STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1271

In re the Marriage of: Andrew Scott Green, petitioner,
Appellant,

vs.

Julie Ann Green,
Respondent.

Filed September 5, 2017
Affirmed
Reyes, Judge

Wadena County District Court
File No. 80-FA-14-828

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Allison Maxim, Morgan Zavadil, Maxim Law, P.L.L.C., St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stauber, Judge.*

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

U N P U B L I S H E D O P I N I O N

REYES, Judge

Appellant-husband argues in this marital-dissolution appeal that the district court abused its discretion in its (1) distribution of marital property to respondent-wife and (2) award of permanent spousal maintenance. We affirm.

FACTS

Appellant-husband Andrew Green and respondent-wife Julie Green married in 1992 in New York. While the parties lived in New York, wife operated a licensed daycare and husband worked for the New York City Police Department (NYPD) from 1990 until 2006 when he retired due to a knee injury. As an NYPD officer, husband responded to the terrorist attacks of September 11, 2001, at the World Trade Center towers.

After husband retired from the NYPD in 2006, the parties moved to Minnesota. In Minnesota, wife worked part-time as a substitute teacher for various schools. Husband obtained occasional employment but received substantially all of his income from Social Security Retirement, Survivors and Disability Insurance (RSDI) and from the New York City Police Pension Fund (the PPF).

After twenty-two years of marriage, the parties separated in 2014. Husband petitioned for dissolution of the parties' marriage. The dissolution action was placed on inactive status by agreement of the parties between January 26, 2015, and March 31, 2015. Wife filed a motion to reinstate the matter and requested, among other things, exclusive use of the parties' home, temporary spousal maintenance, and an order that any funds husband received from settlement of the Victim Compensation Fund (VCF) of the James

L. Zadroga 9/11 Health and Compensation Act be deposited into a trust account. On July 22, 2015, the district court filed a temporary order providing wife with temporary spousal maintenance of $5,290 per month during the dissolution-of-marriage proceeding and granting wife's other requests.

The parties' dissolution trial took place on September 23 and 24, 2015. The parties stipulated to facts related to their financial resources and circumstances, which they filed with the district court. The parties disputed spousal maintenance and the division of property.

The stipulated facts established that husband had a net income of $2,361 available to him from RSDI and $6,017 from his PPF for a total untaxable net income of $8,378. In 2013 and 2014, husband's reported income was $100,934 and $103,546, respectively. Furthermore, husband received a $22,191.52 payment out of the VCF, which he did not place in a trust account as directed by the district court. Additionally, husband did not make any of the temporary spousal-maintenance payments required by the July 2015 order.

The trial testimony and the district court record establish that wife's average gross income for the last three years was approximately $1,000 per month with a net income of approximately $900. Wife was in the process of obtaining a Master's degree in professional counseling. Wife was scheduled to complete her classes and internship by the end of 2016. She would then need to complete 2,000 hours of supervised training. Wife speculated that once she obtained her degree she could earn between $26,500 and $30,000 per year working as a counselor.

In an amended order, the district court found that a portion of husband's PPF was marital property, totaling approximately $25,386 per year (the marital PPF). The district court awarded wife 56% of the marital PPF, "amounting to $1,200 per month."[1]

With respect to the VCF, the district court found that it was marital property because husband obtained the settlement during the marriage, and he failed to prove at trial that it was nonmarital property pursuant to Minn. Stat. § 518.003, subd. 3b (2016). The district court noted that husband had received an initial payment under the VCF for $22,192.52 that he disposed of, "contrary to the [c]ourt's order." Nevertheless, the district court found that husband is entitled to 2/3 of the current VCF, or approximately $130,141, less his 2/3 share of expenses, and should receive 2/3 of any future remaining payments; and wife would receive a 1/3 share of the current VCF, or approximately $65,070, less her 1/3 share of expenses, and should receive 1/3 of any future payments.

In addition to marital property, the district court awarded wife $2,300 per month in spousal maintenance. Noting that it was reducing husband's spousal maintenance from its prior orders, because wife was going to receive $1,200 per month from the marital PPF, the district court found that wife would still receive total resources of $4,400 per month to meet her reasonable living expenses of $4,350.75.

Husband appeals.

[1] Fifty-six percent of the marital PPF is $1,186 per month, slightly less than the $1,200 per month the district court awarded.

D E C I S I O N

I. The district court's order awarding to wife 56% of the marital PPF and 1/3 of the VCF was not an abuse of discretion.

"District courts have broad discretion over the division of marital property and appellate courts will not alter a district court's property division absent a clear abuse of discretion or an erroneous application of the law." *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). A district court abuses its discretion if it divides marital property in a manner "that is against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate courts '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.'" *Sirek*, 693 N.W.2d at 898 (quoting *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002)). "We defer to the [district] court's findings of fact and will not set them aside unless they are clearly erroneous." *Id.* (quotation omitted).

A. The district court's award of 56% of the marital PPF to wife was not an abuse of discretion.

Husband argues that the district court's award to wife of 56% of the marital PPF was an abuse of discretion because the district court improperly considered husband's conduct in deciding the marital PPF amount wife should receive. We are not persuaded.

A district court "shall make a just and equitable division of the marital property of the parties" after considering several 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, opportunity for future acquisition of capital assets, and income of each party." Minn. Stat. § 518.58, subd. 1

(2016). The district court must also consider the value of services provided by either spouse "as a homemaker." *Id*. And "[i]t shall be conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife." *Id*. Furthermore, a district court is not required to divide all assets and liabilities equally, but must ensure that the division is just and equitable. *Gummow v. Gummow*, 356 N.W.2d 426, 429 (Minn. App. 1984). Contrary to wife's assertion, a district court may not take into consideration the marital misconduct of a spouse when deciding upon the division of marital property, although it may take into consideration how a spouse's conduct contributed to the depreciation of the value of the marital property. *See Sirek*, 693 N.W.2d at 900.

Here, the district court noted that it awarded wife a larger share of the marital PPF in part to punish husband for his "nearly complete disregard" of the prior court order requiring him to pay temporary spousal maintenance. This alone would be an erroneous reason upon which to distribute a larger share of the marital property to one of the parties. *See id*. But the district court's order also demonstrates that it considered the needs of wife and other statutory factors in dividing the marital property. As a result, the district court determined that it was "just and equitable" to award wife 56% of the marital PPF. Husband still retained a large portion of his pension, disability benefits, and VCF. Considering the broad discretion a district court has in dividing marital property and the minimal financial resources wife had in this case, the district court's award was not "against logic and the facts on record." *Rutten*, 347 N.W.2d at 50. Thus, because the remainder of the record supports the district court's division of the marital portion of the PPF, any error the district

court made in referring to husband's "disregard" of its prior order is harmless error. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

B. The district court's determination that the VCF was marital property was not erroneous and awarding 1/3 to wife was not an abuse of discretion.

Husband argues that the district court erred in determining that the VCF was marital property and abused its discretion in awarding wife a portion of the VCF. We disagree.

"Marital property" is defined as any real or personal property acquired by the parties during the marriage and before the valuation date. Minn. Stat. § 518.003, subd. 3b. Property is presumed to be marital if it is acquired during the marriage and before the date of valuation. *Id.* But a party can rebut the presumption that property is marital by showing that the property is nonmarital. *Id.* Nonmarital property includes real or personal property obtained prior to the marriage. *Id.* "Whether property is marital or nonmarital is a question of law, but [this] court must defer to the [district] court's underlying findings of fact." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997).

Husband acquired his interest in the VCF by virtue of his role as an officer with the NYPD who responded to the attack on the World Trade Center towers on September 11, 2001. There is no dispute that husband acquired his interest in the VCF during the marriage and before the date of valuation. Therefore, the presumption that the VCF is marital property applies.

Husband argues the VCF was not marital property because it was compensation for personal injuries suffered while responding to the September 11 attacks. How a district court characterizes a personal-injury award depends on the purpose of recovery, which

allows for separate treatment of various components of the recovery. *Van de Loo v. Van de Loo*, 346 N.W.2d 173, 176 (Minn. App. 1984). The district court considers the purpose of the recovery is to replace property whose source derives from something acquired before the marriage, such as a person's good health, which would make it nonmarital property. *Id.* Alternatively, if the recovery replaces property acquired or which would have been acquired during the marriage, such as the replacement of lost wages, it is marital property. *Id.* Husband has the burden to prove by a preponderance of the evidence that his VCF money is nonmarital property. *Id.* at 177.

Husband submitted a one-page printout of the general program information about the VCF and two letters from his attorney, which summarize the amount of the award. The printout states that a special master would "provide compensation for any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the debris-removal efforts that took place in the immediate aftermath of those crashes." Despite Husband's submission to the district court, the record does not establish that husband received the VCF due to injuries stemming from his service during the September 11 attacks. Furthermore, the letters from husband's attorney do not illuminate the matter further. Because the burden is on husband to rebut the presumption that the VCF is marital property and to put forth sufficient evidence that it is nonmarital property, and he failed to

do either here, the district court did not err in considering the VCF marital property. As such, the district court did not abuse its discretion in awarding wife 1/3 of the VCF.[2]

II. The spousal-maintenance award was not an abuse of discretion.

Husband challenges the award and amount of the spousal maintenance. We review a district court's spousal-maintenance award for an abuse of discretion. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). However, we review questions of law related to spousal maintenance de novo. *Id.*

A. The district court did not clearly err in finding that wife is not self-supporting and cannot meet her reasonable needs.

Husband argues that wife is not eligible to receive spousal maintenance because, in light of the district court's distribution of marital property, wife has sufficient property and assets to provide for her reasonable needs and will be self-supporting in the future. We disagree.

In a dissolution proceeding, a district court may award either party spousal maintenance if it finds that, in light of the standard of living established during the marriage, the party seeking maintenance (1) "lacks sufficient property, including marital property apportioned to the spouse, to provide for [the] reasonable needs of the spouse" or (2) "is unable to provide adequate self-support . . . through appropriate employment." Minn. Stat. § 518.552, subd. 1 (2016); *see Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (stating that maintenance award depends on showing need).

[2] Because the VCF is marital property, we do not address the portion of the district court's alternative analysis awarding wife her interest in the VCF in order to avoid an undue hardship.

Husband argues that the district court abused its discretion in awarding maintenance because wife received the home, $1,200 per month from husband's pension, and 1/3 of the VCF (approximately $65,000), which will provide her with more than enough property to meet her reasonable expenses. Husband also argues that by early 2018 wife will be self-supporting, earning approximately $30,000 annually as a licensed professional counselor.

In general, to be eligible to receive maintenance, wife must demonstrate a need for funds beyond those available to her to meet her standard of living. In determining need, the district court must consider all forms of wife's income. *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016). We review a district court's determination of a party's income for clear error. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004). A finding of fact is clearly erroneous where this "court is left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We review the evidence in the light most favorable to the district court's findings, *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000), and defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Here, the record demonstrates that wife's current income is about $1,000 per month with expenses of $4,350.75 per month. In addition, wife would receive approximately $1,200 per month from the PPF. And, while wife's income *may* increase in the future to approximately $26,500 to $30,000, it is not certain that her income will increase or, if it will, when it will increase enough to allow her to be self-supporting. Furthermore, as the district court found, "[w]ife lacks sufficient property to provide for her reasonable needs

considering the standard of living established during the marriage." Beyond that, the district court found that wife had no savings, no vehicle, and a small pension through the Teacher's Retirement Association that paid her $56.38 per month.

The record amply supports the district court's finding that wife has a need for spousal maintenance. Considering wife's reasonable monthly expenses and inadequate income, the district court awarded wife $2,300 per month in permanent spousal maintenance. As such, the district court was justified in determining that wife was eligible to maintenance due to the district court's concerns with wife's ability to become self-supporting.

B. The district court's determination as to the appropriate amount of the spousal-maintenance award was not an abuse of discretion.

Husband also challenges the amount of the spousal-maintenance award, arguing that it was inappropriate because the district court (1) based the award on the district court's dislike of husband; (2) based the award on husband's misconduct by failing to pay the pre-trial temporary maintenance award; and (3) set an excessive award amount. We disagree.

Once a district court determines that a maintenance award is appropriate, it must establish the amount and duration of the award after considering "all relevant factors," such as, (1) "the financial resources of the party seeking maintenance" and that party's ability to meet her needs independently; (2) the time required for the party seeking maintenance to acquire sufficient education or training to find appropriate employment; (3) the marital standard of living; (4) the length of the marriage; (5) the age and health of the party seeking maintenance; (6) the ability of the obligor to pay; and (7) the contribution of each party to

the acquisition and preservation of the marital property. Minn. Stat. § 518.552, subd. 2 (2016). In essence, the district court balances "the recipient's needs against the obligor's ability to pay." *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001) (citing *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982)).

The record shows that the district court considered the financial resources of the parties and balanced the ability of husband and wife to meet their respective needs rather than bias or husband's misconduct. The district court considered the marital standard of living, the length of the marriage, wife's age and health, and the assets acquired by each party before and during the marriage. The district court doubted whether, even if wife could obtain a job in a new field with an increased income, wife could become self-supporting. These findings demonstrate that wife is unable to meet her reasonable expenses even with the $1,200 distribution from the marital PPF. On the other hand, husband has the means to pay spousal maintenance. Based on the district court's findings, husband's monthly income was determined to be $8,378.16 and his reasonable expenses as $4,846. Accordingly, the district court's spousal-maintenance award amount was well within the bounds of its discretion.

III. The district court's award of permanent spousal maintenance was not an abuse of discretion.

Husband also argues that the district court abused its discretion in making the spousal-maintenance award permanent. We disagree.

Spousal maintenance may be temporary or permanent. Minn. Stat. § 518.552, subd. 2. "Where there is some uncertainty as to the necessity of a permanent award, the court

shall order a permanent award leaving its order open for later modification." *Id*. Even when a recipient of spousal support is able to secure employment, if it is uncertain at the time of the district court's decision whether the recipient will become fully self-supporting, an award of permanent maintenance is not an abuse of discretion. *Cf. Duffey v. Duffey*, 416 N.W.2d 830, 833 (Minn. App. 1987), *review denied* (Minn. Feb. 24, 1988); *see also Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987).

In this case, the district court noted that it was unsure whether wife will ever become self-supporting. Although the district court credited wife's testimony about obtaining a new job as a licensed professional counselor, the district court also highlighted that wife's actual employment and income is uncertain. In addition, we note that wife is not yet working as a licensed professional counselor and is earning $1,000 per month.

Finally, husband argues that the district court's order prevents husband from seeking spousal modification even if wife becomes self-supporting and points to the district court's finding that because "[h]usband has higher . . . income and resources (mostly non-taxable) than [w]ife does (and hers is fully taxable), and this disparity will continue even if and when [w]ife becomes more self-supporting as a counselor." However, we note that the district court explicitly made the spousal-maintenance award subject to later modification "if justified by a change in circumstances," as necessary under Minn. Stat. § 518.552, subd. 3. *See* Minn. Stat. § 518A.39 (2016) (addressing modification of spousal maintenance). We agree with the district court that even though this is a permanent award, husband still has a right to seek a modification of the award upon a showing of a substantial

change of circumstances. Therefore, the district court's findings are supported by the record and it was not an abuse of discretion to award permanent spousal maintenance.

Affirmed.