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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1339**

In re the Marriage of: Patricia Ann Szarke, petitioner,
Respondent,

vs.

Steven Bernard Szarke,
Appellant.

**Filed August 19, 2013
Affirmed in part, reversed in part and remanded
Toussaint, Judge***

Wright County District Court
File No. 86-FA-10-6849

Walter G. Bauch, Mark H. Gehan, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul,
Minnesota (for respondent)

Suzanne M. Remington, James T. Williamson, Mylene A. Landry, Hellmuth & Johnson,
PLLP, Edina, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge;
and Toussaint, Judge.

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

UNPUBLISHED OPINION

TOUSSAINT, Judge

Following a dissolution and property division, appellant Steven Bernard Szarke challenges (1) the district court's allocation of funds appellant put into foreign scams to him as an asset; (2) the district court's decision to order the sale of a cabin property; and (3) the district court's award of conduct-based attorney fees to respondent Patricia Ann Szarke. Because the district court did not abuse its discretion in allocating funds to appellant as an asset in making an equitable property division, we affirm that part of the district court's decision. However, because the district court's findings regarding the value and disposition of the cabin property are conflicting, we reverse the order to sell that property and remand the issue to the district court to clarify its decision regarding the property. Finally, because we conclude that two of the three bases for the district court's award of attorney fees are not permissible, we reverse the district court's award of attorney fees and remand so that the district court may award an amount appropriate to the remaining basis.

DECISION

I. Did the district court abuse its discretion by assigning the lottery scam funds to appellant as an asset?

Upon marital termination, the district "court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property." Minn. Stat. § 518.58, subd. 1 (2012).

The court shall base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party. The court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker. 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.

Id. A division of marital property must be equitable, but not necessarily equal. *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). “District courts have broad discretion over the division of marital property and appellate courts will not alter a district court’s property division absent a clear abuse of discretion or an erroneous application of the law.” *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). A district court abuses its discretion in dividing property if it resolves the matter in a manner “that is against logic and the facts on record.” *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

The district court allocated \$286,198 in funds that appellant sent to lottery scam perpetrators to him as an asset in the property division. Appellant sent these funds between 2007 and 2010 to individuals who contacted him by phone and told him that he won money in a foreign lottery, but that he needed to pay taxes and fees in order to collect his winnings. However, appellant had never entered any such lottery and was told multiple times by police that this was a scam and that he would receive nothing. Despite those warnings, appellant continued to send money without respondent’s knowledge or consent, except as to one payment that respondent knew about.

First, appellant argues that the district court erroneously allocated the lottery scam funds to him under Minn. Stat. § 518.58, subd. 1a (2012). That subdivision addresses a party who, without the consent of the other party and in contemplation of commencing or during the pendency of the dissolution, has “transferred, encumbered, concealed, or disposed of marital assets” except in the usual course of the parties’ business or for necessities. *Id.* When the district court finds that this has occurred, “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.*

Appellant notes that the district court referred to appellant’s actions as to the lottery scam as a “dissipation” of marital assets, a term often associated with section 518.58, subdivision 1a. *See, e.g., Baker v. Baker*, 753 N.W.2d 644, 653–54 (Minn. 2008) (referencing a spouse’s possible “dissipation” of marital assets and quoting subdivision 1a). Appellant also argues that the district court relied on subdivision 1a related cases in assigning him the lottery scam funds as an asset. *See Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987) (holding district court did not abuse its discretion by crediting cash advance to spouse for his disposition of marital assets).¹

¹ The district court also cited to an unpublished decision of this court. We note that unpublished cases are not precedential and should not be relied on. Minn. Stat. § 480A.08, subd. 3(c) (2012); *see also Vlahos v. R & I Constr. of Bloomington Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stating that the district court’s reliance on an unpublished case of this court was misplaced “both as a matter of law and as a matter of practice”).

The district court concluded that appellant's conduct "was a dissipation of the marital assets of the parties which in equity requires the Court to place those monies on [appellant's] half of the balance sheet." Equity is a consideration in subdivision 1 but not in subdivision 1a. *Compare* Minn. Stat. § 518.58, subd. 1 (requiring the district court to "make a just and equitable division of the marital property"), *with id.*, subd. 1a (stating that the district court "shall compensate the other party," upon finding that a party improperly "transferred, encumbered, concealed, or disposed of marital assets"). Thus, we do not agree with appellant that the district court relied on subdivision 1a in its allocation of the lottery scam funds to him as a marital asset. Nor do we agree that, because subdivision 1a did not apply, the district court is precluded from achieving the same result under subdivision 1. *See Fick v. Fick*, 375 N.W.2d 870, 874 (Minn. App. 1985) (holding that, even where "the evidence does not establish that [a party] purposefully concealed, dissipated, or misused [marital] assets in anticipation of the divorce," a party may be credited or charged with that property for division purposes if the party "nevertheless exercised dominion over the property and had discretion over the use of the money").

Second, appellant argues that the district court "should have comprehensively analyzed the relative contributions by both parties to the acquisition of marital assets," and that the district court instead "singled out [appellant's] conduct regarding the foreign scam payments." Appellant's suggested comprehensive analysis is unsupported by Minnesota law. According to statute, "[i]t 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.” Minn. Stat. § 518.58, subd. 1. Further, several cases affirmed an equal division of assets where one party produced most of the income of the parties. *See, e.g., Zander v. Zander*, 720 N.W.2d 360, 370 (Minn. App. 2006) (holding that the district court did not abuse its discretion by awarding an equal distribution of property despite finding that one party contributed “most” of the parties’ income), *review denied* (Minn. Nov. 14, 2006); *Gummow v. Gummow*, 356 N.W.2d 426, 429 (Minn. App. 1984) (“The [district] court’s award of assets in strict proportion to the income earned by each party during the marriage was error since the statutory presumption of substantial contribution by each spouse was not rebutted.” (quotation marks omitted)). Moreover, there is record evidence that respondent significantly contributed to the marital estate by managing the parties’ properties, such that the district court did not abuse its discretion by evenly dividing the marital property.

Further, the requirement that the district court “consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property,” addresses situations where one party makes a unique and specific contribution towards the preservation or depreciation of the marital estate. Minn. Stat. § 518.58, subd. 1; *see Letsch v. Letsch*, 409 N.W.2d 239, 243 (Minn. App. 1987) (“Once this conclusive presumption is applied, however, the [district] court may determine that a fair division is not exactly one-half.”). Thus, when a party sells property valued at \$90,000 for less than that amount, the party can be credited with the full value in the property division as an advance on the final distribution of property. *Quick v. Quick*, 381 N.W.2d 5, 6, 8 (Minn. App. 1986). Only when there is substantial unjustified inequity in

the property division, will this court reverse the division. *See Weikle v. Weikle*, 403 N.W.2d 682, 686–87 (Minn. App. 1987) (reversing a property division as inequitable because the district court allowed a party to dissipate marital funds and impermissibly considered child support as a factor in the property division), *review denied* (Minn. June 30, 1987). We do not conclude that the district court abused its discretion by declining to engage in appellant’s suggested analysis relative to the lottery scam funds.

Third, appellant argues that the district court violated the requirement in section 518.58, subdivision 1, that it divide the property “without regard to marital misconduct,” because the allocation of the lottery scam funds was an “unmistakable punishment of [a]ppellant for marital misconduct . . . contrary, as a matter of law, to Minn. Stat. § 518.58, subd. 1.” However, following the enactment of the bar on consideration of marital misconduct, this court has approved the failure to preserve marital assets as a proper consideration in the division of the marital estate. *See Sirek*, 693 N.W.2d at 900 (“The district court may not divide the property on the basis of marital misconduct, but it may consider factors such as [a party’s] contribution to the preservation of the Farmland.” (citation omitted)). Thus, the district court did not impermissibly consider appellant to have committed misconduct.

Finally, appellant argues that the district court inequitably divided marital property through its decision on the lottery scam funds. Appellant cites *Gummow*, which held that the district court abused its discretion by dividing assets according to the parties’ respective incomes, 356 N.W.2d at 429, but then argues that, if the district court’s division of the property creates an unequal distribution of the property, “the district court

must take into consideration each party's contribution" to the marital estate. Appellant also cites *Ziemer v. Ziemer*, 386 N.W.2d 348, 351 (Minn. App. 1986), *review denied* (Minn. July 16, 1986), in which this court reversed the district court's allocation of all of the marital assets to one party. But neither of these cases is applicable to this case. The district court neither divided the property so unevenly that one party was left with nothing nor apportioned the property according to the parties' respective incomes. Rather, the district court presumed that the parties contributed equally, and then determined that appellant's actions in depreciating the marital estate, considering the equities of the situation, required deviation from an equal division.

The equities of this case support the district court's decision. Appellant, without the knowledge of respondent, sent money to a person he had never met to pay taxes on winnings from a lottery he never entered and continued this behavior despite being told multiple times by police officers that these were scams and that he would receive nothing from them. Further, appellant refused to cooperate in going after the perpetrators. Considering the egregious nature of this situation, we cannot conclude that the district court abused its discretion in declining to extend appellant's victimization to respondent.

II. Did the district court abuse its discretion by ordering the sale of the Deerwood property?

The parties, supported by expert testimony, asked the court to resolve the value and disposition of a cabin property (the Deerwood property). Appellant presented the testimony and report of a real estate appraiser who was originally hired jointly by the parties. The appraiser stated that, because roughly half of the property was covered with

a pond that could be used for only limited recreation, the property's value was \$185,000. Respondent presented the testimony of a real estate agent, who compared the Deerwood property to properties adjacent to navigable water, and valued the property at \$245,000 to \$260,000. The district court stated that "[n]either party has sustained their burden of proving the Deerwood real property's fair market value by a preponderance of the evidence," but also stated that "[t]he Court finds that the fair market value of the Deerwood property is \$185,000." Ultimately, the district court stated that "[t]he market will determine its fair market value as the Court is ordering the property to be sold."

Appellant argues that the district court abused its discretion by ordering the sale of the Deerwood property to assess the fair market value of the property. The parties agreed that appellant should be awarded the property. The district court's findings of fact on the value of the property appear conflicting. The district court could have properly ordered the property sold to set the value. *See Nardini v. Nardini*, 414 N.W.2d 184, 188 (Minn. 1987) (stating that district courts "can order the sale or liquidation of the asset and make a just and equitable division of the proceeds of sale or liquidation"). But setting the Deerwood property's value implicates another option presented by *Nardini*: the district court could have properly "determine[d] the value of the asset, order[ed] distribution of the entire asset to one of the parties, and order[ed] the recipient to pay to the other spouse a just and equitable share of the value of the asset." *Id.* Indeed, the district court

assigned the Deerwood property to appellant, though it also split the proceeds, subject to the payment of expenses and the property division equalizer.²

Because of the district court's conflicting findings on the fair market value of the property and because the district court's order to sell the property does not fit the options presented under *Nardini*, we conclude that the district court abused its discretion as to the Deerwood property. As a result, we reverse that order and remand the issue to the district court to determine an appropriate disposition concerning the Deerwood property under *Nardini*.

III. Did the district court abuse its discretion by awarding conduct-based attorney fees to respondent?

A district 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 (2012). "An award of conduct-based attorney fees is reviewed for an abuse of discretion." *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). The party moving for conduct-based attorney fees must establish that the adverse party's conduct justifies such an award. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). The district court must make sufficient findings to show that an award of attorney fees is supported by the appropriate law and facts in the record. *See Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001)

² We note that the parties were required to split the proceeds from the sale of another property, and that both parties assigned the Deerwood property to appellant in their suggested division of the assets. Moreover, based on statements from the parties at oral argument, it appears that a resolution on this issue may be reached without further assistance from the district court.

(stating district court's inadequate findings concerning attorney fees award precluded effective review), *review denied* (Minn. Feb. 21, 2001).

The district court awarded respondent \$25,000 in conduct-based attorney fees. The district court predicated this award on (1) appellant's argument that he should not be allocated the lottery scam funds as a marital asset, (2) appellant's allegation that respondent had misappropriated marital funds while appellant was hospitalized just prior to the parties' separation, and (3) appellant's argument that an annuity he purchased with income from his law practice should be non-marital because he met the client in a non-representative capacity prior to the marriage. The district court characterized these positions, variously, as "obstinate," a "refusal to take responsibility," and without a "basis in the law or a reasonable extension of the law."

Essentially, as to the lottery scam funds and respondent's alleged misappropriation of funds while appellant was hospitalized, the district court awarded attorney fees against appellant because he failed to accept respondent's positions before trial. We do not believe that appellant's refusal to accept the results prior to trial is unreasonable or a permissible basis on which to sanction a party through conduct-based fees. *Cf. Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn. App. 1999) (ordering a spouse to pay attorney fees on appeal under section 518.14 because his positions were "duplicitous and disingenuous"). Therefore, we reverse the district court's award of attorney's fees on these two bases.

However, appellant's argument that the annuity was his non-marital property is legally unsupportable. Thus, the district court did not abuse its discretion in imposing

conduct-based attorney fees on that basis. But in light of our reversal of the other reasons for the imposition of the attorney fees award, we remand so that the district court may determine an amount of fees appropriate to the additional expense caused by appellant's argument regarding the annuity.

Affirmed in part, reversed in part, and remanded.