STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1638

In re the Marriage of:
Sarah A. McCormick, petitioner,
Respondent,

vs.

David L. McCormick,
Appellant.

Filed October 7, 2008
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-000299465

Sarah A. McCormick, 4227 Beard Avenue South, Minneapolis, MN 55410 (pro se respondent)

John Garrett Westrick, Westrick & McDowall-Nix, PLLP, 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Huspeni, Judge;[*] and Muehlberg, Judge.[**]

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

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

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

HALBROOKS, Judge

Appellant challenges the district court's dissolution judgment with respect to the valuation and division of the parties' marital homestead and the denial of conduct- or need-based attorney fees. Because we conclude that the district court did not clearly err in its determination of the homestead's value or abuse its discretion in its denial of attorney fees to appellant, we affirm in part. But because we conclude that the district court's decision to award 100% of the marital equity in the parties' homestead to respondent was an abuse of discretion, we reverse in part and remand on that issue.

FACTS

Appellant David McCormick and respondent Sarah McCormick were married in 1994. They have three children. M.D.M. and M.S.M. are nine-year-old twins; E.R.M. is seven years old. Appellant is an attorney, but his license to practice law was suspended at the time of the dissolution proceedings based on his failure to pay certain debts to the Minnesota Client Security Board. Before the parties' separation, respondent stayed home full-time, caring for their children—in particular, M.S.M., who has autism. Respondent petitioned to dissolve the parties' marriage in the spring of 2005.

During their marriage, appellant and respondent purchased a home in Minneapolis. The home was originally encumbered by first and second mortgages, totaling approximately $148,000. Appellant alone handled the family finances during the marriage, including payment of the two mortgages. In addition to the mortgages, appellant took out a home-equity loan in the amount of $22,000 in April 2000. The

district court found that respondent had no knowledge of the home-equity loan until after the parties' separation.

Subsequent to filing her dissolution petition, respondent learned that their home was in foreclosure due to appellant's failure to pay the mortgages. Respondent obtained an advance on her inheritance from her parents and paid $148,243.46 to satisfy both mortgages. Respondent subsequently learned that appellant had also failed to make payments on the home-equity loan. This failure resulted in additional foreclosure proceedings being initiated against the homestead. To again prevent the home from being foreclosed on, respondent borrowed an additional $15,637.59 (the remaining balance due on the home-equity loan) from her father at a 6% per annum interest rate and redeemed the property.

Several months after the dissolution proceedings were initiated, the parties reached a settlement, partially resolving the division of the marital homestead. The terms of the settlement provided that respondent would be awarded title to the property subject to a lien in favor of appellant. The district court stated that it would determine the amount of appellant's lien at a later date.

The settlement was incorporated into a September 2005 partial judgment and decree. The district court made the following factual finding in this partial judgment:

> The homestead has a FMV of approximately $350,000 and is currently in foreclosure. The parties have agreed that this homestead will be transferred to [respondent], subject to the [appellant's] lien. The Court shall retain jurisdiction to determine the total amount of [appellant's] lien, if any, following an appraisal, considered in light of the property and debt allocation of the parties.

The district court's order also included the following conclusion of law:

> 2. That the [respondent] is awarded all right, title, equity and interest in and to the homestead of the parties, . . . subject to the [appellant's] lien; this Court retains jurisdiction to determine the total amount of [appellant's] lien. The [appellant] shall execute a Quit Claim Deed transferring his interest in the property to the [respondent] within 10 days of the entry of this Judgment and Decree.

Trial was held in October 2006, on the issues of custody, child support, spousal maintenance, parenting time, and the remaining aspects of the property division. The district court issued a final judgment and decree on March 30, 2007. In the final judgment, the district court valued the parties' homestead at $302,000. In apportioning the equity in the homestead, the district court did not divide the marital share in the property equally; instead, it awarded all of appellant's marital share in the homestead (approximately $44,000) to respondent. In addition, the district court denied appellant conduct- or need-based attorney fees related to the cost of litigating the value of the homestead at trial.

Appellant moved to amend portions of the final judgment, including the district court's determinations relating to the valuation of the homestead, the apportionment of the homestead's marital equity, and attorney fees. The district court issued an amended judgment on July 31, 2007, in which it altered several factual findings and conclusions of law that are not relevant to this appeal but reaffirmed its determinations of the homestead's valuation, division of marital equity, and denial of attorney fees. This appeal follows.

D E C I S I O N

A. Property Valuation

Appellant argues that evidence demonstrates that the homestead should be valued at $350,000, instead of the $302,000 figure that the district court determined. A district court's valuation of an asset is a finding of fact that will not be set aside unless it is "clearly erroneous on the record as a whole." *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975); *see also* Minn. R. Civ. P. 52.01. We require district courts to come to reasonably accurate valuations. *McIntosh v. McIntosh*, 740 N.W.2d 1, 6 (Minn. App. 2007). Appellate courts do not reweigh the evidence that was before a district court and will defer to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004).

Here, ample trial evidence supports the district court's valuation of the homestead at $302,000. The home was purchased in August 1996 for $155,000. The district court used a valuation date of June 2005, when the parties separated and the case-management conference was held. A Hennepin County Property Tax Statement was introduced indicating that the estimated fair-market value of the parties' residence, for taxes payable in 2005, was $302,000. The estimated fair-market value for taxes payable in 2006 was $347,500. In the opinion of Kent Stein, an appraiser who was hired by both parties in 2005 to perform an appraisal, the fair-market value of the property was approximately $300,000.

Appellant attacks Stein's qualifications on the grounds that he was a licensed appraiser but not a certified appraiser and that Stein could have used other comparable values that would have resulted in a higher valuation of the parties' home. We note, as did the district court, that Stein's appraisal was reviewed by a supervisory certified appraiser. And assessing the credibility of the licensed appraiser's testimony is a matter for the district court.

> It is not the province of this court to reconcile conflicting evidence. On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous. . . . If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings.

Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999) (citation omitted).

Appellant also argues that a 2006 property tax statement and documentation from the parties' mortgage company indicate that the fair-market value of the homestead was approximately $350,000. But again, weighing conflicting evidence and assessing its credibility is the province of the fact-finder, not an appellate court.

Finally, appellant argues that the district court had already determined the value of the homestead at $350,000 in the partial judgment. But appellant's argument ignores a significant word in the partial judgment: *approximately*. The district court was explicitly approximating, rather than conclusively setting, the value of the homestead. Indeed, the district court stated in the partial judgment that it was awaiting an appraisal, in part to help determine "the total amount of [appellant's] lien, if any." As the district court noted in its final judgment and decree, "This language indicates that the [p]artial [j]udgment

and [d]ecree did not fix the value of the homestead." Because the district court had sufficient evidence to support its determination that the value of the parties' homestead is approximately $302,000, its factual finding to this effect is not clearly erroneous.

B. Division

Both parties used nonmarital funds in the purchase of the homestead—appellant $10,000 and respondent $5,000. In assessing the marital and nonmarital equities in the homestead, the district court applied the *Schmitz* formula to determine the growth of each party's nonmarital contribution to the homestead. *See Schmitz v. Schmitz*, 309 N.W.2d 748, 750 (Minn. 1981). The district court determined that appellant's nonmarital share is $18,120 and that his marital share of the homestead is $44,225.68 for a total of $62,345.68. The district court based its division of marital property on Minn. Stat. § 518.58 (2006), stating that

> Pursuant to Minn. Stat. § 518.58, the Court must make "a just and equitable division of the marital property without regard to marital misconduct" and this division is based upon many factors, including "the contribution of each (party) in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property."

The district court ultimately reduced appellant's share in the homestead to his nonmarital interest of $18,120 with the following explanation:

> In the instant case, the [appellant] was solely in control of the finances until the parties separated and the divorce action was commenced. The amount of encumbrance on the homestead at the time of separation was greater than the encumbrance when the home was purchased. When the parties separated, [respondent] was unemployed and receiving no set support from [appellant]. [Respondent] saved the home from immediate foreclosure by using an inheritance gift from

> her father. Absent this action, the homestead would have been foreclosed with neither party receiving any amount from the homestead. Six months later a loan with Wells Fargo that [appellant] had obtained went into foreclosure. The [appellant] was to take full responsibility for this loan, but did not. The home was saved on this occasion when [respondent] borrowed the necessary funds from her father. Pursuant to the promissory note for this loan, [respondent] owes her father interest at the rate of 6% per annum. While saving the homestead, [respondent] was also scrambling to find employment and sufficient funds for her family's living expenses and medical insurance.
>
> Based on the [respondent's] extraordinary efforts to preserve the marital home, all the payments she made, and the financial difficulties she encountered during this period, the Court finds that an unequal division of assets is appropriate in this matter. Although totally denying [appellant] any share in the home would be inequitable, the [appellant]'s lien should be reduced to his non-marital interest of $18,120.00.

A district court has broad discretion when dividing the parties' marital property, and we will not reverse or alter a property division absent a clear abuse of this discretion or erroneous application of the law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). When a district court engages in a property division, it may not base any part of the division on marital misconduct. Minn. Stat. § 518.58, subd. 1. This division should be based on other relevant factors, including the length of the marriage, the parties' liabilities, and each party's employability. *Id*. Furthermore, "[t]he court shall also consider the contribution of each in the acquisition, *preservation*, depreciation or appreciation in the amount or value of the marital property." *Id*. (emphasis added). As a general rule, "equal division of the wealth accumulated through the joint efforts of the

parties" is presumptively appropriate on dissolution of "a long term marriage."[1] *Miller v. Miller*, 352 N.W.2d 738, 742 (Minn. 1984). But a district court's division of property must ultimately be based on the particular facts and circumstances of each case. *Lenzmeier v. Lenzmeier*, 304 Minn. 568, 571, 231 N.W.2d 71, 74 (1975).

Here, the district court appeared to rely primarily on just one factor when awarding respondent 100% of the marital equity in the couples' homestead—respondent's significant efforts to prevent the home from being foreclosed on. A district court's division of marital property does not have to be equal, but it must be equitable. Minn. Stat. § 518.58, subd. 1; *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). While we agree with the district court's conclusion that some form of unequal division of the marital equity in the homestead is justified under the circumstances, we cannot agree with the decision to deny appellant any marital interest in the home.

Our review of the caselaw did not reveal any cases in which we have upheld the complete denial of a share of the accumulated marital property to one party in a dissolution action. *Cf. Ziemer v. Ziemer*, 386 N.W.2d 348 (Minn. App. 1986) (finding that a 100%-0% split of marital property was an abuse of discretion), *review denied* (Minn. July 16, 1986). In many instances, we have reversed as an abuse of discretion a property division less extreme than the current one. *See, e.g., Ziemer v. Ziemer*, 401 N.W.2d 432 (Minn. App. 1987) (reversing a 75%-25% division), *review denied* (Minn.

[1] The marriage here—11 years—appears to be considered a long-term marriage. *See Gales v. Gales*, 553 N.W.2d 416, 421 (Minn. 1996) (stating, in appeal of maintenance dispute, that the supreme court would not "quibble" with district court's finding of fact that 11-year marriage was "long-term").

Apr. 29, 1987); *Jungbauer v. Jungbauer*, 391 N.W.2d 56 (Minn. App. 1986) (reversing a 70%-30% division); *Gummow v. Gummow*, 356 N.W.2d 426, 428–29 (Minn. App. 1984) (reversing a 80%-20% division of real property and a 100%-0% split of a pension plan). Although district courts are not restrained by a bright-line, outer limit when determining that an unequal division of marital property is appropriate, we note that we have been more willing to hold that an unequal property division was within a district court's discretion when the division did not exceed a 66%-33% split. *See, e.g.*, *Nemitz v. Nemitz*, 376 N.W.2d 243, 248 (Minn. App. 1985) (affirming a 58%-42% division), *review denied* (Minn. Dec. 30, 1985); *Kramer v. Kramer*, 372 N.W.2d 364, 367 (Minn. App. 1985) (affirming a 60%-40% division), *review denied* (Minn. Oct. 11, 1985); *Olness v. Olness*, 364 N.W.2d 912, 914 (Minn. App. 1985) (affirming a 63%-37% division); *but see Nemmers v. Nemmers*, 409 N.W.2d 225 (Minn. App. 1987) (reversing a 63%-37% division); *Oberle v. Oberle*, 355 N.W.2d 210 (Minn. App. 1984) (reversing a 62%-38% division).

We agree with the district court that but for respondent's significant efforts, the home would have been in foreclosure. But the district court gave respondent nonmarital credit for the equity she acquired in the home by paying off the first and second mortgages with the advance on her inheritance. The district court also compensated respondent for borrowing money to pay off appellant's unilateral April 2000 home-equity loan by reducing appellant's marital interest in the homestead by the amount of that loan. Thus, the district court gave consideration to respondent's efforts to preserve the parties'

homestead when determining each party's nonmarital and marital interests in the property.

While the district court clearly has discretion to award respondent a disproportionate marital share of the homestead based on her admirable actions in preventing the home from being foreclosed, we conclude, on this record, that the 100%-0% division is too extreme and constitutes an abuse of discretion. Therefore, we reverse and remand this issue to the district court for redetermination.[2]

C. Attorney Fees

Appellant contends that he should have been awarded both conduct- and need-based attorney fees and that the district court abused its discretion in refusing to do so. As previously noted, the September 2005 partial judgment stated that the approximate value of the parties' residence was $350,000. Before trial, respondent indicated that she planned to present evidence that the value of the home was $300,000. Appellant objected on the ground that respondent intended to relitigate the value of the property. In response, the district court stated:

> [I]f this were a post-decree motion, the court would look at whether or not there had been a significant decline in the value or a change . . . over 20 percent, which is kind of a thumb rule that we use in the family court for whether there's been a substantial change. . . . However, what I'm going to do . . . is if the court does not change the value of [the

[2] A homestead, of course, is often only part of a marital estate. And we do not mean to indicate that a marital homestead must always be divided in some manner between the parties if the division of other marital assets compensates for the unequal division of a marital residence. But the homestead here constituted the vast majority of the parties' accumulated marital property, and the district court divided the remaining marital assets and debts relatively evenly.

> homestead] by more than 20 percent, then [respondent]'s paying the cost . . . on this issue for attorney's fees. If, however, based upon all of the information that's before the court [respondent] does prevail, I'm not setting attorney's fees against [her].

Based on the district court's ultimate determination that the fair-market value of the home was $302,000, the $48,000 downward adjustment represented less than 20% of the former approximated value.

Appellant now argues that the district court should have followed through on its earlier statement and awarded him $2,160 in conduct-based attorney fees. In refusing to do so in the final dissolution judgment, the district court stated that because respondent "prevailed on her argument regarding the value of the marital home . . . no attorney fees shall be awarded to [appellant] based upon pursuit of this issue."

In proceedings under chapter 518, a district court may, "in its discretion," award additional attorney "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2006). An award of conduct-based attorney fees under section 518.14 "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). 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 shortcoming of appellant's argument is that it overlooks the statutory basis underlying an award of conduct-based attorney fees—a *party's* conduct. Minn. Stat.

§ 518.14, subd. 1. Appellant is requesting fees based on the district court's statement, not the conduct of respondent. Indeed, if the district court awarded conduct-based attorney fees based on its "20% change" remark alone, this award would have had a questionable legal basis. *See Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983) (stating that, generally, attorney fees cannot be awarded absent specific statutory authority for the award). Thus, the focus must be on whether or not *respondent's* conduct fell within the statutory criteria permitting an award of conduct-based attorney fees.

Here, respondent's litigation of the value of the homestead was based on property-tax records and an appraisal of the property. While presentation of this evidence may have added to the length and expense of the trial to some degree, appellant has made no showing, as he is required to do, that it "unreasonably" did so. Indeed, respondent prevailed on the issue of the homestead's value. On this record, we conclude that the district court did not abuse its discretion in refusing to award appellant conduct-based attorney fees.

Appellant further argues that the district court abused its discretion in refusing to award him need-based attorney fees in the amount of $14,685.24. In refusing to award these fees, the district court found that respondent "does not have the ability to pay this amount."

Minn. Stat. § 518.14, subd. 1, also governs need-based attorney fees. The statute states that a district court "shall" award need-based fees in an amount that enables a party to carry on a proceeding if (a) the fees are necessary for a good-faith assertion of rights, (b) the payor has the ability to pay the fees, and (c) the recipient is unable to pay his or

her own fees. Minn. Stat. § 518.14, subd. 1. The party seeking need-based attorney fees has the burden of establishing that the adverse party has the ability to pay the fees. *See In re Marriage of Sammons*, 642 N.W.2d 450, 458 (Minn. App. 2002) (refusing to award attorney fees because the party failed to establish "the existence of those elements required by section 518.14 that would entitle her to need-based attorneys' fees").

The district court's dissolution judgment, which is 32 pages in length, is very thorough in its analysis and discussion of respondent's and appellant's financial circumstances. For example, the district court found that respondent's net monthly income was $2,988 and that her current monthly expenses were in excess of this income. The court stated that respondent would have to reduce her monthly budget to live within her means. Respondent was awarded sole physical custody of the parties' three children. The district court found that neither party is financially capable of paying spousal maintenance. While respondent recently obtained a higher paying job, the district court noted that "[s]he has not had this position . . . for an extended period of time and ha[s] debt to repay for the period she was unemployed and only partially employed following the [parties'] initial separation." Appellant does not challenge any of these factual findings.

Given the district court's careful consideration of respondent's financial situation and its finding that respondent's monthly expenses exceed her net income, the court properly concluded that respondent did not have the ability to pay appellant need-based attorney fees.

Affirmed in part, reversed in part, and remanded.