STATE OF MINNESOTA
IN COURT OF APPEALS
A10-389

In re the Marriage of:
Keith F. Ostrosky, petitioner,
Appellant,

vs.

Kristi J. Ostrosky,
Respondent.

Filed March 22, 2011
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Dakota County District Court
File No. 19-F9-07-014838

John A. Warchol, Warchol Meyer PLLC, Minneapolis, Minnesota (for appellant)

John R. Hill, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Following a marriage-dissolution trial, appellant challenges the district court's (1) finding that he misappropriated checking-account funds and an annuity, (2) conclusion that a piano is marital property instead of appellant's nonmarital property,

(3) order apportioning the parties' undetermined 2008 tax debt solely to appellant with equal division of any refund, and (4) order that appellant be solely responsible for the minor child's health-care costs. By notice of related appeal, respondent challenges the court's failure to account for tax liability in setting her spousal-maintenance award. We affirm with respect to the court's 2008 tax apportionment and its spousal-maintenance award but otherwise reverse and remand.

FACTS

On February 20 and March 3, 2009, the district court conducted a dissolution trial of the marriage of appellant Keith Ostrosky (Ostrosky) and respondent Kristi Ostrosky, n/k/a Kristi Erickson (Erickson). On July 13, 2009, the district court issued findings of fact, conclusions of law, and a judgment and decree dissolving the marriage, dividing the parties' property, and obligating Ostrosky to pay child-support and spousal-maintenance to Erickson. Both parties moved for amended findings or a new trial, and the court denied the motions as to matters relevant here. This appeal follows.

D E C I S I O N

Ostrosky's Personal Checking Account

The district court charged against Ostrosky's portion of the marital assets the December 31, 2007 balance of $20,998 of Ostrosky's personal checking account,[1] based on its finding that Ostrosky "appropriated marital assets without consulting [Erickson]" when he later transferred money from the account into college savings plans for the

[1] In its order, the district court rounded the value of the account to $20,998 from $20,998.20.

parties' two children.[2] Ostrosky argues that the district court erred by making this charge against his portion of the martial property. We agree.

Ostrosky testified at trial that, during the marriage, he saved his change and bought savings bonds titled jointly in his and the children's names for the children's college educations. After learning that the savings bonds did not have the desired tax advantages, Ostrosky moved the money to college savings accounts in the Minnesota College Savings Fund, which is Minnesota's implementation of 26 U.S.C. § 529 (2006). To accomplish this, in about December 2007, Ostrosky cashed in the bonds for approximately $19,000 and deposited the proceeds in his checking account, which also contained his "normal paychecks and the other funds [he] used for day-to-day bills." After depositing the bond proceeds, his checking-account balance was $20,998.20, as reflected on the December 31, 2007 statement. On December 27, 2007, and January 8, 2008, Ostrosky wrote two checks totaling $20,448.50 to the Minnesota College Savings Fund. The checks were negotiated on January 7 and 14, 2008, as reflected on Ostrosky's January 31, 2008 checking-account statement.

Erickson testified that she "assume[d]" and "presume[d]" that the savings bonds were for the children's college educations, and that she had no problem with Ostrosky's cashing in the bonds and depositing the proceeds in college funds for the children. She presented no evidence that she did not consent to Ostrosky's actions.

[2] Although the district court did not explicitly so state, the parties appear to agree that the court based its finding on Minn. Stat. § 518.58, subd. 1a (2010).

Minnesota law places a reciprocal fiduciary duty on the parties to a marriage dissolution "for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets." Minn. Stat. § 518.58, subd. 1a (2010). Accordingly, if the district court finds that one party,

> without consent of the other party, has . . . transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

Id. The party claiming that the other party violated this statute has the burden of proof in all respects. *Id.* This court will not reverse the district court's finding unless clearly erroneous. Minn. R. Civ. P. 52.01.

Under Minn. Stat. § 518.58, subd. 1a, Erickson had the burden to prove that (1) Ostrosky "transferred, encumbered, concealed, or disposed of marital assets"; (2) he did so other than in the usual course of business or for the necessities of life; and (3) he did so without her consent. Based on the parties' undisputed testimony at trial, we conclude that Erickson failed to meet her burden of proof that Ostrosky made the transfers without her consent. The district court's finding that Ostrosky misappropriated $20,998 from funds in his checking account is therefore clearly erroneous.

Annuity

The parties stipulated that for purposes of trial, their annuity was worth $106,385, and that it should be divided equally. The district court expressly adopted the parties' stipulated value, but rather than dividing the annuity equally, the court awarded Erickson

50% of the annuity's March 31, 2008 cash surrender value of $199,509.51, or $99,784.76, and "[t]he balance" of $6,630.24 to Ostrosky.[3] The court explained that while the annuity had a current value of $106,385, "[t]his was *after* a $40,137 withdrawal by [Ostrosky] to pay taxes. Thereafter, [Ostrosky] withdrew the balance down from $199,509 to $106,385—yet again without conferring with [Erickson]."[4] Ostrosky argues that the court's finding that he improperly disposed of marital assets by "withdr[awing] the balance down from $199,509 to $106,385" is clearly erroneous. We agree.

The record reveals the following transaction history for the annuity. At the beginning of the first quarter of 2008, the annuity had a balance of $261,266.57. Ostrosky withdrew $40,137.47 during that quarter to pay income taxes,[5] and the annuity lost $4,899.56 during the quarter due to market activity. At the end of the first quarter of 2008, the annuity had a balance of $216,229.54, which equated to a cash surrender value of $199,509.51.

At the beginning of the fourth quarter of 2008, the annuity had a balance of only $170,726.87.[6] Ostrosky testified that he withdrew $30,276.60 during this quarter "to pay taxes and ke[ep] the two households going," and the annuity lost $6,399.53 during the

[3] This property award is inconsistent with the district court's later conclusion in the order in which it awarded "one-half" of the annuity to each of the parties.

[4] Although not explicitly stated by the district court, the parties agree that the court's departure from the stipulated value and division of the annuity was based on its belief that Ostrosky violated section 518.58, subdivision 1a, by disposing of marital assets other than for the necessities of life without Erickson's consent.

[5] Ostrosky's withdrawal of $40,137.47 is not at issue—the district court acknowledged that Ostrosky used this money to pay income taxes, and the court divided the annuity based on its value after this money was withdrawn.

[6] The record does not include annuity statements for the second and third quarters of 2008.

quarter due to market activity. At the end of the fourth quarter of 2008, the annuity had a balance of $134,050.74.

In February 2009, Ostrosky withdrew $25,000 from the annuity to put into his business checking account to keep his business afloat, but admitted that he used $1,300 from his business checking account to pay a drywall contractor for work on his home. The parties stipulated on February 20, 2009, that the annuity had a remaining value of $106,385.

Ostrosky admitted that he did not ask Erickson for permission to make the annuity withdrawals in advance, but testified that after each withdrawal, he informed his attorney, who then informed Erickson's attorney. At trial, Erickson could not remember whether Ostrosky asked her in advance before making the withdrawal to pay the taxes. Although she was aware that the couple owed back taxes, she did not offer to pay the taxes or make any suggestion to Ostrosky about how to resolve the issue. Ostrosky never received any objections from Erickson or her attorney about the withdrawals. Erickson testified that she did not object "to the fact the taxes were paid," and was "not sure" whether she objected "to the manner in which they were paid." She suggested in retrospect that Ostrosky could have sold the parties' cabin or some artwork to pay the taxes. But Erickson offered no evidence whatsoever about whether Ostrosky's use of the withdrawals to "ke[ep] the two households going" or to keep his business afloat was for the necessities of life or was in the ordinary course of business or whether she consented to the use.

Erickson had the burden to prove that (1) Ostrosky "transferred, encumbered, concealed, or disposed of marital assets"; (2) he did so other than in the usual course of business or for the necessities of life; and (3) he did so without her consent. *See* Minn. Stat. § 518.58, subd. 1a. We conclude that Erickson failed to meet her burden of proving that Ostrosky's use of the annuity funds was not for the necessities of life or in the ordinary course of business without her consent. The district court's finding that Ostrosky improperly disposed of the annuity withdrawals is therefore clearly erroneous.

Piano

The district court characterized a $20,000 piano as marital property and included the piano in Ostrosky's marital apportionment after finding that Ostrosky did not sufficiently trace the piano to a nonmarital source. Ostrosky argues that the district court erred by not characterizing the piano as his nonmarital property. We agree.

In 1994, Ostrosky received approximately $25,000 from the sale of his deceased father's house. Ostrosky testified that, within two months of his receipt of the money, he used $20,000 to purchase a grand piano "in memory of" his parents. Erickson testified that when Ostrosky purchased the piano, he told her that he bought it with the inheritance money, and she took his word for it, but he did not tell her that he purchased the piano in memory of his parents. When asked whether she believed the piano was marital property, Erickson testified:

> I don't know. I don't know the details. I just know that after his parents passed on he said that that's what he was going to use but I don't know what—how much it cost. I don't know how much he received from his parents.

> Everything just went into an account, so I have no idea. He did it. I was unaware of it at the time.

She also testified, "The money went into an account. And just like when I inherited some money, it went into our bank account. We paid bills with it." She also testified that Ostrosky's paychecks also went into a bank account but was unable to say whether it was the same account.

This court "independently review[s] the issue of whether property is marital or nonmarital, giving deference to the district court's findings of fact." *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008). Marital property, with exceptions not relevant here, is defined as real or personal property acquired by either party at any time during the existence of the marriage. Minn. Stat. § 518.003, subd. 3b (2010). Nonmarital property, in relevant part, is defined as real or personal property, acquired by either spouse, which "is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse"; or "is acquired in exchange for or is the increase in value of" nonmarital property. *Id.* "All property acquired by either spouse during the marriage is presumptively marital, but a spouse may defeat the presumption by showing by a preponderance of the evidence that the property acquired is nonmarital." *Baker*, 753 N.W.2d at 649–50 (citing Minn. Stat. § 518.003, subd. 3b).

"For nonmarital property to maintain its nonmarital status, it must either be kept separate from marital property or, if commingled with marital property, be readily traceable." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Tracing is required when a party wishes to show that property is nonmarital because it was purchased with

nonmarital funds. *Danielson v. Danielson*, 392 N.W.2d 570, 572 (Minn. App. 1986). "Simply routing the funds through a joint account does not transform non-marital property into marital property." *Nash v. Nash*, 388 N.W.2d 777, 781 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Aug. 20, 1986). And tracing property to its nonmarital source does not require intricate detail. *Danielson*, 392 N.W.2d at 572; *see also Nash*, 388 N.W.2d at 781 ("Tracing does not require a party to produce the serial numbers of the dollar bills used."). "Whether a nonmarital interest has been traced is . . . a question of fact." *Kerr v. Kerr*, 770 N.W.2d 567, 571 (Minn. App. 2009).

Here, the district court found that Ostrosky did not sufficiently trace the piano's nonmarital character based on his failure "to provide any form of documentation to substantiate his claim." This finding is supported only by Erickson's testimony that Ostrosky's inheritance money "went into an account . . . just like when [she] inherited some money," and that they "paid bills with it." But Ostrosky was not required to supply "intricate detail," such as documentary evidence, to support his tracing, s*ee Danielson*, 392 N.W.2d at 572, and the mere fact that the inheritance money went into a bank account from which the parties paid bills, alone, is insufficient to destroy its nonmarital character, *see Nash*, 388 N.W.2d at 781.

The undisputed evidence at trial was that, within two months of receiving a $25,000 inheritance from his father, Ostrosky bought a $20,000 piano by which to remember his parents. Erickson concedes that this testimony was undisputed, but argues that the district court was nonetheless not required to accept it, pointing out that "[t]he finder of fact is not required to accept even uncontradicted testimony if the surrounding

facts and circumstances afford reasonable grounds for doubting its credibility." *Varner v. Varner*, 400 N.W.2d 117, 121 (Minn. App. 1987) (citing *Waite v. Am. Family Mut. Ins. Co.*, 352 N.W.2d 19, 22 (Minn. 1984)). But the district court did not make credibility findings, and Erickson has pointed to nothing in the facts and circumstances in this case that would give the district court reasonable ground for doubting the veracity of Ostrosky's testimony. What remains is Ostrosky's undisputed testimony that his purchase of the piano was traceable to the inheritance money.

We conclude that the district court's finding that Ostrosky did not sufficiently trace the piano to a nonmarital source is clearly erroneous, and therefore the court erred by characterizing the piano as marital.

2008 Tax Liability or Refund

At the time of trial, the parties' joint 2008 tax returns had not been completed. Ostrosky argues that the district court abused its discretion by apportioning to him solely any joint tax liabilities for 2008, but ordering that any refund be divided equally.

The law does not require an exactly equal division of property, but rather only a just and equitable one. Minn. Stat. § 518.58, subd. 1 (2010); *see also Crosby v. Crosby*, 587 N.W.2d 292, 297 (Minn. App. 1998) ("An equitable division of marital property is not necessarily an equal division."), *review denied* (Minn. Feb. 18, 1999); *Justis v. Justis*, 384 N.W.2d 885, 888 (Minn. App. 1986) ("[T]he property division need not be mathematically equal to be just and equitable."), *review denied* (Minn. May 29, 1986). Debt apportionment is part of property division; district courts are "not required to apportion marital debts but [are] only required to meet the just and equitable standard of

property divisions." *Berenberg v. Berenberg*, 474 N.W.2d 843, 848 (Minn. App. 1991), *review denied* (Minn. Nov. 13, 1991). The district court has broad discretion to divide property in dissolution actions and its decision will not be overturned on appeal except for a clear abuse of discretion. *Reck v. Reck*, 346 N.W.2d 675, 678 (Minn. App. 1984), *review denied* (Minn. Apr. 25, 1984).

Ostrosky earned more than 99% of the couple's income in 2008. The district court's division of the tax debt need not be equal; it need only be logical and equitable. Because Ostrosky earned the vast majority of the income, the court's order that he bear the tax burden was neither illogical nor inequitable. Likewise, the court's order that any refund be divided equally was neither illogical nor inequitable, given the court's generally equal division of the parties' other assets.

Noting the parties' disparate resources, the district court stated in its memorandum and order on the parties' motions for amended findings or a new trial: "That husband may have borne a greater financial burden in the winding down of this marriage accords with the totality of the evidence admitted at trial, and is fair under all the circumstances." Because the district court's treatment of the parties' 2008 income-tax liability or refund was not a clear abuse of discretion, we will not disturb it.

Allocation of Minor Child's Health-Care Insurance Premiums

Finally, Ostrosky argues that the district court erred by requiring that he be solely responsible for the minor child's medical coverage. Minnesota law provides:

> Unless otherwise agreed to by the parties and approved by the court, the court *must* order that the cost of health care coverage and all unreimbursed and uninsured medical

> expenses under the health plan be divided between the obligor and obligee based on their proportionate share of the parties' combined monthly PICS.

Minn. Stat. § 518A.41, subd. 5(a) (2010) (emphasis added). Appellant argues that the district court erred by not allocating the costs of the premiums pursuant to this statute, and instead "requiring [Ostrosky] to pay the entire cost of such insurance."

Erickson argues that the district court was not required to allocate the cost of the minor child's insurance because the marginal cost of the insurance is zero, relying on a child-support guidelines worksheet submitted by Ostrosky along with his proposed findings of fact and conclusions of law after trial. But this worksheet is not part of the record because it was not received in evidence at trial. At the close of trial, the court stated, "That completes the record." And Ostrosky argues that the worksheet only states a cost of $0 because he left that field blank because he did not yet know the cost.

Neither party presented any evidence at trial about the cost of the child's insurance. The record therefore contains no evidence to support Erickson's argument that the district court's failure to divide the premiums in proportion to the combined monthly PICS was harmless or justified because the cost was zero. Under the plain language of section 518A.41, subdivision 5(a), the district court erred by not dividing the costs of the child's insurance premiums between the parties "based on their proportionate share of [their] combined monthly PICS."

Spousal Maintenance

After making detailed findings under Minn. Stat. § 518.552, subd. 2 (2010), the district court found that Erickson had reasonable monthly living expenses in the amount

of $6,676, that she had the potential to earn $1,359 per month working, and that an award of $5,000 per month for maintenance and $543 per month for child support would allow her to "meet[] her monthly expenses" and allow Ostrosky to "exceed[] his monthly expenses." Erickson does not challenge the district court's award except to argue that the court abused its discretion by failing to properly consider the tax consequences of her maintenance award. Erickson points out that the court found that it was considering the tax impact of the award, but argues that the amount of the award belies that finding.

We review the district court's spousal-maintenance award for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). The court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it misapplies the law. *Id.*

A district court may award maintenance in an amount that it "deems just" to enable the recipient to meet his or her reasonable needs considering the marital standard of living. Minn. Stat. § 518.552, subds. 1, 2 (2010). In setting an amount, the district court must consider "all relevant factors" including the obligee's resources, the obligee's employability, the marital standard of living, the duration of the marriage and the obligee's absence from the employment market, the obligee's loss of earnings due to being out of the employment market, the obligee's age and physical and emotional condition, the obligor's ability to pay while still meeting his or her reasonable needs, and the contributions of each party to the marital property and the furtherance of the other's career. *Id.*, subd. 2. The district court may consider the tax consequences of the award when it has a "reasonable and supportable basis for making an informed judgment as to

the probable liability." *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). But the court should not be required to speculate regarding the tax consequences of its decision. *See Miller v. Miller*, 352 N.W.2d 738, 744 (Minn. 1984) (discussing tax consequences of property division).

Erickson presented no evidence of her expected tax burden to the district court—she points out that she attached an estimate to her proposed findings of fact, conclusions of law, and order, but this document was not admitted at trial and is not part of the factual record. The parties, not the district court, are responsible for providing the court with evidence that would allow the court to rule in their favor. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). A party may not complain on appeal that information needed to rule in the party's favor was lacking when the reason the information was lacking was that the party failed to provide it. *Id.* Given the lack of any evidence in the record of the tax consequence of the maintenance award, we conclude that the district court did not abuse its discretion by failing to expressly adjust the award upward to account for taxes.

Affirmed in part, reversed in part, and remanded.