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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1764**

In re the Marriage of: Anthony J. Dempsey,
petitioner,
Appellant,

vs.

Dawn L. Earl,
Respondent

**Filed April 21, 2014
Reversed and remanded
Worke, Judge**

Hennepin County District Court
File No. 27-FA-05-50

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respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this marital-dissolution matter, appellant-husband argues that the district court misstated the equalization formula used to calculate the amount he owes respondent-wife, resulting in an inequitable property distribution. We agree, and reverse and remand.

FACTS

In September 2005, appellant Anthony J. Dempsey and respondent Dawn L. Earl co-petitioned for dissolution of their marriage. The parties estimated that their marital home had a market value of \$1,200,000. The home had a first mortgage in the amount of \$485,000. The parties also had a home equity account with Merrill Lynch that was secured by the home.

In October 2005, the district court issued a judgment and decree dissolving the marriage. The district court found that Dempsey withdrew \$126,000 and Earl withdrew \$50,500 from the Merrill Lynch account. The district court determined that each party would receive one-half of the net proceeds from the sale of the marital home after accounting for their respective withdrawals from the Merrill Lynch account. The district court explained:

At the time of sale, the parties shall equally divide the net proceeds from closing Net proceeds shall be defined as proceeds from sale less: 1) reasonable costs of sale; 2) any fix up costs required by the terms of sale; 3) payment of existing encumbrances; 4) a payment of \$75,500 to [Earl] so as to equalize the previous distributions to the parties from the Merrill Lynch Equity account; and 5) reimbursement of up to \$10,000 to each party for contribution toward the children's post-secondary living and educational needs.

But nearly five-and-a-half years later, the parties still owned the home. The district court found that the home had significantly decreased in value and was “virtually certain” to sell at a loss. In April 2012, Earl moved the district court for judgment against Dempsey in the amount of \$75,500 to equalize the distributions from the Merrill Lynch

account. Alternatively, she requested that Dempsey be responsible for the first \$75,500 of the anticipated shortfall upon the sale of the home.

On July 31, 2012, the district court found that Dempsey “had the use of \$75,500 more than [Earl].” The court stated that the parties stipulated that they would have to “equalize [Dempsey’s] higher draw from the parties’ home equity account[,]” which was going to be handled through the sale of the home. The district court reasoned:

[Dempsey] has already received more than his share of the home’s equity. Dividing the shortfall equally, without regard to the \$75,500 equalizer provision, would mean that [Earl] would likely lose her entire equalization payment and *in addition* pay the same amount of the shortfall as [Dempsey] to effectuate the sale. The [c]ourt finds that this result is unfair and inequitable—and moreover, is not what the parties intended at the time of the Judgment and Decree.

The district court stated further, “[Dempsey’s] obligation to equalize under the [judgment and decree] should not disappear because no one anticipated that the house would drop in value.” The district court ordered that when the home sells, Dempsey shall “pay the first \$75,500 of any outstanding liabilities secured by the homestead[.]” And in the event that the difference between the liabilities and the sale price is less than \$75,500, Dempsey “shall pay all the outstanding secure liabilities and shall pay [Earl] the difference between the shortfall on the secured liabilities and \$75,500.” This appeal followed.

DECISION

Dempsey argues that the district court erred when it ordered him to pay Earl the difference between the shortfall on the sale of the residence and the \$75,500 he owed as

an equalization payment. He claims that the intent of the judgment and decree was to equally divide distributions from the Merrill Lynch account.

A district court may issue orders to implement or enforce specific provisions of the dissolution decree, *Erickson v. Erickson*, 452 N.W.2d 253, 255 (Minn. App. 1990), as long as the district court does not change the parties' substantive rights. *Hanson v. Hanson*, 379 N.W.2d 230, 233 (Minn. App. 1985). Dempsey argues that the error "is significant because the \$75,500 equalizer payment was supposed to be paid from the sale proceeds of the house, not from assets awarded to [him]." Dempsey claims that he will end up paying Earl "twice as much as necessary to equally divide the homestead and the Merrill Lynch equity account." We agree.

The only marital asset that had been disbursed at the time of the judgment was the Merrill Lynch account. This account totaled \$176,500 and each party should have received one half, or \$88,250. However, Dempsey received \$126,000 and Earl \$50,500; thus, Dempsey owed Earl \$37,750 to achieve the parties' intended equalization.

Believing that there was substantial equity in the marital home, the parties agreed that Dempsey would give up his one-half equity share in the first \$75,500 (\$37,750) to Earl to equalize the property division. As a result, the parties anticipated that Earl would receive the first \$75,500 of equity, which would equate to a \$37,750 transfer by Dempsey as well as her receipt of the one half she would have been entitled to if there had not been a need to equalize the Merrill Lynch disparity. This accomplishes the parties' intent if, as they believed at that time, there was at least \$75,500 in equity.

Because of the dramatic decrease in the value of the marital home the district court was faced with the parties needing to make up a deficiency. To accomplish the intent of equalizing these two accounts between the parties the court amended the original order to require Dempsey to pay the entire shortfall up to \$75,500 with the parties equally sharing any amount thereafter. This accomplishes the parties' original intent only if the deficiency is at least \$75,500, because Dempsey is then paying his one half of the shortfall and Earl's one half of the shortfall, which equates to a transfer of \$37,750 to her and equalizes their respective positions. But the district court was aware that the shortfall was likely going to be less than \$75,500. The court made a mathematical mistake in attempting to accomplish the equalization by ordering Dempsey to pay Earl all of the difference between the actual shortfall and \$75,500. He should have been ordered to pay only one half of the difference because there was no longer a second half of the deficiency that would have been his separate shortfall obligation.

The district court's order needs to provide that Dempsey is responsible for paying Earl "one half of the difference between the shortfall on the secured liabilities and \$75,500" not "the difference between the shortfall on the secured liabilities and \$75,500." Because we have no record of the actual shortfall, and to insure the equal division of assets that the parties bargained for, we reverse and remand to the district court so that equalization can be made with the actual numbers following the sale of the marital home.

Reversed and remanded.