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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0884
A19-1182**

In re the Marriage of:
Beth Marie Delzer, petitioner,
Respondent,

vs.

Randy Edward Delzer,
Appellant.

**Filed May 18, 2020
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge**

Dakota County District Court
File No. 19AV-FA-17-738

Wayne A. Jagow, Jagow Law Office, P.A., Burnsville, Minnesota (for respondent)

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Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

SEGAL, Chief Judge

In these consolidated marriage-dissolution appeals, husband argues that the district court (1) understated wife's income for child-support purposes by failing to consider her spousal-maintenance award; (2) erred in determining that wife had a 7% nonmarital interest in the marital home; (3) abused its discretion in its award of attorney fees; (4) exceeded the

scope of its authority as a successor judge under Minn. R. Civ. P. 63.01; (5) erred in its disposition of certain funds in the trust account of husband's former attorney; and (6) failed to enforce the mediation provision in the judgment. We affirm in part, reverse in part, and remand.

FACTS

Appellant-husband Randy Edward Delzer and respondent-wife Beth Marie Delzer were married on August 4, 2001. The parties have three minor children. On March 11, 2017, wife petitioned for dissolution of marriage. The district court held a trial on August 7, 2018, and issued its judgment and decree dissolving the parties' marriage on December 4, 2018. On December 20, the district court issued an amended order that corrected several clerical errors, but did not substantively alter the judgment.

On January 17, 2019, wife filed a motion for amended findings. She requested that the district court amend the judgment to award her a nonmarital interest in the marital homestead and delete the portion of the judgment that awarded husband conduct-based attorney fees. She argued that she was entitled to a nonmarital interest in the marital homestead because she paid the down payment for the marital homestead from the proceeds of the sale of a home she acquired and sold prior to the marriage. She asserted that the district court had misapplied the law in its initial judgment by determining that her nonmarital interest was extinguished when the parties refinanced the home. She also argued that the district court provided no factual basis to support the award of conduct-based attorney fees to husband and therefore the award was not justified. Husband filed a

responsive motion, requesting that the district court deny wife's motion in its entirety and seeking an additional award of conduct-based attorney fees.

Prior to the hearing on these motions, the district court judge retired. On February 5, 2019, a different district court judge held a hearing on the motions. On April 5, the new judge issued an amended judgment and decree that granted wife's request to be awarded a 7% nonmarital interest in the homestead and determined that neither party was entitled to conduct-based attorney fees.

On April 17, wife filed a motion to enforce the judgment and require husband's former attorney to disburse funds being held in that attorney's trust account. In response, husband filed a motion to stay execution of the judgment and decree pending appeal by either party to this court. Husband again sought conduct-based attorney fees. Following a hearing, the district court granted wife's motion and ordered that a portion of the funds held in the trust account be disbursed to wife and the remaining portion be deposited with the clerk of court, and denied husband's motion for conduct-based attorney fees. Husband appeals.

D E C I S I O N

I. The district court erred by failing to include spousal maintenance in calculating wife's income for child-support purposes.

Husband claims that the district court erred in calculating the parties' child-support obligations because it failed to include the spousal maintenance awarded to wife when calculating her income. We review a district court's determination of a party's income for

child-support purposes for clear error. *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015), *review denied* (Minn. Dec. 15, 2015).

Under Minn. Stat. § 518A.29(a) (2018), “gross income includes . . . spousal maintenance.” As part of the dissolution judgment, wife was awarded \$1,000 per month in spousal maintenance for a period of five years. When calculating the parties’ incomes to determine child support, the district court subtracted the maintenance award from husband’s monthly income but did not add it to wife’s monthly income. The district court therefore erred in its calculation of wife’s monthly income by failing to include spousal maintenance as required by Minn. Stat. § 518A.29(a). Accordingly, we reverse and remand to the district court to recalculate the parties’ child-support obligations.

II. The district court’s ruling that wife had a nonmarital interest in the marital homestead is supported by the record and not contrary to law.

Husband challenges the district court’s award of a 7% nonmarital interest in the marital home. “Whether property is marital or nonmarital is a question of law, but a reviewing court must defer to the trial court’s underlying findings of fact.” *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Property can have “both marital and nonmarital aspects.” *Schmitz v. Schmitz*, 309 N.W.2d 748, 750 (Minn. 1981). But “[w]hen 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). “Whether a nonmarital interest has been traced is also a question of fact.” *Kerr v. Kerr*, 770 N.W.2d 567, 571 (Minn. App. 2009).

The district court awarded wife a nonmarital interest of 7% in the marital homestead because she paid the down payment, equal to 7% of the purchase price, on their marital home using her own nonmarital assets. Prior to the parties' marriage, wife purchased a home in Bloomington. In the spring of 2001, wife decided to sell the Bloomington home and purchase a home with husband. Husband helped wife prepare the Bloomington home for sale and lived there for approximately one month. In April 2001, wife sold the Bloomington home for a profit of \$21,087.86. On April 27, 2001, prior to the marriage, the parties purchased the marital home for \$245,000. Wife used a portion of the proceeds from the sale of the Bloomington home to pay the \$17,253.42 down payment. The parties were not married until August 4, 2001. Approximately one year after purchasing the home, the parties refinanced the home and took out \$15,000 in equity. The marital homestead increased in value during the marriage and sold in October 2018 for \$393,000.

Husband argues that the district court erred by determining that wife had a nonmarital interest in the marital homestead based on her payment of the down payment from the sale proceeds of her premarital home. He argues that the district court failed to consider the labor he contributed to prepare wife's premarital home for sale and that any nonmarital interest wife may have had in the marital home was extinguished by improvements made that increased the value of the marital home during the marriage. He alternatively argues that, even if wife did retain a nonmarital interest, the district court erred in calculating the amount. We shall address each argument in turn.

Husband's Contributions to Wife's Premarital Home

Husband argues that he contributed significant labor in fixing up wife's house to prepare it for sale and that the district court erred by not factoring that into the calculations. He concedes that he did the work as a gift and did not expect payment for it, but argues that it nonetheless constitutes marital property under Minn. Stat. § 518.003, subd. 3b (2018), because the gift was not made by a third party. That statute provides, in relevant part, that nonmarital property includes property "acquired by either spouse before, during or after the existence of their marriage, which (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not the other spouse; [or] (b) is acquired before the marriage." Minn. Stat. § 518.003, subd. 3b(a)-(b). Husband argues that the gift cannot be considered nonmarital because it was not made by a third party. But Minn. Stat. § 518.003, subd. 3b(a), applies to situations in which a gift is made by a third party *during* the marriage, not *prior* to the marriage. Specifically, the subdivision references a gift made to one *spouse* but not to the other *spouse*. At the time the gift was made, the parties were not married and therefore were not spouses. Since this subdivision of the statute only applies to gifts to spouses, it only applies to gifts made during a marriage and is not applicable here. Wife received the "gift" from husband before the marriage and, therefore, Minn. Stat. § 518.003, subd. 3b(a), is not applicable.

Impact of Refinancing and Improvements to Marital Home

Husband next argues that any nonmarital interest wife had in the marital home was extinguished by the subsequent refinancing of and improvements to the marital home. Under Minnesota law, a formula, referred to as the "*Schmitz* formula," is applicable to

determine the extent of marital and nonmarital interests when a marital home is acquired with a nonmarital down payment. *Antone v. Antone*, 645 N.W.2d 96, 102 (Minn. 2002).

The “*Schmitz* formula” has been summarized as follows:

The present value of a nonmarital asset used in the acquisition of marital property is the proportion the net equity or contribution at the time of acquisition bore to the value of the property at the time of purchase multiplied by the value of the property at the time of separation. The remainder of equity increase is characterized as marital property

Brown v. Brown, 316 N.W.2d 552, 553 (Minn. 1982).

In the December 20, 2018 judgment and decree, the district court determined that wife had a nonmarital interest in the marital home based on her use of nonmarital funds for the down payment, but concluded that the refinancing of the marital home extinguished the nonmarital interest. The district court relied on *Senske v. Senske*, which held that “[w]hen the parties refinanced the home, all of the equity in the home, including respondent’s nonmarital share, was extinguished.” 644 N.W.2d 838, 841 (Minn. App. 2002). Following wife’s motion for amended findings, the district court reversed the prior ruling and determined that the refinancing of the marital home did not extinguish wife’s nonmarital interest. We agree. Since the release of *Senske*, Minnesota courts have repeatedly clarified that refinancing a home does not automatically extinguish a nonmarital interest. *See Antone*, 645 N.W.2d at 103; *Kerr*, 770 N.W.2d at 570-71 n.3 (noting that *Senske* was released a month prior to *Antone* and, to the extent that the holding from *Senske* on refinancing and nonmarital interests is inconsistent with *Antone*, the court follows *Antone*). In *Kerr*, this court explained that the “nonmarital interest is not lost or decreased by

increasing the marital debt secured by a homestead.” 770 N.W.2d at 570. Accordingly, the refinancing of the marital home did not extinguish wife’s nonmarital interest in the marital home.

Because wife maintained a nonmarital interest in the marital home after the refinancing, we must next consider what impact the improvements the parties made to the home during the marriage had on her nonmarital interest. The parties made numerous improvements to the homestead during the marriage. They finished the basement, installed new windows, remodeled the kitchen, did electrical work, built a pole shed and horse arena, and enhanced the landscaping. In general, “[i]mprovements made by the parties are presumed to be marital property.” *Dorweiler v. Dorweiler*, 413 N.W.2d 572, 576 (Minn. App. 1987). When marital contributions and improvements increase the value of the home, our opinion in *Dorweiler* established the following formula to calculate the value of the nonmarital interest:

Proper calculation of [wife’s] current nonmarital interest in the homestead requires that the court first divide her nonmarital contribution to the downpayment by the purchase price of the house. Next, the cost of repairs and improvements must be subtracted from the current value of the house in order to determine the increase in value of the property due solely to appreciation. Finally, the net appreciated value of the house must be multiplied by the ratio of nonmarital net equity to purchase price in order to determine [wife’s] nonmarital interest in the homestead.

Id. (citation omitted).

Husband argues that the district court erred in its determination that wife had a 7% nonmarital interest in the marital home because it failed to properly apply the *Dorweiler*

formula. But as the district court observed, while it is undisputed that the parties made improvements to the marital home, the record contains little to no information about the costs of those improvements or the corresponding increase in value of the marital home. The district court was therefore unable to subtract the costs of the repairs and improvements because it did not have this information. Rather, the district court was left to calculate wife's nonmarital interest based on the only solid evidence it did have—the amount of the down payment made by wife and the purchase price of the home. We therefore conclude that the district court did not err by failing to factor in the improvements made to the home during the parties' marriage because the record does not contain that information.

Calculation of Nonmarital Interest

Finally, husband argues that the district court erred in calculating the amount of wife's nonmarital interest in the marital home. He argues that the district court erred because it failed to factor in the closing costs of \$6,003.42 and, therefore, the purchase price of the home was not \$245,000, but \$251,003.42. He argues that, based on the purchase price plus closing costs, wife's nonmarital interest should have been calculated as 6.8%, rather than 7%. He relies on *Kerr* to support his assertion. In *Kerr*, the wife contributed \$54,985 "towards the closing costs, taxes, and down payment applied to the purchase price of the marital home." 770 N.W.2d at 570. On appeal, the husband argued that the money contributed by the wife toward the closing costs should have been deducted from the total amount of her down payment, thereby decreasing her nonmarital interest. *Id.* This court disagreed and determined that the district court "did not err by failing to

deduct” the money toward closing costs and taxes before calculating the wife’s nonmarital interest. *Id.*

Husband in this case argues that, because no error was found in *Kerr* where the court added closing costs to the overall purchase price, error must be found here where the court failed to add in such costs. Husband makes various policy arguments to support his assertion that this constitutes error, but cites to no additional legal authority requiring this deduction. Moreover, this court noted in *Kerr* that when calculating a party’s nonmarital interest, it is not necessary that the *Schmitz* formula be strictly applied by the district court. *Id.* Rather, “[i]t is sufficient that the trial court arrive at a figure which is close to the figure it would have arrived at had it used the *Schmitz* formula.” *Id.* Further, it should be noted that the error alleged by husband is only two-tenths of one percent of the sale price of the marital home, which equals \$786. Even if this was an error, this amount is de minimis and does not require remand. *See Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 694 n.1 (Minn. App. 2010) (refusing to remand for de minimis error in valuation of land).

Throughout the proceedings, the parties agreed that the purchase price of the marital home was \$245,000, which is the figure that the district court ultimately used when calculating wife’s nonmarital interest. Because the district court used the purchase price agreed upon by the parties and has some flexibility in its application of the *Schmitz* formula, we discern no error in its determination that wife has a 7% nonmarital interest in the marital home.

III. Rulings on attorney fees.

Husband challenges the district court's award of need-based attorney fees to wife and denial of an award of conduct-based fees to him. We review an award of attorney fees for an abuse of discretion. We "will rarely reverse" a district court's decision to award or deny attorney fees. *Rosenberg v. Rosenberg*, 379 N.W.2d 580, 587 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986).

Need-Based Attorney Fees

Husband challenges the district court's award of need-based attorney fees to wife. In a marriage-dissolution action, a district court "shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding," provided that the district court finds:

(1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2018). If the statutory requirements are met for need-based attorney fees, then a district court "shall" award the need-based attorney fees. *Id.* The supreme court has established that district court decisions regarding need-based attorney fees are reviewed for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

Husband argues that the district court did not make sufficiently specific findings to support the award of need-based attorney fees. In general, “[c]onclusory findings on the statutory factors do not adequately support a fee award.” *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2011). But a lack of specific findings “is not fatal to an award where review of the order reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case and had access to the parties’ financial records.” *Id.* (quotations omitted).

Here, the district court awarded wife \$10,000 in need-based attorney fees but did not make any specific findings on the need for the award. We therefore must consider whether a review of the order “reasonably implies” that the district court considered the relevant factors and was sufficiently familiar with the history of the case and the parties’ financial records. *Id.* It is clear that the district court was familiar with the parties’ general monthly incomes and expenses, as those records were submitted and evaluated by the district court when determining the issue of spousal maintenance. But it is unclear from the record whether the district court considered wife’s ability to pay from the property award she received in the dissolution. And we note that the attorney fees were awarded in the initial judgment that did not award wife a nonmarital interest in the marital home. Following the motion for amended findings, her property award was significantly increased based on the determination that she had a nonmarital interest in the marital home. On this record, we cannot conclude that the order “reasonably implies” that the district court considered the relevant factors and was sufficiently familiar with the parties’ financial situations because wife’s property award significantly changed following the

determination that she had a nonmarital interest in the marital home. Accordingly, we remand to the district court for more specific findings on the necessity of need-based attorney fees.

Conduct-Based Attorney Fees

We review a district court's decision regarding conduct-based attorney fees for an abuse of discretion. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). Husband argues that the district court abused its discretion by "deleting from the Amended Decree the \$6,000 award of conduct based attorney's fees." The district court determined that husband was not entitled to conduct-based attorney fees because the initial judgment did not contain factual findings to support, and the record did not justify, such an award. Husband argues that he is entitled to conduct-based fees because the initial judgment contained a conclusion of law that stated "[Wife] has unnecessarily increased the length of this case." He argues that this was a finding of fact that was merely mislabeled as a conclusion of law and therefore the record supports an award of conduct-based fees. But as wife notes, there are no findings that address how wife unnecessarily contributed to the length of the case. Notably, husband moved for conduct-based fees several times based on the assertion that wife was unnecessarily increasing the length of the case by continuing to claim a nonmarital interest in the marital home. Wife, however, ultimately succeeded in being awarded a nonmarital interest. On this record, the district court did not abuse its discretion by deleting the conduct-based attorney fees award from the amended judgment.

IV. Authority of a successor judge under Minn. R. Civ. P. 63.01.

Husband further contests the district court's posttrial order on the ground that the judge exceeded the authority granted to him as a successor judge under Minn. R. Civ. P. 63.01. "The interpretation of the Minnesota Rules of Civil Procedure is a question of law that we review de novo." *Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016).

The rule provides:

If by reason of death, sickness, or other disability a judge before whom an action has been tried is unable to perform judicial duties after a verdict is returned or findings of fact and conclusions of law are filed, any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that the duties cannot be performed because that judge did not preside at the trial or for any other reason, that judge may exercise discretion to grant a new trial.

Minn. R. Civ. P. 63.01.

In this case, the district court judge who presided over the trial and issued the initial judgment and decree retired prior to the posttrial motions and hearings on those motions. A different judge was assigned to the case and considered and ruled on those motions. Husband argues that the second judge exceeded his authority as a successor judge by considering and ruling on wife's posttrial motions. For purposes of Minn. R. Civ. P. 63.01, the phrase "other disability" includes retirement, and a successor judge may reconsider and amend findings made by the prior judge. *Kornberg v. Kornberg*, 542 N.W.2d 379, 385-86 (Minn. 1996). Based on *Kornberg*, the successor judge in this case had the authority to consider the posttrial motions because the initial judge retired. And while the successor judge had the discretion under rule 63.01 to grant a new trial if he felt it was necessary, he

chose not to exercise that discretion. This was reasonable considering that wife's motion for amended findings was based not on the kind of issues in the province of the fact-finder at trial, but on a purely legal argument—she asserted that the prior judge misapplied the law by relying on *Senske*. On this record, the successor judge did not exceed the authority granted under rule 63.01.

V. Ruling on wife's motion to enforce the judgment.

Husband argues that the district court abused its discretion by granting wife's motion to enforce and ordering that the money held in a trust account by husband's former attorney be disbursed. This issue is also governed by an abuse-of-discretion standard of review. *Potter v. Potter*, 471 N.W.2d 113, 114 (Minn. App. 1991).

The judgment provided that certain items of personal property would be included in a property auction and that the parties would each receive 50% of the net proceeds of the auction, subject to any property equalization. The proceeds of the auction were deposited in a trust account of husband's former attorney. Husband argues that the district court abused its discretion by granting wife's motion to enforce and require funds to be disbursed from the trust account so that wife could be paid for her nonmarital interest in the marital home. He argues that his substantive rights were affected "because the terms of the decree are property and property awards are final."

"While a [district] court may not modify a final property division, it may issue orders to implement, enforce, or clarify the provisions of a decree, so long as it does not change the parties' substantive rights." *Redmond v. Redmond*, 594 N.W.2d 272, 275 (Minn. App. 1999). An order does not affect substantive rights if it does not increase or

decrease the division of marital property. *Nelson v. Nelson*, 806 N.W.2d 870, 871 (Minn. App. 2011). Here, the order did not affect the parties' substantive rights because it ultimately did not increase or decrease the total property award to either party. Rather, the order merely served to clarify and enforce the provisions of the judgment based on the posttrial amended order granting wife the 7% nonmarital interest in the marital home. The initial judgment did not include the 7% nonmarital award and the marital home was already sold with the net proceeds distributed on a 50% basis in accordance with the original order. The district court's order simply required husband to pay the nonmarital interest to wife from the available funds in the trust account. The order was, therefore, necessary to enforce the provision of the amended judgment that granted wife a nonmarital interest in the homestead, and did not increase or decrease the total property award to either party. As such, the order did not affect husband's substantive rights, and the district court did not abuse its discretion by granting wife's motion to enforce.

VI. Failure to enforce the mediation provision.

For his final issue, husband argues that the district court erred by failing to enforce the mediation provision contained in the December 20, 2018 judgment and decree. The judgment contains a provision that "[a]ny claim or controversy arising under this Judgment and Decree, which cannot be resolved by and between the parties through direct communication, shall be promptly submitted to mediation" and that "[t]he above procedure shall be followed before either party may apply to the Court for relief." He argues that, based on this provision, all subsequent orders issued by the district court must be vacated. But as wife points out, husband did not raise this issue in the district court, and fully

participated in the subsequent proceedings. Accordingly, this issue has been forfeited because it was not timely raised before the district court. *See Ries v. State*, 920 N.W.2d 620, 640 n.2 (Minn. 2018) (noting that a party forfeits a right by failing to make a timely assertion of that right).

In sum, we affirm the district court's determination that wife has a 7% nonmarital interest in the marital home, its denial of an award of conduct-based attorney fees to husband and its order granting wife's motion to enforce. But we reverse and remand to the district court to recalculate the parties' child-support obligations by including the spousal maintenance award in wife's income and to make additional findings based on the current record on the issue of need-based attorney fees for wife.

Affirmed in part, reversed in part, and remanded.