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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0322**

In re the Marriage of:

Lisa Michelle Johnson, n/k/a Lisa Michelle Bayer, petitioner,
Respondent,

vs.

Kyle David Johnson,
Appellant.

**Filed June 3, 2008
Affirmed
Lansing, Judge**

Ramsey County District Court
File No. DM-F5-03-1739

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Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this appeal from judgment in a marital-dissolution action, Kyle Johnson and Lisa Bayer dispute the division of a partnership interest, the valuation of the partnership interest, the calculation of spousal maintenance, and the order for conduct-based attorneys' fees. Because we defer to the district court's credibility determinations, the findings are reasonably supported by the record, and the district court did not abuse its discretion when it made the challenged determinations, we affirm.

FACTS

Lisa Bayer and Kyle Johnson were married in 1995. Bayer petitioned for marital dissolution in July 2003, and Bayer and Johnson separated in October 2003. In a contested dissolution trial held in late 2005 and early 2006, the primary issue was whether Johnson had acquired a partnership interest in Staffing Partners, an employment-placement business.

Staffing Partners had been purchased by Johnson's father and a business partner in June 2002. The record shows that Johnson had originally planned to purchase Staffing Partners himself, but that the purchase had been placed in his father's name because Johnson had signed a noncompete agreement with his previous employer, another employment-placement business. Bayer introduced evidence showing that—after the parties began contemplating marital dissolution—Johnson decided to keep the business in his father's name even after the noncompete agreement expired.

At the conclusion of the trial, the district court found that Johnson was the equitable owner of his father's fifty-percent partnership interest in Staffing Partners. As a result, the district court ordered Johnson to pay Bayer half the value of his partnership interest. Based on an appraisal, the district court determined that the partnership interest was worth \$255,000.

The district court's judgment provided for spousal maintenance. In determining the amount of maintenance, the district court found that Johnson had been self-limiting his income while working at Staffing Partners. As a result, the district court based the maintenance amount on Johnson's earning capacity of \$150,000.

The judgment also ordered Johnson to pay \$70,500 in attorneys' fees and expert witness fees. The order for fees was grounded on Bayer's need and Johnson's conduct during the trial. The district court found that conduct-based fees were warranted because Johnson's defense was not in good faith, his "deplorable" conduct "unduly contributed to the length of the five day trial," and his "attempts to explain away notes made contemporaneous[ly] with the conduct by [Johnson's attorney] belied credibility."

On appeal, Johnson challenges the district court's conclusion that he had a partnership interest in Staffing Partners, the determination of his income for purposes of spousal maintenance, and the order to pay conduct-based attorneys' fees and expert-witness fees. Bayer, by notice of review, challenges the valuation date of Staffing Partners, the denial of her motion to obtain additional business records, the distribution of the marital home, and the allowance of less than the full amount of her submitted attorneys' fees.

DECISION

I

Johnson challenges on three grounds the district court's conclusion that he had a partnership interest in Staffing Partners. First, he argues that because the business is owned by his father and a business partner, the district court improperly adjudicated the rights of nonparties. Second, he argues that the business was not a marital asset. Third, he argues that he did not conceal his interest in the partnership for purposes of the marital dissolution. We reject all three arguments.

Nonparties' rights

First, the district court did not adjudicate a nonparty's property rights. In a dissolution proceeding, a district court lacks personal jurisdiction over a nonparty and cannot adjudicate a nonparty's property rights. *Danielson v. Danielson*, 721 N.W.2d 335, 339 (Minn. App. 2006). Contrary to Bayer's objection, Johnson has standing to assert the third parties' rights because the district court's distribution of the purported interest resulted in an injury in fact. *See Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 31-32, 221 N.W.2d 162, 165 (1974) (stating that party may acquire standing by suffering injury in fact).

In support of his argument on the district court's lack of authority over the rights of a nonparty, Johnson relies on two cases that addressed interests of a nonparty in a marital dissolution proceeding: *Danielson* and *Sammons v. Sammons*, 642 N.W.2d 450 (Minn. App. 2002). In both of those cases, however, the district court ordered that property be held by a third party in constructive trust. *Danielson*, 721 N.W.2d at 339-40;

Sammons, 643 N.W.2d at 457-58. In this case, in contrast, the district court adjudicated the financial rights of Johnson and Bayer only as they affect Johnson and Bayer. The district court determined that Johnson was the equitable owner of the partnership interest and distributed the *value* of the partnership interest, not the interest itself. Although the court initially granted Bayer a mortgage interest in Staffing Partners to secure payment of her share of the value of Staffing Partners, this security interest was removed in an amended dissolution judgment. Thus, the district court did not adjudicate the rights of nonparties.

Partnership interest as marital asset

Second, the district court did not abuse its discretion or err as a matter of law by concluding that the partnership interest was marital property. Under Minnesota law, “[a]ll property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership.” Minn. Stat. § 518.003, subd. 3b (2006). “To overcome the presumption that property is marital, a party must demonstrate by a preponderance of the evidence that the property is nonmarital.” *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Property may be nonmarital if it is acquired before, during, or after the marriage as a gift, devise, or inheritance made by a third party to one but not to the other spouse. Minn. Stat. § 518.003, subd. 3b(a). Whether property is marital or nonmarital is a question of law on which we exercise independent review, but we defer to the district court’s underlying findings of fact. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 852 (Minn. 2003).

Johnson asserts that the district court did not specifically determine that the partnership interest was a marital asset. But the detailed findings provide otherwise. The findings state that Johnson “is the owner of a fifty percent interest in the Staffing Partners businesses” and that the court “compensate[d] the marital estate by crediting the value of these businesses as an advance against [Johnson’s] share of the marital estate.” We conclude that the district court made findings that support its conclusion that Johnson had an equitable interest in the partnership and the interest was marital property.

The findings track Johnson’s efforts during the marriage to acquire a partnership interest in Staffing Partners. In February 2002, Johnson sought attorney Bryan Jamison’s assistance in purchasing the Administrative Group portion of the Staffing Partners businesses. In March, the transaction changed to include the purchase of the Financial Group portion of the businesses. Under the purchase plan, a business partner, who already owned 25% of the Administrative Group, and Johnson would each own 50% of the Financial Group.

In April, Johnson and the business partner met with Jamison to discuss ownership structure. Under the plan, the business partner would own 51% of the Financial Group and Johnson would own 49% of it, and each would own 50% of the Administrative Group. They planned a leveraged buyout of Staffing Partners for \$550,000 over five years, with the purchase price reverting to \$900,000 if it was not paid by the fifth anniversary. At about that time, Jamison learned of Johnson’s noncompete agreement with his employer, Robert Half, International (RHI). Jamison reviewed the agreement and proposed forming a new entity, Trifecta Capital Management, Inc., with Johnson’s

business partner as the sole owner. This entity was used by Johnson to continue negotiating the purchase of Staffing Partners.

In May, acting together, the business partner and Johnson developed a plan for Johnson's father to own the stock for one year to insulate Johnson from noncompete issues and then the father would gift the stock to Johnson. The father's name replaced Johnson's name on purchase agreements. Yet Johnson continued to be deeply involved as the primary negotiator of the purchase. Johnson and Bayer had taken out a home-equity line of credit in April, and Johnson used this line of credit to loan \$10,000 to the business partner and \$30,500 to his father to cover the purchase.

The purchase was completed in June 2002, with Johnson's business partner and father as the title owners of Staffing Partners. Johnson left RHI and began working at Staffing Partners. Soon after the purchase, Johnson and his business partner discussed creating an interim shareholder agreement between his father and the business partner and then revising that agreement after Johnson became a full owner. No shareholder agreement appears in the record.

In April 2003 Johnson notified Jamison of his upcoming marital dissolution. Jamison proposed not completing the planned transfer in July 2003, and Johnson agreed. In July, Bayer formally filed for dissolution, and Jamison advised Staffing Partners to stop paying Johnson's compensation in the name of Bayer.

In a deposition, Johnson's father, when asked what he provided "for the right to become an owner," responded, "Just my signature." The father acknowledged visiting the business premises only four or five times.

These facts support the district court's finding that Johnson had an equitable one-half interest in the partnership. Johnson planned the purchase, participated in the negotiations, helped to fund the purchase, and planned to become a title owner in the future. The father's role was to act as a conduit through which Johnson attempted to conceal from RHI the acquisition of a competing business. *See Pfleiderer v. Pfleiderer*, 591 N.W.2d 729, 732 (Minn. App. 1999) (finding that transferring title to property is not dispositive of whether property is marital or nonmarital). Johnson argues that his interest in Staffing Partners cannot be marital property because it does not have a legal form and is a mere expectancy interest. But the equitable nature of property ownership does not prevent its classification as marital property. *Id.* at 732-33; *see also Nelson v. Nelson*, 400 N.W.2d 763, 765 (Minn. App. 1987) (stating that, in dividing property, district court has power to invoke equity for purposes of reaching just result), *review denied* (Minn. Apr. 23, 1987). Johnson's equitable interest was acquired during the marriage, and the district court did not err in determining that the equitable interest was marital property.

Concealment of marital asset under section 518.58, subd. 1a (2006)

Third, the record supports the district court's determination that Johnson concealed property and that Bayer should be compensated as a result. Minnesota law prohibits concealing or disposing of marital assets in contemplation of commencing, or during the pendency of, dissolution or separation proceedings:

If the court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, 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.

Minn. Stat. § 518.58, subd. 1a (2006).

Johnson disputes the district court's findings that he concealed marital assets in contemplation of dissolution proceedings. He argues that he only concealed his interest from RHI and did not conceal his interest from Bayer.

The district court found that Johnson was "concealing his ownership interest in one half of the Staffing Partners businesses." The district court first determined that Johnson temporarily relinquished title to his father to conceal Johnson's actual ownership interest in order to shield him from suit by RHI for violating his noncompete agreement. The district court further found that the concealment extended beyond the term of the noncompete agreement with the intent to shield the asset from marital property division during the dissolution. The district court based this finding on Jamison's conversation notes from April 9, 2003 showing that Johnson and Jamison discussed the pending dissolution proceedings, that Jamison suggested that Johnson "[n]ot do planned transfer in July" and that Johnson agreed. In addition, the district court's finding was based on a July 2, 2003 email in which Jamison stated, "The Court could also re-think the issue of ownership of the company. One of the primary goals of the [dissolution] settlement should be to keep [Bayer] from acquiring any interest in the company."

The district court concluded that "the operative plan to conceal the ownership interest by deferring the transfer was made contemporaneous[ly] with the commencement of this dissolution of marriage proceeding in violation of the prohibition against

concealing assets as set forth in” Minn. Stat. § 518.58, subd. 1a. It added, “[i]n contemplation of this dissolution of marriage, [Johnson] has concealed, transferred and relinquished temporarily to his father . . . the right to possess the stock/membership units in the Staffing Partners businesses that were to have been transferred in July, 2003.” Johnson testified that alternative inferences could be drawn from these events. But the district court found that the testimony in support of the other inferences was not credible. Credibility determinations are within the province of the district court, and the district court’s findings are supported by the record. Thus, the district court did not err when it concluded that Johnson violated Minn. Stat. § 518.58, subd. 1a.

Johnson argues that crediting Bayer with half the value of his interest in Staffing Partners is inconsistent with the statutory remedy. If Minn. Stat. § 518.58, subd. 1a is triggered, “the court shall compensate the other party by placing both parties in the same position that they would have been in had the . . . concealment . . . not occurred.” He asserts that the proper remedy would be to place the parties in the same position as before the 2002 home-equity line of credit. We conclude that the district court acted within its statutory discretion in framing the remedy. The district court focused on the time of contemplation of dissolution, April 2003. The record supports the district court’s finding that Johnson had an equitable partnership interest, and the district court did not abuse its discretion when it placed Bayer in the same position she would have been had the concealment of Johnson’s partnership interest not occurred.

Marital home

An additional property-division issue, which was raised by Bayer in the district court and on appeal, is the district court's determination that Johnson should receive the marital home. At oral argument, counsel for Bayer withdrew the issue because the property has been foreclosed and is no longer owned by Johnson. The issue is withdrawn as moot, and we do not address it.

II

Both Bayer and Johnson challenge the district court's valuation of the interest in Staffing Partners. Bayer argues that the value on December 31, 2004 rather than the value on March 31, 2004 should have been used. In addition, she argues that the district court erred by denying her request to obtain 2005 financial data to establish the value of Staffing Partners at the time of the trial. Johnson argues that the district court failed to account for Staffing Partners' debt.

Valuation date for partnership interest

"The district court has broad discretion in setting the marital property valuation date." *Grigsby v. Grigsby*, 648 N.W.2d 716, 720 (Minn. App. 2002). The district court set the date of valuation as April 8, 2004 because it was the date of the first pretrial hearing. Minnesota law directs the district court to use the day of the initially scheduled prehearing settlement conference as the date for valuation, "unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable." Minn. Stat. § 518.58, subd. 1 (2006). Based on the applicable statute, April 8, 2004, is the appropriate date of valuation. *Id.* Johnson and

Bayer did not stipulate to a different date and the court did not make specific findings that another date of valuation is fair and equitable.

Bayer alternatively argues that the district court should have applied the December 31, 2004 value of \$375,000 because it represents a substantial change in value from the March 31 value of \$255,000. “If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court *may* adjust the valuation of that asset as necessary to effect an equitable distribution.” Minn. Stat. § 518.58, subd. 1 (emphasis added). The court heard the evidence and concluded that it was “not persuaded to use a different date for valuation.” The district court acted within its discretion when it followed the statutory guidelines in setting the date of valuation.

Furthermore, we cannot conclude that the district court abused its discretion when it denied Bayer’s request for discovery of the value of Staffing Partners at the time of trial. A district court has broad discretion to issue or deny discovery orders and its decision will not be disturbed absent a clear abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Because the district court properly applied the statutory valuation date and further discovery would have required a second continuance, we conclude that the district court did not abuse its discretion when it denied further discovery.

Value of Staffing Partners interest

Johnson argues that the district court failed to consider the Staffing Partners’ debt when determining the value of the partnership interest. Determining the specific value of an asset is a finding of fact. *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44

(1975). The district court's findings of fact on valuation issues, "when made without a jury, shall not be set aside unless clearly erroneous on the record as a whole." *Id.* Broad deference is appropriate because "valuation is necessarily an approximation in many cases." *Id.* Accordingly, the value arrived at by the district court need only fall "within a reasonable range of figures." *Id.* The district court may value a business in a dissolution proceeding by determining the value of the asset, ordering distribution of the entire asset to one of the parties, and ordering the recipient to pay to the other spouse a just and equitable share of the value of the asset. *Nardini v. Nardini*, 414 N.W.2d 184, 188 (Minn. 1987).

The district court found that the value of Johnson's partnership interest was \$255,000 based on the valuation report submitted by Bayer's business appraiser. The appraiser first determined the value of Staffing Partners and then determined the value of Johnson's fifty-percent share. The appraiser applied a ten-percent discount for reduced marketability of Johnson's share as a nonmajority owner. Johnson did not present his own business appraiser. The district court declined to subtract debt from the partnership value because "the purchase is a leveraged buyout, and . . . the business revenues themselves are being used to pay off this debt." We agree with Johnson that whether or not the purchase is a leveraged buyout, the valuation should include the entity's debt.

But the district court's second reason for declining to offset the value of the company's debt is well within the district court's discretion. The district court found that the loan was taken out "one week after the seller's testimony on October 28, 2005." This was over a year and a half after the district court's valuation date of April 8, 2004. At the

time of the valuation the entity did not have the debt. The district court did not abuse its discretion when it did not consider the loan in determining the value of the partnership interest.

III

Johnson also challenges the district court's determination of his income for purposes of spousal maintenance. When it is impracticable to determine actual income or the actual income is unjustifiably self-limited, earning capacity is an appropriate measure of income. *Veit v. Veit*, 413 N.W.2d 601, 605 (Minn. App. 1987).

The district court found that Johnson was "voluntarily self-limiting his income with an annual earning capacity of at least \$150,000." The district court based this determination on a review of Johnson's 2000 and 2001 tax returns which listed his RHI W-2 income of \$116,531 in 2000 and \$121,655 in 2001, Johnson's reported earnings of \$97,987 from RHI for the first six months of 2002, Johnson's testimony in the RHI litigation that he was earning \$200,000 when he left RHI, a vocational expert's conclusion that Johnson had an earning capacity of \$150,000, and Johnson's efforts to conceal his ownership interest in Staffing Partners. The district court did not find Johnson's 2003 Staffing Partners W-2 income of \$40,841 and 2004 Staffing Partners W-2 income of \$49,767 reliable because Johnson "retained the capacity to earn what he had previously earned and engaged in behavior that led to self-limiting his income by trying to hide his ownership interest in Staffing Partners while accepting a substantially lesser W-2 salary."

In light of the district court’s findings of a salary diminution to conceal ownership, the district court reasonably determined it could not rely on the last two years of Johnson’s documented W-2 income. Thus, under *Veit*, the district court could base its spousal maintenance calculation on Johnson’s earning capacity. *Id.* The district court therefore did not err when it deemed Johnson’s income to be his earning capacity of \$150,000.

IV

Both Johnson and Bayer challenge aspects of the district court’s determination on legal fees and expert-witness fees. Johnson challenges the imposition of conduct-based fees. Bayer—who claims she incurred more than \$100,000 in fees—argues she should have received all, rather than a portion, of her submitted attorneys’ fees. We review an order of attorneys’ fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

Conduct-based attorneys’ fees may be imposed under Minn. Stat. § 518.14 (2006) “against a party who unreasonably contributes to the length or expense of the proceeding.” The district court found that Johnson’s defense was not in good faith, that his “deplorable” conduct “unduly contributed to the length of the five day trial,” and that his “attempts to explain away notes made contemporaneous[ly] with the conduct by [Jamison] belied credibility.” These findings are supported by the record, which includes evidence that Johnson was hiding assets. Thus, the district court did not abuse its discretion when it ordered Johnson to pay Bayer’s legal fees. The district court is not, however, required to order payment of *all* attorneys’ fees. *See Cisek v. Cisek*, 409

N.W.2d 233, 238 (Minn. App. 1987) (holding that district court did not abuse its discretion when it ordered payment of only \$750 of party's \$7000 in attorneys' fees), *review denied* (Minn. Sept. 18, 1987). Thus, the district court did not abuse its discretion by ordering that Johnson pay \$70,500 of Bayer's fees.

Affirmed.