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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1782**

In re the Marriage of:

Patricia Ann Norman, petitioner,
Respondent,

vs.

David Lee Norman,
Appellant.

**Filed November 18, 2008
Reversed and remanded
Worke, Judge**

Becker County District Court
File No. F8-06-897

Stephen R. Dawson, 2108 South University Drive, Suite 103B, Fargo, ND 58103 (for respondent)

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Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

On appeal from a dissolution-of-marriage judgment, appellant-husband argues that (1) the district court should have classified certain funds received during the marriage as

a loan rather than a gift; (2) the record does not support the permanent-maintenance award because respondent-wife has the ability to rehabilitate and support herself; and (3) the division of property is inequitable because the district court failed to value and divide all of the property subject to division. Because we conclude that the funds received during the marriage were a loan and marital debt, and that the findings regarding spousal maintenance and property division are not supported by the record, we reverse and remand.

DECISION

Classification of \$200,000

Appellant David Lee Norman first argues that the district court abused its discretion by classifying \$200,000 transferred from a family trust as a gift rather than as a loan. Apportionment of marital debt is within a district court's discretion. *O'Donnell v. O'Donnell*, 412 N.W.2d 394, 396 (Minn. App. 1987). This discretion extends to deciding whether intra-family transactions were gifts or loans. *See Novick v. Novick*, 366 N.W.2d 330, 332 (Minn. App. 1985). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

During the marriage, appellant's father passed away, and upon his death a family trust was created to benefit appellant's mother during her lifetime, and she was named the beneficiary. Originally, a bank was the trustee, but in 2002 the bank resigned as trustee and appellant and his two sisters took over as co-trustees. The trust includes a provision

granting several rights, powers, and privileges to the co-trustees. One such privilege is the power to “borrow money with or without security and to repay such borrowings from principal and income in such manner as the Trustee[s] determine[.]”

Between late 2004 and early 2005, appellant received approximately \$200,000 from the trust. The funds were transferred into either the parties’ joint personal bank account or into their restaurant’s business account. The money was used to provide cash flow for the restaurant, to expand the restaurant, to remodel condominiums the parties purchased in Mexico, to pay debts, and for a myriad of other things. Appellant testified that in late June 2005, he told his mother and sisters that he believed that divorce was imminent. According to appellant, his family told him that he needed to make sure that the money borrowed from the trust was repaid. Appellant testified that he created and back-dated repayment “notes” because he knew that he needed to repay the trust. Between June and September 2005, appellant repaid approximately \$6,750 to the trust. And the record shows that appellant had made at least one repayment to the trust prior to learning that divorce was imminent.

The district court found that the funds were a gift because the “loan” was undocumented and unsecured and there was no evidence that anyone considered the advancement to be a loan until after it was clear that the parties would be divorcing. But the district court failed to consider the nature of the funds in making this determination. The trust empowers the trustees to “borrow money with or without security.” The trust does not permit or authorize any trustee to make gifts of trust funds or to remove funds from the account without the agreement of all three trustees. Additionally, the money

was transferred into either an account held by the parties or into their business account and appellant testified that the money was used during the marriage for the parties' benefit. Appellant testified that his mother spends time in one of the parties' Mexican condominiums and he considered selling the property to her in exchange for forgiveness of a portion of the debt. And even respondent Patricia Ann Norman testified that appellant could "pay [his mother] back with [the condominium]."

Finally, respondent had the burden of showing that the money was a gift and the only evidence she offered was her testimony that she knew nothing about the funds. *See Oehler v. Falstrom*, 273 Minn. 453, 457, 142 N.W.2d 581, 585 (1966) (requiring the party alleging that the transfer is a gift to prove by clear and convincing evidence that the transaction created a gift); *In re Estate of Lobe*, 348 N.W.2d 413, 414 (Minn. App. 1984) (defining clear and convincing as "highly probable"). But respondent also testified that she was never involved in financial decisions and that appellant did not keep her informed of any business dealings or investments. Thus, it is not remarkable that respondent was not aware of the loan. Respondent has failed to show that it is highly probable that the funds were a gift and the district court's finding that the transfer was a gift is clearly erroneous based on the record. Therefore, we conclude that the funds were a loan and marital debt, and we reverse the district court's ruling on this issue and remand with instructions to reapportion marital debt to include the \$200,000 loan.

Spousal Maintenance

Appellant next argues that the district court abused its discretion in awarding respondent permanent spousal maintenance. Appellate courts review a district court's

maintenance award under an abuse-of-discretion standard. *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). To successfully challenge the district court’s findings of fact under the clearly-erroneous standard, a party

must show that despite viewing that 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.

Vangsness v. Vangsness, 607 N.W.2d 468, 474 (Minn. App. 2000).

A maintenance award is “payments from the future income or earnings of one spouse for the support and maintenance of the other.” Minn. Stat. § 518.003, subd. 3a. (2006). A district court may order maintenance if the party seeking maintenance lacks sufficient property to provide for his or her reasonable needs or is unable to provide self-support through adequate employment. Minn. Stat. § 518.552, subd. 1(a), (b) (2006). In determining the amount and duration of a spousal-maintenance award, the district court must consider the statutory factors under Minn. Stat. § 518.552, subd. 2 (2006). The district court must consider “all relevant factors,” including: financial resources, including marital property awarded to the spouse seeking maintenance; the probability of self-support; the contributions of each party to marital property; the marital standard of living; the duration of the marriage; and the obligor’s ability to meet needs while meeting those of the spouse seeking maintenance. *Id.*, subd. 2(a)-(h). No single factor is

dispositive, and the issue is basically the obligee's need and ability to meet those needs balanced against the obligor's financial condition. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). The party seeking maintenance has the burden to produce evidence on the statutory factors at trial. *See Dobrin*, 569 N.W.2d at 202 (stating the statute implicitly places burden on spouse seeking maintenance to prove need). When "there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3 (2006).

The district court ordered appellant to pay respondent \$1,800 per month in permanent spousal maintenance after finding that respondent is unable to provide adequate self-support based on the standard of living established during the marriage, her lack of job training, skills and experience and all relevant circumstances. The district court found that although neither party is gainfully employed, appellant has many employment opportunities while respondent has the ability and skill to earn slightly more than minimum wage. The district court found that the parties were accustomed to a lavish lifestyle during their 30-year marriage. The court also found that respondent lost earning opportunities while she did not work outside of the home during the marriage. Regarding whether appellant would be able to meet his needs and provide for respondent's needs, the district court found that appellant was willing to offer support to his two adult daughters, so he could also support respondent.

Appellant argues that neither party has the ability to maintain the high standard of living enjoyed during the marriage and that respondent could work, but desires not to do

so. Additionally, appellant suggests that the district court should have considered respondent's meretricious relationship to the extent that it improves her economic well-being. While it does appear that respondent is entitled to some maintenance award, many of the district court's findings are not supported by the record and we question the amount of the maintenance award.

First, the district court found that neither party was gainfully employed, but then imputed income to appellant in the amount of \$50,000 and failed to consider that respondent has a job. Prior to and during the early years of the parties' marriage, respondent worked as an artist. Respondent testified that she has a job doing graphic design and customized artwork for a friend's company. Respondent predicted that she would be able to start earning \$500 per month and grow from there. Respondent also testified that this is the type of work she is trained to do and that she completed two years of college. The district court failed to consider that respondent has a job, is already trained in the field in which she obtained employment, and it is a business in creative arts where respondent is able to take advantage of her natural abilities.

Second, the district court failed to consider the marital property apportioned to respondent in assessing her financial resources or the fact that her children no longer live with her and she is supporting only herself. *See* Minn. Stat. § 518.552, subd. 2(a). The court awarded respondent a \$1,500 motorcycle, \$25,000 in jewelry, and \$55,000 in personal property. Respondent testified that the parties have expensive personal property in storage that totals approximately \$60,000; appellant testified that the property's value is approximately \$80,000. The district court valued the property at \$50,000, which is

included in the award of \$55,000 in personal property to respondent. It is not clear how the district court arrived at a valuation of \$50,000 when both parties testified that the value was higher; regardless, the court awarded all of that property to respondent and failed to consider that award in determining the maintenance award.

Third, the district court put a great deal of emphasis on the fact that the parties lived a lavish lifestyle during the marriage. The court found, however, that neither party can now afford that lifestyle. But after making this finding the court then determined that this factor favored a maintenance award. Because the court found that neither party can now afford the high standard of living enjoyed during the marriage, the court should not have found that this factor favored awarding respondent maintenance at the marital standard of living at this time. *See Peterka v. Peterka*, 675 N.W.2d 353, 358-59 (Minn. App. 2004) (addressing sub-marital-standard-of-living maintenance award). Finally, while respondent may be entitled to maintenance because of the length of the marriage and because she did not work outside of the home during the marriage, the amount of the award is not appropriate because appellant may not be able to meet his needs and provide for respondent. The court imputed income to appellant in the amount of \$50,000 and imputed \$12,000 to respondent. The court awarded \$1,800 per month in maintenance. If appellant is supposedly earning \$50,000 per year, that is approximately \$4,200 per month, less the \$1,800 in maintenance per month leaves appellant with less than \$2,400 per month. If respondent earns \$12,000 per year, with the maintenance award, she has \$2,800 per month to meet her expenses. Appellant would be left living off of \$28,400

per year and respondent would be living off of \$33,600 per year. The court does not explain this discrepancy; nor does the court explain how it reached the \$1,800 award.

Appellant also contends that the district court should have considered respondent's relationship with her boyfriend and his assistance in supporting her.

[T]he existence of a meretricious relationship does not constitute, simply by reason of the nature of the relationship, sufficient ground for the termination of alimony. Where, however, a former spouse's need for support is reduced through such a relationship, modification is appropriate. We affirm our earlier adoption of the rule that a meretricious relationship may be a basis for reducing or terminating alimony to the extent it improves a former spouse's economic well-being.

Abbott v. Abbott, 282 N.W.2d 561, 566 (Minn. 1979). Thus, if respondent is cohabitating with her boyfriend, it may serve as a basis for denying/modifying a maintenance award. But respondent testified that she does not live with her boyfriend. And the district court found that there was no evidence of respondent's boyfriend's financial position or that he is supporting respondent. Therefore, this is not a record showing a meretricious relationship that affects the award of maintenance.

While it appears that a maintenance award is appropriate, many of the district court's findings on the statutory factors and the amount of the maintenance award do not find support in the record. We remand to the district court to balance respondent's need against appellant's current financial condition and for findings that are supported by the record.

Property Division

Finally, appellant argues that the district court abused its discretion in dividing marital property. “District courts have broad discretion over the division of marital property and appellate courts will not alter a district court’s property division absent a clear abuse of discretion or an erroneous application of the law.” *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). A district court abuses its discretion regarding a property division if its findings of fact are “against logic and the facts on [the] record.” *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). This court “will affirm the [district] court’s division of property if it had an acceptable basis in fact and principle even though [this court] might have taken a different approach.” *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002).

In dividing marital property, a district court shall base its findings on all relevant factors. Minn. Stat. § 518.58, subd. 1 (2006). Such factors include: “length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party.” *Id.* Also relevant is the “contribution of each [spouse] in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker.” *Id.* While courts are directed to make a just and equitable division of marital property, an equitable division does not necessarily have to be an equal division. *Crosby v. Crosby*, 587 N.W.2d 292, 297 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

Appellant contends that the district court failed to (1) apply the statutory factors; (2) value any of the personal property; and (3) divide all of the personal property subject to division. The district court considered the length of the marriage, prior marriages, and the parties' ages and health, finding that none of these factors favored either party. The court found that respondent's lifestyle will have to change significantly because of her lack of job skills. Despite also finding that appellant has no job or any meaningful employment, the district court found that the parties' lifestyle and occupations favored awarding more property to respondent. This finding is not supported by the record. In February 2007, respondent testified that she had made no efforts to gain employment and that she had no plans to find employment. When asked whether she would be willing to find employment, respondent testified that she would in order to keep herself "entertained." By March 2007, respondent testified that she had begun employment doing art projects. Appellant testified consistently that he was seeking out business ventures because he was aware that he had to find employment. The district court's finding does not support the determination that station in life and occupation support awarding more property to respondent when neither party was gainfully employed and appellant was aware of the need for and was actively seeking employment and respondent initially felt that employment would only serve as a hobby.

The district court also found that need supported awarding property to respondent. This determination, however, is not supported by the record and the court's findings that both parties have outrageous budgets, neither party has income for self-support, and the marital estate is not liquid. These findings support a determination that both parties are in

need, neither one more than the other. Finally, the district court awarded all of the parties' personal property in storage to respondent, assigning a value that did not comport with either parties' estimations. Additionally, the total amount of property awarded to appellant (property without encumbrances) is \$47,300, while the total amount awarded to respondent is \$82,000. Despite the fact that the division of property does not need to be equal in order for it to be equitable, there should be some basis for the award and some support for it in the record. Because the record and the district court's findings do not support the district court's conclusions, we remand to the district court. On remand, the district court retains the discretion to reopen the record.

Reversed and remanded.