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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1519**

In re the Marriage of:
Brent Lee Florine, petitioner,
Appellant,

vs.

Lauren Marie Florine,
Respondent.

**Filed October 23, 2017
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Hennepin County District Court
File No. 27-FA-14-6543

Susan A. Daudelin, Ben M. Henschel, Henschel Moberg Goff, P.A., Minneapolis, Minnesota (for appellant)

Kay Nord Hunt, Marc A. Johannsen, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this marital-dissolution action, appellant-husband challenges the district court's property-division, maintenance, and security decisions. By notice of related appeal, respondent wife argues that the district court abused its discretion by failing to take taxes

into account when setting her maintenance award and by ordering her to pay all of the homestead costs pending sale of the homestead. We affirm in part, reverse in part, and remand.

FACTS

Appellant-husband Brent Lee Florine and respondent-wife Lauren Marie Florine married in 1994. Husband began dissolution proceedings in September 2014. The parties have two minor children; although custody and support were issues in the dissolution trial, the parties have not challenged the district court's judgment on those matters in this appeal.

Husband had income from his employment as an oral and maxillofacial surgeon averaging approximately \$800,000 per year and additional rental income averaging \$115,000 per year. Husband claimed living expenses of \$12,136 per month, assuming that he was not in the homestead, and expenses for the children of \$8,887 per month. The district court found that this was a reasonable budget.

Wife had been self-employed as an insurance broker during the entire marriage. Her average income was \$168,900 per year. She claimed a monthly budget of \$63,181, based on the parties' standard of living during the marriage, and requested monthly spousal maintenance of \$29,080, but the district court rejected this amount as unreasonable. After reviewing the factors set forth in Minn. Stat. § 518.552 (2016) for determining the amount and duration of maintenance, the district court found that a reasonable monthly budget for wife would be \$25,000 and that wife's \$14,075 average monthly earned income and \$2,500 average monthly interest income would leave wife with an average monthly shortfall of \$8,425. The district court then factored in wife's likely annual tax obligation and found

that a \$15,000 monthly spousal-maintenance award was appropriate and reasonable to meet wife's monthly shortfall.

The parties own a homestead worth more than \$3 million and subject to a \$428,699 mortgage. Wife was permitted to remain in the house until it can be sold, after which the parties will divide the net proceeds. The judgment and decree was originally silent about who is responsible for the homestead costs pending sale. These costs were approximately \$15,000 per month, which included \$6,334 for the mortgage, approximately \$5,222 for real-estate taxes, and approximately \$592 for homeowner's insurance. Husband had paid the mortgage until the date of trial.

The parties agreed to use the services of a consensual special magistrate (CSM) to resolve any differences regarding the sale of the homestead, and the district court ordered the parties to use a CSM to resolve any disputes. In May 2016, the CSM entered an interim order that addressed the costs of preparing the homestead for sale and maintaining the homestead until it can be sold. The CSM ordered each party to be solely responsible for some of the costs and to pay specified portions of other costs; some costs were divided equally between the parties and others were assigned 30% to husband and 70% to wife, in recognition of the fact that wife would be occupying the homestead until sale. The parties moved to amend the findings in the dissolution judgment, and the district court denied wife's motion requesting an amendment to make the parties equally responsible for paying insurance premiums and real-estate taxes pending sale of the homestead.

Husband alleged that wife had depleted marital assets by withdrawing \$463,581 from an account between January 2011 and November 2014. Some of the money was used

to pay attorneys with whom wife consulted before husband initiated the dissolution action. The district court found that wife did not draw a salary from her company but instead took periodic cash distributions and that the money she withdrew from the account was her earnings. The district court concluded that husband had not sustained his burden of proving depletion of marital assets.

At the time of the initial case management conference (ICMC) in November 2014, wife had a money-market account worth \$1,058,846; at the time of the dissolution trial in October 2015, only \$150,000 remained in the account. The district court found that wife had received no support during the 13 months between service of the dissolution summons and trial, and that she had used the money for household expenses, remodeling her business office, attorney fees, and expert fees. The district court concluded that husband had not sustained his burden of proving depletion.

The parties' property includes a building that houses husband's surgical practice and another tenant. The district court accepted wife's appraiser's \$1,150,000 valuation for the building. Husband purchased the building before the marriage and claimed a nonmarital interest, but he was not able to prove that he paid off the mortgage before the marriage or to establish an accurate value for the building on the date of the marriage. The district court found that the value of husband's nonmarital interest in the property is \$195,000.

Wife owns two insurance policies that insure husband's life. The district court ordered husband to pay the premium for one of the policies, which has a \$3,000,000 death benefit. At trial, under cross-examination, wife stated that she would pay the premium.

On appeal, husband argues that the district court erred by making him responsible for the premium when wife said that she would pay it; he also argues that, in light of the children's ages, the death benefit is more than is needed to secure his child-support obligation.

By notice of related appeal, wife argues that the district court abused its discretion by setting maintenance at \$15,000 per month because the district court did not take into account the taxes that wife will have to pay and the homestead costs for which she was made responsible. Wife moved for amended findings after the trial and offered an expert's affidavit on the tax issue. The district court rejected the affidavit because it was not part of the trial record.

D E C I S I O N

I.

A district court's marital-property division will only be reversed for an abuse of discretion. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). A district court abuses its discretion if its decision "is against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Division of marital property is made after considering a number of factors, including, among others, the length of the marriage and the parties' ages and health, occupations and incomes, employability and skills, and assets. Minn. Stat. § 518.58, subd. 1 (2016). Because the parties to a dissolution action owe each other a fiduciary duty, neither party may transfer, encumber, conceal, or dispose of marital assets "except in the usual course of business or for the necessities of life" during the pendency of a dissolution action or in contemplation of a dissolution action. Minn. Stat. § 518.58, subd. 1a (2016). If the district court finds that a party has depleted assets, it "may impute

the entire value of an asset and a fair return on the asset to the party who transferred, encumbered, concealed, or disposed of it.” *Id.* The party asserting depletion has the burden of proving it. *Id.*

The district court concluded that husband failed to sustain his burden of proving that wife depleted marital assets by taking \$463,581 in cash withdrawals between January 2011 and November 2014 when the ICMC was held. Husband argued that in addition to this sum, wife secreted \$250,000 by withdrawing it from one account and depositing it in another. The district court found that husband was aware of this transfer because he listed interest earned on the \$250,000 in the later account on the parties’ 2013 tax return. The district court also found that husband paid the parties’ bills during the marriage, including credit-card charges totaling \$115,542 that wife made at Nordstrom department store, and he was thus aware of those expenditures. In 2012 and 2013, wife paid \$16,197 in attorney fees for two consultations with dissolution attorneys but decided both times not to initiate dissolution proceedings. Finally, the district court found that wife “took no salary or regular draw from her company . . . [and] [i]nstead merely took her compensation periodically/sporadically in cash and spent it as she wanted.” The district court stated that wife

cannot be assessed for spending her own earnings, especially when the parties never went into debt. All expenses (except the mortgage) were paid off in full monthly. The fact that the parties had different views on spending and did not communicate freely or effectively is not the same as depletion.

The district court’s findings are supported by the record and are not clearly erroneous.

Husband also argues that wife depleted a money-market account held in her name, which had a balance of \$1,058,846 on the date of the ICMC and a \$150,000 balance at the time of trial. Wife used these funds after her motion for temporary relief was denied. The district court found that, although husband paid the homestead costs and the children's tuition during this time, he did not pay other expenses, including amounts for credit-card bills, nannies, attorney fees, housecleaning, counselors, experts, vacations, and remodeling costs. The district court found that these expenses were "in the nature of ordinary and necessary expenses" and declined to conclude that wife had depleted marital assets. *See* Minn. Stat. § 518.58, subd. 1a (stating that depletion does not occur when marital assets are used "in the usual course of business or for the necessities of life").

The district court has discretion to determine whether a party has depleted marital assets, and the party claiming depletion has the burden of proof. The district court's findings are supported by record evidence and are not clearly erroneous. Although husband characterizes wife's use of the funds differently than the district court, he has not demonstrated that the district court's decision is against logic and the facts on record.

II.

Husband argues that, when dividing the marital property, the district court erred by failing to attribute to him the increase in the value of his nonmarital interest in his commercial property. The district court's determination of whether property is marital or nonmarital in nature is a question of law that we review de novo, and the district court's findings of fact are reviewed for clear error. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). The party claiming a nonmarital interest in property has the burden of proving the

nonmarital nature of the property by a preponderance of evidence. *Kerr v. Kerr*, 770 N.W.2d 567, 569 (Minn. App. 2009). “A nonmarital interest in property may be established on the basis of credible testimony.” *Id.* at 570. This court defers to the district court’s credibility determinations. *Id.*

“Nonmarital property” includes property that was acquired before the marriage. Minn. Stat. § 518.003, subd. 3b (2016). “Increases in the value of nonmarital property remain nonmarital if shown to be attributable solely to market forces or conditions, such as simple appreciation in value of an asset.” *Kerr*, 770 N.W.2d at 570 (quotation omitted).

The district court’s decision reflects a failure of proof: husband had the burden of proving the nonmarital nature of the property and that an increase in value was solely attributable to market forces. The district court accepted the valuation of wife’s expert as more credible than the valuation of husband’s expert and found that the value at the time of the ICMC was \$1.15 million. The district court found that husband purchased the building for \$305,000 before the marriage by making a down payment of \$55,000 and financing the balance with a \$250,000 mortgage and concluded that husband had a nonmarital interest of \$195,000, based on an assumption that the mortgage balance was \$110,000 on the date of marriage. Husband claimed that he had paid off the mortgage before the marriage, but he was unable to produce any proof, and the parties were unable to establish the value of the property on the date of marriage. The district court rejected as “speculative” husband’s expert’s conclusion that the property was worth between \$372,000 and \$390,700 on the date of marriage, because the conclusion was based on properties that the district court determined were not comparable. Husband was unable to locate his 1994

tax return to show the mortgage balance and instead provided his tax returns for 1991 through 1993. The Dakota County recorder's office had no record of a mortgage satisfaction. The district court's determination that husband had a \$195,000 nonmarital interest is supported by the only concrete evidence that husband offered: the purchase price less the \$55,000 down payment and some evidence that there was a mortgage balance of \$110,000 on the date of marriage. The district court's findings are not clearly erroneous in light of the limited evidence introduced at trial.

III.

Husband argues that the district court abused its discretion by ordering him to pay the premium on a \$3 million life-insurance policy owned by wife that is intended to secure payment of child support and maintenance. A court may require an obligor to provide sufficient security to ensure payment of child support or spousal maintenance. Minn. Stat. § 518A.71 (2016). We review the district court's decision to impose a security requirement for an abuse of discretion. *Hunley v. Hunley*, 757 N.W.2d 898, 900 (Minn. App. 2008) (quotation omitted). When requiring security, a court may consider such factors as the obligee's age, education, work experience, employment prospects, and any other relevant circumstance. *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

The district court did not provide reasoning for why it ordered husband to maintain the insurance policy and make the premium payment. In the dissolution judgment, husband was ordered to pay approximately \$8,700 per year in child support and \$180,000 per year in spousal maintenance. He also pays \$8,887 per month in child-related expenses, which

presumably includes the children's private-school tuition, tutoring, musical instrument, and extracurricular expenses. These obligations total almost \$300,000 per year for the next five years, and the spousal-maintenance obligation may continue after that. Wife is now only 55 years old. The life-insurance policy will secure husband's maintenance and support obligations, and the district court did not abuse its discretion by requiring husband to maintain the policy.

IV.

The district court awarded wife \$15,000 per month in permanent spousal maintenance. Husband argues that wife failed to prove that she had a need for permanent maintenance. By notice of related appeal, wife argues that the district court abused its discretion by awarding her only \$15,000 per month because the court failed to take into account her tax liability and her sole responsibility for the homestead expenses.

We review the district court's maintenance decision for a clear abuse of discretion. *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016). A clear abuse of discretion occurs when the district court resolves the matter in a manner "that is against logic and the facts on record." *Id.* (quotation omitted). A district court must consider the standard of living enjoyed by the parties during the marriage when making a maintenance award. *Melius v. Melius*, 765 N.W.2d 411, 416 (Minn. App. 2009).

The district court found that wife's claimed budget was "patently implausible" and rejected wife's request for \$29,080 per month in maintenance, but nevertheless considered the parties' lifestyle and noted that "[t]he parties have enjoyed a very high standard of living throughout the marriage while simultaneously building a significant marital estate

without accruing any significant debt.” The district court conducted a thorough analysis of the factors listed in Minn. Stat. § 518.552, subd. 2, including the parties’ needs and abilities to pay, the standard of living, the duration of the marriage, wife’s foregone earnings to accommodate the children’s needs, the parties’ ages and health, and their contributions to the marital estate. The district court’s findings are supported by the record and are not clearly erroneous. In addition, the district court considered wife’s tax obligation. The court explained in a footnote that wife’s income from earnings and investments left her with “an average monthly shortfall of \$8,425.” The district court reasoned that with permanent maintenance of \$15,000 per month, there was sufficient income to meet her reasonable monthly expenses and her tax obligations. We conclude that the district court considered all the relevant factors, its findings are not clearly erroneous, and its maintenance award was not an abuse of discretion.

Wife also argues that the district court abused its discretion by ordering her to pay all of the housing costs without “tak[ing] into account the resources of both parties in determining [wife] alone should pay these expenses pending sale.” In her request for amended findings, wife asked that the parties assume equal responsibility for paying the homeowners’-insurance premium, approximately \$592 per month, and the real-estate taxes, approximately \$5,222 per month. The district court addressed this in its order resolving the parties’ motions for amended findings, noting that wife “was afforded a generous maintenance award to meet a reasonable budget” and that she “is benefitting from temporary occupancy of the home.” The district court added that a CSM had been

appointed to address disagreements about the sale of the house “out of the recognition that the parties needed incentives and tools to not unduly delay the sale.”

We are sympathetic to the district court’s desire to encourage sale of the homestead, but we are also troubled by the effect of requiring wife to pay the equivalent of her entire maintenance award, or approximately 60% of her reasonable monthly budget, for housing costs, particularly when the district court also acknowledged that wife would be responsible for paying an undetermined amount for her taxes. The original judgment and decree did not assign responsibility for the housing costs; husband paid the mortgage until the trial, and in May 2016, the CSM entered an interim order that required each of the parties to pay some of the costs. The CSM ordered each of the parties to pay 50% of the real-estate taxes for the first half of 2016, ordered wife to pay insurance premiums, and ordered husband to continue making mortgage payments.

The district court assigned responsibility for the housing costs to wife after she requested an amended finding “directing equal responsibility for payment of the homestead’s insurance and real estate tax expenses pending sale.” Although wife will receive the benefit of occupying the homestead until it is sold, the full cost of maintaining the homestead is a disproportionate share of her budget, and the real-estate taxes and insurance premiums are costs that the parties will incur until the homestead is sold even if wife does not occupy the homestead. The district court’s decision is “against logic and the facts on record.” *Curtis*, 887 N.W.2d at 252. We therefore reverse the district court’s decision regarding the payment of insurance premiums and real-estate taxes and remand

so that the district court can assign a portion of the insurance and real-estate-tax expenses to husband.

Affirmed in part, reversed in part, and remanded.