STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2244

In re the Marriage of:
Fay M. Terzo, petitioner,
Appellant,

vs.

Samuel A. Terzo,
Respondent.

Filed April 5, 2011
Affirmed
Klaphake, Judge

Clearwater County District Court
File No. 15-FA-07-490

Richard C. Mollin, Jr., Bagley, Minnesota (for appellant)

Samuel A. Terzo, Coos Bay, Oregon (pro se respondent)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

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

KLAPHAKE, Judge

In this marital dissolution action, appellant Fay M. Terzo argues that the district court erred by refusing to address her post-trial motion for amended findings or a new trial because the scheduled hearing was untimely. Appellant also asserts that the district court erred in its choice of valuation date; division of marital assets dissipated by her

husband, respondent Samuel A. Terzo, prior to the dissolution action; and valuation of appellant's nonmarital interest in the parties' homestead.

Although the district court did not err by denying appellant's motion because the hearing was untimely, we nevertheless have jurisdiction to hear this appeal because appellant's motion and her notice of appeal were timely. Because the district court did not abuse its discretion in its choice of valuation date, its division of the parties' marital assets, and calculation of appellant's non-marital interest, we affirm.

D E C I S I O N

Jurisdiction

On August 14, 2009, appellant served a motion to amend the district court's findings in its July 21, 2009 order for judgment dissolving the parties' marriage. This motion was timely under Minn. R. Civ. P. 52.02 and 59.03 (requiring motion for new trial/amended findings to be served within 30 days after notice of filing of decision). The hearing date on the motion, October 7, 2009, was not timely under Minn. R. Civ. P. 59.03, which requires the hearing to be held within 60 days of the notice of judgment, unless the time for the hearing is extended. Appellant did not request an extension, and the court did not extend the time. Appellant filed a timely notice of appeal from the district court's order denying her motion for amended findings.

In *Rubey v. Vannett*, 714 N.W.2d 417 (Minn. 2006), the supreme court addressed the question of jurisdiction on similar facts. In *Rubey*, appellant's counsel filed a timely motion for new trial/amended findings but, due to an apparent misunderstanding, failed to schedule a timely hearing date. *Id.* at 420. The district court decided that it lacked

jurisdiction to hear appellant's motion. *Id.* at 421. We affirmed and further determined that the appeal to this court was untimely because the motion did not toll the time to appeal. *Id.*

The supreme court reversed, concluding that the timing of the hearing is not jurisdictional, but is a procedural tool, and the failure to comply with the 60-day rule did not divest the district court of jurisdiction. *Id.* at 422. Therefore, the district court's decision to dismiss the motion was not an abuse of discretion because the hearing was untimely. *Id.* at 424. But because appellant's motion was timely, his appeal to this court was timely because it was from the order denying the motion, over which the district court had jurisdiction. *Id.* at 425.

Finally, the supreme court concluded that although this court erred by refusing to hear the appeal, the standard of review on appeal was "as though no new trial/amended findings motion had been made" and was limited to "'whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment.'" *Id.* (quoting *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976)).

We therefore conclude that we have jurisdiction to hear and determine this appeal in accordance with *Rubey*.

Valuation Date

Appellant argues that the district court abused its discretion by refusing to consider an alternative to the pretrial hearing date of March 25, 2009, as the valuation date. Appellant submitted a memorandum before trial asking the court to consider the date of

the parties' informal separation in June 1998 as the valuation date. The district court declined to do so, stating that it "finds no compelling reason to change the date of valuation in this proceeding from the date of the Pretrial Conference as provided by Minn. Stat. § 518.58(1)."

"The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conferences, 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 (2008).

We review the district court's choice of a valuation date for an abuse of discretion. *Grigsby v. Grigsby*, 648 N.W.2d 716, 720 (Minn. App. 2002), *review denied* (Minn. Oct. 15, 2002). There is no abuse of discretion when the district court's factual findings are supported by the record and when the district court's decision has "an acceptable basis in fact and principle." *Id.* at 719-20 (quotation omitted). The statute does not require the district court to make specific findings if the court uses the date of the initially scheduled prehearing conference as the valuation date. Minn. Stat. § 518.58, subd. 1. Alternatively, if the district court selects a different date, it must make specific findings showing that the alternative date is fair and equitable. *Id.* Here, the district court had no obligation to make specific findings because it used the prehearing settlement conference date as the valuation date, noting on the record that no party had shown that this would not be fair and equitable.

Although we recognize that the record includes facts that could have supported a different valuation date, we will not substitute our judgment for that of the district court

absent a clear abuse of discretion. *Arundel v. Arundel*, 281 N.W.2d 663, 667 (Minn. 1979). Appellant has not demonstrated that the district court clearly abused its discretion.

Dissipated Assets

Appellant argues that the district court erred by refusing to award her a 50% share of marital assets that respondent dissipated prior to the dissolution. Appellant describes the dissipated assets as two life insurance policies, a $10,000 certificate of deposit (CD), and one-half of the parties' savings account valued at $14,985.

If a party transfers, encumbers, conceals, or disposes of marital assets "[d]uring the pendency of a marriage dissolution, separation, or annulment proceeding, or in contemplation of commencing a marriage dissolution, separation, or annulment proceeding," the district court shall compensate the other party by placing both parties in the position they would have been in had the action not occurred. Minn. Stat. § 518.58, subd. 1a (2008). The party claiming dissipation of assets has the burden of proof. *Id.* We review the district court's action for an abuse of discretion. *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987).

In order to prevail on this issue, appellant had the burden of showing that respondent intentionally concealed or disposed of these assets during the pendency of a dissolution or separation action. According to the record evidence, when respondent took or cashed in these assets, the parties were living separately but no formal action for a legal separation or dissolution was planned or pending. Thus, at the time, this was a marital asset not subject to a court's authority. *See Lynch*, 411 N.W.2d at 266 ("All

assets in existence at dissolution are marital assets subject to equitable division between the parties").

The district court credited one-half of the cash value of the insurance policies and a portion of the CD and savings account values against respondent's marital interest in the homestead. Under these circumstances, the district court did not abuse its discretion by refusing to credit appellant with a greater interest in these assets or to order respondent to pay interest on these assets.

Non-Marital Property

Appellant argues that the district court erred in its calculations of appellant's non-marital interest in the homestead. The question of whether property is marital or non-marital is one of law, although the reviewing court defers to the district court's findings of fact. *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), *review denied* (Minn. July 19, 2005); *see Kerr v. Kerr*, 770 N.W.2d 567, 569 (Minn. App. 2009) (stating that reviewing court must affirm district court's findings of fact on marital or non-marital nature of property unless clearly erroneous). Generally, all property acquired jointly or by either spouse during the marriage is considered to be marital property. Minn. Stat. § 518.03, subd. 3b (2008); non-marital property includes property acquired during the marriage by gift, bequest or inheritance to one party but not the other, property acquired by one spouse before the marriage or after the valuation date, property excluded by a valid antenuptial agreement, and property acquired in exchange for any of the above-listed property. *Id.* Here, the source of the non-marital interest is the home in California

that appellant owned prior to the marriage. There is no dispute that appellant has some non-marital interest in the homestead.

The district court calculated appellant's non-marital interest in accordance with *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981). Using the *Schmitz* formula, a court can calculate the current value of a party's non-marital interest in marital property by dividing the party's non-marital contribution at the time of purchase by the value of the property at the time of purchase. *Kerr*, 770 N.W.2d at 570; *Brown v. Brown*, 316 N.W.2d 552, 553 (Minn. 1982). The resulting percentage value is multiplied by the value of the property at the time of its sale or its valuation for dissolution purposes. *Kerr*, 770 N.W.2d at 570. The calculation here is more complex because more than one piece of property was involved.

Appellant sold her non-marital home for $21,950; the parties used this money to purchase a $40,000 home subject to an $18,000 mortgage (the second home). Dividing appellant's non-marital interest of $21,950 by $40,000 yields a non-marital percentage value of 54.875%. When the second home was sold, the parties purchased the current homestead for $58,000. The parties paid the purchase price by using $46,000 in cash and $12,000 from appellant's sons' trust fund. The court subtracted the $12,000 down payment, treating this as a third-party source, neither marital nor non-marital in character. The parties used the money from the sale of the second home, which sold for a net price of $82,000, to pay the $46,000 in cash. The court assumed 54.875% of the $46,000 represented appellant's non-marital interest, or $25,242. If one divides $25,242 by the purchase price of $58,000, the resulting percentage is 43.52%, representing appellant's

non-marital share in the current homestead. Applying this percentage to the presumed value at the valuation date of $199,000 yields a non-marital interest of $86,605. The district court subtracted this from $199,000; this equals $112,392, which is presumed to be marital property. The district court awarded each party one-half of this amount or $56,196, subject to certain credits against respondent's share.

We conclude that the district court's calculations are correct based on the *Schmitz* formula and are supported by the record; therefore, the district court's findings are not clearly erroneous and the court did not abuse its discretion in its division of marital and non-marital interest in the homestead property.

Affirmed.