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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2243**

In re the Marriage of:
Michael Kenneth Mahowald, petitioner,
Appellant,

vs.

Teresa Elizabeth Mahowald,
Respondent.

**Filed September 9, 2013
Affirmed
Rodenberg, Judge**

Dakota County District Court
File No. 19AV-FA-11-3579

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Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant-husband contends that the district court erred by (1) determining that wife had proven and traced a nonmarital interest in the parties' homestead; (2) finding that the survivorship interest in appellant's pension plan awarded to respondent-wife has

a present value of “zero”; (3) offsetting against wife’s share of the marital estate only \$25,000 for her gambling losses during the marriage, and (4) awarding wife temporary spousal maintenance. We affirm.

FACTS

Appellant-husband Michael Kenneth Mahowald and respondent-wife Teresa Elizabeth Mahowald, n.k.a. Teresa Elizabeth Pretasky, were married on December 14, 1991. Until their separation in October 2011, they lived in a home that had been owned by wife prior to the marriage. Although there are no children of the marriage, each party has adult children from previous relationships.

At the time of the marriage, wife had equity in the homestead of \$7,400. The property was improved during the parties’ marriage with the addition of new siding, a deck, a remodeled kitchen, and a new garage/shop. The home was refinanced three times during the marriage, including one refinancing from which a 2009 Harley Davidson motorcycle was purchased. The parties also owned rental real estate at the time of trial, which has since been sold. The parties owned various checking, savings, and investment accounts, including a joint account that was closed when the parties separated.

At the time of the parties’ marriage, wife operated a daycare facility and the parties made joint use of wife’s earnings. Although wife retired in 2011, she returned to part-time work in April 2012. She now receives monthly social security benefits of \$370, and earns a gross monthly income of \$1,113 from her part-time job. Husband worked as an iron worker for 39 years until his retirement in 2009. The parties made joint use of his earnings. He is a vested participant in a pension plan and receives a gross monthly

pension benefit of \$3,083.50 (\$2,578.50 net). Husband's pension is partly nonmarital, as a result of his employment prior to the marriage. He also does woodworking and has performed "side jobs" out of the family's garage, both during his working years and after his retirement. The garage has been renovated to accommodate husband's woodworking. He has purchased specialized equipment, advertised his woodworking business, and engaged in marketing efforts. He testified at trial that he had made "a couple hundred bucks here or there" from woodworking and that he planned to expand this business.

At a two-day bench trial in July 2012, the parties testified about their assets, debts, marital estate, and nonmarital claims. Wife enjoys gambling at casinos (which she described at trial as a "hobby") and she wagered with earnings from her part-time job and from her social security benefit payments. She reported both winnings and losses for tax purposes and testified that, when she won or had money left over, she would deposit it into the parties' bank account. The district court also heard testimony from husband's expert concerning both the present value of the marital portion of husband's pension and the present value of wife's survivorship rights to husband's pension. The district court issued its findings of fact, conclusions of law, and order for judgment on August 3, 2012. Both parties moved for amended findings of fact and conclusions of law. The district court issued an amended order on October 17, 2012. This appeal from the resulting judgment and decree followed.

DECISION

I.

Husband challenges the district court's award to wife of a portion of the current value of the homestead corresponding to her premarital interest in the homestead. Husband agrees that wife had \$7,400 in equity in the home prior to the parties' marriage in 1991, but argues that there remains no identifiable nonmarital interest in the property.

We review whether property is marital or nonmarital de novo, but we defer to the district court's findings of fact. *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008). All property acquired during a marriage is presumed to be marital; property acquired before the marriage is nonmarital. Minn. Stat. § 518.003, subd. 3b (2012); *Antone v. Antone*, 645 N.W.2d 96, 100-01 (Minn. 2002). Nonmarital property includes property acquired by either spouse before the marriage, and property that is "acquired in exchange for or is the increase in value of property" acquired before the marriage. Minn. Stat. § 518.003, subd. 3b(c). "Increases in value of nonmarital property remain nonmarital if shown to be attributable solely to market forces or conditions, such as simple appreciation in value of an asset." *Kerr v. Kerr*, 770 N.W.2d 567, 570 (Minn. App. 2009) (quotation omitted). "To overcome the presumption that property is marital, a party must demonstrate by a preponderance of the evidence that the property is nonmarital." *Antone*, 645 N.W.2d at 101 (citing Minn. Stat. 518.54, subd. 5 (2000)). A nonmarital interest in property may be established based upon credible testimony. *See, e.g., Doering v. Doering*, 385 N.W.2d 387, 390 (Minn. App. 1986) (affirming the district court's resolution of conflicting testimony regarding the amount of a party's nonmarital interest in the homestead). We

defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Husband first argues that wife's nonmarital share of the property was extinguished by the couple having thrice refinanced the home. Husband concedes that "the record does not provide details on the parties' different refinancings of the home" but argues that wife has failed to meet her burden to "prove her case."

Husband cites *Senske v. Senske*, 644 N.W.2d 838, 840–41 (Minn. App. 2002), for the proposition that wife's nonmarital interest in the home was extinguished when the parties refinanced it and took out a line of credit. In *Senske*, we considered the narrow issue of whether the formula in *Schmitz v. Schmitz*, 309 N.W.2d 748, 750 (Minn. 1981), applies "when the parties refinanced the home for its entire market value and none of the proceeds was put into the new equity." 644 N.W.2d at 840. We concluded in *Senske* that, "when the parties refinanced the home, *all of the equity in the home, including respondent's nonmarital share, was extinguished*. The money from this refinancing was used to purchase furniture and for home improvements; *it did not go toward payments on the home*." *Id.* at 841. We also concluded that "[b]ecause no identifiable portion of the home's current equity can be traced to a nonmarital source, the presumption that all of the equity is marital property has not been rebutted and the *Schmitz* formula does not apply." *Id.* at 842.

Less than one month after our decision in *Senske*, the Minnesota Supreme Court issued its decision in *Antone*, wherein it "reject[ed] appellant's argument that respondent

withdrew his nonmarital equity in the homestead by refinancing the homestead.” 645 N.W.2d at 103. The *Antone* court noted that

[t]he [district] court did not make findings as to how the parties used the proceeds from the refinanced first mortgage and the second mortgage. The [district] court found that the debt secured by the home equity line of credit was marital. Appellant concedes that she does not know how the proceeds from the additional encumbrances were used. Thus, appellant failed to demonstrate by a preponderance of the evidence that the loan proceeds were used by respondent for nonmarital purposes.

Id. On remand, the supreme court directed the district court to “determine the fair market value of the homestead at the time of the marriage and at dissolution, and to apply the *Schmitz* formula to determine the marital and nonmarital interests in the homestead.” *Id.* at 104.

More recently, in *Kerr*, we declined to follow *Senske*, noting that “*Senske* was decided approximately one month before *Antone*. To the extent that the holding in *Senske* may be inconsistent with the holding in *Antone*, this court follows *Antone*.” 770 N.W.2d at 571 n.3. The issue in *Kerr* was whether a nonmarital interest in a homestead was “lost or decreased” as a result of a refinancing of the parties’ homestead, which decreased the equity in the homestead when it “rolled the closing costs into the new mortgage.” *Id.* at 570–71. We concluded in *Kerr* that a “nonmarital interest is not lost or decreased by increasing the marital debt secured by a homestead: ‘By refinancing the homestead during the marriage, the [marital] estate effectively borrow[s] against its interest in the homestead.’” *Id.* (alteration in original) (quoting *Antone*, 645 N.W.2d at 103). Further, we noted:

Appellant contends that, because the parties removed \$53,000 of equity from the homestead by obtaining a home-equity line of credit, the second mortgage reduced respondent's nonmarital interest. But again, a party who has nonmarital equity in a homestead does not lose that equity by increasing the debt secured by the homestead.

Id. at 571 (citing *Antone*, 645 N.W.2d at 103).

Here, the record contains little information about the three instances in which the parties refinanced the homestead.¹ The parties agree, and the district court found, that wife had \$7,400 of equity in the homestead at the time of her marriage to husband, amounting to 17.6% of the gross value at that time. The district court awarded wife a nonmarital interest in the home based on that 17.6% premarital equity. On this record, and in light of our precedent in *Kerr*, 770 N.W.2d at 570-71, the district court did not abuse its discretion in concluding that wife maintains a nonmarital interest in the homestead. *See also Antone*, 645 N.W.2d at 103.

Husband also argues that, "if wife was able to trace her nonmarital equity, the *Schmitz* formula used to increase it does not apply." Citing *Dorweiler v. Dorweiler*, 413 N.W.2d 572 (Minn. App. 1987), he argues that "the *Schmitz* formula applies only to the appreciation of property not attributable to improvements made by the parties." But the *Antone* court noted that

[t]he *Schmitz* formula may be used to determine marital and nonmarital interests in property acquired . . . before the marriage. . . . The formula recognizes that the net equity at the time of the marriage is nonmarital property because it was

¹ Husband concedes that the record merely reflects that wife's original mortgage on the homestead was \$42,400, that the mortgage balance after the last refinancing was \$75,000, and that the parties obtained a line of credit for \$15,000.

acquired before the marriage. Assuming the property appreciates during the marriage, the formula also recognizes that the increase in value of the property acquired before the marriage—that is, the net equity at the time of the marriage—is nonmarital property.”

645 N.W.2d at 102–03 (quotations and citations omitted). It is true that “[i]mprovements made by the parties are presumed to be marital property.” *Dorweiler*, 413 N.W.2d at 576. But in its division of the marital estate here, the district court specifically accounted for the portion of the current value of the homestead attributable to improvements during the marriage. The district court found that “improvements . . . were made to the homestead during the marriage that increased the value of the property by 20%,” and it subtracted that percentage from the total value of the property before awarding wife her 17.6% nonmarital share of the equity. By doing so, the district court concluded that “[w]ife has established that she has a non-marital interest in the equity of the homestead equal to 17.6% of 80% of the net proceeds from the sale of the homestead.” And the record supports the district court’s finding that the improvements to the homestead increased its value by 20%. The district court did not abuse its discretion by awarding wife a nonmarital interest of 17.6% of that portion of the homestead equity which it determined not to have been affected by improvements made during the marriage.

The record supports wife’s claim to a nonmarital interest in the homestead property, and the district court did not abuse its discretion by determining and valuing wife’s nonmarital interest in dividing the marital estate.

II.

Husband contends that the district court erred in determining that the age difference between and relative health of the parties does not support the district court's determination that the potential survivorship benefits in husband's pension have no present value to wife. Husband seems to argue both that the district court concluded that a survivorship interest is not subject to valuation and that wife's potential survivorship interest was not properly valued.

The first of those arguments, identified by husband's briefing as "[w]hether a survivorship benefit is marital property and subject to division," was not addressed by the district court. The district court concluded, based on the facts of the case and the record at trial, that the survivorship interest in husband's pension benefits had "zero" value. It did not conclude that a survivorship benefit is not an asset or that a survivorship interest in pension benefits may never have value.

The task of valuing and dividing a party's pension falls within the district court's exercise of discretion when dividing the parties' property. *Johnson v. Johnson*, 627 N.W.2d 359, 362 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). A party's pension-plan benefits or rights acquired during the marriage are marital property, and marital property must be justly and equitably divided between the parties. Minn. Stat. §§ 518.003, subd. 3b, .58, subd. 1 (2012). Pension benefits acquired prior to the marriage, and any passive appreciation thereof, are the employee-spouse's nonmarital property. Minn. Stat. § 518.003, subd. 3b; *see also White v. White*, 521 N.W.2d 874, 879 (Minn. App. 1994) (holding that a portion of a retirement plan and annuity acquired prior

to marriage are nonmarital property). A pension may be partly marital and partly nonmarital. *White*, 521 N.W.2d at 878-79.

Here, the district court found that husband's pension was partially marital and partially nonmarital, and it calculated the marital portion of his pension to be 45.5976% of the total monthly benefit, amounting to \$1,406 per month based on husband's expert's testimony. The district court noted wife's objection to this calculation but found that "[o]verall, the determination by [husband's expert] regarding the marital portion of the pension is reasonable." But the district court also found that "[t]he opinion of [husband's expert] regarding adjusting wife's marital portion of the pension based upon her potential survivorship rights is unpersuasive." The district court, having had the opportunity to observe the parties during the course of the trial, and in consideration of the entire record, concluded that "[t]he age difference between the parties and the relative health of the parties [do] not support a determination that the potential survivorship benefits have any present value to wife." Husband's expert's testimony assumed a life expectancy of wife. The district court assigned a "zero" value to wife's potential survivorship benefits based on its consideration of wife's age and health. It divided the marital portion of the pension benefits equally between the parties and assigned no value to the potential survivorship benefits.

The district court was not required to accept the expert opinion concerning the value of wife's potential future receipt of survivorship benefits should she survive husband. *See In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005) ("Qualifying a witness as an expert . . . does not require the court to admit any and all

testimony from that witness, nor does it require the court to find such testimony persuasive.”). Weight and credibility issues regarding an expert’s witness testimony are within the province of the fact-finder. *Id.* The record supports the district court’s reasons for finding this portion of the expert’s valuation testimony unpersuasive. While the district court might well have found the survivorship benefit to have had a present value, it was not bound to do so. That the district court might have been able to find differently than it did is no indication of error. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The district court did not abuse its discretion by assigning no present value to wife’s potential survivorship pension benefits.

III.

Husband argues that the district court abused its discretion by finding that wife had gambling losses of only \$25,000. He contends that the record “clearly show[s]” that wife lost \$49,000 by gambling, and that she admitted to that amount at trial.

“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). When dividing property, a district court abuses its discretion 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 is not required to divide all assets and liabilities equally, but must ensure that the division is just and equitable. *Gummow v. Gummow*, 356 N.W.2d 426, 429 (Minn. App. 1984). The district court is in the best position to weigh the credibility of witnesses. *Goldman v. Greenwood*, 748

N.W.2d 279, 284 (Minn. 2008); *Sefkow*, 427 N.W.2d at 210. And “[w]hen evidence relevant to a factual issue consists of conflicting testimony, the district court’s decision is necessarily based on a determination of witness credibility, which we accord great deference on appeal.” *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009).

At trial, the district court heard testimony from wife about her gambling and that she used her paychecks and social security checks to fund what she described as her “hobby.” Wife disputed the amount of the casino withdrawals (“I think it was more like 43,000”), which husband refers to as “losses.” She also testified that she made cash deposits back into the accounts with money that she withdrew but did not spend and with gambling winnings. The district court found that “wife spent significant amounts of money during the marriage gambling. While the amount of the money spent by wife gambling is disputed and the source of the funds is disputed, the evidence supports a finding that wife dissipated a minimum of \$20,000.00 of marital assets by gambling.” After a hearing on the parties’ posttrial motions, the district court amended its finding to provide that “the evidence supports a finding that wife dissipated \$25,000.00 of marital assets by gambling.” From the “Amended Appendix B” attached to that posttrial order, it is evident that the district court treated the “dissipated \$25,000” as being awarded to wife for purposes of effectuating an equitable division of the marital estate.

Husband argues that the district court erred by finding that the amount and source of wife’s gambling losses were “disputed.” The district court noted, and the record supports, that the amount of the gambling losses was in dispute. Even the gross amount of wife’s withdrawals for gambling purposes was disputed. And the parties disagree on

whether and to what extent wife had made deposits back into the account after withdrawing the funds for gambling purposes.

Wife points out that her gambling losses predate the parties' separation and argues that the parties had an "agreement about how they would use their respective income." Wife testified at trial that "[husband] and I agreed that his side job money was his and the money that I made working . . . was mine. Before that, when I ran the day care center . . . that was both of ours into the same account." Husband counters that the source of the money used for gambling is irrelevant because money earned by a spouse during marriage is presumptively marital property.

The district court did not find that wife's gambling amounted to dissipation or concealment of assets under Minn. Stat. § 518.58, subd. 1a (2012), because the gambling losses in question were not incurred in contemplation of or during this proceeding.² Rather, the district court, exercising its broad discretion to equitably divide the marital estate, charged wife with having received the \$25,000 that it found her to have lost by gambling. *See Gummow*, 356 N.W.2d at 429 (stating that division of marital property must be "just and equitable"). The issue on appeal is not whether the district court might have exercised its broad discretion differently than it did, *id.*, but rather whether the district court abused its discretion, *Sirek*, 693 N.W.2d at 898.

The district court did not clearly err in its finding with respect to the amount of money it found wife to have dissipated by gambling and did not abuse its discretion in

² By its terms, the statute applies where a party "in contemplation of commencing, or during the pendency of, the current dissolution, . . . transfer[s] . . . assets except in the usual course of business . . ." *Id.*

effectuating a just and equitable division of the parties' marital property. Although the district court could have exercised its broad discretion in a different manner, husband has not shown that the division made by the district court constitutes an abuse of that broad discretion.

IV.

Husband argues that the district court abused its discretion by awarding temporary spousal maintenance to wife because the award will require husband to return to the workforce. The district court may award spousal maintenance to a party who is unable to provide for his or her reasonable needs. Minn. Stat. § 518.552, subd. 1(a) (2012). When doing so, the district court considers the obligor's ability to pay spousal maintenance. *Id.*, subd. 2(g) (2012). We review the district court's maintenance award for an abuse of discretion. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). The district court abuses its discretion if its maintenance order is based on clearly erroneous findings. *Id.* "Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quotation omitted). "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangness*, 607 N.W.2d at 474.

[A party] must show that despite viewing [the] evidence in the light most favorable to the [district] court's findings (and accounting for an appellate court's deference to a [district] court's credibility determinations and its inability to resolve conflicts in the evidence), the record still requires the definite and firm conviction that a mistake was made. Only if these conditions are met, that is, only if the findings are "clearly

erroneous,” does it become relevant that the record might support findings other than those that the [district] court made.

Id. We view the record in the light most favorable to the district court’s findings and defer to the district court’s credibility determinations. *Id.* at 472; *Sefkow*, 427 N.W.2d at 210.

Husband argues that, to fulfill his maintenance obligation to wife, he is forced to re-enter the job market. He contends that we should look beyond “[n]umbers alone—the parties’ respective income and expenses”—and consider his retirement status. Wife counters that husband never fully left the workforce, as he has continued to do woodworking “side jobs.”

After weighing the appropriate statutory factors, the district court found that wife was entitled to temporary spousal maintenance until she is eligible for increased social security benefits because her present social security benefits, part-time income, and the portion of husband’s pension awarded to her was not adequate to cover her reasonable monthly needs. The district court also found that “[w]ife is 62 years old and suffers from arthritis and a thyroid condition” and that “[s]he has a 20 pound lifting restriction,” but that wife’s “medical conditions do not prevent [her] from engaging in full time employment.” The district court found that, to meet her reasonable needs, wife requires \$400 per month from husband. These findings are all supported by the record.

The district court also found:

Husband is able bodied and should be able to find part time employment that pays at least as much as wife is able to earn and with this additional income and husband’s share of the

marital assets, husband should be able to provide for his reasonable monthly needs while paying temporary maintenance. . . . Husband has experience in the construction business and retired with the intention of continuing to work doing [wood] working and other construction related activities. There is evidence that husband has in the past and continues to perform [wood] working and construction related work for compensation. Husband admitted doing work for others and earning “a couple hundred bucks” here and there and by “bartering” for his services. It is reasonable to impute part time income of \$1,000.00 per month to husband.

The district court considered husband’s physical condition and found as a fact that he is in “good physical and emotional health” and that “[h]e is capable of engaging in full time employment.” These findings are supported by the record. The record also supports the district court’s finding that husband has the ability to “meet his own reasonable monthly needs and to contribute maintenance to assist wife to meet her reasonable monthly needs.”

The district court awarded wife temporary spousal maintenance of \$400 per month to meet her reasonable monthly needs “until she is eligible for increased social security benefits . . . when husband becomes eligible for social security benefits.” The record supports the district court’s findings, and the district court acted within its broad discretion in awarding temporary spousal maintenance. Although the record might also support different findings or some different resolution on the issue of spousal maintenance, the district court’s findings and conclusions are not erroneous under the applicable standard of review. *Vangness*, 607 N.W.2d at 474. Nor, on this record, do the district court’s conclusions of law constitute an abuse of discretion.

Affirmed.