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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1623**

In re the Marriage of:
Michelle Popel, petitioner,
Respondent,

vs.

Alexei Popel,
Appellant.

**Filed October 14, 2008
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge**

Rice County District Court
File No. 66-F7-05-000258

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80
South 8th Street, Minneapolis, MN 55402 (for respondent)

M. Sue Wilson, James T. Williamson, M. Sue Wilson Law Offices, P.A., Two Carlson
Parkway, Suite 150, Minneapolis, MN 55447 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Alexei Popel challenges the judgment dissolving his marriage to respondent Michelle Popel, arguing that the district court abused its discretion when it (1) awarded the parties joint physical custody of their child; (2) considered his pension payments when finding his net monthly income for child-support purposes; (3) denied his motion for child-support arrearages; and (4) determined respondent's nonmarital interest in the marital home. Because we conclude that the district court did not abuse its discretion in its award of joint physical custody and denial of arrearages to appellant, we affirm on those issues. But because we conclude that the district court failed to make the findings necessary to support its deviation from the child-support guidelines and that the basis for its calculation of respondent's nonmarital interest in the marital home is unclear, we reverse and remand those issues.

FACTS

The parties married on February 19, 2000; they have one child together, L.V.P. Respondent also has sole physical custody of her child from a prior relationship. During the parties' marriage, respondent worked full-time as a technical-support manager for American Express, earning \$80,000-\$105,000 annually. Appellant retired from the Fargo, North Dakota Police Department approximately six months after the marriage. He then managed his rental properties in Fargo. At the time of the dissolution, appellant was working as a property manager earning \$42,000 per year with a net monthly income of \$2,665. He also received \$17,003 per year from his police pension.

Respondent petitioned to dissolve the marriage in February 2005; the parties separated in May 2005 when respondent and her older child moved out. On that day, she had been drinking, and the parties argued. A scuffle ensued during which appellant, who believed that respondent was intoxicated, tried to stop her from leaving. Respondent threw a videotape at appellant, struck him with her hands, and knocked him down with a pan. Respondent also interfered with appellant's effort to call 911 by taking the telephone from him and smashing it. Much of this dispute occurred in front of the children. When police arrived, they determined that respondent's alcohol concentration was .116. She later pleaded guilty to domestic assault based on this incident.

The district court awarded appellant temporary sole physical custody of their child and ordered respondent to submit to a chemical-dependency evaluation. The evaluator determined that respondent met the criteria for alcohol abuse and that she has anger issues when drinking. The evaluator recommended abstinence and continued Alcoholics Anonymous involvement.

At trial, appellant sought sole physical custody and respondent sought joint physical custody of their child. The district court's judgment details the parties' history, their inability to get along and respondent's alcohol problems, but the district court noted that each party sought what was best for L.V.P. Ultimately, the district court awarded the parties joint legal and physical custody, stating that L.V.P. "is blessed with two loving, competent parents, each of whom brings different strengths and emphases to the parent-child relationship. As such, it would be extremely detrimental if one parent had sole

authority over her upbringing and the other became a mere occasional presence in [L.V.P.'s] life.”

The district court directed respondent to pay appellant monthly child support. In its child-support calculation, the district court included in appellant’s net monthly income his annual police-pension income. In addition, the district court determined that respondent had a \$175,000 nonmarital interest in the marital home. The district court denied appellant’s posttrial motion seeking a new trial, sole physical custody of the child, increased support, support arrearages, and a reduction of respondent’s nonmarital interest in the home. This appeal follows.

D E C I S I O N

I.

Appellant challenges the district court’s award of joint physical custody. Appellate review of custody determinations is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Findings of fact are reviewed for clear error. Minn. R. Civ. P. 52.01.

The controlling principle in a child-custody dispute is the child’s best interests. *Pikula*, 374 N.W.2d at 711; *see* Minn. Stat. § 518.17, subd. 1 (2006) (listing best-interest considerations). On appeal, the law “leaves scant if any room for an appellate court to question the [district] court’s balancing of best-interests considerations.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). Before a district court orders joint

physical custody, it must consider (1) the ability of parents to cooperate in the rearing of their child; (2) the methods for resolving disputes regarding any major decision concerning the life of the child and the parents' willingness to use those methods; (3) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (4) whether domestic abuse has occurred between the parents. Minn. Stat. § 518.17, subd. 2 (2006). If joint physical custody is awarded over the objection of a party, the court must make "detailed findings" on the joint-custody factors "and explain how the factors led to its determination that joint custody would be in the best interests of the child." *Id.* Further, if domestic abuse has occurred between the parties, a rebuttable presumption exists that joint physical custody is not in the child's best interests. *Id.*

The parties here have had difficulty cooperating with one another. The district court found that they could not agree on how to parent L.V.P., reached a "total impasse" over where she would attend school, and were so lacking in their ability to resolve disputes that they needed an "outside agency" to help. But the district court also found that L.V.P.'s best interests are served by joint physical custody because, individually, appellant and respondent are loving, competent parents who do not allow their personal conflicts to harm her.

Addressing respondent's alcoholism and the domestic-abuse charge, the district court found:

In deciding to grant the parties joint physical custody, the court considered the presumption against joint physical custody in cases in which there has been domestic abuse . . .

and the parties' demonstrated inability to resolve disputes concerning parenting [L.V.P.]. In deciding that the presumption has been overcome, the court did not minimize the detrimental impact on [appellant] or [L.V.P.] of [respondent's] domestic abuse. . . . Two facts must be considered, however. First, all of [respondent's] prior acts of domestic abuse against [appellant] occurred when [respondent] was abusing alcohol and was intoxicated. There is every reason to believe [respondent] has effectively addressed that problem. Second, [respondent's] domestic abuse against [appellant] was not significantly motivated by [respondent] seeking to exercise power and control over [appellant], but rather was the seriously inappropriate use of force to separate herself from [appellant] when she perceived [appellant] was seeking to control her actions. As such, these acts appear to have been more panic reactions . . . than attempts to either punish or intimidate [appellant]. The change in the relationship from the separation and divorce is likely to change the dynamic that led to [respondent's] domestic violence.

The parties' inability to effectively discuss and resolve disputes is also extremely troubling. The award of joint physical custody in this case is also based on a balancing of the risks inherent in their lack of cooperative skills with the risk that an award of sole custody to [appellant] would lead to a denial of [respondent's] parenting time, either from [appellant] shutting [respondent] out of parenting decisions or from [appellant] moving from the area. . . .

Finally, in resolving this issue, the court places great weight on the evidence that despite the parties' inability to discuss and resolve differences, they have not allowed their conflicts to harm [L.V.P.].

Joint physical custody can be appropriate despite a history of domestic abuse if the abuser is amenable to, and willing to undertake, treatment. *Cf. Uhl v. Uhl*, 413 N.W.2d 213, 217 (Minn. App. 1987) (upholding award of custody to parent despite substantiated history of domestic abuse against children when custodial parent had shown amenability

to therapy and willingness to change). But joint custody should not be used as a “legal baseball bat” to coerce parties to cooperate. *Chapman v. Chapman*, 352 N.W.2d 437, 441 (Minn. App. 1984). When parties have demonstrated a past inability to cooperate with each other, but are nevertheless able to set that inability aside for the good of their child, joint physical custody may be appropriate. *Zander v. Zander*, 720 N.W.2d 360, 367 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). Here, respondent has actively sought to effectively address her alcohol abuse through treatment. The district court found that, by the time of the dissolution, respondent had been sober for a year. In addition, the district court found that the parties have the ability to set aside their differences in order to avoid harming L.V.P. While appellant understandably notes that the parties’ history could be a source of significant concern regarding custody, we conclude that the district court effectively addressed those concerns with findings of fact that are supported by the record. Therefore, on this record, we cannot say that the district court’s resolution of the custody question was an abuse of its discretion.¹

¹ Appellant also contends that the district court abused its discretion by finding sole physical custody improper because he might deny respondent parenting time by moving from the area. A parent cannot move a child to another state unless it is in the child’s best interests, and the parent proposing the move has the burden of proof in the matter. Minn. Stat. § 518.175, subd. 3(b), (c) (2006). Under *Goldman v. Greenwood*, 748 N.W.2d 279 (Minn. 2008), which was issued after the district court made its decision in this matter, a district court may be able to restrict a custodial parent’s ability to move by employing a “locale restriction” governed by Minn. Stat. § 518.18(d) (2006). Thus, the district court’s concern on this point is now misplaced. But on this record, this fact does not outweigh the other considerations the district court used in concluding that joint physical custody is in the best interests of L.V.P.

II.

Appellant challenges the calculation of child support, arguing that the district court improperly included his police pension in his income, resulting in a lower amount of child support being paid to him by respondent. The determination of child support is discretionary with the district court, and its setting of support will not be altered on appeal unless the district court abused its discretion. *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008).

A. Deviation from Child-Support Guidelines

Appellant's argument that his pension income was improperly included in the district court's determination of his income is based on the law in the spousal-maintenance context. Spousal maintenance is a payment from the future income or earnings of one former spouse for the benefit of the other former spouse. Minn. Stat. § 518.003, subd. 3a (2006). Therefore, in the context of spousal maintenance and property divisions, the property portion of a pension that a dissolution judgment awards is not to be later treated as income when determining a maintenance obligor's ability to pay maintenance; to do so would allow the asset awarded to the maintenance obligor as property to be redistributed to the maintenance recipient as income. *Neubauer v. Neubauer*, 433 N.W.2d 456, 461 (Minn. App. 1988), *review denied* (Minn. Mar. 17, 1989); *see also Kruschel v. Kruschel*, 419 N.W.2d 119, 121-22 (Minn. App. 1988). Noting that the district court awarded him his police pension as property, appellant argues that this rule also applies in the context of finding a party's net monthly income for child-

support purposes and, therefore, that the district court overstated his net monthly income for child-support purposes when it included his pension benefit in his income.

Whether a source of funds is income for child-support purposes is a legal question, which we review de novo. *Hubbard County Health & Human Servs. v. Zacher*, 742 N.W.2d 223, 227 (Minn. App. 2007). Generally, “income” is defined as “any form of periodic payment to an individual.” Minn. Stat. § 518.54, subd. 6 (2004)²; *see Duffney v. Duffney*, 625 N.W.2d 839, 843 (Minn. App. 2001) (stating that, “[g]enerally, if a payment is periodic it is income”). Even though appellant is generally correct in asserting that the spousal-maintenance rule prohibiting basing an obligation on a property award applies to child-support matters, pension benefits and similar disbursements may, under appropriate circumstances, be considered when setting a support obligation, even if they were awarded in a property division. *See* Minn. Stat. § 518.551, subd. 5(c)(1) (2004) (stating that, when setting a support obligation, the district court, in addition to considering the obligor’s “income” is to consider “all” of the obligor’s “earnings” and “resources,” “including real and personal property”); *Darcy v. Darcy*, 455 N.W.2d 518, 521 (Minn. App. 1990) (noting the breadth of the requirement that court consider earnings, income, and resources when addressing child support and stating that “[t]he exact parameters of what may or may not be used to satisfy or set a support obligation have not been fully determined”); *cf. Swanson v. Swanson*, 583 N.W.2d 15, 18 (Minn. App. 1998) (holding that “[a]lthough property, [a party’s] share of the disability benefit must be considered in

² Because this dissolution was filed in February 2005, the 2004 and 2005 statutes apply to the determination of child support. *See* 2006 Minn. Laws ch. 280, § 44, at 1145 (addressing effective date of 2006 amendments of child-support statutes).

determining his child support obligation” under Minn. Stat. § 518.551, subd. 5(c)(1)), *review denied* (Minn. Oct. 20, 1998); *Kuronen v. Kuronen*, 499 N.W.2d 51, 54 (Minn. App. 1993) (reversing a suspension of an incarcerated obligor’s child-support obligation and remanding for the district court to include the obligor’s retirement account in addressing his ability to pay support), *review denied* (Minn. June 22, 1993). Thus, the fact that something was awarded as property does not necessarily preclude it from being included as income underlying a child-support obligation.

To base a support obligation, in part, on a property award, however, is to base the support obligation on something other than the obligor’s net monthly income as defined by Minn. Stat. § 518.551, subd. 5(b) (2004), which constitutes a deviation from the presumptively appropriate guideline support amount for that obligor’s net monthly income. *See* Minn. Stat. § 518.551, subd. 5(b) (stating that “[t]he court shall derive a specific dollar amount for child support by multiplying the obligor’s net income by the percentage indicated by the following guidelines”); (i) (stating that the child-support guidelines are “rebuttabl[y] presum[ed]” to be applicable in “all cases”). If the district court sets support at an amount deviating from the guideline amount, it “shall make written findings” that address the considerations required by Minn. Stat. § 518.551, subd. 5(c) (2004). Minn. Stat. § 518.551, subd. 5(i); *see also* Minn. Stat. § 645.44, subd. 16 (2004) (stating that “[s]hall’ is mandatory”).

Here, the district court did not make the findings necessary to support a deviation from the child-support guideline amount. Therefore, on remand, the district court shall re-evaluate the question of appellant’s net monthly income for child-support purposes, as

well as any impact the recalculated figures may have on respondent's net monthly child-support payment. If the district court determines that there is an adequate basis to deviate from the presumptively appropriate guideline amount, the district court shall make the requisite findings of fact. *See Kahn v. Tronnier*, 547 N.W.2d 425, 429 (Minn. App. 1996) (remanding an above-the-guidelines support obligation where deviation findings were absent), *review denied* (Minn. July 10, 1996).

B. Support Calculation

The district court found that appellant and respondent had net monthly incomes for child-support purposes of \$3,900 and \$5,700, respectively. Its conclusion of law regarding child support states that respondent “shall pay [appellant] \$618 per month as and for child support.” The district court applied the *Hortis/Valento* formula to identify each party's monthly support obligation. *See Bender v. Bender*, 671 N.W.2d 602, 608 (Minn. App. 2003) (stating that the *Hortis/Valento* formula is presumptively applicable where the parties have joint physical custody and that, under that formula, “separate support obligations are set for each parent, but only for the periods of time that the other parent has physical custody of the children, and a single net payment is determined by offsetting the two obligations against each other”), *review denied* (Minn. Jan. 28, 2004). In its *Hortis/Valento* application, the district court found that appellant would have custody of the child about 62% of the time and respondent would have custody about 38% of the time. It then computed child support, stating: “\$5900 x .25 x .62 = (\$915), less \$3900 x .25 x .38 (= \$371) = \$544.” (Emphasis added.) In calculating respondent's monthly child-support obligation, the district court used an income figure of \$5,900

instead of its finding of respondent's net monthly income (\$5,700). As a result, the net monthly support payment of \$544 calculated by the district court is less than its recitation of what it determined respondent's net monthly payment to be (\$618). These discrepancies are not otherwise clarified in the judgment, and while they were not formally identified in this court as errors on appeal, appellate courts have a duty to decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990); *see Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. App. 1990) (applying *Hannuksela* in a civil case), *review denied* (Minn. Feb. 4, 1991). Therefore, on remand, we ask the district court to clarify its support calculation.

III.

While this matter was pending, the district court ordered respondent to pay temporary monthly child support of \$440. At trial, appellant testified that respondent did not pay child support for approximately six months; respondent testified that she did not pay support for three months. When the dissolution judgment did not award child-support arrears to appellant, he challenged the ruling as a clerical error. But the district court stated in its posttrial order that it “did not believe at the conclusion of the evidence that there were any arrears due” and that the omission of arrears was not a clerical error. Appellant challenges the district court's refusal to award him arrearages. We affirm the district court on this issue.

While Minn. R. Civ. P. 60.01 allows correction of a clerical error at any time, it may not be used to cause a judgment to state something other than what the judgment originally pronounced. *Denike v. W. Nat'l Mut. Ins. Co.*, 473 N.W.2d 370, 372 (Minn.

App. 1991); *see Gould v. Johnson*, 379 N.W.2d 643, 646 (Minn. App. 1986) (explaining the nature of a clerical error), *review denied* (Minn. Mar. 14, 1986). The district court rejected appellant's argument that its failure to award arrearages was a clerical error. To reverse the district court's ruling based on the theory that the ruling was a clerical error would be to improperly use the clerical-error rule to alter the judgment to include something that was not originally included in that judgment. Appellant also makes an argument to this court based on Minn. R. Civ. P. 60.02. But because that argument was not made to the district court, we decline to address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that, generally, appellate courts address only issues presented to and considered by the district court).

IV.

Appellant asserts that the district court improperly determined the amount of respondent's nonmarital interest in the parties' home. Whether property is marital or nonmarital is a legal question, but reviewing courts 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 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). A former spouse can show that property is nonmarital by showing that it was acquired before the marriage or in exchange for nonmarital property. Minn. Stat. § 518.003, subd. 3b(b)-(c) (2006).

Appellant does not dispute and the district court found that respondent used nonmarital funds in the acquisition of the marital home.

The present value of a nonmarital asset used in the acquisition of marital property is the proportion the net equity or contribution at the time of acquisition bore to the value of the property at the time of purchase multiplied by the value of the property at the time of separation. The remainder of equity increase is characterized as marital property

Brown v. Brown, 316 N.W.2d 552, 553 (Minn. 1982).

The parties bought the marital home for \$385,000. The district court found that the purchase was financed by \$113,700 from the proceeds of the sale of respondent's premarital home, \$27,000 from a loan from her premarital 401(k) fund, and a mortgage of \$252,000. The district court determined that \$175,000 of the equity in the marital home at the time of dissolution was respondent's nonmarital property, based on its calculation that respondent's nonmarital funds accounted for about 29.5% of the purchase of the home ($\$113,700/\$385,000$). Multiplying this percentage by the \$588,000 estimated value of the home at the time of dissolution, respondent's nonmarital interest in the home would be \$173,650.

Respondent did not ask the court to find the loan from her 401(k) constituted a nonmarital payment, and the district court did not include the loan in its calculation. Appellant claims that the home was purchased for \$385,000, and paid for with a mortgage of \$252,000, \$27,000 from respondent's nonmarital 401(k) and \$113,700 from the sale of respondent's premarital home. But he asserts that \$11,000 of respondent's premarital 401(k) was used to pay the balance of respondent's mortgage on her premarital home and that respondent's 401(k) plan was then repaid with marital funds.

As a result, he asked the district court to amend respondent's original nonmarital payment to be \$102,700 (\$113,700 – \$11,000), making respondent's nonmarital interest \$156,996.

Although the district court agreed that respondent's nonmarital contribution from the sale of her premarital home was \$102,700, it denied appellant's motion. It concluded that the home was paid for with a \$252,000 mortgage, \$102,700 from the sale of respondent's premarital home, and a \$38,000 loan from respondent's premarital 401(k) that has since been repaid, and stated that “[t]he same total amount of premarital funds came from [respondent], whether from a larger loan from her [401(k)] or from more equity in her [home].” The district court did not explicitly address appellant's argument that the contested \$11,000 amount was repaid with marital funds, and the record on this matter is not clear. While appellant asserts that the repayment of respondent's 401(k) loan occurred with marital funds via a home-equity line of credit on the marital home, there is also evidence in the record to suggest that the \$11,000 used to pay off the mortgage on respondent's premarital home may have been repaid with respondent's premarital funds. On this record, the source of the funds in question is not clear, thereby precluding review. As a result, we remand for the district court to reconsider this issue.

Whether to reopen the record on remand shall be discretionary with the district court.

Affirmed in part, reversed in part, and remanded.