STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1402
A18-1408

In re the Marriage of:
Faye Karen Bernstein, petitioner,
Appellant (A18-1402),
Respondent (A18-1408),

vs.

Scott Tomi Gilbert,
Respondent (A18-1402),
Appellant (A18-1408).

Filed August 5, 2019
Affirmed
Slieter, Judge

Hennepin County District Court
File No. 27-FA-16-2816

Kelly M. McSweeney, Jensen, Mullen, McSweeney, & Meyer, PLLP, Bloomington, Minnesota (for appellant)

Louise C. Rogness, Rogness & Field, P.A., Oakdale, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Slieter, Judge.

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

SLIETER, Judge

In these consolidated appeals, Faye Bernstein (wife) argues that the district court erred in declining to enforce the parties' purported settlement agreement, abused its

discretion in distributing the marital property, and abused its discretion in denying her motion for need-based attorney fees. Scott Gilbert (husband) argues that the district court abused its discretion in distributing the marital property and abused its discretion in denying his motion for conduct-based attorney fees. The trial court properly concluded there was no meeting of the minds between the parties, properly distributed the parties' marital property, and did not abuse its discretion in denying either party attorney fees. Therefore, we affirm.

FACTS

Marriage and divorce

The parties married in 2005 and have one minor child. The parties separated in February 2016; the dissolution action was commenced in April 2016. Before trial, the parties agreed on all matters related to custody and spousal support. The issues at trial and on appeal concern allocation of marital assets and whether a purported stipulated agreement should be enforced.

Husband's nonmarital assets

Before the parties' marriage in 2005, husband owned what became the marital homestead. At the time of marriage, husband's nonmarital share in the home was 22% of the home's value. Over the next few years, the parties obtained equity lines of credit, a second mortgage, and refinanced the mortgage, all of which reduced husband's nonmarital share in the homestead to 10% of the home's value.

The parties sold the marital home in December 2015—husband's nonmarital portion of the proceeds was $50,930. Despite knowing they were separating, the parties deposited

this money into their joint U.S. Bank checking account. Some of husband's paychecks were also deposited into this account during this time. Both parties readily spent from this account from about December 2015 until April 2016 when the funds were depleted. From this account, wife spent $2,500 for construction on her new home, $3,000 for legal fees, $13,594 for closing costs on her new home, wrote a $9,000 check to herself, and wrote a $4,000 check out to cash.

Wife's nonmarital assets

Shortly before moving into the marital home in 2005, wife sold her nonmarital home. Wife deposited these proceeds into her own account and, over next few years, transferred some of the nonmarital money to husband for various marital expenses, including: (1) a $50,000 check from wife to husband used for renovations on the marital home, (2) $8,000 for wedding and honeymoon expenses, (3) $5,000 for husband's retirement contribution, (4) $10,000 for marital expenses, and (5) several $1,000 checks to husband for marital expenses.

Settlement agreement

After wife filed for divorce, the parties tried to reach an agreement on asset and debt division. The parties' attorneys negotiated via email from about February 27, 2017 to March 29, 2017. At the time of these negotiations, wife's counsel was Kelly McSweeney and husband's counsel was Josh Gitelson.

On February 27, 2017, McSweeney emailed Gitelson a settlement offer. The offer included a $50,000 equalizer payment from husband to wife, and attached to the email was a one-page "asset/debt worksheet" that included a division of several of the parties'

retirement accounts. Gitelson responded on March 9, 2017, stating that husband was agreeable to the $50,000 equalizer payment on three conditions: (1) a 401k transfer to wife, via a qualified-domestic-relations order, that would ultimately be used to restructure husband's debt, (2) that the parties equally share the cost of a joint and survivor benefit on wife's pension at her retirement, and (3) husband obtain the right to carry medical insurance for the minor child. Gitelson also stated "[i]f these conditions are acceptable, then all issues in the case are indeed resolved, and you may begin drafting a stipulated Judgment and Decree."

McSweeney requested clarification of husband's conditions. Gitelson responded and McSweeney then said she would talk to wife about the conditions.

On March 13, 2017, Gitelson emailed McSweeney; he inquired if McSweeney had a response to the proposed stipulation and suggested a continuance of an upcoming hearing if "settlement [was] around the corner." McSweeney responded via email on March 14, 2017 with a proposed settlement of the financial issues. Gitelson emailed a counteroffer aimed at resolving the outstanding disagreement about tax implications of the equalizer payment, husband's bonus, and the survivorship option of wife's pension.

McSweeney responded that she would review the "stipulation" and "latest offer[]" with wife. Three days later, McSweeney emailed another "proposal in an effort to settle all remaining issues." Over the next few days, the parties also discussed several other issues.

On March 28, 2017, McSweeney emailed Gitelson another offer regarding the unresolved issues. On March 29, 2017, Gitelson responded "[husband] has authorized me

to accept the terms you have put forward below, so we do have an agreement." The parties then cancelled their trial date.

Several hours after canceling the trial date, Gitelson emailed McSweeney, writing "in all of our back-and-forth over the $50,000 payment, its source, and the allocation of taxes and penalties, there was never any mention of the three other transfers on your balance sheet that I only understood after our conversation this morning were an integral part of your offer of settlement." McSweeney responded that "what [Gitelson] is suggesting . . . sounds like buyer's remorse. We have a deal and we will enforce the deal and ask for fees for having to move to enforce, if necessary."

Wife then moved to enforce the agreement, and the district court denied the motion. Wife appealed this denial, but this court dismissed the appeal as taken from a nonappealable, interlocutory order. The case proceeded to trial.

Attorney Fees

Both parties moved, at the conclusion of trial, for attorney fees. Wife requested need-based attorney fees in the amount of $38,000. The district court denied wife's motion and reasoned that wife went on numerous trips during the pendency of the dissolution, including: (1) a ten-day trip to Panama, (2) a six-day trip to Florida, (3) a 14-day trip to Honduras, (4) a trip to New York, and (5) a planned 10-day trip to Canada after the divorce trial.

Husband requested conduct-based fees stemming from wife's motion to enforce the purported settlement agreement. The district court denied this motion, finding that wife's motion did not cause unnecessary delay or expense. This appeal follows.

D E C I S I O N

I. The district court did not clearly err in declining to enforce the parties' purported settlement agreement.

"Whether parties reach an objective meeting of the minds on the essential elements of a contract is a question of fact, which this court reviews under the clear-error standard." *Tornstrom v. Tornstrom*, 887 N.W.2d 680, 686 (Minn. App. 2016), *review denied* (Minn. Feb. 14, 2017). "Factual findings are clearly erroneous when they are manifestly against the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* at 683.

Settlement agreements are contractual in nature and are binding on the parties. *Chalmers v. Kanawyer*, 544 N.W.2d 795, 797 (Minn. App. 1996). "For a stipulation to stand, a meeting of minds on the essential terms of the agreement must have occurred." *Pekarek v. Wilking*, 380 N.W.2d 161, 163 (Minn. App. 1986) (quotation omitted). "To constitute a full and enforceable settlement, there must be such a definite offer and acceptance that it can be said that there has been a meeting of the minds on the essential terms of the agreement." *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963) (footnote omitted). "Whether a contract is formed is judged by the objective conduct of the parties and not their subjective intent." *Gresser v. Hotzler*, 604 N.W.2d 379, 382 (Minn. App. 2000).

The district court found that "[husband] and [wife] didn't have a single, unified idea of what the 'deal' was." Although wife's initial offer included all terms of wife's proposed agreement, the parties then negotiated various terms over a six-week span of email

exchanges. There was never a full offer made by either party with *every* term of the agreement in a single document. The district court's finding that there was no meeting of the minds between the parties is "reasonably supported by the evidence as a whole." *Tornstrom*, 887 N.W.2d at 683.

II. The district court did not err in concluding that husband's nonmarital share of the homestead proceeds was traceable.

Wife argues that the district court erred in determining that husband's nonmarital share of the homestead proceeds was traceable. Because the record supports the district court's findings that husband's nonmarital funds were traced, wife's claim fails.

Appellate courts "independently review the issue of whether property is marital or nonmarital, giving deference to the district court's findings of fact." *See Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008). This court will only overturn a finding of fact if it is "clearly erroneous on the record as a whole." *Lund v. Lund*, 615 N.W.2d 860, 861 (Minn. App. 2000).

Marital property includes any property that either party acquires during the marriage, unless covered by a statutory exception. *See* Minn. Stat. § 518.003, subd. 3b, 3b(a)-(e) (2018). "To overcome the presumption that property is marital, a party must demonstrate by a preponderance of the evidence that the property is nonmarital." *Antone v. Antone*, 645 N.W.2d 96, 101 (Minn. 2002). Nonmarital property includes property "acquired before marriage[,]" Minn. Stat. § 518.003, subd. 3b(b), and property that "is acquired in exchange for or is the increase in value" of nonmarital property. *Id.*, subd. 3b(c).

When marital and nonmarital funds are commingled, the party asserting a nonmarital claim must sufficiently trace the nonmarital assets to prove the nonmarital character. *See Crosby v. Crosby*, 587 N.W.2d 292, 296-97 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). Property can have "both marital and nonmarital aspects." *Schmitz v. Schmitz*, 309 N.W.2d 748, 750 (Minn. 1981). But if nonmarital and marital property are commingled, "the nonmarital investment may lose that character unless it can be readily traced." *Wiegers v. Wiegers*, 467 N.W.2d 342, 344 (Minn. App. 1991). A spouse seeking to trace an asset to a nonmarital source is not held to a "strict tracing" standard, but need only show by a preponderance of the evidence that the asset was "acquired in exchange for" nonmarital property. *Kottke v. Kottke*, 353 N.W.2d 633, 636 (Minn. App. 1984) (quotation marks omitted), *review denied* (Minn. Dec. 20, 1984).

Wife contends that husband failed to satisfy his burden of proof with respect to the tracing of his 10% nonmarital interest in the home. We disagree. The district court found that from the joint checking account that held husband's nonmarital share of the sale of the marital home, wife spent $32,094 for her benefit. This finding is supported by the bank statements and records admitted at trial. Further, the district court found that husband provided all bank activity in the account from the time the proceeds were deposited through the account's exhaustion, and credibly testified regarding what activity on the account was not normal marital expenses. "Deference must be given to the opportunity of the trial court to assess the credibility of the witnesses." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (1988). The district court did not err by concluding that wife spent $32,094 of husband's nonmarital funds.

III. The district court made an equitable property distribution.

Husband contends that in dividing the marital property, the district court abused its discretion because that property division was based on erroneous factual findings related to: (1) wife's application of her nonmarital funds towards marital expenses, and (2) husband's nonmarital share in the homestead. Husband also contends that the district court abused its discretion in apportioning the parties' marital debt to husband. Because we conclude that the district court properly awarded the parties' marital property in an equitable manner, we reject husband's claim.

A district court generally has broad discretion in dividing marital property during a dissolution, and its decision will not be reversed on appeal absent an abuse of this discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164-65 (Minn. 1989). A reviewing court "will affirm the [district] court's division of [marital] property if [the division] had an acceptable basis in fact and principle even though [the reviewing court] might have taken a different approach." *Antone*, 645 N.W.2d at 100.

In a dissolution, all marital property is subject to a fair and equitable, but not necessarily equal, division. Minn. Stat. § 518.58, subd. 1 (2018); *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). "When dividing marital property, the district court may consider many factors, such as the length of the marriage, sources of income, and the contribution of each party in the preservation of the marital property." *Sirek v. Sirek*, 693 N.W.2d 896, 899 (Minn. App. 2005); *see* Minn. Stat. § 518.58, subd. 1 (listing factors to be considered). "It 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." *Sirek*, 693 N.W.2d at 899 (quotation omitted).

Because the district court found that wife spent $78,000 of nonmarital funds to pay marital expenses, the district court awarded wife $25,000 of the marital funds to compensate her for the use of her nonmarital funds on marital expenses. The district court found that husband did not use his nonmarital funds to pay marital expenses and did not make a similar award to husband. Husband argues that the district court overstated wife's nonmarital expenditures because, at most, she could have spent $58,000. Even if true, however, this does not render the district court's property division inequitable.

Assuming wife spent $58,000 of her nonmarital funds for marital expenses, the marital estate contained $58,000 more in property than it would have but for this expenditure by wife. After the $25,000 award, the remaining marital estate was divided equally between the parties, resulting in each party receiving more *marital* property than they would have otherwise. Husband cannot show that the district court abused its broad discretion by dividing the marital property in a manner that results in a larger award to him than he would have received otherwise.

Moreover, the amount of marital property awarded to wife, including the $25,000 awarded as compensation for her use of nonmarital funds, resulted in a net award to wife of less than she would have received had she not used her nonmarital funds to pay marital expenses. Awarding wife $25,000 as compensation was consistent with the district court's obligation when dividing marital property to "consider the contribution of each spouse in

the acquisition, preservation, depreciation or appreciation in the amount or value of marital property [.]" Minn. Stat. § 518.58, subd. 1.

Husband also argues that the district court clearly erred by finding that he did not spend his nonmarital funds on marital expenses. Husband notes that the district court found that his nonmarital share in the marital home decreased from 22% to 10% as a result of various lines of credit and mortgages. Husband then asserts that the borrowed funds were used for marital expenses and that the district court abused its discretion in distributing the marital property when it compensated wife for her use of nonmarital funds to pay marital expenses but did not similarly compensate him.

The decrease in the percentage of husband's nonmarital interest in the house does not demonstrate a decreased dollar value of husband's nonmarital interest. Assuming that there was a decrease in the dollar value of husband's nonmarital interest in the house, husband has not shown the district court abused its broad discretion in dividing the marital property. The district court is required to make an equitable, but not necessarily equal, division of marital property. *Sirek*, 693 N.W.2d at 900. Husband has not shown that the extent of any alleged decrease in the dollar value of his interest in the house was so significant as to show a clear abuse of the district court's broad discretion.

Finally, husband argues that the district court abused its discretion in awarding husband the parties' marital debt. The district court based its debt division on husband's substantially greater income. The district court's division has an "acceptable basis in fact and principle[,]" and it did not abuse its broad discretion. *See Antone*, 645 N.W.2d at 100.

IV. The district court did not abuse its discretion in denying the parties' motions for attorney fees.

Both husband and wife contend the district court abused its discretion in denying their respective motions for attorney fees. The district court properly exercised its discretion in denying both parties' attorney-fees requests.

"An award of attorney fees rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Crosby*, 587 N.W.2d at 298 (quotation omitted).

The district court found that during the pendency of the divorce, wife and the child took various trips. The district court determined that "[t]his extensive travel activity to far away locations for extended periods of time is not consistent with [w]ife's position that she is so insolvent as to be unable to pay her own attorney's fees." The district court did not abuse its discretion in denying need-based attorney fees.

Husband argues that the district court should have awarded conduct-based fees for wife's motion to enforce the settlement agreement. A court may, in its discretion, award additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2018).

Husband claims the district court erroneously believed conduct-based fees require both unnecessary delay *and* expense because it did "not find that [w]ife's actions caused unnecessary delay and expense." The district court, however, correctly explained the standard for awarding conduct-based fees and nothing in its decision suggests that the district court believed that the conduct-based fees require both unnecessary delay and

expense. The district court did not abuse its discretion in denying husband's conduct-based attorney fees.

Affirmed.