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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1915**

In re the Marriage of: Patricia Rose Whipps, petitioner,
Respondent,

vs.

Richard Cordell Whipps,
Appellant.

**Filed November 20, 2017
Reversed and remanded
Florey, Judge**

Anoka County District Court
File No. 02-FA-14-1047

Kurt Robinson, Kurt Robinson, P.A., Blaine, Minnesota (for respondent)

Melanie P. Persellin, Jensen, Sondrall, Persellin & Woods, P.A., Brooklyn Park, Minnesota
(for appellant)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and
Kalitowski, Judge.*

UNPUBLISHED OPINION

FLOREY, Judge

Appellant-husband Richard Whipps challenges the district court's third amended
property-division judgment resulting from the dissolution of his marriage to respondent-

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

wife Patricia Whipps. Husband argues that the district court abused its discretion in concluding that 80% of an individual retirement account (IRA) was wife's nonmarital property.¹ We reverse and remand.

FACTS

Husband and wife married in 1987. In 2014, wife initiated dissolution proceedings. A trial was held in 2015 regarding the division of certain assets; wife claimed a nonmarital interest in an IRA two weeks before the trial. Following the trial and before the district court issued a decision, the district court judge was removed from the bench. The case was reassigned to a different district court judge, who adopted two pretrial orders from the first trial which made no reference to a contested nonmarital interest in the IRA. The case proceeded to a second trial.²

At the trial, the parties disputed whether the IRA had a nonmarital property component, and the extent of that component. Wife testified on cross-examination that 80% of the IRA was nonmarital property, indicating that "there were four years when it was marital." Husband testified that he wanted the IRA to be divided equally. But on cross-examination, he admitted that wife "should get most of it," indicating that wife had acquired part of the IRA prior to the marriage. He testified that he had not been provided with information about the value of the IRA at the date of the marriage or when wife left her employment and did not know the amount of interest earned on the IRA. Wife testified

¹ Wife has not filed a brief in this appeal; we therefore consider the merits of the case pursuant to Minn. R. Civ. App. P. 142.03.

² The parties' marriage was dissolved pursuant to a stipulation on December 30, 2015, prior to the second trial concerning the disputed property.

that she did not have documentation showing the value of the IRA at the time of marriage or documentation to prove the IRA's existence prior to the marriage date. The district court inquired as to why information had not been gathered regarding the value of the IRA at the time that wife left her employment. The district court then stated that wife had not presented testimony to clarify her nonmarital interest in the IRA and therefore the district court had been inclined to consider the IRA marital property until husband acknowledged that he thought that wife earned part of the IRA prior to the marriage.

The district court filed an order for judgment and entered a judgement and decree on July 1, 2016. The district court concluded that the IRA included both marital and nonmarital property. In support of its conclusion, the district court found that husband acknowledged that wife "should get most of it" and believed that 80% of the account was wife's nonmarital property. The district court found that wife did not provide any information to aid the district court in dividing the nonmarital portion of the IRA from the marital portion. Resting on husband's testimony, the district court concluded that 80% of the asset was nonmarital and 20% of the asset was marital.

Husband moved to amend the finding of fact, arguing that the district court erred when it based its finding on husband's testimony. Wife moved for amended findings and filed an affidavit claiming that she testified at trial that she contributed to the IRA from 1971 until 1991. The district court amended its findings of fact and conclusions of law, but did not substantively modify its findings concerning the IRA. Judgment was entered accordingly.

Husband appeals.

DECISION

A district court has broad discretion over the division of property in dissolution cases, and we will not reverse a district court's division of property absent a clear abuse of discretion or an erroneous application of the law. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984); *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). We defer to the district court's credibility determinations and will defer to the district court's findings of fact unless they are clearly erroneous. *Kerr v. Kerr*, 770 N.W.2d 567, 569-70 (Minn. App. 2009). We will affirm a district court's property division "if it had an acceptable basis in fact and principle even though we might have taken a different approach." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). But whether property is marital or nonmarital is a question of law that we review de novo. *Id.*; see also *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008) (stating that "[appellate courts] independently review the issue of whether property is marital or nonmarital, giving deference to the district court's findings of fact").

Property acquired by either spouse before marriage is nonmarital property. Minn. Stat. § 518.003, subd. 3b (2016). Likewise, property which is "acquired in exchange for or is the increase in value of" nonmarital property is also nonmarital property. *Id.*; *Baker*, 753 N.W.2d at 649. On the other hand, property acquired by either party during the marriage is presumed to be marital property. Minn. Stat. § 518.003, subd. 3b. The presumption that property acquired during the marriage is marital property may be overcome by a showing, by a preponderance of the evidence, that the property is nonmarital in nature. *Id.*; *Kerr*, 770 N.W.2d at 569.

Husband first argues that the evidence in the record does not support the district court's conclusion that a portion of the IRA was acquired before the marriage. We disagree. "A nonmarital interest in property may be established on the basis of credible testimony." *Kerr*, 770 N.W.2d at 570. Husband testified at trial that he believed a portion of the IRA was acquired before marriage. The district court found husband's testimony to be credible. We defer to the district court's credibility determinations. *Id.* The evidence was sufficient for the district court to conclude that the IRA had a nonmarital component.

Husband next argues that, even if a portion of the IRA was nonmarital property, the district court "erred when it characterized 80% of the total value [of the] IRA as wife's nonmarital property."³ He argues that wife provided no evidence with which to trace a nonmarital portion within the total value of the IRA, and therefore, the asset should have been considered marital property in its entirety.

If nonmarital property has been commingled with marital property, the proponent of the nonmarital interest must show by a preponderance of the evidence that the

³ Before reaching the merits of the next issue, we address the limitations placed on our review of the record because of the limited trial transcripts provided to the court on appeal. Husband ordered only a partial trial transcript for our review. He did not provide wife's direct examination or a full transcript of his testimony on cross-examination. In any appeal, the appellant is responsible for ordering and submitting any transcripts that are necessary for appellate review. Minn. R. Civ. App. P. 110.02, subd. 1. If the appellant omits portions of the transcript that the respondent deems necessary, the respondent shall order the missing portions of the transcript, or serve and file a motion in the district court requesting that the appellant be made to do so. *Id.* Wife did not order additional transcripts or request that the district court order husband to produce the remainder of the trial transcripts. At oral argument, counsel for husband asserted that she provided all of the trial transcripts in which the IRA was the subject of testimony. We are unable to reconcile this assertion with the district court's references to what appears to be wife's direct testimony about the IRA.

nonmarital interest is readily traceable to the nonmarital source. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Strict tracing is not required, and testimony credited by the district court can be sufficient to trace a nonmarital interest. *Doering v. Doering*, 385 N.W.2d 387, 390-91 (Minn. App. 1986); *see also Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 697 (Minn. App. 2010) (“[T]racing property to its nonmarital source does not require intricate detail.”), *review denied* (Minn. Nov. 16, 2010). But “[t]he [district] court’s exercise of its discretion in valuing and distributing an asset should be supported by either clear documentary or testimonial evidence or by comprehensive findings issued by the court.” *Nash v. Nash*, 388 N.W.2d 777, 780 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Aug. 20, 1986). “Whether a nonmarital interest has been traced is . . . a question of fact.” *Kerr*, 770 N.W.2d at 571.

The record before us does not indicate the portion of the IRA that was nonmarital. The district court found as much, indicating “wife did not provide any information to help this court divide the nonmarital portion of this asset from the marital portion.” Rather, the district court indicated that it was relying on testimony that “husband believes 80% . . . of this account is wife’s nonmarital property” to divide the nonmarital portion from the marital portion. Appellant argues that wife, not husband, testified that she had an 80% nonmarital interest in the IRA. The record indicates that wife testified that 80% of the IRA was nonmarital, but the district court, in its findings, did not rely on wife’s testimony. The record provided to this court does not include testimony in which husband concedes that 80% of the IRA was nonmarital property. While acknowledging that wife “should get most of it,” husband also testified that he wanted the IRA treated as marital property because

wife provided no information from which to deduce the value of the IRA at the time of the marriage. Based on the record before us, the district court clearly erred in finding that husband conceded that 80% of the IRA was nonmarital property.

Wife had the burden of tracing her nonmarital interest within the IRA. The district court found that wife failed to do so. While the district court could rely on the credible testimony of husband to trace the nonmarital asset, the district court erroneously concluded that husband conceded an 80% nonmarital interest in the IRA in favor of wife. Because the district court clearly erred in its finding, and because the district court indicated there is no other evidence upon which to trace a nonmarital interest in the IRA, we reverse. Because wife did not meet her burden of establishing the nonmarital interest in the IRA, it should be treated as marital property and divided accordingly. On remand, the district court shall divide the IRA in accordance with Minn. Stat. § 518.58, subd. 1 (2016) (requiring the district court to “make a just and equitable division of the marital property”).

Reversed and remanded.