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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0947**

In re the Matter of:
Thomas C. Dukowitz, petitioner,
Appellant,

vs.

Diane M. Dukowitz,
Respondent.

**Filed July 15, 2008
Affirmed
Halbrooks, Judge**

Stearns County District Court
File No. F7-04-2541

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Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant argues that the district court abused its discretion in the dissolution
judgment on the following issues: (1) the award of spousal maintenance; (2) the district

court's imputation of income on the ground that he is voluntarily underemployed; (3) the referral of the issue of his income to a child-support magistrate; (4) the district court's distribution of nonmarital assets; and (5) the award of attorney fees to respondent. Because we conclude that the district court properly exercised its discretion, we affirm.

FACTS

Appellant Thomas Dukowitz and respondent Diane Dukowitz were married on October 26, 1996; they have three minor children: SMD, age 15; JRD, age 13; and AND, age 6. The parties were awarded joint legal custody, and respondent was awarded sole physical custody.

This matter has been before the district court on multiple occasions. The initial dissolution judgment was filed on January 13, 2006; in it, the district court concluded that appellant's claimed income was a result of voluntary underemployment for the purpose of avoiding child-support and maintenance obligations and ordered appellant to pay temporary spousal maintenance of \$300 per month and child support in the amount of \$903 per month.¹ The district court ordered the sale of the marital home and use of \$106,998.45 of the net sale proceeds to pay the parties' debts, including respondent's nonmarital student loans in the amount of \$29,372.85. The balance of \$71,011.93 was split between the parties, but the district court ordered that appellant's portion be reduced to pay his child-support arrearage, day-care expenses, personal debt, and a contribution to

¹ At the time of the dissolution decree, there was a previous temporary support order requiring appellant to pay monthly child support in the amount of \$903. This order became effective July 14, 2004, and at the time of the dissolution decree, appellant had accrued arrears in the amount of \$10,603.18.

respondent's attorney fees. As a result, appellant was awarded \$11,228.55 and respondent was awarded \$59,783.38 from the sale of the home. Appellant was required to pay his own attorney fees, and the district court reserved the final determination of respondent's attorney fees, pending submission of an accounting of fees from respondent's attorney.

Appellant moved the district court for a new trial and amended or supplemental findings, and respondent filed a counter-motion seeking additional attorney fees beyond those awarded in the initial dissolution judgment. On June 23, 2006, the district court denied appellant's motion for a new trial but made amended findings concerning respondent's student-loan debt, marital property, and its determination that appellant was voluntarily underemployed. The district court concluded that respondent was entitled to permanent spousal maintenance. Because appellant had "submitted new-to-the-Court evidence of income that has not had the benefit of examination on the record," the district court "refer[ed] the issues of income and child support to the Child Support Magistrate [CSM] in Expedited Process." The district court denied respondent's motion for additional attorney fees beyond those awarded in the initial dissolution judgment, stating that "[r]espondent is not without fault" in the protracted length of the dispute, having provided "no less than two additional submissions to amend the proposed findings, protraction in regard to the filing of the proper paperwork and affidavits regarding [her] claim for attorney's fees."

The CSM conducted a hearing on October 27, 2006 and issued its order on December 7, 2006. Because the CSM found that appellant's testimony was "rife with

inconsistencies,” the CSM concluded that appellant’s average monthly income was not substantially changed from the time of the dissolution judgment and denied his request to modify his child-support obligation. Upon review of the CSM’s order, the district court agreed with the CSM’s conclusions regarding appellant’s income, denied his request to modify his spousal-maintenance obligation, and reiterated that appellant was “voluntarily underemployed and providing the [district] [c]ourt with inconsistent and misleading evidence regarding his income.” This appeal follows.

D E C I S I O N

1. Spousal Maintenance

Appellant challenges the factual findings made in support of the award of spousal maintenance, arguing that the record lacks support for them. Appellant also contends that the district court failed to make findings demonstrating that it considered the relevant statutory criteria in determining the amount of spousal maintenance.

An appellate court reviews a maintenance award for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). “Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous.” *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); *see also* Minn. R. Civ. P. 52.01. Where the findings of fact are clearly erroneous or there is a misapplication of the law, the district court has abused its discretion. *Dobrin*, 569 N.W.2d at 202. Conducting an “[e]ffective appellate review of the exercise of that discretion is possible only when the trial court has issued sufficiently detailed findings of fact to demonstrate its consideration of all factors relevant to an award of permanent spousal maintenance.” *Stich v. Stich*, 435

N.W.2d 52, 53 (Minn. 1989). But, a district court's findings may implicitly address required statutory findings. *Dobrin*, 569 N.W.2d at 202.

A district court may order spousal maintenance if it finds that the spouse that is to receive maintenance:

(a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

(b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Minn. Stat. § 518.552, subd. 1 (2004).² Once the district court has applied these requirements and concluded that a party needs maintenance, Minn. Stat. § 518.552, subd. 2 (2004), provides factors that the district court should consider to determine the amount and duration of the spousal maintenance. *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001). The district court must balance the recipient's needs with the ability of the obligor to pay the maintenance. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982).

² We traditionally apply the current statute in effect where, as here, subsequent changes to the relevant portions do not affect the rights of the party. *See McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986). But here, because the district court and parties have cited to the 2004 version of the law, we cite to the same statutes in the interest of consistency. Were we to cite to the 2006 version of the statute we conclude there would be no change in our decision.

In its initial judgment, the district court did not include an explicit justification for its award of spousal maintenance. But in the amended findings, which are incorporated in the initial dissolution order, the district court stated:

[U]nder Minn. Stat. § 518.552, subd. 1(b), [r]espondent is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, and she is the custodian of a child whose condition or circumstances make it appropriate that she not be required to seek full time employment outside the home.

This finding explicitly states that respondent is unable to provide self-support, one of the statutory criteria necessary to receive spousal maintenance. Minn. Stat. § 518.552, subd. 1.

Appellant challenges the portion of the district court's finding that states that respondent is the custodian of a child whose condition makes it appropriate that she not seek full-time employment outside the home, arguing that although their children have recurring issues with lazy eyes, they do not have the level of disability contemplated by the statute. The statute does not specify a particular level of disability. Further, the district court noted that one of the parties' children has been diagnosed with special needs. Because appellant has not demonstrated that that finding is clearly erroneous, we conclude that the district court did not abuse its discretion in awarding spousal maintenance to respondent.

Appellant asserts that even if the district court properly determined that respondent is entitled to receive maintenance and included the required findings, it failed to consider the factors described in Minn. Stat. § 518.552, subd. 2, in its determination of the amount

and duration of the spousal maintenance. According to Minn. Stat. § 518.552, subd. 2, the relevant factors include: (1) the financial resources of the party seeking maintenance; (2) the time the party seeking maintenance requires to gain sufficient education or training to become self-supporting through employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) any loss of earnings or employment opportunities foregone by the party seeking maintenance; (6) the age, physical and emotional condition of the party seeking maintenance; (7) the ability of the spouse obligated to pay maintenance to meet their own needs while paying maintenance; and (8) the contribution of each party to the value of the marital property or furtherance of the other party's employment.

In the initial dissolution order, the district court made the following factual findings concerning spousal maintenance:

26. Respondent receives public assistance from Stearns County in the form of Minnesota Care, Day Care Assistance, rental assistance and Food Stamps.
.....
30. Respondent is currently dependent upon [appellant] for a contribution to the support of herself and the minor children of the parties.
.....
32. The [r]espondent has reasonable living expenses for herself and the minor children in excess of \$2,500 per month. Even with the receipt of child support, together with her own income from her present part-time employment, the [r]espondent is currently unable to meet her financial needs.

In its amended findings of fact and order issued on June 23, 2006, the district court made the following additional findings relating to maintenance and appellant's ability to pay:

1. c. Respondent did not work outside the home for most of the parties' marriage, with the exception of working part-time as a substitute teacher. She was a stay-at-home mother after the birth of their third child.

....

2. g. Finding of Fact 27(c).
As regards the necessity for [appellant] to close his once lucrative business which supported his spouse and three children, and the necessity of taking a job earning a meager hourly wage, [appellant's] excuse and rationale are incredible, and offered in bad faith. . . . In addition, [appellant's] claim that he is now working a set number of hours per week for another company, and not taking any side work on evenings or weekends for extra pay, is not credible.

....

2. k. Finding of Fact 35(b).
[Appellant] has the ability to meet the need of spousal maintenance, given his disputed income, imputed income, and voluntary underemployment.

Although the district court did not explicitly reference the statutory factors in Minn. Stat. § 518.552, subd. 2, it did make findings that sufficiently enable this court to conclude the statutory requirements were met and that the district court properly exercised its discretion in its award of spousal maintenance. *See Robinson v. Robinson*, 355 N.W.2d 737, 741 (Minn. App. 1984) (determining findings were adequate when they are sufficient to conclude that statutory requirements were met), *review denied* (Minn. Jan. 4, 1985).

2. Voluntary Underemployment

Appellant challenges the district court's finding that he is voluntarily underemployed and the district court's subsequent imputation of income. In general, the obligation to make support payments is premised on an obligor's ability to pay. *Schneider v. Schneider*, 473 N.W.2d 329, 332 (Minn. App. 1991). But a district court shall impute income for the purpose of calculating support "[i]f the court finds that a parent is voluntarily unemployed or underemployed." *Franzen v. Borders*, 521 N.W.2d 626, 628 (Minn. App. 1994) (citing Minn. Stat. § 518.551, subd. 5b(d) (1996)). As defined by Minn. Stat. § 518.551, subd. 5b(d) (2004), voluntary underemployment is a proper basis for imputing income when the underemployment is neither (1) temporary and will lead to an increase in income nor (2) a bona fide career change that outweighs the adverse effect of the diminished income. *Kuchinski v. Kuchinski*, 551 N.W.2d 727, 728-29 (Minn. App. 1996). Once the district court determines that a party is voluntarily underemployed, it is required to impute income, considering the factors described in Minn. Stat. § 518.551. *Id.* at 729.

As described by Minn. Stat. § 518.551, subd. 5b(d), "[i]mputed income means the estimated earning ability of a parent based on the parent's prior earnings history, education, and job skills, and on availability of jobs within the community for an individual with the parent's qualifications."

[T]here are only two situations in which an obligor who chooses to terminate or scale back employment is not voluntarily unemployed or underemployed. In all other situations, including those in which the obligor unjustifiably self-limits his or her income in bad faith, the obligor is

voluntarily unemployed or underemployed and the court must calculate the support obligation on the basis of imputed income.

Putz v. Putz, 645 N.W.2d 343, 351 (Minn. 2002). A court may consider an obligor's prior income to determine the obligor's current ability to pay. *Darcy v. Darcy*, 455 N.W.2d 518, 522 (Minn. App. 1990). When a district court imputes income, it enjoys broad discretion, and we review the imputation only for an abuse of that discretion. *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008).

Before the dissolution, appellant owned and operated Transcend Building and Excavating, Inc. According to appellant, a company dump truck broke down, and because he did not have the money to fix it, he was unable to continue operating the business. At the time of the dissolution, appellant was employed by Tri-City Paving, Inc., earning a gross income of \$1,926.36 per month. After deductions for taxes and appellant's child-support obligation for his two children from a previous marriage, appellant claimed a net income of \$954.79. Reviewing the evidence before it, the district court determined that "this employment [is] intentional underemployment for the purposes of avoiding possible child support and maintenance obligations."

In support of its conclusion, the district court stated that appellant's claims regarding his income were "incredible, given the lifestyle the parties were living while married, his claimed ability to maintain the house, and his claim that he was forced to close his profitable business due to the breakdown of a vehicle." According to the district court, the "assets of the parties were being characterized as [appellant's] company assets

in order to assist [appellant] in avoidance of other financial obligations in bad faith, including his child support obligation from a prior relationship.” The district court stated

[i]n conjunction with the other Findings of Fact regarding [appellant’s] income while self-employed, his claims of inability to maintain his business due to one vehicle requiring repairs (not replacement), and [appellant’s] choice to obtain the same work at a much lower income level, and the credible evidence of [appellant’s] previously attempting to hide income and assets to avoid child support obligations, the [district court] finds [appellant] is voluntarily underemployed in bad faith.

Appellant asserts that there is no evidence in the record that he has done anything to voluntarily limit his income or that his employment with Tri-City Paving is in bad faith. But the district court made explicit findings of appellant’s credibility that reject the evidence and testimony he offered. We are not in a position to dispute those credibility determinations. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (“Deference must be given to the opportunity of the [district] court to assess the credibility of witnesses.”). Along with the discrepancy in the record between appellant’s earnings during the marriage and his earnings at the time of dissolution, the credibility determinations made by the district court support its conclusion that appellant is voluntarily underemployed.

Appellant contends that even if the district court properly imputed income to him due to his voluntary underemployment, the record does not support the income determinations that the district court made. The district court initially determined appellant’s monthly gross income was \$4,123, using appellant’s claimed monthly income of \$2,711 and averaging it with respondent’s estimation of appellant’s income at \$5,535

per month. Because appellant moved for modification of his child support after the initial dissolution judgment and that motion was already pending before the CSM, the district court referred the matter of appellant's income to the CSM for determination. The CSM found that appellant's annual income as of October 14, 2006, was \$39,142.77, establishing a gross monthly income of \$4,140.40. This amount was taken from appellant's pay stub and included the off-season income that appellant earned in the winter months.

Despite the evidence, appellant testified that he had a much lower income. But, like the district court, the CSM found appellant to lack credibility and stated that appellant's assertion that his wage was \$13.44 an hour is "belied by the pay stubs which reflect varied hourly wages of \$13.38, \$25.66 and \$26.41 with significant overtime earned at \$18.585 to \$39.615 per hour." Although appellant asserts that the CSM should not have included his overtime pay, the CSM found that appellant "failed to establish that overtime should not be included in determining guideline support" and he testified that "he worked significant overtime hours in his business," that was not voluntary, during the marriage. In addition to the examination of appellant's payroll records, the CSM also independently reviewed the State of Minnesota's Department of Employment and Economic Development Salary Survey and determined that the median wage for similarly situated excavation workers was consistent with its finding of \$4,140 in gross monthly income. The record contains substantial support for the CSM's determinations of appellant's income.

3. Referral of Income to CSM

Appellant also argues that it was improper for the district court to refer the issue of his income to the CSM. But Minn. R. Gen. Pract. 353.02, subd. 2, allows a district court to exercise its discretion and refer issues to the CSM when it is in the best interests of the parties. It was appellant's own pending motion that prompted the district court to refer the issue to the CSM. Therefore, appellant's argument on this issue lacks merit. Resolution of that motion to modify appellant's child support necessarily involved determination of his income.

4. Division of Property

Appellant challenges two specific divisions of property ordered by the district court. Appellant argues that the district court abused its discretion in its conclusion that his portion of the proceeds from the sale of the homestead should be reduced to pay respondent's student loans and also argues that an award of a 1955 Chevrolet to respondent was an abuse of discretion.

In a marital dissolution, a district court has broad discretion in apportioning property, and its decisions about that property will not be overturned absent an abuse of that discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn. 1989). Upon dissolution of a marriage, debts are treated as property and are allocated and divided like assets. *Korf v. Korf*, 553 N.W.2d 706, 712 (Minn. App. 1996). When distributing debts, a district court should be guided by equitable considerations. *O'Donnell v. O'Donnell*, 412 N.W.2d 394, 396 (Minn. App. 1987). Even if an appellate court might have divided property differently, it should affirm the district court if the district court had an

acceptable basis in fact and principle. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984). Although an appellate court defers to the underlying facts in a division of property, whether property is marital or nonmarital is a question of law which is subject to de novo review. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997).

It is undisputed that respondent's student loan is her nonmarital debt. But this does not require the district court to apportion it in whole or part to respondent. *See* Minn. Stat. § 518.58 (2006). Section 518.58 allows a district court to apportion up to one-half of nonmarital property to avoid working an unfair hardship on one of the parties. *Id.*, subd. 2. Here, the district court ordered the remaining balance on respondent's nonmarital student loan to be paid from the net proceeds of the sale of the home before dividing the proceeds between the parties. By applying the proceeds of the marital home to respondent's student loan, the district court effectively apportioned one-half to respondent and one-half to appellant. The district court was guided by equitable considerations and stated its intent to pay the student loan as "an offset to the \$29,061.43 which was previously paid by the parties for [appellant's] nonmarital child support judgment and . . . truck from [appellant's] self employment." Because appellant's nonmarital debts were paid with marital funds, the district court concluded they were paid to respondent's detriment.

Although the district court did not make an explicit finding regarding the unfair hardship suffered by respondent required to apportion her nonmarital property, none is needed where the specific facts and findings of the case warrant a finding of unfair hardship. *Hein v. Hein*, 366 N.W.2d 646, 649 (Minn. App. 1985). In addressing

respondent's financial needs, the district court concluded that even with her employment and child support she will be "unable to meet her financial needs." In his argument against the district court's apportionment of respondent's loan, appellant suggests *Greco v. Albrecht-Greco*, No. A04-1580 (Minn. App. June 28, 2005), should control and require this court to reverse the district court order on this issue. But *Greco* is factually distinguishable from the present facts and, as an unpublished case, is not binding on our present decision. Minn. Stat. § 480A.08, subd. 3(c) (2006).

Appellant also asserts that the district court erred in awarding a 1955 Chevrolet to respondent and asserts that the district court's finding that the car was a gift to respondent from her father is unsupported in the record. Respondent claimed the Chevrolet had sentimental value because she had helped her father build the car; appellant claimed he purchased the car before the marriage and put the title in his business's name in order to avoid the creditors of respondent's father's estate. The district court ordered that respondent should have the full title, right and interest in the Chevrolet, free of any claim by appellant. In its supplemental findings, the district court stated:

Though the title of the vehicle was placed in the name of [appellant's] business, the [district] court finds the purpose of this was for protecting the asset from [appellant's] prior obligations of child support once the parties were married; testimony and evidence to show that it was a gift from respondent's father for respondent's benefit is credible. [Appellant's] arguments regarding financial investment in the vehicle fail to take into consideration that those finances were marital monies.

Again, the district court's finding contains explicit credibility determinations to which we give deference on review. *Sefkow*, 427 N.W.2d at 210. Because the district court

properly exercised its discretion in resolving conflicting testimony in the record, we conclude that it did not abuse its discretion. *Maranda*, 449 N.W.2d at 164.

5. Attorney Fees

Appellant challenges the district court's award of respondent's attorney fees, arguing that the district court improperly required him to pay \$10,296.67. Minn. Stat. § 518.14 (2006) allows a district court to award attorney fees in a marriage dissolution and provides that attorney fees may be awarded for two reasons. First, attorney fees "shall" be awarded if the district court finds:

- (1) that the fees are necessary for the good-faith assertion of the party's rights . . .;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1. Second, the district court may award attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." *Id.* In a challenge to an award of attorney fees, an appellate court reviews the issue for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999).

In its initial judgment, the district court ordered appellant to pay \$10,297.67, reserving the final determination of respondent's total attorney fees. In its amended findings, the district court declined to award respondent any additional fees. Although the district court did not explicitly make any of the three statutory findings in Minn. Stat. § 518.14, subd. 1, when the district court has a reasonable belief that the party charged

with fees can pay them and has a clear familiarity with the finances of the parties, no explicit finding is necessary. *See Gully*, 599 N.W.2d at 826.

After multiple hearings, the district court was certainly in a position to determine the finances of the parties and the credibility of each party's representations. The district court noted that respondent is unable to meet her monthly expenses and found appellant voluntarily underemployed in an attempt to avoid paying support obligations. Appellant argues that the district court concluded that both parties had contributed to the length of the proceedings. But appellant mischaracterizes the statements of the district court. Respondent requested attorney fees at two points—at the time of the dissolution judgment and in response to appellant's motion for modified or amended findings. The district court awarded attorney fees for respondent's first request but denied her second request. In denying respondent's second request, the district court noted that both "parties do not seem interested in having this matter resolved absent a full finding in their own favor," and indicated that respondent had provided proposed findings "peppered with assumptions of a forthcoming grant of attorney's fees."

The district court's language that appellant uses in support of his argument that respondent should not receive attorney fees was made in its denial of respondent's second request for fees. The award of attorney fees in the dissolution judgment was based on appellant's misrepresentation of his income, and the district court made clear that appellant had, "in the most flattering light," produced "inconsistent evidence of income . . . and demonstrate[d] bad faith by attempting to mislead the [district] [c]ourt regarding

his income.” Therefore, we conclude that the district court properly exercised its discretion in awarding \$10,296.67 in attorney fees to respondent.

Affirmed.