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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0540**

In re the Marriage of:
Lainie Ann Stewart, petitioner,
Appellant,

vs.

James Swedlund Stewart,
Respondent.

**Filed April 7, 2014
Affirmed
Randall, Judge***

Hennepin County District Court
File No. 27-FA-11-1193

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Minnesota (for appellant)

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Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Randall,
Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Appellant mother argues the district court erred by failing to award her temporary spousal maintenance, calculating the parties' incomes and expenses, failing to award her the non-marital appreciation in her retirement account, valuing the parties' savings account as of the valuation date, and not awarding her conduct-based fees. We affirm on all issues.

FACTS

Appellant Lainie A. Stewart (mother) and respondent James S. Stewart (father) were married in 1994. At the time of the dissolution in 2012, the parties had two minor children and stipulated to joint legal and joint physical custody. Mother was ordered to pay father \$280 per month in child support. Mother is employed in a sales position with a base salary of \$77,800 and fluctuating commissions. In its original judgment in 2012, the district court used a ten-year average to determine mother's income for child support and found mother's income to be \$18,160 per month. In the amended judgment in 2013, the district court chose a two-year average, finding her income to be \$23,730 per month. Father is self-employed as the owner and sole shareholder of an excavating company and provided contradictory evidence of his income. Father's 2011 W-2 showed wages of \$72,800 and his K-1 showed S-corporation income of \$90,018 from his business. Father ran personal expenses through his business and has bartered for services in the past without reporting this income on his tax returns. The district court combined father's

W-2 income and K-1 income to find that his monthly income was \$13,568, and imputed \$2,000 per month in income, for a total of \$15,568.

The parties have a homestead which they agreed to sell and which requires substantial upkeep, maintenance, and repairs before it can be sold. After the parties separated, father stopped making payments on many of the expenses associated with the homestead that were historically paid during the marriage. At trial, mother requested temporary spousal maintenance to pay these expenses. She did not request spousal maintenance in her dissolution petition, but the district court permitted testimony about the maintenance and upkeep of the parties' home and related expenses. In the original judgment, the district court awarded mother \$3,733 per month in temporary spousal maintenance until the sale of the home. In the amended judgment, the district court denied maintenance and explained that an attempt to rectify any financial imbalances regarding the homestead should have been made through an award of marital property.

Mother was awarded the parties' high-yield savings account. The parties stipulated to a valuation date of April 13, 2011. The account was worth \$95,171 on that date. At trial, mother argued the account had a \$15,000 or \$20,000 balance because she used the account to pay for expenses for the children and the home, and claimed that an equitable value for the account would be \$15,000. In post-trial submissions, she stated that the value of the account was \$0. In the initial judgment, the district court valued the savings account at \$0. In its amended judgment, the district court applied the stipulated valuation date and valued the account at \$95,171.

Mother was awarded non-marital property in her Charles Schwab Rollover IRA. The funds in the IRA come from employment prior to the marriage and after the marriage. At the valuation date, the IRA held \$341,208. Prior to the marriage, mother was employed at Transition Engineering and contributed \$7,790 to the IRA; father does not dispute this portion of the IRA is non-marital. When she became employed at Kent Electronics in 1992, she rolled over the \$7,790 into a Kent 401(k). Kent was then acquired by Avnet. Mother separated from employment with Avnet in 2003 to work for her current employer, Hickory Tech. On October 3, 2003, mother rolled over her entire Avnet 401(k) valued at \$126,141 into a Charles Schwab Rollover IRA. Mother attempted to obtain account statements as of 1994, but was unable to do so. In 2003, mother started a new 401(k) with Hickory Tech, and this account is valued and awarded separately in the judgment.

In the original judgment, the district court awarded mother \$17,130, which is 20% of her contributions, and \$6,512 which is 20% of her employer's contributions, because she was employed for roughly two years prior to the marriage and had ten years of employment with Kent/Avnet. Mother testified that she thought her non-marital portion would double after seven years at a rate of return of eight percent, and more than double after 20 years.¹ Mother did not testify to the amount she typically contributed, the maximum contribution amount, or the amount her employer matched in contributions. She submitted no evidence of how the funds were invested, the stock market trends, or

¹ Although not an issue on appeal, we simply note the correct math: with an eight percent compound rate, the non-marital portion would double in nine years ("the rule of 72"), not seven.

any account statements showing her appreciation rate. Based on mother's testimony, the district court added her \$17,130, \$6,512, and \$7,790, for a total of \$31,432; then it added \$31,000 to estimate non-marital appreciation. Mother received \$62,000 for her non-marital portion. In its amended judgment, the district court calculated her non-marital share of the \$126,141 by subtracting the original non-marital \$7,791, and correcting the multiplier to 15% based on 19.5 months of pre-marital contributions out of 130 months of employment. Mother was awarded \$25,544 in non-marital assets from the account. It did not award any appreciation because it found mother did not meet her burden of proof to trace that claim.

In the original judgment, the district court awarded mother \$10,000 in conduct-based attorney fees. The amended judgment awards no conduct-based fees. The record shows both parties contributed to the length and expense of the proceedings, and mother did not offer evidence of which fees were incurred as a result of father's conduct. This appeal follows.

D E C I S I O N

I.

Mother argues the district court abused its discretion by not awarding her temporary spousal maintenance. We review a district court's maintenance award for abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). Findings of fact must be upheld unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). The district court may award maintenance if it finds that the "spouse seeking maintenance lacks sufficient property to provide for her reasonable

needs or is unable to provide adequate self-support.” *Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. App. 1997) (citing Minn. Stat. § 518.552, subd. 1 (1996)).

Mother argues the district court abused its discretion in refusing to grant her temporary spousal maintenance. She sought temporary spousal maintenance to pay for upkeep and repairs to the parties’ home until it sold. She did not allege that the property awarded to her was insufficient to provide for her needs or that her income was inadequate for self-support, and the record does not show that mother cannot support herself. The district court initially awarded mother temporary spousal maintenance to remedy the imbalance between the parties’ financial circumstances regarding the homestead. However, a reason not listed in the statute is generally not grounds for awarding spousal maintenance. The district court did not abuse its discretion by denying maintenance to mother. As the district court explained in its amended judgment, financial imbalances regarding the homestead should have been resolved through an award of marital property.

II.

Mother argues the district court erred in determining both parties’ incomes and her expenses. Findings on net income for child-support calculations will be upheld “if those findings have a reasonable basis in fact and are not clearly erroneous.” *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 470 (Minn. App. 1999). The district court must use current income when available to calculate child-support obligations. *See Merrick v. Merrick*, 440 N.W.2d 142, 146 (Minn. App. 1989). A child support obligation is calculated based on a parent’s gross income. Minn. Stat. § 518A.34 (2012). Gross

income “includes any form of periodic payment to an individual, including, but not limited to, salaries, wages, [and] commissions” and expense reimbursements “if they reduce personal living expenses.” Minn. Stat. § 518A.29(a), (c) (2012).

The district court is not required to adopt a party’s claimed expenses or the other party’s estimation of those expenses. *See Maeder v. Maeder*, 480 N.W.2d 677, 680 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). We defer to the district court’s credibility determinations. *Rutz v. Rutz*, 644 N.W.2d 489, 493 (Minn. App. 2002), *review denied* (Minn. Jul 16, 2002).

Mother’s Income

Calculating average income over a time period may be appropriate if the nature of employment causes income to fluctuate. *Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987). There is no standard time period for income averaging. *See id.* at 606 (three-and-a-half years); *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359, 363 (Minn. App. 1987) (six years), *review denied* (Minn. Oct. 28, 1987). The district court has discretion to select the averaging period, and inclusion of an unusually good or bad year in the time frame is not necessarily erroneous. *See Veit*, 413 N.W.2d at 606. Section 518A.29 does not specifically address whether it is appropriate to prorate a person’s income. The financial information parties must provide includes “pay stubs for the most recent three months.” Minn. Stat. § 518A.28(a) (2012). And the district court has authority to prorate certain types of income when calculating income. *See Mower Cnty. Human Servs. ex rel. Meyer v. Hueman*, 543 N.W.2d 682, 684 (Minn. App. 1996) (holding district court could prorate periodic annuity payment); *Johnson v. Johnson*, 533 N.W.2d 859, 863-64 (Minn. App.

1995) (permitting district court to prorate overtime income when obligor worked increased overtime hours after the dissolution).

In its amended judgment, the district court applied a two-year average to calculate mother's income for child support. Mother submitted four paystubs from 2012 and the district court prorated them over 12 months and averaged that number with mother's 2011 income. Mother argues that the district court erred when it applied a two-year average and prorated her income. She also argues the district court did not make sufficient findings to support use of a two-year average.² The two-year average reflects a more accurate calculation of mother's income than a ten-year average. Mother's income steadily increased from 2007-2010 up to \$290,600, and then decreased slightly in 2011 to \$274,170. The district court prorated her first four months of income in 2012 to conclude her income in 2012 would be \$295,353. If the district court had used a ten-year average, it would have included years with income amounts more than \$100,000 less than her current income, so a two-year average takes account of the fluctuation in her income without including the years where her income was much lower. The facts support the conclusion that the nature of mother's industry can cause a worker's income to fluctuate. The district court properly averaged her income over two years. And the district court's findings were sufficient because they state why the district court used an average income and that a two-year period reflects more current income for mother. A district court has

² Mother also argues that she advised the court that she went on disability status in August 2012 and sustained a loss in income. This evidence was not part of the record at trial, so it cannot be considered on appeal. See *State v. Larson*, 520 N.W.2d 456, 464 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

authority to prorate income, and is required to calculate child support using a person's current income. It was a proper use of discretion for the district court to prorate mother's income from 2012.

Father's Income

We review a decision to impute income for abuse of discretion. *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008). Mother argues that the imputed income does not account for the personal expenses paid by father's company, his bartered services, or proceeds from flipping two Buffalo homes. She also questions whether the imputation number accurately accounts for all of father's income. Father testified that he had \$2,000 in personal expenses paid by the company, \$719 in personal expenses and \$1,472 in personal charges to the company's visa. Father's K-1 reflects income in the form of disbursements and expenses, and this was included in his monthly income calculation. Mother points to Schedule 4 in Exhibit 2 where special-project expenses were accounted for on the adjusted income statements for father's company from 2007-2010. The business appraiser that valued father's company testified that those amounts were items that accrued to the benefit of the Stewart family. But the record does not identify how much of those expenses were personal income for father or whether those expenses were accounted for in father's K-1. Because mother does not show that the special project expenses are not already accounted for in father's K-1 or that those expenses are personal income to father, she cannot show that the district court abused its discretion by declining to impute further income to father on that basis.

As for the Buffalo homes, mother is correct that the district court did not include income received from flipping those homes. The parties' tax returns indicate that the first Buffalo home sale occurred in 2010; thus any profit realized by the sale is not current income. The second Buffalo home occurred during the proceedings, but the proceeds went back to the parties' home-equity line of credit. Neither party could testify about the net income received from the second home, and there was no evidence that father had other homes to flip. The district court did not err by not imputing income to father related to these home sales.

Mother also argues that the district court did not explain how it arrived at \$2,000 as an imputation number. We note that the record supports the district court's findings that father had approximately \$2,000 in personal expenses paid for by his company, so there was no abuse of discretion related to the sufficiency of the district court's findings.

Mother's Expenses

The district court's original judgment found that mother claimed living expenses of \$18,160. Following father's motion for amended findings, the court found that some of mother's claimed expenses were incorrect or unreasonable and adjusted mother's budget to \$15,649.³ Because the district court properly denied an award of temporary spousal maintenance, we need not decide the issue of mother's expenses because a

³ Mother points out a math error by the district court. The district court concluded that mother's total adjusted expenses related to the home were \$5,466 per month when the accurate total is \$5,966 per month. However, the district court correctly stated her total monthly expenses, and mother's expenses do not impact the child-support calculations. This mathematical error need not be addressed.

parent's monthly expenses are not a factor for calculating child-support obligations. *See* Minn. Stat. § 518A.34.

III.

Mother argues the district court erred in determining the value of her retirement account by failing to award her any appreciation on the non-marital portion of her IRA. She argues that the account increased solely through appreciation from 2003 until 2011, and because the overall account appreciated by 170%, her non-marital share appreciated at the same rate. The district court has broad discretion over the division of marital property and will not be overturned on appeal absent a clear abuse of discretion. *Bogen v. Bogen*, 261 N.W.2d 606, 609 (Minn. 1977). Non-marital property includes property acquired by either spouse prior to the marriage, property acquired in exchange for non-marital property, and appreciation in the value of non-marital property. Minn. Stat. § 518.003, subd. 3b (2012). Upon dissolution, a spouse is entitled to receive the original non-marital asset and any passive appreciation in value. *Johnson v. Johnson*, 388 N.W.2d 47, 49 (Minn. App. 1986). A spouse seeking to claim non-marital property must prove its non-marital character by a preponderance of the evidence. *Swick v. Swick*, 467 N.W.2d 328, 330 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). This means that the party seeking to prove the non-marital character of the asset must trace an identifiable portion of the property to a non-marital source. *Senske v. Senske*, 644 N.W.2d 838, 841-42 (Minn. App. 2002). Increases in value of non-marital property remain non-marital if shown to be attributable solely to market forces or conditions, such as appreciation in value. *Kerr v. Kerr*, 770 N.W.2d 567, 570 (Minn. App. 2009).

The district court properly denied mother's claim for appreciation because she did not prove by a preponderance of the evidence that she traced her non-marital appreciation. The district court explained that it erred when accepting mother's non-marital claim solely based on her speculative testimony about the rate that her funds would double. We affirm the district court's determination that it did not find mother's testimony about appreciation credible. Aside from mother's speculative testimony, which was not based on any accounting background, there was no evidence of where the funds were invested, no annual statements from the account, and scant documentation overall. We find, as did the district court, that mother did not provide enough evidence tracing the non-marital appreciation to establish her claim by a preponderance of the evidence. The district court properly limited the value of the retirement account to the assets that she did trace.

IV.

Mother argues the district court erred in valuing the parties' savings account as of the stipulated valuation date. Minnesota law requires the district court to make a "just and equitable" division of marital property, after considering all relevant factors. Minn. Stat. § 518.58, subd. 1 (2012). The valuation date is determined as follows:

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.

Id. The district court has broad discretion in setting the marital property valuation date. *Desrosier v. Desrosier*, 551 N.W.2d 507, 510 (Minn. App. 1996). Valuation of an asset is a finding of fact and we will not set it aside unless it is clearly erroneous. *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975). The valuation of the asset does not need to be exact. *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979). Stipulations are judicially favored as a way to expedite dissolution litigation, and are accorded “the sanctity of binding contracts.” *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). A party “cannot repudiate or withdraw from a stipulation without the consent of the other party, except by leave of the court for cause shown.” *Toughill v. Toughill*, 609 N.W.2d 634, 638 (Minn. App. 2000) (quotation omitted).

There is no evidence in the record that father consented to repudiate the stipulation or that mother requested leave of the court to withdraw the stipulation. The district court could have adjusted the valuation of the savings account if there was a substantial change in the value of the asset, but mother did not provide evidence that the value of the account had changed substantially. The most recent statement she provided for the account was for November 2011, when it held \$88,806.17. The district court fairly used the stipulated valuation date to value the account.

V.

Mother argues the district court abused its discretion by failing to award her conduct-based attorney fees. The district court may award attorney fees against a party “who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat.

§ 518.14 (2012). We review a district court's award or denial of attorney fees for abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The party moving for conduct-based fees has the burden to establish that the adverse party's conduct during the litigation process justifies an award. *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). The party seeking fees must document or state the amount of additional fees incurred. *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Where both parties contribute to the expense or delay of the case, conduct-based fees are not appropriate. *Id.*

Mother requested and was awarded conduct-based fees in the original judgment. In the amended judgment, the district court denied mother's request for fees because she was "unable to provide documentation of which fees were specifically associated with each alleged infraction" and found that both parties contributed to the length and cost of the proceedings. Mother did not testify about which fees were incurred as a result of father's actions and the billing statements of attorney fees were not detailed enough to accurately determine which fees were incurred because of father's conduct. The district court's finding that both parties' conduct contributed to the length and cost of the proceedings supports the denial of conduct-based fees. Mother testified that father was not forthcoming with information about his income and financial documents. Father alleged that mother also contributed to the delay and cost of the action by failing to provide information about various assets, and requesting to value the savings account at a different date than the stipulated valuation date. We conclude the district court properly

determined that both parties' actions contributed to the cost and expense of the litigation and it was not an abuse of discretion not to award either party conduct-based fees.

Affirmed.