily traceable and therefore nonmarital. *See, e.g., Nash*, 388 N.W.2d at 781 (affirming finding that inheritance spent on home remodeling was nonmarital when spent about two weeks after received). We also note that wife contributed to the account by making regular monthly deposits. On this record, husband has not shown that the district court clearly erred in finding that the \$50,000, the Pontiac, and \$3,125 in repairs to the Wisconsin cabin were marital assets.

II

If a district court finds that either spouse's award of property, including marital property, constitutes an unfair hardship, it may award up to one-half of nonmarital property to the spouse enduring the unfair hardship. Minn. Stat. § 518.58, subd. 2 (2010). To do so, the district court must base its finding of unfair hardship on "all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, and opportunity for future acquisition of capital assets and income of each party." *Id.* To support a finding of unfair hardship, there must be a "very severe disparity between the parties." *Ward v. Ward*, 453 N.W.2d 729, 733 (Minn. App. 1990), *review denied* (Minn. June 6, 1990).

The district court found that, if the property at issue was considered to be nonmarital, it would be an unfair hardship on wife to award all of the nonmarital property to husband. Husband asserts that the district court clearly erred by taking into account whether wife would experience an unfair hardship should the property at issue be found

to be nonmarital. Because we conclude that the district court clearly erred in finding that the 73.9260 shares of WalMart de Mexico stock was marital property, we address husband's unfair-hardship argument as it applies to the inherited shares of WalMart de Mexico stock. *See* Minn. Stat. § 518.58, subd. 2 (stating that finding of unfair hardship applies to award of nonmarital property).

In finding unfair hardship on behalf of wife, the district court took into account the length of the marriage, which was 16 years; the estate; the age of wife and husband; and the income of each. The district court stated in its amended findings that wife's gross monthly income is approximately \$6,000 and husband's is \$10,500. But, in its original judgment, the district court found that wife's gross monthly income was \$5,984, with an additional \$75,584 in annual commissions, which amounts to an average of \$6,299 in monthly commission income. Wife's substantial commission income, however, was not taken into account by the district court in making its unfair-hardship determination. When wife's additional commission income is included in the income calculation, she earned \$12,282 per month in 2009, which exceeded husband's gross monthly income. Therefore, because wife's income demonstrates that she will not suffer a "very severe" disparity if she is not awarded a share of husband's nonmarital property, we reverse the district court's finding to the contrary. *See Ward*, 453 N.W.2d at 733 (requiring a "very severe disparity between the parties" for unfair-hardship finding). Further, because we reverse this finding, we need not reach husband's additional argument that the district court clearly erred because it did not take into account wife's retirement assets.

III

Minn. Stat. § 518.14, subd. 1 (2010) allows for the award of conduct-based attorney fees “against a party who unreasonably contributes to the length or expense of the proceeding.” The decision to award attorney fees “rests almost entirely within the discretion of the [district] court” and is reviewed for an abuse of discretion. *Solon v. Solon*, 255 N.W.2d 395, 397 (Minn. 1977). In addition, Minn. Gen. R. Pract. 303.03(b) states that if a party fails to comply with rule 303.03(a) by failing to timely serve or file motion documents, the district court “may” award reasonable attorney fees.

Wife argues that the district court abused its discretion by denying her motion for conduct-based attorney fees pursuant to Minn. Stat. § 518.14 and rule 303.03(b). Wife asserts that she should have been granted conduct-based fees because husband did not comply with rule 303.03(a)’s filing deadlines and he failed to identify defects in the district court’s findings, which resulted in delay and added expense. However, wife provides no authority that shows such errors rise to the level of misconduct that warrants an award of conduct-based fees under Minn. Stat. § 518.14 or rule 303.03(b). Wife also does not address in what way the district court abused its discretion by denying her motion for attorney fees. Finally, rule 303.03(b) states that a district court “may” award attorney fees, which is permissive and not mandatory. *See* Minn. Stat. § 645.44, subd. 15 (2010) (stating use of “may” is permissive).

Given the deference afforded a district court’s decision regarding the award of attorney fees, the district court did not abuse its discretion in denying wife’s motion for attorney fees.

Affirmed in part and reversed in part.