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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2417**

In re the Marriage of:
Susanne C. Clay,
f/k/a Susanne C. Dvorak,
petitioner,
Respondent,

vs.

Christopher A. Dvorak,
Appellant.

**Filed February 26, 2008
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27FA 297-270

Peter H. Watson, Peter H. Watson & Associates, P.A., 2124 Dupont Avenue South,
Minneapolis, MN 55405; and

Leland S. Watson, 895 TriTech Office Center, 331 South Second Avenue, Minneapolis,
MN 55401 (for respondent)

Michael Ormond, Ormond & Zewiske, 303 Butler North Building, 510 First Avenue
North, Minneapolis, MN 55403 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Christopher A. Dvorak challenges the district court's distribution of property in his dissolution from respondent Susanne C. Clay, f/k/a Susanne C. Dvorak, arguing that the district court abused its discretion by (1) adopting a date for valuation of marital property that was different from the date to which the parties stipulated; (2) determining that appellant had failed to adequately trace a nonmarital interest in the townhouse awarded to respondent; and (3) rejecting the financial neutral's valuation of stock awarded to respondent, while accepting the valuation of the company's board chairman.

Because the district court explained its basis for selecting a new valuation date in order to make an equitable distribution and accepting the board chairman's opinion over that of the financial neutral, in findings that are supported by the record, and because appellant failed to sustain his burden of tracing his nonmarital interest in the townhouse, we affirm.

DECISION

Valuation Date

In a dissolution action,

[t]he court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court may

adjust the valuation of that asset as necessary to effect an equitable distribution.

Minn. Stat. § 518.58, subd. 1 (2006). Within these standards, the district court has considerable discretion to set an alternative marital property valuation date. *Grigsby v. Grigsby*, 648 N.W.2d 716, 720 (Minn. App. 2002), *review denied* (Minn. Oct. 15, 2002). If the district court makes specific findings explaining its rationale and those findings are not clearly erroneous, there is no abuse of discretion. *Id.*

Here, the parties stipulated to a valuation date of March 31, 2005. The district court determined in its February 13, 2006 order that the increase in the investment accounts that occurred during the marriage was marital property. The investment accounts had not been divided and appellant continued to control the accounts, including respondent's share of the marital assets, between the stipulated valuation date and the court's amended order issued on November 1, 2006. The investment accounts increased by \$235,000 during that period of time and appellant sought to have that entire amount awarded to him as nonmarital property. The court found that the gain was attributable to appellant's efforts and to the fact that he continued to control all the marital assets. The court concluded that it would be unfair to allow appellant to receive all the gain, particularly when respondent had no access to or control over the accounts and could not invest her share of the marital assets for her sole benefit. *See Bender v. Bender*, 671 N.W.2d 602, 605-06 (Minn. App. 2003) (concluding in matter where investments had fluctuated in value after stipulated valuation date that the court's findings supported exercise of its discretion in adjusting valuation dates).

Because the district court provided findings supporting its decision to adjust the valuation date and these findings are supported by the record, it was not an abuse of discretion to adjust the valuation date to the date of the actual division of property.

Nonmarital Interest in Townhouse

“Nonmarital property” includes property acquired by one spouse before the marriage and any property acquired in exchange for such property. Minn. Stat. § 518.003, subd. 3b (2006). “Whether property is marital or nonmarital is a question of law, but a reviewing court must defer to the [district] court’s underlying findings of fact.” *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). The party asserting that property is nonmarital has the burden of proving it by a preponderance of the evidence. *Crosby v. Crosby*, 587 N.W.2d 292, 296-97 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). When marital and nonmarital assets have been commingled, the party asserting the nonmarital claim must adequately trace the nonmarital funds in order to establish their nonmarital character and meet the burden of proof. *Id.*

Appellant claims that the down payment for the townhouse subsequently awarded to respondent was drawn from his premarital account, the Think Equity account. On the date of the marriage, the balance in this account was \$46,255; on the valuation date of March 31, 2005, the account balance was \$11,763. The district court awarded appellant this remaining balance as nonmarital property. Appellant contends that the reason the balance was so low was because he transferred \$45,010 to respondent to fund a partial down payment on the townhouse and that prior to the transfer in December 2004, the

account balance was \$55,000. Appellant argues that he should be reimbursed for what he describes as a nonmarital transfer in order to purchase the townhouse.

According to the record, the value in the Think Equity account on the date of marriage was in fact \$46,255, but the value thereafter fluctuated between a high of \$112,677 and a low of \$11,877, the final amount recorded. The account records show transfers and distributions from the account over a period of several years, as well as substantial fluctuations in market value, apparently due to appellant's active management of the account. Although the court concluded that this account was nonmarital, its reasoning was based on the fact that the balance on the valuation date was less than the premarital balance. Had the account balance been at its high of \$112,677 on the valuation date, the court would properly have construed that increase in value to be marital, based on appellant's active management of the account. The down payment for the townhouse came from this account; given the great fluctuation in value, it is impossible to determine whether the down payment was made with marital or nonmarital funds, something that appellant has the burden of proving.

Appellant has failed to sustain his burden of tracing because he has not shown that only nonmarital funds were used for the down payment, given the fluctuations in value in this account. We therefore conclude that the district court did not abuse its discretion by refusing to award appellant a nonmarital interest in the townhouse.

Stock Valuation

The district court's findings of fact regarding valuation of an asset will not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001).

The district court's estimation of value is "necessarily an approximation in many cases" and must "fall within a reasonable range of figures." *Id.* A finding of fact is clearly erroneous if manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). The district court may accept or reject expert testimony in its discretion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760-61 (Minn. 1998). Expert knowledge may be based both on an expert's scientific knowledge and on the extent of the expert's practical experience. *Id.* at 761. "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

Appellant asserts that the district court abused its discretion by accepting the board chairman's valuation of common stock held by respondent in the startup biotechnology company where she is employed, rather than relying on the financial neutral's valuation. The district court made extensive findings about why it accepted the board chairman's testimony and rejected the financial neutral's testimony, specifically noting that the board chairman had more experience with start-up companies, particularly in the biotechnology field, and that he acknowledged a fiduciary duty "to establish a fair market price for the options [of common stock] that it grants to its employees. The financial neutral used the prior transaction method of valuation, but premised his opinion on earlier purchases of preferred shares by venture capital investors, although respondent held only common shares. The board chairman provided a reasonable explanation of why preferred shares would have a higher value than common stock, particularly in a startup company,

because the preferred shareholders acquire priority and greater rights in the event of liquidation or bankruptcy.

We could disagree with the court's choice of expert valuation in this situation, but we defer to the district court's reconciliation of conflicting testimony, given the court's opportunity to judge credibility. The court's findings on valuation are explained by the court and supported by the record; as such, they are not clearly erroneous.

Affirmed.