STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1715

In re the Marriage of:
Tracy Wong Belcher, petitioner,
Respondent,

vs.

Benjamin Moore Belcher, III,
Appellant

Filed August 28, 2017
Affirmed in part, reversed in part, and remanded
Worke, Judge

Anoka County District Court
File No. 02-FA-14-2490

Jonathan K. Askvig, Jill M. Johnson, Askvig & Johnson, PLLP, St. Paul, Minnesota (for respondent)

Kathryn A. Graves, Jaime Driggs, Henson & Efron, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Klaphake, 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

WORKE, Judge

Appellant-husband argues that the district court abused its discretion by failing to set a specific parenting-time schedule, awarding respondent-wife a portion of his nonmarital property, ordering him to pay an excessive amount of spousal maintenance over seven years, awarding wife occupancy of the homestead, and ordering a disposition of the parties' tools that is contrary to their stipulation. We affirm in part, reverse in part, and remand.

FACTS

Appellant-husband Benjamin Moore Belcher III and respondent-wife Tracy Wong Belcher were married in 1999. They have two minor children: S.B. was born in May 2002, and J.B. was born in September 2004.

Husband works as a millwright. He typically works only 12 to 16 weeks per year and receives unemployment compensation for at least some of the time that he is not working. Husband could work more but chooses to decline job offers. In 2014, he earned $69,065 in wages and $5,508 in unemployment compensation. In 2015, he worked 12 weeks, earned $52,462 in wages, and did not apply for unemployment compensation.

Husband is the sole beneficiary of two trusts that were established prior to the parties' marriage: the N.K.B. Irrevocable Trust and the Benjamin Belcher III Credit Shelter Trust. The trusts have a combined balance of approximately $1.6 million. Husband receives approximately $3,788 per month in payments from these trusts. Husband is also a contingent beneficiary of three additional trusts that were established to benefit husband's

stepmother during her lifetime. Husband and his sister are the contingent remaindermen of these trusts. If husband survives his stepmother, he should receive approximately $5 million in trust. Husband also has an investment account valued at $709,942 that is the product of stock that husband owned before the marriage.

Wife has bachelor's degrees in Aeronautical Studies and French. She worked as a flight instructor and then as a charter pilot until she became pregnant with S.B. and had to quit flying. Wife is no longer certified to fly commercially or as a flight instructor, and it is not feasible for her to fly the required number of hours to regain certification.

From 2002 to 2015, wife was a stay-at-home mother. In recent years, wife has sold skin care products out of her home. In 2014, she earned $2,271 through this work. In 2015, wife began working as a substitute teacher. She earns approximately $185 per week and teaches approximately 2.5 days per week.

The parties own a home with a fair market value of $415,000. The property is currently subject to a mortgage with a balance of $260,185. In 2003, the parties used funds from husband's investment account to pay down the mortgage by $52,669. The $1,786 monthly mortgage payment is paid from the investment account. In addition, the parties receive $8,000 payments from this account four times per year, which were used during the marriage to pay household expenses. The mortgage and quarterly payments from the account consist of interest, dividends, and principal.

In December 2014, wife petitioned for dissolution of the marriage. The parties reached an agreement on several issues: they would have joint legal custody and wife would have sole physical custody of the children, husband would have parenting time two

evenings per week and every other weekend, wife would receive retirement accounts with a total value of approximately $40,000, and husband would receive his interest in the trusts. They proceeded to trial on the remaining issues, including the investment account, spousal maintenance, and the homestead.

At trial, wife asked the district court to award her a portion of the investment account as either marital property or, if it was husband's nonmarital property, award her a portion of the account based on a hardship. Wife also sought permanent spousal maintenance and asked to remain in the home until J.B. graduates from high school. Husband asked that the home be sold immediately.

The district court found that the investment account was husband's nonmarital property, and because this account was used to pay down a portion of the parties' mortgage, husband had a $52,669 nonmarital interest in the home. The district court, however, awarded wife a portion of the investment account and husband's nonmarital interest in the home. The investment account was split equally and wife was awarded half of the parties' total equity in the home ($77,407). The district court found that wife would suffer "a substantial undue hardship" if she were to leave the marriage without any of husband's nonmarital property. The district court pointed to the length of the marriage, the parties' upper-middle-class lifestyle, the income and asset disparity between the parties, and the parties' decision to have wife stay home and take care of the children. The district court further found that the parties had made a decision not to save for wife's retirement because they planned to use husband's access to funds from the trust and investment accounts to pay for their retirement expenses.

The district court also ordered husband to pay wife spousal maintenance of $5,000 per month until September 2020. Maintenance will be decreased to $4,000 in October 2020, and then to $2,000 in October 2022, before terminating in September 2023.

Finally, the district court awarded "all right, title and interest in and to the homestead" to husband. The district court, however, awarded wife "occupancy of the homestead until the parties' youngest child turns 18." Husband is responsible for the mortgage and major repairs or improvements. Wife is responsible for regular upkeep and maintenance as well as property taxes, insurance, utilities, and other costs associated with the home. To compensate her for her equity in the home, wife was awarded a $77,407 lien on the property. Upon sale of the home, wife's lien will be paid and husband will receive the remainder of the proceeds. This appeal followed.

D E C I S I O N

Parenting-time schedule

Husband first argues that the district court abused its discretion by denying his request to have parenting time on Tuesday and Thursday evenings. Prior to trial, the parties agreed that husband would have parenting time "up to two evenings per week when he is able to do so and every other weekend." At trial, husband asked the district court to specify that his two evenings be on Tuesday and Thursday. In the judgment and decree, the district court incorporated the parties' parenting-time agreement but did not specify the days of the week. The district court found that husband did not request a specific schedule.

The district court has broad discretion to decide parenting-time issues. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). The district court abuses that discretion

"if its findings are unsupported by the record or if it misapplies the law." *Id.* The findings of fact underlying the district court's parenting-time decision will be sustained unless they are clearly erroneous. *Id.*

"Upon request of either party, to the extent practicable an order for parenting time must include *a specific schedule for parenting time*, including the frequency and duration of visitation . . . ." Minn. Stat. § 518.175, subd. 1(e) (2016) (emphasis added). "A schedule is a procedural plan that indicates the time and sequence of each operation." *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (quotation omitted). Because specific days for husband's weekday parenting time were not listed in the judgment and decree, it did not include "a specific schedule for parenting time." *See id.* at 76 (stating the district court did not clearly err by determining that there was no parenting-time schedule because the "judgment and decree does not indicate which days the children will be with each parent"). But, contrary to the district court's finding, husband requested a specific schedule at trial. The district court therefore abused its discretion by failing to address husband's request that his weekday parenting time be set on Tuesdays and Thursdays.

Wife maintains that because the parties stipulated to the parenting-time agreement, it must be "treated as a binding contract that cannot be repudiated by one party without the consent of the other." But such treatment would violate Minn. Stat. § 518.175, subd. 1(e). Moreover, parenting-time orders based on a stipulation are not set in stone. For example, they are subject to modification just like any other parenting-time provision in a judgment and decree. *Id.*; *see also* Minn. Stat. § 518.175, subd. 5 (2016) (providing for modification of parenting time).

We reverse and remand the district court's parenting-time order and instruct the district court to consider husband's request for a specific parenting-time schedule.

Nonmarital property

Husband next argues that the district court abused its discretion by awarding wife a portion of his nonmarital property. If a district court finds that a party's resources or property, including the party's portion of marital property, "are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may . . . apportion up to one-half of [nonmarital] property . . . to prevent [an] unfair hardship." Minn. Stat. § 518.58, subd. 2 (2016). While a district court generally enjoys broad discretion regarding the division of property in marriage dissolutions, *Hein v. Hein*, 366 N.W.2d 646, 649 (Minn. App. 1985), that discretion is narrower in the nonmarital-property-division context. *Stageberg v. Stageberg*, 695 N.W.2d 609, 618 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

When the district court apportions nonmarital property, it must make findings to support the apportionment that are based on all relevant factors, including: "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." Minn. Stat. § 518.58, subd. 2. "A very severe disparity between the parties is required to sustain a finding of unfair hardship necessary to apportion nonmarital property" and should occur only in "an unusual case." *Ward v. Ward*, 453 N.W.2d 729, 733 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. June 6, 1990).

Spousal maintenance overlap

Husband first argues that the district court's award of spousal maintenance and child support, combined with wife's income, is more than sufficient to meet her needs. This is inaccurate. The district court found that wife's after-tax monthly income is $7,840 and that this amount is sufficient to meet her monthly expenses of $7,805. But, in calculating wife's monthly income, the district court included $2,226 from the nonmarital investment account. If this $2,226 is subtracted, then wife will fall well short of meeting her monthly needs.

In finding an unfair hardship, the district court cited wife's lack of retirement savings compared to husband who can rely on his trust income. Husband argues that this was improper because the district court included a retirement contribution in wife's monthly living expenses, and therefore "[w]ife's need to accumulate retirement savings has already been accounted for in the award of spousal maintenance and cannot be used again as a justification for invading [h]usband's nonmarital property." But, again, this argument ignores the fact that the district court included money from the investment account in calculating wife's monthly income. Moreover, the maintenance award is temporary. The retirement portion of wife's budget is $458. Accordingly, over the seven-year life of the maintenance award, less than $40,000 of wife's income will go to retirement savings. The district court found that the parties contributed little to wife's retirement savings during the marriage because they expected to rely on the trust income. Implicit in this finding is that the portion of wife's budget allocated to retirement is not sufficient to make up for the lack of retirement savings during the marriage.

Husband further argues that the district court impermissibly "double-count[ed]" by considering his trust income in both dividing nonmarital property and in determining his income for maintenance purposes. But the district court is required to consider "all relevant factors," including "amount and sources of income," as well as "opportunity for future acquisition of capital assets and income of each party" in apportioning nonmarital property. Minn. Stat. § 518.58, subd. 2. Likewise, in determining the amount and duration of a maintenance award, the district court must consider "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." Minn. Stat. § 518.552, subd. 2(g) (2016).

To support his argument that the trust income may not be considered, husband cites *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009) and *O'Brien v. O'Brien*, 343 N.W.2d 850 (Minn. 1984). In *Lee*, the supreme court affirmed the district court's decision to exclude the marital portion of husband's monthly pension benefit from the calculation of his ability to pay maintenance. 775 N.W.2d at 639-40. In *O'Brien*, the supreme court similarly held that the district court properly excluded rental income from marital real property when determining spousal maintenance because the district court's valuation of the property accounted for future rental income. 343 N.W.2d at 852. In both cases, the property involved was marital. Including that property in calculating spousal maintenance would upset the equitable division of the property. *See* Minn. Stat. § 518.58, subd. 1 (2016) (requiring the district court to "make a just and equitable division of the marital property of the parties"). Here, the district court determined that husband's interest in the trusts are nonmarital, and the district court did not award any portion of that nonmarital property to

wife. Accordingly, this nonmarital income may be used to calculate husband's ability to pay spousal maintenance. *See Lee*, 775 N.W.2d at 639 (stating pre-marital pension benefits that constitute nonmarital property may be considered as income when calculating maintenance).

There is no impermissible overlap between the district court's nonmarital-property and spousal-maintenance awards. Both awards are necessary to provide for wife's needs, and the district court did not erroneously "double-count[]" husband's trust income by considering it both as nonmarital property and income available for spousal maintenance.

Trust income

Husband also maintains that his interests in the trusts and the trusts' assets may not be considered in apportioning nonmarital property because he is only a beneficiary of the trusts, and a trust's assets are property owned by the trust and not the beneficiary. Regardless, husband receives $3,788 per month from the trusts. The district court also found that husband "receives principal distributions whenever he requests them." As stated above, the district court is required to consider "sources of income" and "opportunity for future acquisition of . . . assets and income" in distributing nonmarital property. Minn. Stat. § 518.58, subd. 2. The district court did not err by considering husband's interests in the trusts and the distributions from the trusts.

Husband further argues that the district court erred by considering his contingent interests in the trusts that currently benefit his stepmother. Husband argues that the idea that he will ever receive anything from these trusts, much less the $5 million the district court mentioned in the judgment and decree, is speculative. We agree. The district court

characterized husband as a "contingent remaindermen" of these trusts. Until the contingency takes place and husband's interests in the trusts vests, it is speculative to place any value on the interests. *See Rosenberg v. Rosenberg*, 402 N.W.2d 830, 832 (Minn. App. 1987) (stating a "contingency makes any fixed sum valuation of the expectancy interest highly speculative"), *review denied* (Minn. May 28, 1987); *Nolan v. Nolan*, 354 N.W.2d 509, 513 (Minn. App. 1984) ("It is generally held that speculative or contingent liabilities should not be considered in determining the net marital estate."), *review denied* (Minn. Dec. 20, 1984).

Nevertheless, the district court's finding of unfair hardship was not dependent on husband receiving $5 million from these trusts. The district court merely noted that because of the income from husband's other trusts and the money he expected to receive when his stepmother died, the parties did not save for retirement during the marriage. Even when the trusts benefiting husband's stepmother are not considered, the record is sufficient to support the district court's finding of unfair hardship. If no nonmarital property were awarded to wife, she would leave the 15-year marriage with her retirement accounts and her equity in the home, which together total less than $100,000. These illiquid assets, combined with her limited income, and her child-support and maintenance awards would not be sufficient to meet the reasonable monthly expenses of her and the children. Husband would leave the marriage with an investment account worth over $700,000 and with more than $100,000 in equity in the homestead, and as the sole beneficiary of two trusts containing assets of $1.6 million. Moreover, husband earns an income from his work and unemployment compensation, while wife stayed home to care for the children during the

marriage and does not have skills that make her particularly employable. There is a very severe disparity between the parties that supports the district court's finding of an unfair hardship.

Job training or education

Husband next argues that the district court abused its discretion by speculating that wife would need money to go back to school and using that expense to justify an invasion of his nonmarital property. The district court stated that it "fully expects [wife] to use a portion of this [nonmarital] money to get the training she needs to become self-supporting." Husband argues that wife has no need to go back to school because she is already highly educated. While wife has bachelor's degrees in Aeronautical Studies and French, she is no longer licensed to fly and the district court found that it is not feasible for her to regain certification. This finding is supported by wife's testimony. Wife does have a license to substitute teach. But she testified that she is not licensed to teach full time.

The district court found that wife has no skills that make her particularly employable other than as a substitute teacher. A vocational assessment of wife was admitted at trial. It found that wife could earn $13 to $15 an hour in an office job or as much as $19 or $20 per hour in a retail position. The district court found the assessment not credible because the positions have no relationship to wife's experience or education and would require her to work far from home or during hours that she is not available because of her responsibilities to the children. The district court also found the $19 or $20 per hour wage not credible because it would require wife to earn significant commissions or a supervisory

position. The record supports the district court's finding that wife needs additional education or training to become self-supporting.

Husband also argues that wife is not interested in returning to school or working full time and that there is no evidence in the record of what additional schooling would cost. Wife did testify that she does not have a desire to be a full-time teacher, but she indicated that this was because she lacks the resources to pay for the necessary training. Husband is correct that the record does not contain evidence of the cost of training to be a full-time teacher, but that does not negate the district court's finding that wife needs additional training or education to be self-supporting. That finding is supported by the record and, combined with the severe disparity already noted, supports a finding of unfair hardship.

The district court considered the relevant factors and made an appropriate finding of unfair hardship. The district court did not abuse its discretion by apportioning some of husband's nonmarital property to wife.

Spousal maintenance

Husband argues that the district court made factual errors and abused its discretion in the amount and duration of spousal maintenance it awarded to wife. 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). The district court's findings of fact are reviewed for clear error and legal issues related to maintenance are reviewed de novo. *Id.*

In a dissolution proceeding, a district court may award a party spousal maintenance if it finds that, in light of the standard of living established during the marriage, the party

seeking maintenance "lacks sufficient property, including marital property apportioned to the spouse, to provide for [the] reasonable needs of the spouse" or "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 maintenance award depends on showing of need). If the district court determines that a maintenance award is appropriate, it must establish the amount and duration of the award after considering "all relevant factors," including (1) "the financial resources of the party seeking maintenance" and that party's ability to meet his or 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 and, "in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished"; (5) the loss of employment opportunities and benefits foregone by the party seeking maintenance; (6) the age and health of the party seeking maintenance; (7) the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting the needs of the spouse requesting maintenance; and (8) the contribution of each party to the acquisition and preservation of the marital property, "as well as the contribution of a spouse as a homemaker." Minn. Stat. § 518.552, subd 2. "No single factor is dispositive." *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009).

Principal from investment account

Husband first argues that the district court abused its discretion because it required him to draw down the principal of his investment account in order to meet his monthly

maintenance obligation. "Maintenance" is defined as "an award made in a dissolution or legal separation proceeding of payments from the *future income or earnings* of one spouse for the support and maintenance of the other." Minn. Stat. § 518.003, subd. 3a (2016) (emphasis added). Accordingly, a maintenance obligor is generally not required to liquidate assets in order to pay maintenance. *See Zagar v. Zagar*, 396 N.W.2d 98, 101 (Minn. App. 1986) ("We find no authority to support appellant's suggestion that an award be preserved based on an expectation that the obligor liquidate assets to make payments."), *superseded by statute on other grounds*, Minn. Stat. § 518.14, subd. 1 (1990) (amending attorney fee statute); *see also Curtis v. Curtis*, 887 N.W.2d 249, 254 (Minn. 2016) (explaining the district court may not require a maintenance-seeking spouse "to invade the principal of the property [awarded to a spouse seeking maintenance] to pay living expenses" (quotation omitted)). Whether property constitutes "future income or earnings" from which maintenance can be paid is a legal question reviewed de novo. *Lee*, 775 N.W.2d at 637-38.

In setting maintenance, the district court incorporated $2,226 from the investment account into each parties' net monthly income. This amount represents the $1,786 monthly mortgage payment and quarterly $8,000 payments withdrawn from the investment account during the marriage. The district court found that this amount includes "interest, dividends and principal." The principal of the investment account is not income or future earnings available for paying maintenance. We reverse and remand the maintenance award and instruct the district court not to consider principal from the investment account in calculating the monthly income husband has available to pay maintenance.

Limitation of income

In calculating husband's income from wages and unemployment compensation, the district court found that he unjustifiably limited his 2015 income from these sources. Accordingly, the district court calculated his income from wages and unemployment compensation based on 2014. Husband argues that the 2015 income should be considered.

In order to impute income to an obligor for the purposes of spousal maintenance, the district court must find that the obligor unjustifiably self-limited his income. *Melius v. Melius*, 765 N.W.2d 411, 415 (Minn. App. 2009). An obligor unjustifiably limits income when he takes some action that reduces income and is inconsistent with his past behavior. *See Curtis v. Curtis*, 442 N.W.2d 173, 177-78 (Minn. App. 1989) (affirming district court's finding of limiting income when obligor quit his job to go to school soon after the dissolution decree); *Juelfs v. Juelfs*, 359 N.W.2d 667, 670 (Minn. App. 1984) (affirming district court's finding of limiting income when husband quit job to run a business that did not bring in sufficient income to meet his needs and obligations), *review denied* (Minn. Mar. 29, 1985).

Here, the district court found that husband limited his income in 2015 by working only 12 weeks and failing to file for unemployment compensation. Husband earned significantly less in 2015 than previous years. Husband had received unemployment compensation in each of the previous four years and had worked as many as 16 weeks during those years. The district court also found that husband could work more but declines jobs for no apparent reason. The district court did not clearly err by finding that husband

unjustifiably limited his income in 2015 by working only 12 weeks and declining to apply for unemployment compensation.

Husband next argues that because his income from wages and unemployment compensation is variable, the district court should have calculated it based on an average of multiple years rather than using only 2014. When a party does not have a stable, predictable income, the district court may determine income by calculating the mean income over several years. *Swick v. Swick*, 467 N.W.2d 328, 332-33 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). This, however, is not appropriate when changes in income reflect a steady trend. *Sefkow v. Sefkow*, 372 N.W.2d 37, 47-48 (Minn. App. 1985), *remanded on other grounds*, 374 N.W.2d 733, 733 (Minn. 1985).

Husband's income from wages and unemployment compensation was $64,391 in 2011, $67,032 in 2012, $61,483 in 2013, and $74,573 in 2014. Husband's income fluctuates. Therefore, the district court could have used an average, but it was not required to do so. The district court's calculation of income is given due deference and will not be reversed unless "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Kampf*, 732 N.W.2d at 633 (quotation omitted). The incomes do not fluctuate drastically. Moreover, given that husband works only 12 to 16 weeks per year and often declines jobs that he could take, the district court's decision to use his 2014 income is not manifestly contrary to the weight of the evidence. It is not unreasonable to expect husband to earn an income on the higher side of these historical fluctuations by working more than 12 weeks out of the 52 weeks in a year.

Mathematical errors

Husband next argues that the district court made mathematical errors in the judgment and decree. In finding 19, the district court listed the total distributions from the N.K.B. trust and credit shelter trust for the last four years. The average monthly distributions from the trusts based on these numbers are $2,395 per month for the N.K.B. trust and $1,228 per month for the credit shelter trust. Yet in listing husband's income for maintenance, the district court found that husband's average distributions from these trusts are $2,667 and $1,121. In addition, the judgment and decree lists several different monthly gross incomes for husband: $12,228, $12,460, and $12,669.

On this record, these errors are de minimis. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (declining to remand based on technical error because the effect on the case was de minimis). In actually calculating husband's ability to pay maintenance, the district court used the lowest gross monthly income of $12,228 including a monthly income from the trusts of $3,788. There is a discrepancy of only $165 between these numbers and the trust account distributions discussed in finding 19. Nevertheless, because we remand the maintenance award on other grounds, we direct the district court to account for this discrepancy and the other inconsistencies in husband's gross income.

Monthly budgets

Husband makes several claims relating to his and wife's monthly budgets. In her monthly budget, wife included $900 for unreimbursed counseling, medical, and chiropractic expenses for herself and the children. Husband argues that this number is clearly erroneous because the judgment and decree requires him to pay 46% of these

expenses. We agree. In her testimony, wife admitted that the numbers in her budget would be inaccurate if husband were ordered to pay a portion of the unreimbursed medical expenses. On remand, we instruct the district court to calculate the portion of the monthly $900 due to the children's expenses and reduce wife's budget by 46% of that amount.

Second, husband argues that the district court clearly erred by failing to reduce wife's budget by $470 for the cost of the children's tutoring program. Husband also argues that the district court clearly erred by subtracting the cost of the program from his budget. But wife testified that, although husband historically paid for the program, "going forward, [she] would need to be responsible for paying for tutoring." The district court allocated this cost to wife, saying wife "pays for all of the children's expenses." The district court did not clearly err by striking the cost of the program from husband's budget and not from wife's budget.

Third, husband argues that the district court clearly erred by finding that his claimed budget was $4,579. Husband submitted two budgets. One listed total monthly expenses of $4,579. The other claimed $5,264 in expenses. Husband maintains that the district court erred by finding that the $4,579 budget represented his claimed expenses. But, at trial, husband was asked by his attorney if the $4,579 budget was "a listing of [his] monthly bills." He said that it was and that he was claiming $4,579 in expenses. The district court did not clearly err by relying on this testimony and the $4,579 budget husband submitted.

Lastly, husband argues that the district court clearly erred by ordering him to pay the monthly mortgage payment on the homestead but failing to include that amount in his monthly budget when calculating his ability to pay maintenance. We agree. Despite

ordering husband to pay the mortgage, the district court noted that neither party's budget included the $1,786 monthly payment. The district court clearly erred by failing to include this substantial expense in husband's monthly budget. *See Lee*, 775 N.W.2d at 642-43 (instructing district court to consider the cost of life insurance it ordered husband to buy in determining his monthly expenses). We instruct the district court to recalculate husband's ability to pay maintenance based on a monthly budget that includes the mortgage payment.

Unreasonable percentage of husband's income

Husband next argues that the district court abused its discretion by setting a maintenance amount that "consumes an unreasonably high percentage of [his] net income." He argues that, when the mortgage and child-support payments are also considered, he was ordered to pay 74% of his net monthly income to wife. He cites cases in which this court concluded that spousal-maintenance awards that consumed 54% and nearly 62% of the obligor's net income were unreasonably high. *See Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989); *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). These cases are inapposite. First, husband's net monthly income is more than double the income of the obligor's in these cases. *See Rask*, 445 N.W.2d at 854; *Kostelnik*, 367 N.W.2d at 670. *Rask* noted that an "extremely high income" may justify a maintenance award consuming a larger percentage of an obligor's income. 445 N.W.2d at 854. Second, these cases did not consider costs other than maintenance. *Id.*; *Kostelnik*, 367 N.W.2d at 670. The $5,000 spousal-maintenance award

consumes less than 50% of husband's net monthly income.[1] Finally, husband's maintenance obligation will be decreased twice before terminating in 2023. In *Rask*, the spousal-maintenance award was permanent, 445 N.W.2d at 853, and in *Kostelnik*, the award was the same for seven years. 367 N.W.2d at 670. The spousal-maintenance award does not consume an unreasonably high percentage of husband's net monthly income.

Tax consequences

Finally, husband argues that the district court "made a legal error" because it scheduled the maintenance payments to terminate on a date that could result in unintended tax consequences. The district court stated that all maintenance payments are includable as income on wife's tax returns and deductible on husband's tax returns. This is consistent with federal tax law. *See* 26 U.S.C.A. §§ 71(a) (providing maintenance is includable as gross income for the recipient), 215(a) (2016) (providing that maintenance is deductible for the payor). The same does not apply to child support payments. 26 U.S.C.A. §§ 71(c)(1), 215(b) (2016). A payment is treated as child support if it will be reduced "on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency)," or at a time that can be clearly associated with such a contingency. 26 U.S.C.A. § 71(c)(2) (2016). Under federal regulations, payments that would otherwise qualify as maintenance are presumed to be child support if they are reduced within six months of the date the

[1] Moreover, on remand, when the district court includes costs such as the mortgage payment in husband's monthly budget and makes the other adjustments discussed in this opinion, husband's maintenance obligation will likely decrease.

payor's child reaches 18, 21, or the local age of majority. 26 C.F.R. § 1.71-1T(c), Q & A-18 (1984); *Shepherd v. Comm'r*, 79 T.C.M. (CCH) 2078, 2000 WL 680238, at *2 (2000). The parties' youngest child will likely graduate from high school within six months of the date the spousal-maintenance obligation terminates. Husband argues that because Minnesota law defines "[c]hild" to include "an individual under age 20 who is still attending secondary school," Minn. Stat. § 518A.26, subd. 5 (2016), at least a portion of the maintenance payments may be treated as child support.

The regulation husband cites creates only a presumption that the payments are child support. *Shepherd*, 2000 WL 680238, at *2. The presumption can be overcome if the facts indicate that the reduction in maintenance was determined independently of any contingencies relating to the children. *Id.* Here, maintenance was set by the district court after a contested trial. The judgment and decree includes a separate monthly child-support obligation of $1,104 and makes clear that the maintenance period is not based on when the children reach the age of majority. The district court gave a long list of reasons for the seven-year award that did not involve the parties' children.

The judgment and decree shows that the maintenance-termination date was set independent of any contingencies relating to the children. The district court did not err by failing to consider the potential tax consequences of the maintenance-termination date.

In conclusion, we reverse and remand the maintenance award and instruct the district court to recalculate maintenance after subtracting any principal from the investment account included in husband's monthly income, subtracting husband's portion of the children's unreimbursed medical expenses from wife's monthly budget, and adding the

mortgage payment to husband's monthly budget. We also instruct the district court to address the math errors and inconsistencies discussed above.

Homestead

Husband next claims that the district court abused its discretion in disposing of the marital homestead. The district court has broad discretion to divide marital property, and this court will not reverse the district court's decision absent an abuse of discretion. *Lee*, 775 N.W.2d at 637. The district court must "make a just and equitable division of the marital property." Minn. Stat. § 518.58, subd. 1. But a just and equitable division need not be a strictly equal division. *Sirek v. Sirek*, 693 N.W.2d 896, 900 (Minn. App. 2005).

Intertwined interests of the parties

Husband argues that the disposition of the homestead creates "a convoluted scheme that guarantees the parties will be embroiled in conflict." The district court awarded ownership of the homestead to husband but occupancy of the homestead to wife until the parties' youngest child turns 18 years old.

Husband maintains that the district court's disposition of the homestead "is contrary to the overwhelming body of Minnesota law that when dividing assets between parties to a dissolution, courts should try to achieve a clean break and separate the parties' interests as much as they can." But Minnesota law explicitly allows the district court to award occupancy of the homestead to one party:

> The court, having due regard to all the circumstances and the custody of children of the parties, may award to either party the right of occupancy of the homestead of the parties, exclusive or otherwise, upon a final decree of dissolution or

> legal separation or proper modification of it, for a period of time determined by the court.

Minn. Stat. § 518.63 (2016); *see also Goar v. Goar*, 368 N.W.2d 348, 351 (Minn. App. 1985) ("Minnesota courts frequently have approved of awarding possession of the homestead to the custodial parent and postponing its sale until the children are emancipated."). A determination that considers the "children's ages and circumstances, including whether retention or sale of the homestead serves their best interests, as well as the financial condition of both parties and the costs of maintaining the homestead, . . . will be upheld." *Schuck v. Schuck*, 390 N.W.2d 2, 4 (Minn. App. 1986).

Wife has physical custody of the children. The district court found that the oldest child has special needs and struggles with change. A caseworker for the child testified that because of his special needs it would be difficult for him to change school districts. Wife looked for rentals that would allow her to stay in the school district but did not find any that were more affordable than the home. Based on these considerations, the district court found that it is in the best interests of the children to allow wife to remain in the home until the youngest child turns 18. The district court further found that husband has sufficient resources to pay the mortgage. On the other hand, the district court found that wife would not qualify for a mortgage or be able to refinance the home. The district court considered the best interests of the children and the financial condition of the parties in devising its disposition of the homestead. The disposition is not an abuse of discretion.

Cost of sale

Noting that the district court said it was trying to equally divide the total marital and nonmarital equity in the home, husband further argues that the disposition of the homestead equity "saddles him with all of the costs of sale, including realtor's fees and costs to prepare the property for sale." Husband argues that this arrangement is unequal because it would result in him receiving only $52,508 from the sale of the home, while wife would receive her full equity interest of $77,407.

Husband's math is misleading. It assumes, without any citation to the record, that closing costs will be six percent of the home's overall value. It also assumes that the home's value will remain static and ignores the fact that, under the district court's order, husband receives the benefit of any appreciation. If the home's value increases by even a modest percentage, husband will receive more than wife's equity interest.

Even if husband's math is accurate, the division of marital property does not need to be perfectly equal to be just and equitable. *See Sirek*, 693 N.W.2d at 900. Given husband's greater financial resources and his potential ability to profit from an increase in the home's value, the district court's disposition of the marital homestead is just and equitable.

Husband also argues that by making him responsible for the costs of selling the home, the district court's order invades more than one-half of his nonmarital property. Husband's argument is unclear about whether he is referring to his nonmarital interest in the home or his overall nonmarital property interests. Husband maintains that if the district court's plan is affirmed, he would receive $52,508 after the sale of the home. Husband's

nonmarital interest in the home is only $52,669. It is unclear how awarding husband $52,508 could constitute an invasion of more than half of this interest, not to mention more than half of his overall nonmarital property.

The district court did not abuse its discretion by making husband responsible for the costs of selling the home.

Arbitration

Husband also argues that the district court impermissibly required the parties to submit any dispute over improvements or upkeep of the home to binding arbitration. We agree. Binding arbitration may only occur by stipulation. Minn. R. Gen. Prac. 114.02(a)(1); *see also* Minn. Stat. § 572B.03 (2016) (providing the Minnesota Uniform Arbitration Act governs "agreements to arbitrate"). The parties did not stipulate that arbitration related to the home would be binding. While we affirm the overall disposition of the home, on remand we instruct the district court to modify that disposition to reflect that arbitration will be nonbinding.

Tools

Finally, husband argues that the district court abused its discretion by ordering a distribution of the parties' tools that is contrary to their stipulation. The district court found that the parties agreed to "equitably divide" the tools. The district court also found that if the parties could not agree on a division of the tools, they stipulated that they would submit the issue to binding arbitration. The district court, therefore, ordered that the tools "be equitably divided between the parties" and "[i]n the event the parties are unable to agree on an equitable division of tools, they shall submit this issue to binding arbitration."

Husband argues that the actual agreement was that he would receive "his tools" and disputes about what tools were his would be submitted to arbitration.

The district court has broad discretion in dividing marital property. *Lee*, 775 N.W.2d at 637. The district court's underlying findings of fact may not be set aside unless clearly erroneous. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). Stipulations are a favored means of simplifying dissolution litigation and are treated as binding contracts. *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). As with any contract, if the language of the stipulation is clear and unambiguous, we construe it according to its plain meaning. *Ertl v. Ertl*, 871 N.W.2d 410, 415 (Minn. App. 2015).

The parties' stipulation was placed on the record. Husband's attorney said that husband will "be awarded miscellaneous tools." She also said, "In the event there are any disputes . . . about any items that [husband] wishes to take from the home that I haven't specifically mentioned, [husband and wife] will submit to binding arbitration." Wife's attorney then said, "I understand [husband] wants to get some tools from the homestead. If there is some dispute about what tools can be divided, . . . they will be open to arbitration."

As the judgment and decree states, the parties agreed that husband and wife would divide the tools and should they not be able to reach agreement, the issue would be submitted to binding arbitration. Husband takes issue with the district court's use of the word "equitably" because he claims that it indicates that wife will receive "one-half" of the tools. But "equitable" does not mean equal; it means "[j]ust; consistent with principles of justice and right." *Black's Law Dictionary* 617 (9th ed. 2009); *see also Sirek*, 693 N.W.2d

at 900 ("An equitable division of marital property is not necessarily an equal division." (quotation omitted)). Moreover, the attorneys never said that husband would receive all the tools in the garage or would receive "his tools." Husband's attorney merely said that husband would receive "miscellaneous tools" and wife's attorney said that husband "wants to get some tools" and if there is a "dispute about what tools can be divided," the parties are open to arbitration. The district court's findings as to the parties' stipulation are not clearly erroneous, and the district court did not abuse its discretion in dividing the tools.

In sum, we affirm the award of a portion of husband's nonmarital property to wife, the disposition of the homestead, and the disposition of tools. We reverse the parenting-time schedule and the spousal-maintenance award. On remand, we instruct the district court to consider husband's request for a specific parenting-time schedule. We also instruct the district court to recalculate maintenance as specified in this opinion. Finally, we instruct the district court to modify its disposition of the homestead to reflect that any arbitration related to improvements or upkeep of the property will be nonbinding.

Affirmed in part, reversed in part, and remanded.