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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2126**

In re the Marriage of:

Kimberly Ann Habberstad, petitioner,
Respondent,

vs.

Stephen Douglas Habberstad,
Appellant.

**Filed November 7, 2011
Affirmed in part, reversed in part, and remanded
Schellhas, Judge**

Houston County District Court
File No. 28-FA-07-363

Ben M. Henschel, Joani C. Moberg, Henschel Moberg P.A., Minneapolis, Minnesota;
and

Laura J. Seaton, Bosshard Parke Ltd., La Crosse, Wisconsin (for respondent)

Jill I. Frieders, O'Brien & Wolf L.L.P., Rochester, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's marriage-dissolution judgment, arguing that (1) the court's valuation of the parties' bank stock is clearly erroneous, (2) the court abused its discretion by ordering quarterly property-equalization payments exceeding his ability to pay, and (3) the court abused its discretion by awarding respondent spousal maintenance and attorney fees. Respondent also challenges the judgment, arguing that (1) the court abused its discretion by not awarding permanent spousal maintenance, (2) the court's valuation of the parties' bank stock was clearly erroneous or, alternatively, that the court abused its discretion by not dividing the bank stock equally between the parties, (3) the court erred by characterizing certain bank shares as appellant's nonmarital property and excluding other shares from the marital estate, and (4) the court erred by not awarding respondent a lien against appellant's real estate to secure his property-equalization obligation.

We affirm the district court's characterization of certain bank stock as appellant's nonmarital property and its exclusion of other bank stock from the marital estate. Because the parties have agreed on appeal to divide the marital bank stock equally, we do not reach their valuation arguments regarding the stock. We remand this case to the district court for an equal division of the marital bank stock and an amended judgment to reflect that division. In light of the parties' amended property division, we also remand to the district court the issues of spousal maintenance and respondent's property-equalization obligation.

We reverse and remand to the district court its award of attorney fees to respondent.

FACTS

Appellant-husband Stephen Habberstad and respondent-wife Kimberly Habberstad were married on October 29, 1977. The parties have four adult children: N.H.W., E.H., B.H., and A.H. Husband's grandfather became involved in the banking business more than 100 years ago when he acquired an interest in Farmers & Merchants Bank. At some point, husband's father, E.C.H., took over the business. After the parties married, husband began working for his father at Farmers & Merchants Bank. Farmers later acquired Citizens State Bank of Hayfield. The bank stockholders organized Country Banker's, Inc. (CBI) to be the holding company for Farmers and Citizens. Husband is the chief executive officer of Farmers, president of CBI, and chairman of the board of Citizens, Farmers, and CBI.

The district court valued the CBI stock as of December 31, 2007, at which time the stock was owned as follows:

<u>Owner</u>	<u>Shares</u>	<u>Percentage</u>
husband	15,363	30.582872
husband and wife	9,080	18.075407 ¹
husband's sister and brother-in-law	16,130	32.109727

¹ Over the years, husband's father and sister transferred bank stock to the parties' children. Husband was the custodian of the shares and, at some point, transferred the stock owned by N.H.W., E.H., and B.H. to himself and wife. At the time of the dissolution trial, these three children had sued the parties, claiming ownership of 4,524.5 shares (9.006848%). The district court therefore excluded these shares from the marital estate and the property division.

husband, as custodian for A.H.	1,417	2.820799
wife's parents	608	1.210334
J.J.F.	2,780	5.534100
M.M.	2,195	4.369551
P.J.S.	1,550	3.085560
R.W.S. and P.J.S.	1,000	1.990684
D.A.A.	111	.220966.

The parties' combined ownership, as of December 31, 2007, was 24,443 shares (48.658279%).

After an eight-day trial, the district court dissolved the parties' marriage. Upon the parties' posttrial motions for amended findings, the court amended the findings of fact, conclusions of law, order for judgment, and judgment. Both parties now appeal.

D E C I S I O N

Controlling Interest in and Value of CBI

The district court found that husband controlled A.H.'s shares, as her custodian, and wife's parents' shares because he voted their shares. Based upon the combined shares that husband voted, testimony from two bank presidents, and husband's testimony, the district court found that husband "ran the bank in a manner consistent with an individual having complete control over" CBI.

As of December 31, 2007, the district court valued the CBI stock at \$324.78 per share for a total value of \$6,469,130 and husband's nonmarital interest at \$584,762. The court found that a sale of the parties' stock is inappropriate because "[t]he parties derive a significant amount of income from the banks that have been in [husband's] family for over 100 years." Stating various reasons, the court did not equally divide the bank stock

between the parties, instead awarding all of the parties' stock to husband at a value of \$5,884,368 (\$6,469,130 (total value) - \$584,762 (husband's nonmarital interest)).

At oral argument on appeal, the parties confirmed their agreement to divide the marital bank stock equally. We therefore do not address the parties' arguments regarding valuation of the bank stock and remand the distribution of the marital bank stock to the district court to effectuate the parties' agreement and to amend the judgment accordingly.

Husband's Equalization Obligation

To equalize the marital property division, the district court ordered husband to pay wife \$3,466,100.50 (equalization obligation) in quarterly payments over 15 years at 4% interest per annum, and the court granted wife a lien against husband's bank stock to secure husband's payment. Husband argues that the court abused its discretion because the amount of the quarterly payments exceeds his ability to pay. Wife argues that the court abused its discretion by not awarding her a lien against husband's real estate as additional security for husband's equalization obligation. Because we are remanding for an equal division of the bank shares, we also remand for the district court to recalculate the amount of husband's equalization obligation and to reconsider the payment schedule and the issue of security for the equalization obligation.

Spousal Maintenance

The district court awarded wife spousal maintenance of \$10,000 per month for five years. The court based the award on the following findings: husband had an adjusted gross income of \$1,217,962 in 2006, \$1,148,601 in 2007, and \$1,247,162 in 2008; husband will continue to have income at this level; "the parties enjoyed a high standard

of living throughout the marriage” and “[b]oth parties were active contributors during the marriage”; wife did not work during the 32-year marriage; wife is 53 years old and “it is not anticipated that she will be able to make a significant contribution to her own support”; and wife’s anticipated monthly living expenses of \$24,998 are “excessive.”

A spousal-maintenance award is appropriate when one spouse demonstrates that he or she lacks sufficient property to provide for his or her “reasonable needs” or is otherwise “unable to provide adequate self-support.” Minn. Stat. § 518.552, subd. 1 (2010). When determining the amount and duration of spousal maintenance, the district court must consider eight statutory factors² and, in essence, balance the recipient’s need

² The statutory factors are as follows:

- (a) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party’s ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party’s age and skills, of completing education or training and becoming fully or partially self-supporting;
- (c) the standard of living established during the marriage;
- (d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;

against the obligor's ability to pay. *Id.*, subd. 2 (2010); *Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982).

In *Lyon v. Lyon*, the supreme court reversed a spousal-maintenance award of \$4,000 per month. 439 N.W.2d 18, 20, 22 (Minn. 1989). The parties in *Lyon* were married for 32 years. *Id.* at 19. Mr. Lyon earned over \$300,000 per year and Ms. Lyon was a homemaker. *Id.* at 19, 22. The parties agreed that Ms. Lyon was unemployable. *Id.* at 21. The district court “divided the marital property equally” with “each spouse receiving approximately \$3.6 million.” *Id.* at 20. The supreme court noted that Ms. Lyon’s \$3.6 million estate would generate an annual income of over \$200,000. *Id.* at 22. Although Mr. Lyon had the ability to pay \$4,000 per month in maintenance, the supreme court emphasized that maintenance is need based and that the case was unusual because the spouse seeking maintenance had received \$3.6 million. *Id.* at 21–22.

(e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;

(f) the age, and the physical and emotional condition of the spouse seeking maintenance;

(g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and

(h) the contribution of each party 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 or in furtherance of the other party’s employment or business.

Id.

In this case, according to the values set forth on exhibit A attached to the marriage-dissolution judgment, after the parties equally divide the marital bank stock, wife will receive marital property worth approximately \$4,096,907.50. A distribution to wife of half the marital bank stock will reduce the amount of husband's equalization obligation, it will likely reduce husband's income from the bank stock, and it will likely increase wife's income from the bank stock. Because the modified distribution of marital property to the parties affects both parties' incomes, we remand to the district court the issue of spousal maintenance. On remand, the court must revisit wife's need for spousal maintenance. *See* Minn. Stat. § 518.552, subd. 1(a) (requiring district court to examine the property award when considering need); *Lyon*, 439 N.W.2d at 22–23. The court must also revisit the duration of that need, if any, and husband's ability to pay maintenance.

Fair Oaks Property

Husband's Transfer to Wife

Prior to the parties' marriage, husband owned a one-third interest in Fair Oaks Apartments located in Austin, Minnesota. The district court found that husband's nonmarital interest was approximately 57%. During the marriage, the parties owned a 50% interest in Fair Oaks. The district court found that husband's nonmarital interest was approximately 38%.

On December 30, 1992, husband transferred title to his interest in Fair Oaks to wife through a straw person. The deed stated, "The purpose and intent of this deed is to transfer title to Kimberly A. Habberstad individually, and for no other purpose or reason." Husband testified that he transferred the interest to protect the asset from

creditors because he was involved in a lawsuit at the time. He testified that his attorney “recommended that I transfer some of my assets into my wife’s name for estate planning and possibly a shield against suits of this nature.” Based on his attorney’s advice, husband transferred his interest in Fair Oaks to wife. Husband testified that he did not intend to gift the Fair Oaks property to wife. The district court found that husband transferred his interest in Fair Oaks to wife for the purposes of estate planning.

Wife argues that husband “transmuted his nonmarital property to marital property” when he transferred his Fair Oaks interest to her. We disagree.

“Marital property” means property, real or personal, . . . acquired by the parties . . . to a dissolution . . . at any time during the existence of the marriage relation between them All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of co-ownership The presumption of marital property is overcome by a showing that the property is nonmarital property.

“Nonmarital property” means property . . . which . . .

(b) is acquired before the marriage; [or]

(c) is acquired in exchange for or is the increase in value of property which is described in clause[] . . . (b)

Minn. Stat. § 518.003, subd. 3b (2010). To overcome the marital-property presumption, a spouse has the burden to establish the property’s nonmarital character by a preponderance of the evidence. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997).

To retain its nonmarital character, nonmarital property must be kept separate from marital property, or if it is commingled with marital property, it must be readily traceable

to an identifiable nonmarital asset. *Id.*; *Robert v. Zygmunt*, 652 N.W.2d 537, 541 (Minn. App. 2002), *review denied* (Minn. Dec. 30, 2002). The party asserting the nonmarital character of the property bears the burden of establishing by a preponderance of the evidence that the asset was acquired with nonmarital funds. *Prahl v. Prahl*, 627 N.W.2d 698, 705 (Minn. App. 2001); *Carrick v. Carrick*, 560 N.W.2d 407, 413 (Minn. App. 1997). “Determining whether property is marital or nonmarital . . . is an issue over which we exercise independent review, though deference is given to the district court’s findings of fact.” *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 852 (Minn. 2003).

The parties do not dispute that before husband’s transfer of his interest in the Fair Oaks property, the interest was nonmarital. The parties dispute whether the transfer converted husband’s nonmarital property to marital property. In a similar context, this court held that “[t]he mere act of transferring title from individual ownership to joint tenancy does not transform non-marital property into marital property.” *Pfleiderer v. Pfleiderer*, 591 N.W.2d 729, 732 (Minn. App. 1999) (quotations omitted). And “it is equally clear that transferring joint property into one party’s name for estate planning purposes does not convert marital property into nonmarital property.” *Id.* at 733. “[T]he form of ownership is not dispositive of the property’s marital or non-marital nature.” *Montgomery v. Montgomery*, 358 N.W.2d 169, 172 (Minn. App. 1984).

Wife argues that husband gifted the interest to her. “[T]he party asserting that there was a gift must prove the requisite elements by clear and convincing evidence.” *McCulloch v. McCulloch*, 435 N.W.2d 564, 568 (Minn. App. 1989). “[Q]uestions of intent are questions of fact.” *Id.* (quotation omitted). “To constitute a valid gift . . . the

donor must intend to make a gift, the property must be delivered and the donor must absolutely dispose of the property.” *Olsen*, 562 N.W.2d at 800. “The most important factor in determining whether a gift is marital or nonmarital is the donor’s intent.” *Id.*

We conclude that the district court’s implicit finding that husband did not intend to gift the property to wife is not clearly erroneous. The court therefore did not err by concluding that husband’s transfer of the Fair Oaks property to wife did not eliminate his nonmarital interest in the property.

CBI Bank Shares in Name of A.H.

In 1993, husband transferred the parties’ interest in Fair Oaks to his sister in exchange for 6,730 shares of CBI stock. Instead of transferring all 6,730 shares to husband, husband’s sister transferred shares to husband, wife, and each of their four children. Husband and wife each received 521.5 shares of CBI stock from husband’s sister. Husband was the custodian of the bank stock transferred to the children. Husband subsequently transferred the children’s bank stock to wife and himself. He also transferred 521.5 shares that he received and 521.5 shares that wife received to A.H. with himself as custodian. Over the years, husband frequently transferred bank stock among family members. As of December 31, 2007, the oldest three children owned zero shares of CBI stock, and A.H. owned 1,417 shares, all of which can be traced to the Fair Oaks exchange.

When husband transferred his shares and wife’s shares of CBI stock (1,043 shares) to A.H., he did so by first transferring the shares to N.H.W. with himself as custodian. To transfer wife’s shares to N.H.W., husband directed his secretary to forge wife’s name on

the stock certificate. Husband then transferred 73 of N.H.W.’s shares to himself and 970 shares to A.H. with himself as custodian. Wife argues that the district court erred by excluding from the marital estate the 521.5 shares of CBI stock that husband’s sister gave to her and which are now in the name of A.H. Wife argues that 521.5 of the CBI shares in A.H.’s name should be included in the marital estate because husband improperly transferred the shares by directing his secretary to forge wife’s name on the bank stock certificate.

“[I]n a dissolution proceeding, a district court lacks personal jurisdiction over a nonparty and cannot adjudicate a nonparty’s property rights.” *Danielson v. Danielson*, 721 N.W.2d 335, 339 (Minn. App. 2006). Wife may not assert a claim in the marriage-dissolution action against A.H. for the 521.5 shares of CBI stock titled in A.H.’s name because A.H. is not a party to the action. The district court therefore did not err by not addressing the ownership of the 521.5 shares currently titled in A.H.’s name and excluding the shares from the marital estate at this time.

Attorney Fees

The district court awarded wife attorney fees as follows:

<u>Date of Order</u>	<u>Amount of Award</u>
June 28, 2007	\$ 7,000 ³
February 27, 2008	\$ 7,500
February 23, 2009	\$ 10,000 ⁴
June 5, 2009	\$150,000

³ The district court’s first award is contained in a stipulated temporary order filed on June 28, 2007, in which the parties agreed that “[h]usband shall contribute \$7,000.00 toward attorney, accountant, and appraisal fees and other costs.”

⁴ This is an amount that the district court ordered husband to place in his attorney’s trust account to cover mediation expenses.

November 1, 2010

\$125,000.

Husband argues that the court abused its discretion in its awards of attorney fees to wife.

“On review, this court will not reverse a [district] court’s award or denial of attorney fees absent an abuse of discretion.” *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). In a dissolution proceeding, the district court is authorized to award both need-based and conduct-based attorney fees. A district court “shall” award need-based attorney fees, if it finds that (1) “the fees are necessary for the good faith assertion of the party’s rights . . . and will not contribute unnecessarily to the length and expense of the proceeding,” (2) the party ordered to pay the fees “has the means to pay them,” and (3) the party awarded the fees “does not have the means to pay them.” Minn. Stat. § 518.14, subd. 1 (2010). A district court “may,” “in its discretion,” award “additional” conduct-based attorney fees “against a party who unreasonably contributes to the length or expense of the proceeding.” *Id.* But “fee awards made under this provision must indicate to what extent the award was based on need or conduct or both.” *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001); *see also Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001) (remanding attorney-fee issue because district court failed to “make findings sufficient to show what combination of need or conduct support all, or different parts of, the entire award,” precluding effective appellate review), *review denied* (Minn. Feb. 21, 2001).

As to the district court’s award of attorney fees of \$7,000 on June 28, 2007, because the award is contained in a stipulated temporary order, husband’s argument that the district court abused its discretion lacks merit. As to the court’s award of \$7,500 on

February 27, 2008, and its February 23, 2009 order that husband deposit \$10,000 in his attorney's trust account for mediation expenses, the record is insufficient regarding the bases for the awards, and therefore effective review is precluded.

As to the district court's supplemental temporary order on June 5, 2009, awarding wife \$150,000 in attorney fees,⁵ the court noted that it had reviewed the entire file, it was troubled by husband disposing of property in violation of a court order, it was troubled by husband's possible involvement in the oldest children's lawsuit against the parties, and wife had a need for \$150,000 in fees "to enable her to continue to retain counsel in defending the action brought by the children . . . and to proceed to litigate the remaining issues in this proceeding."⁶ The court's order does not explain how much of the award is for need-based fees and how much is for conduct-based fees.

After the dissolution trial, when the district court awarded wife an additional \$125,000 in attorney fees, the court found that wife's outstanding attorney fees were \$341,452.60, that wife "has chosen an aggressive approach to this dissolution" by using five attorneys, including two at trial, and that husband's "relationship with his children has continued to cause this Court concern." The court also noted that it had already awarded wife \$173,500 in attorney fees.⁷ Based on its findings, the court awarded wife an

⁵ To satisfy this court-ordered obligation, husband borrowed \$150,000 from United Bankers Bank.

⁶ Even though the children's litigation is ancillary to the marital dissolution, "this fact, by itself, does not render the fee awards improper." *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). And husband is not challenging the propriety of the award on that basis.

⁷ This court's calculation of the pretrial attorney fees awarded to wife does not equal \$173,500.

additional \$125,000 in attorney fees. And in its order following the parties' posttrial motions, the district court noted that husband "requests that the Court re-examine its findings regarding attorney's fees and find that [wife] has the financial ability to pay her own attorney's fees." The court ruled as follows: "The Court finds that the findings regarding attorney's fees in the June 7, 2010 Judgment is supported by the facts and evidence and they will not be amended."

While the district court's findings regarding its posttrial award of attorney fees *suggest* that its award is based both on wife's need and husband's conduct, the court's findings do not reveal how much of the fee award is need based or how much is conduct based. And the court made no findings regarding whether the fees awarded to wife were necessary for her good-faith assertion of rights and whether wife lacks the means to pay the fees. And other than expressing its continuing concern about husband's relationship with the children, the court made no findings about how husband's conduct contributed unnecessarily to the length and expense of the proceeding. *See* Minn. Stat. § 518.14, subd. 1. The lack of findings precludes our effective review, and we therefore reverse and remand the award of posttrial attorney fees for additional findings.

In conclusion, we affirm the district court's determination that certain shares of CBI stock, traceable to Fair Oaks, are husband's nonmarital shares. We also affirm the district court's exclusion of the shares currently titled in A.H.'s name from the marital estate. Because the parties agree to an equal division of the marital CBI stock, we remand to the district court to effectuate the parties' agreement and to amend the judgment accordingly. We also remand to the district court the issues of spousal maintenance and

husband's equalization obligation for reconsideration in light of the parties' amended marital property division. We reverse and remand the award of attorney fees for additional findings. The district court may, in its discretion, reopen the record on remand.

Affirmed in part, reversed in part, and remanded.