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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1036**

In re the Marriage of:

Kathryn Ann Pearson, petitioner,
Respondent,

vs.

James Bruce Pearson,
Appellant.

**Filed May 4, 2010
Affirmed
Shumaker, Judge**

Otter Tail County District Court
File Nos. 56-FA-07-1792, 56-FA-08-1279

Timothy J. McLarnan, McLarnan & Skatvold, Moorhead, Minnesota (for respondent)

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

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from a marriage-dissolution judgment, husband argues that the district
court erred by (1) not valuing, and instead ordering, the sale of the parties' homestead;

and (2) selecting a valuation date of the parties' investment account that was different from the date of the pretrial hearing. Wife argues on appeal that the district court erred by (1) reserving, rather than awarding, spousal maintenance; and (2) not allowing her to submit an affidavit of attorney fees after the trial ended. Because the district court had sound reasons for making its determinations, and thus did not abuse its discretion, we affirm.

FACTS

Appellant-husband James Bruce Pearson and respondent-wife Kathryn Ann Pearson were married on November 29, 1975, in Fargo, North Dakota. After a contested trial, the district court dissolved the parties' marriage in 2009.

The district court found the parties' homestead to be worth, at most, \$781,500. The district court ordered that the home be sold, with the net sale proceeds divided 61.65% to husband and 38.35% to wife, based on findings that husband had a nonmarital contribution to the homestead.

At the time of trial, husband was unemployed but received income from two family trusts and an investment account. Using the average of husband's yearly trust income in 2006 (\$20,117) and 2007 (\$28,345), the district court found that husband's gross monthly income was approximately \$2,054. Husband submitted a list of monthly expenses totaling \$3,028. The district court adjusted husband's list to make it more realistic, adding an estimated \$700 in rent, decreasing the cost of utilities, adding the cost of "other grocery store items," and increasing the cost of "personal allowances and

incidentals.” The district court determined that reasonable monthly expenses for husband would be closer to \$3,357.

Wife had not worked full time since 1980, after becoming pregnant with the parties’ first child. During the summers of 2007 and 2008, wife worked part time, earning an average gross monthly income of \$866. The district court found wife’s monthly expenses to be \$3,428. At the time of trial, wife had no earned income, and, since separating from husband, had been meeting her expenses through the use of an A.G. Edwards (“A.G.”) investment account in her name. Wife also testified that she had been using money from the A.G. account to pay expenses that the court had ordered husband to pay, but which he failed to pay, such as wife’s health insurance and certain credit-card payments.

Wife opened the A.G. account in 1994. The 2007 year-end value of the account was \$320,353.11. The pretrial valuation date was set for March 17, 2008, and the balance of the account as of March 31, 2008, was \$311,157.69. On June 30, 2008, which was the date of the last A.G. account statement in evidence, the value was \$322,092.69. Wife testified that on November 30, 2008, the A.G. account balance was approximately \$192,000. Wife testified that the drop in the stock market since 2006 accounted for a substantial portion of the devaluation of the A.G. account. The district court determined that \$50,600 of the account could be traced to wife’s nonmarital share. The remaining portion of the account was marital and thus the court ordered that it be divided equally between the parties.

The district court issued its findings of fact, conclusions of law, order for judgment, and judgment and decree (decree) on April 24, 2009. After hearing the parties' motions to amend the decree, the district court issued an order addressing motions for amending judgment, and amended judgment on May 26, 2009. This appeal follows.

D E C I S I O N

Property division in divorce proceedings is regulated by statute and the applicable caselaw. *Palmi v. Palmi*, 273 Minn. 97, 101-02, 140 N.W.2d 77, 80-81 (1966). The applicable statute is Minn. Stat. § 518.58 subd. 1 (2008):

Upon a dissolution of a marriage . . . the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct, after making findings regarding the division of the property. The court shall base its findings on all relevant factors including the 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. The court shall also consider the contribution of each 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. It shall be conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife.

In a marital dissolution, the district court has broad discretion in valuing and dividing property and its determinations will not be disturbed absent an abuse of discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn. 1989). If the district court's division of property had an acceptable basis in fact and principle, this court will

affirm, even though we might have taken a different approach. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984). We will not set aside the district court’s findings of fact unless they are clearly erroneous. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). A reviewing court must give deference to the district court’s opportunity to assess the credibility of the witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Husband argues that the “trial court erred in failing to value the homestead, failing to award the homestead to [husband], forcing the homestead to be sold, and forcing [husband] to vacate the premises.” Husband also argues that the district court erred in choosing a November 30, 2008 valuation date for the A.G. account. Considering the husband’s arguments in turn:

Valuation of homestead

“Assigning a specific value to an asset is a finding of fact,” and this court will not reverse the district court’s valuation of an asset 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). The market value assigned by the district court should be upheld if it falls within a range of realistic estimates made by competent witnesses, even if it does not exactly match any one of the estimates. *Id.* “[I]f the homestead is to be sold and the proceeds equally divided, the court’s valuation is irrelevant. The sale will determine its market value.” *Henry v. Henry*, 404 N.W.2d 376, 379 (Minn. App. 1987).

The district court did not give an exact valuation of the homestead, finding it to be “worth at most \$781,500.” The court indicated that it reached this number based on testimony and other evidence submitted at trial. A real-estate appraiser testified that the

estimated value of the homestead property was \$781,500. The county assessor valued the property at \$603,000. A valuation of “at most \$781,500” is within the range of reasonable estimates given at trial from credible sources. The district court’s determination, that husband has a 61.65% interest and wife has a 38.35% interest in the homestead, was not challenged by either party. Furthermore, the district court ordered the sale of the home (which was not clearly erroneous as discussed below), so ultimately the district court’s valuation is immaterial because the sale will produce the actual value of the homestead.

Order to sell homestead

“[H]aving due regard to all the circumstances and the custody of children of the parties,” a district court may award the right to occupancy of the homestead to either party. Minn. Stat. § 518.63 (2008). Also, “[i]n order to effect a division or award of property as is provided by section 518.58, the court may order property sold or partitioned.” Minn. Stat. § 518.65 (2008).

Requiring the sale of the parties’ homestead is consistent with the evidence and is not contrary to law. *See Ruprecht v. Ruprecht*, 255 Minn. 80, 92-94, 96 N.W.2d 14, 24-25 (1959) (holding that the district court’s order for the sale of the parties’ homestead was not an abuse of discretion, in light of the financial obligations of the parties and statutory requirements); *see also Wilson v. Wilson*, 388 N.W.2d 432, 433 (Minn. App. 1986) (concluding that an order of the immediate sale of the marital homestead was not an abuse of discretion where the parties had no children and disagreed on the value of the home), *review denied* (Minn. Aug. 20, 1986). Here, the parties have no minor children to

be considered. Well within its discretion, the district court found it was necessary to order the sale of the homestead in order to equitably distribute the parties' assets and for both parties to meet the costs of their separate households. This finding is supported by the record.

The district court determined that husband's gross monthly income is \$2,054, and his monthly expenses are \$3,357; husband does not dispute these figures. On appeal, husband points to the same evidence the district court considered in reaching these figures and asserts that "[t]he record shows [husband] can afford to maintain the homestead," despite the fact that husband falls over \$1,000 short in his monthly income to pay his expenses. Furthermore, husband's estimated expenses do not reflect the added costs of maintaining the homestead. As the district court stated, "[p]roperty taxes and home owner's insurance on the homestead alone cost approximately \$500 per month, and Husband estimated that utilities in the homestead cost \$800 per month."

In addition, husband still has not established that he can afford to pay wife for her interest in the homestead. Husband fails to point out what significant assets are available to him other than the A.G. account. Even assuming husband's ability to pay wife her portion of the equity, he has failed to follow previous court orders requiring him to make certain credit-card payments as well as to provide wife with health insurance. His ability to meet financial obligations is doubtful. For instance, wife testified that husband misappropriated checks from trust funds that were sent to the parties' sons at the parties' homes, suggesting that husband did not have immediate resources with which to pay expenses.

The district court considered all of the circumstances in making its determination to sell the homestead. The homestead is the parties' one major asset; furthermore, a sale of the homestead would not prevent husband from buying it. The district court's order for the immediate sale of the homestead was not clearly erroneous.

Valuation date of A.G. Edwards account

“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 pertinent statutory language in setting a valuation date of marital property is found in Minn. Stat. § 518.58, subd. 1:

The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, 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. 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.

Here, the district court determined that \$50,600 of the A.G. account is wife's nonmarital property, and the remainder is marital property which should be divided between the parties equally. Upon cross-examination, wife testified that the account was valued at approximately \$192,000 on November 30, 2008. The district court chose a valuation date for the account of November 30, 2008, the date of the last statement prior to the final evidentiary hearing in the matter. The district court explained that it picked a later valuation date because:

(1) the balance on the account has decreased substantially since March 17, 2008, because the value of stocks generally has substantially declined and the market is currently volatile; (2) Wife has justifiably relied on the account to pay for living expenses since the prehearing conference; and (3) Husband's conduct in this matter has caused delays, including failure to make forthcoming disclosures, and appear for mediation the first time it was scheduled. The most recent A.G. Edwards account statement in evidence is from June 2008, nearly six months before the last evidentiary hearing, and there was no clear evidence on the value of the account at the time of the final hearing.

The court's reasons for choosing a later valuation date that is fair and equitable are supported by the record. The record reflects that the value of the A.G. account from the date of the March 17, 2008 pretrial hearing (\$311,157.69 on March 31) to the final evidentiary hearing on December 23, 2008 (approximately \$192,000 on November 30), decreased substantially. Wife testified that she believed that the drop in the stock market since 2006 accounted for a substantial portion of the devaluation of the A.G. account. Wife justifiably relied on the A.G. account to support herself from the time she separated from husband, because she had no earned income and she had been using money from the A.G. account to pay for certain expenses that the court had previously ordered husband to pay. Husband's actions contributed to delays in the dissolution proceeding. For example, husband withheld financial information, and it took wife extra time to obtain it; and husband failed to attend a mediation.

The district court provided reasons based on the evidence for choosing a November 30, 2009 valuation date for the A.G. account. Thus, the date was neither arbitrary nor clearly erroneous.

Spousal maintenance

On appeal, wife argues that the district court abused its discretion in reserving spousal maintenance and should have awarded her a lump-sum spousal-maintenance award. She also argues that the district court abused its discretion in denying her motion for an amended judgment seeking 15 days to submit an affidavit on her attorney fees in excess of \$1,000.

This court reviews a district court's award of spousal maintenance under an abuse-of-discretion standard. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). A reviewing court will not find an abuse of discretion unless the facts in the record do not support the way in which the district court settled the matter. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

“Maintenance” means an award of “payments from the future income or earnings of one spouse for the support and maintenance of the other.” Minn. Stat. § 518.003, subd. 3a (2008). Maintenance may be granted when the district court finds that the spouse seeking 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 (2008).

Once a court has found that a party is eligible for spousal maintenance, the amount and duration of that maintenance are determined after considering and making findings on the statutory factors outlined in Minn. Stat. § 518.552, subd. 2(a)-(h) (2008). *Reinke v. Reinke*, 464 N.W.2d 513, 514-15 (Minn. App. 1990) (citing 1988 statutes).

Here the record shows that wife is eligible for spousal maintenance because the district court correctly determined that her monthly expenses exceed her monthly income of \$866 by approximately \$2,562. The district court also considered each factor in § 518.552, subd. 2(a)-(h). Based on the factors and its findings for each, the district court concluded that, although wife's current income is insufficient to provide for her needs, she has sufficient assets available to her to at least temporarily meet her needs. The court concluded that the record did not contain enough information to determine whether wife will be able support herself permanently, and it thus reserved the issue of spousal maintenance.

When the district court considered factor (g), "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance," the court correctly determined that husband's monthly expenses exceed his net income by approximately \$1,503. Like wife, he was awarded substantial assets, mainly from the sale of the homestead. The court found that "[h]usband has no income available to pay [w]ife monthly spousal maintenance, but has the ability to make a lump sum payment." However, the district court further determined that "[h]usband will

require his portion of the marital assets to meet his own shortfall, and there is no showing of unfair hardship to allow distribution of some of his nonmarital assets to [w]ife.”

The “basic consideration” in determining spousal maintenance “is the financial need of the spouse receiving the maintenance, and the ability to meet that need balanced against the financial condition of the spouse providing that maintenance.” *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006). In essence, the issue of spousal maintenance requires a balancing of the recipient’s need against the obligor’s ability to pay. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). Spousal maintenance is fact and case specific, and no single fact is dispositive. *Id.* at 39.

The district court ultimately concluded, and the record reflects, that husband’s current financial condition does not fairly enable him to pay spousal maintenance. Considering husband’s lack of ability to pay, and wife’s lack of immediate need for maintenance, a reservation of maintenance was not an abuse of discretion. There was not enough evidence before the court at this time to determine whether either party will be able to find employment. By retaining jurisdiction over the issue of maintenance the court allows both parties time to explore future employment, and it keeps open the opportunity to make such award, if any, if husband’s income increases. The district court’s conclusions regarding spousal maintenance are supported by the record and are not clearly erroneous.

Wife’s request for 15 days to submit affidavit on attorney fees

“An award of attorney fees should not be disturbed absent a clear abuse of discretion.” *Bury v. Bury*, 416 N.W.2d 133, 138 (Minn. App. 1987). The district court

determined that husband was responsible for a portion of wife's attorney fees and costs, finding that husband unreasonably contributed to the length and expense of the proceedings because he failed to make financial disclosures, attend a mediation session, and cooperate with the real-estate appraiser. *See* Minn. Stat. § 518.14, subd. 1 (2008) (stating that a court may award, "in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding"). As part of the decree, the court awarded wife \$1,000, noting that she did not itemize her attorney fees and costs at trial, and that \$1,000 is the maximum amount allowed without itemization. *See* Minn. R. Gen. Pract. 119.01 and 119.02 (stating that a party seeking an award of attorney fees in excess of \$1,000 must make a motion, accompanied by a detailed account of the work involved). The district court subsequently denied wife's motion for an allowance of 15 days to submit an affidavit on her attorney fees in excess of \$1,000, indicating that there is no support in the record for an award greater than \$1,000. Wife now argues that neither Minn. Stat. § 518.14 nor rule 119 states a deadline for the submission of such a motion and affidavit; and that there would have been no prejudice to husband to allow more time within which to request additional fees.

The additional attorney fees wife seeks are conduct based. They reasonably should have been determinable by the conclusion of the trial and provable then, or within a short period thereafter. The trial concluded on December 23, 2008, and the judgment and decree was entered on April 24, 2009. Wife moved to amend the judgment and decree on May 6, 2009, although she necessarily had to know by the conclusion of the

trial that she had presented no itemized evidence of conduct-related attorney fees. The court was within its discretion in declining to open the matter to further litigation when such litigation was entirely avoidable.

Affirmed.