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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2007**

In re the Marriage of:

Peder Kristian Rogich, petitioner,
Appellant,

vs.

Denise Lynn Rogich,
Respondent.

**Filed January 13, 2020
Reversed and remanded
Rodenberg, Judge**

Hennepin County District Court
File No. 27-FA-16-443

Rodney H. Jensen, Mark E. Mullen, Jensen, Mullen, McSweeney & Meyer, PLLP,
Bloomington, Minnesota (for appellant)

Becky Toevs Rooney, Minneapolis, Minnesota; and

Edward F. Rooney, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant-husband Peder Rogich appeals from a supplemental judgment and decree of dissolution, arguing that the district court erred by determining that husband does not need spousal maintenance, failed to make adequate factual findings concerning the parties' reasonable budgets, and erred by dividing the Kelly Lake property titled in husband's name as marital property. We remand to the district court for amended findings concerning spousal maintenance and reverse and remand for a new trial limited to the Kelly Lake property issue.

FACTS

Husband and respondent-wife Denise Rogich were married in 2002. They have three minor children. Husband petitioned for dissolution of the marriage in 2016.

During pretrial-motion hearings, the district court found that husband was unemployed and that wife worked as a pharmacist and earned about \$135,000 per year. The district court ordered wife to pay husband \$3,750 per month in combined temporary child support and temporary spousal maintenance. Wife later moved the district court to reconsider its award of temporary spousal maintenance because husband became gainfully employed. The district court denied the motion.

At trial, husband testified that he was a stay-at-home parent for 12 years after the birth of the parties' first child. Husband reentered the workforce after this action was commenced, but before the trial. He requested at trial that the district court award him spousal maintenance.

The district court found after trial that husband was employed as a maintenance technician and earned gross income of \$48,880 per year. Wife was employed as a pharmacist and earned gross income of \$135,907 per year.

The district court considered monthly budgets proposed by each party and what wife thought to be a reasonable monthly budget for husband. The district court found that husband's claimed reasonable expenses were "inflated" and "unreasonable" based on the standard of living established during the parties' marriage. It made no specific finding of either party's reasonable monthly expenses.

The district court found that husband credibly testified concerning his ability to irregularly receive overtime and "chemical pay."¹ It considered husband's overtime and chemical pay "too speculative" to be considered in calculating his income for spousal-maintenance purposes. The district court later found husband's income, including overtime and chemical pay, adequate to meet his monthly expenses and determined that husband was not entitled to further spousal maintenance.

Husband claimed at trial that his childhood home, the Kelly Lake property, was his nonmarital property. In June 2004, husband's mother transferred the Kelly Lake property to husband by way of a handwritten quitclaim deed. Although the parties were married when the quitclaim deed was executed, wife was not an identified grantee.

Husband's argument at trial was that the Kelly Lake property was gifted to him by his mother. Husband explained that he gave his mother money at some point, but he

¹ "Chemical pay" is pay that husband receives for working on machines that are associated with hazardous chemicals.

testified that any money he gave his mother was not given in exchange for the Kelly Lake property. The quitclaim deed shows husband's mother transferred the Kelly Lake property to husband and deed tax was paid in the amount of \$1.65, which amount the parties agree indicates that consideration for the deed was less than \$500.

Wife testified and argued at trial that the Kelly Lake property was purchased from husband's mother during the marriage using \$20,000 of marital funds. Wife stated that husband had asked her to consider purchasing the Kelly Lake property on multiple occasions, but that she told husband that she did not want to buy the property. Wife testified that she later realized that \$20,000 was missing from the parties' joint checking account. Wife testified that she asked husband about the missing money, and that he told her that he had paid his mother to purchase the Kelly Lake property. Wife testified that husband and his mother arrived at the \$20,000 purchase price because husband's mother wanted to leave each of her children a \$2,000 inheritance. Husband has ten siblings.

Husband countered wife's testimony by explaining that his mother did want to give a monetary gift to each of her children, but denied that he made a lump sum payment of \$20,000 to his mother.

Wife referred at trial to an email sent by husband's counsel, labeled as being "[f]or [s]ettlement [p]urposes [o]nly." The email stated that husband and wife did gift husband's mother \$20,000, but not as payment for the Kelly Lake property. The email further states that the word "gift" was written on the \$20,000 check. Subsequently, in the same chain of emails between counsel for the parties, husband's counsel indicated that husband was still

looking for the \$20,000 check. The district court found this email to be compelling evidence in support of wife's position and admitted it into evidence.

Neither party produced bank records from the time period during which the \$20,000 was allegedly withdrawn from the parties' joint checking account or the alleged \$20,000 check supposedly with the notation "gift." Husband testified as follows concerning the claimed payment to his mother:

WIFE'S COUNSEL: So you deny paying \$20,000 in marital funds to your mother.

HUSBAND: A \$20,000 check, yes.

WIFE'S COUNSEL: No. The question was you denied paying \$20,000 to your mother, as described in counsel's email to me that is Exhibit 145.

HUSBAND: Yes. I don't believe there was even 20,000.

The district court allowed wife to testify, over husband's objection, concerning a conversation wife had with husband's mother about the Kelly Lake property. The district court later concluded in its posttrial order that it would not consider that testimony concerning a conversation with husband's mother because there was "other, more reliable, evidence" in the record to support wife's argument that the Kelly Lake property is not husband's nonmarital property.

After wife's testimony about the conversation with husband's mother, husband attempted to call rebuttal witnesses to testify concerning the transfer of the Kelly Lake property. The district court did not allow husband to call these rebuttal witnesses because they had not been disclosed until the morning before the last day of trial.

The district court ultimately found wife more credible than husband concerning the Kelly Lake property transfer. The district court further drew unfavorable inferences from

husband's not having produced a copy of the \$20,000 check that—according to the email between counsel—contained the notation “gift.”

The district court found the Kelly Lake property to be marital property and divided the marital property accordingly.

After trial, husband moved for amended findings of fact or, in the alternative, for a new trial. The district court denied husband's motion for a new trial, but did correct some errors in its original findings. The district court did not amend either the denial of spousal maintenance to husband or its determination that the Kelly Lake property is marital property.

This appeal followed.

D E C I S I O N

The district court's findings are insufficient to review the denial of spousal maintenance to husband.

Husband argues that the district court abused its discretion by not awarding him spousal maintenance from wife and contends that the district court did not make the necessary findings concerning the parties' net incomes or reasonable monthly expenses.

A district court has broad discretion in deciding whether to award spousal maintenance. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009). We review a district court's spousal-maintenance determination for an abuse of discretion. *Id.* A district court abuses its discretion concerning maintenance if findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). “[B]efore an

appellate court determines that there has been a clear abuse of . . . discretion, it must determine that there must be a clearly erroneous conclusion that is against logic and the facts on [the] record.” *Id.* We review de novo questions of law concerning spousal maintenance. *Van de Loo v. Van de Loo*, 346 N.W.2d 173, 175 (Minn. App. 1984).

Reasonable Monthly Expenses

Husband and wife each submitted proposed budgets to the district court. Husband indicated that his monthly expenses were \$6,537, which included \$2,231 which the district court found to be “attributable to the children.” Wife submitted a proposed budget for husband, suggesting that husband’s reasonable monthly expenses were but \$4,371.86. Wife indicated that her monthly expenses were \$5,770.16.

The district court listed in its findings of fact the portions of husband’s claimed monthly budget that wife challenged, and agreed with wife that husband’s expenses were “inflated” and “unreasonable” based on the standard of living established during the parties’ marriage.

The district court made no express finding of either party’s reasonable monthly expenses.

Income

In its child-support determination, the district court found that wife earned gross income of \$135,907 per year (\$11,325 per month) from her job as a pharmacist, and that husband earned gross income of \$48,880 per year (\$4,073 per month) from his job as a maintenance technician.

The district court made separate findings concerning the parties' incomes in its analysis of husband's spousal-maintenance claim. Although the district court concluded that husband's overtime and chemical pay were "too speculative" to consider for child-support purposes, it also found as a fact that husband's "base salary and opportunity for overtime and 'chemical pay' is adequate to meet his reasonable needs." The district court made no finding concerning the amount of overtime and chemical pay husband could reasonably earn.

"In order to determine ability to pay [spousal maintenance], the court must make a determination of the payor spouse's net or take-home pay." *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985)

Husband's income as determined by the district court for child-support purposes is less than husband's claimed reasonable monthly expenses. It is also less than wife's proposed monthly budget of husband's reasonable expenses. Adding in the \$1,148 in monthly child support ordered to be paid to husband, his monthly household income would be \$5,221, which is still less than husband's claimed monthly expenses.² Although the district court did not accept as reasonable all of husband's claimed expenses, it did not make an explicit finding of his reasonable monthly needs. There is no finding by the

² As discussed above, the district court found that husband's claimed monthly expenses "include[] \$2,231 attributable to" the children. Excluding both child support and these expenses attributable to the children leaves husband's monthly income insufficient to meet his claimed or attributed needs. The same is true if both child support and the expenses attributable to the children are included.

district court of a reasonable monthly budget consistent with the standard of living during the marriage of \$5,221 or less for husband.

Moreover, it is unclear whether and how the district court considered husband's ability to get overtime and chemical pay when it determined that he did not need spousal maintenance. The district court initially found the possibility of husband receiving overtime and chemical pay "too speculative" to consider. But in denying husband spousal maintenance, it explained that husband is able to meet his reasonable needs based on his base salary coupled with his "opportunity" for overtime and chemical pay. But here again, the district court made no finding concerning how much overtime and chemical pay husband can reasonably earn.

Because the district court made no express findings concerning either the reasonable monthly expenses of the parties or their respective net incomes, we are unable to properly review whether the district court abused its discretion by denying husband temporary spousal maintenance. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (holding a district court's findings insufficient where the district court made findings concerning the parties' incomes, but not concerning their separate expenses).³

³ We do note, but do not rely on as precedent, our opinion in *Hammond v. Buchanan*, No. A18-1623, 2019 WL 5304175, at *2-3 (Minn. App. Oct. 21, 2019) (concluding that we could not "adequately review the district court's decision not to modify the spousal-maintenance award" where the district court did not make findings concerning the reasonableness of respondent's budget). Unpublished opinions are not binding authority, but they may have persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

The district court's findings are insufficient to allow review the denial of an award of spousal maintenance to husband. We therefore remand for amended findings concerning the spousal-maintenance issue.

The district court committed trial errors requiring both reversal of its classification of the Kelly Lake property as marital property and a remand for a new trial.

Husband argues that the district court erred by classifying the Kelly Lake property as marital property because he was separately gifted that property by his now-deceased mother. Wife argues that the Kelly Lake property is marital and that it was not a gift from husband's mother, and that, instead, husband paid his mother \$20,000 of marital funds to purchase the Kelly Lake property.

A district court's classification of property as marital or nonmarital is a question of law which appellate courts review *de novo*. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). But an appellate court will "defer to the district court's underlying findings of fact and [will] not set the findings aside unless they are clearly erroneous." *Gill v. Gill*, 919 N.W.2d 297, 301 (Minn. 2018). District courts have "broad discretion in evaluating and dividing property in a marital dissolution and will not be overturned except for [an] abuse of discretion." *Antone*, 645 N.W.2d at 100. A district court abuses its discretion in dividing property if it resolves the matter in a manner "that is against logic and facts on the record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We defer to the district court's determinations of credibility. *Svoboda v. Svoboda*, 376 N.W.2d 755, 757 (Minn. App. 1985).

Property acquired by a spouse during a marriage is presumed to be marital property. Minn. Stat. § 518.003, subd. 3b (2018). This presumption applies “regardless of whether title is held individually or by the spouses in a form of co-ownership.” *Id.* “The presumption of marital property is overcome by a showing that the property is nonmarital property.” *Id.*

Nonmarital property, in relevant part, is property “acquired by either spouse before, during or after the existence of their marriage, which . . . is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse.” Minn. Stat. § 518.003, subd. 3b(a). “The burden of establishing the nonmarital character of an asset acquired during the marriage is on the party claiming the property as nonmarital.” *Dorweiler v. Dorweiler*, 413 N.W.2d 572, 575 (Minn. App. 1987). “The most important factor in determining whether a gift is marital or nonmarital is the donor’s intent.” *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). A donor’s intent “is demonstrated by the surrounding circumstances, including the form of the transfer.” *Id.*

The district court found wife’s testimony about the Kelly Lake property more credible than husband’s testimony. It found the Kelly Lake property to be marital property, valued at \$42,800.

The district court’s findings concerning the Kelly Lake property are both unsupported by the record and rely on evidence erroneously admitted at trial.

Finding 71 of the district court’s original and amended judgments and decrees of dissolution states, “[Husband] testified that he gifted \$20,000 to his mother before her passing so that she could leave an inheritance to his ten siblings.” We are unable to find

any place in the trial transcript where husband testified to that effect. Husband's denial of having paid his mother \$20,000 by check seems perhaps to have been coy, but he did not admit to giving his mother a \$20,000 check. And he testified that any money he gave to his mother amounted to less than \$20,000.

The only place in the record where this portion of finding 71 finds any support is in an email sent by husband's counsel to wife's counsel. The district court characterized the email as a response to an informal discovery request. The email expressly identifies its purpose as being "For Settlement Purposes Only."

Minnesota Rule of Evidence 408 prohibits admission of "[e]vidence of conduct or statements made in compromise negotiations" as proof of "liability for or invalidity of the claim or its amount." "Evidence violates the rule when it (1) constitutes a compromise or an offer to compromise a claim that is disputed as to either validity or amount, (2) is offered to prove liability, and (3) is not offered for another legitimate purpose." *In re Buckmaster*, 755 N.W.2d 570, 577 (Minn. App. 2008). Rule 408 is an exclusionary rule, meaning "if a statement violates the rule, a trial court does not have discretion to admit the statement." *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. App. 1999).

Although the email in question did convey information about the existence of a check with the note "gift," the email was expressly purposed as a "settlement" communication. At trial, husband's counsel argued that the email should be excluded under rule 408 because he "headed the email for settlement purposes only." Husband's counsel alternatively argued that the email should be excluded as hearsay. Husband's counsel also informed the district court that the email, which was sent about ten months

before trial, contained errors and incorrect information. Nonetheless, the email was admitted into evidence and cited by the district court in its Kelly Lake property findings as “compelling evidence in support of [wife]’s position.”

On this record, the admission of the email into evidence was error. The email is the only evidence of husband having claimed the existence of a \$20,000 check with the notation “gift.” That communication was expressly purposed for settlement and was a statement by counsel who had no personal knowledge of the existence of the check (and who may have misunderstood what husband had told him). The district court’s error in admitting this email into evidence leaves finding 71 without support in the evidence properly admitted at trial.

The district court faulted husband for not producing at trial the \$20,000 check referenced in the email from his counsel. Wife claimed at trial that the check was from their joint account. It appears from the record that either party could have produced a copy of any check written on that account. Without the improperly admitted email, husband cannot be faulted for not having produced any bank records relating to the alleged \$20,000 payment to his mother.

Moreover, and even if \$20,000 was paid to appellant’s mother in exchange for the Kelly Lake property, the record seems to us to suggest that the property might still be partly nonmarital. Husband has ten siblings. Wife’s evidence at trial was that the amount paid in exchange for the property was \$20,000, so that each of husband’s ten siblings would get \$2,000 by way of an inheritance from their mother. This at least suggests that, at the time

of the deed, the Kelly Lake property may have had a value of \$22,000.⁴ And the record at trial is sparse regarding the true value of the Kelly Lake property at the time of the transfer in 2014. The district court did not determine whether, even if \$20,000 was paid for the Kelly Lake property, some value over that amount was a gift to husband.

We also see trial error in the district court having allowed wife to testify, over husband's objection, concerning a conversation that wife had with husband's now-deceased mother concerning the Kelly Lake property transfer, but having then denied husband the opportunity to meet that testimony by similar testimony he sought to present.

The district court allowed wife's testimony as rebuttal to husband's statements about his mother's wishes. But the district court did not allow husband to call his sister and brother-in-law as rebuttal witnesses to testify concerning the transfer of the Kelly Lake property and the sale of other land from which husband's mother supposedly received money that she distributed to her children. The district court based its refusal to allow husband to call these rebuttal witnesses on husband having known that the Kelly Lake property was going to be a contested issue at trial, and having failed to timely disclose the rebuttal witnesses. However, husband's rebuttal witnesses were only necessary after the district court allowed wife's testimony concerning her conversation with husband's deceased mother.

⁴ \$20,000 would give each of husband's siblings \$2,000, but then his mother presumably intended that husband would receive some gift—perhaps \$2,000 or perhaps some other amount.

“[A]n appellant will not always know what testimony he will present on rebuttal, and he need not anticipate what rebuttal witnesses might testify to and disclose all possible rebuttal testimony” *Whitney v. Buttrick*, 376 N.W.2d 274, 278 (Minn. App. 1985).

The district court, “in light of the totality of the evidence provided,” explained in its findings of fact that it would not consider wife’s conversation with husband’s mother when deciding the Kelly Lake property issue. But combined with the erroneous admission of the email from counsel, the district court’s erroneous exclusion of husband’s rebuttal witnesses leaves the record inadequate for the conclusion that the entirety of the Kelly Lake property is marital property.

The district court’s erroneous finding 71, its allowing into evidence the settlement email between counsel for the parties, and its allowing wife to testify concerning her conversation with husband’s mother while prohibiting husband from calling rebuttal witnesses require that we reverse the district court’s conclusion that the Kelly Lake property is marital property and remand for a new trial on that issue.

In sum, we remand for amended findings concerning husband’s spousal-maintenance claim and we reverse the district court’s determination concerning the Kelly Lake property and remand for a new trial on that issue.

Reversed and remanded.