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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0479**

In re the Marriage of:  
Ann Christine Falldin, petitioner,  
Respondent,

vs.

John Eric Falldin,  
Appellant.

**Filed June 3, 2008  
Affirmed in part and reversed in part  
Peterson, Judge**

Hennepin County District Court  
File No. 27-FA-000290443

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Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Collins,  
Judge.\*

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

## **UNPUBLISHED OPINION**

**PETERSON, Judge**

In this appeal from a marital-dissolution judgment, appellant-husband argues that the district court erred when it (1) treated certain compensation as income when determining husband's ability to pay maintenance and also awarded respondent-wife one-half of the compensation in her property award, and (2) failed to award husband his nonmarital interests in certain investment accounts and in the marital homestead. We affirm in part and reverse in part.

### **FACTS**

Appellant-husband John Eric Falldin and respondent-wife Ann Christine Falldin were married in January 1991 and separated in August 2004. They have two minor children. The parties agreed to submit the child-custody and support issues to early neutral evaluation and to try the property-division and spousal-maintenance issues. A judgment determining the property-division and spousal-maintenance issues was entered on July 12, 2005. The district court granted in part and denied in part husband's motion for amended findings of fact and conclusions of law. A second amended judgment, which incorporated the parties' stipulation on child custody and support, was entered on January 10, 2007. This appeal followed.

### **DECISION**

#### **I.**

This court will uphold a maintenance determination absent an abuse of the district court's broad discretion. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). An

abuse of discretion occurs when the district court reaches a “conclusion that is against logic and the facts on record.” *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

Husband argues that the district court erred when it included production stock bonuses in his income for maintenance purposes and also awarded wife one-half of the production stock bonuses that were earned during the marriage but that were not yet vested and have not been paid to husband. Husband is employed by Morgan Stanley as a financial adviser. His employment income consists of regular earnings, sales commissions, residuals, and a production stock bonus. The production stock bonus is determined at the end of each year based on husband’s earnings and is awarded in the form of Morgan Stanley stock. The bonus is held by the company in the form of stock for four and one-half years and then vests and is paid to the employee. If an employee leaves the company before the bonus vests, the employee does not receive the bonus. The bonus is reported as taxable income for the year when it vests. In 2004, husband earned a production stock bonus of \$37,501.27.

In determining husband’s income, the district court considered (1) husband’s \$326,979 in gross earnings from employment in 2004, which included the \$37,501.27 production stock bonus; (2) husband’s admission that he has had annual earnings as high as \$500,000 and his testimony that he generally earns a gross annual income of \$350,000 to \$400,000; and (3) the parties’ tax returns for the years 2000 through 2003, which show that husband “had gross W-2 earnings (not including pre-tax deductions such as retirement) for the four years, 2000 through 2003 totaling \$1,616,728,” which equals an average of \$404,182 per year. The district court found that, “[b]ased on [husband’s]

historic earnings as set out on the parties' tax returns, it is reasonable to conclude and the Court finds that [husband] has an earning capacity of no less than \$350,000 a year." In denying husband's motion to amend the finding on his income, the district court stated, "This finding relates to earning capacity. In fact, there was testimony that his past annual earnings were as high as \$500,000. The evidence was not sufficiently clear how to quantify the [production stock bonus] assets or their future realization. [Husband's] own testimony even reflects some hesitation on the subject."

When an obligor's income fluctuates, using an income-averaging method takes into account fluctuations in income and can accurately measure income. *See Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987) (holding that when self-employed business income fluctuates, income averaging more accurately measured child-support obligor's net income). Appellate courts have not set any standard time period for averaging income. *See, e.g., Veit*, 413 N.W.2d at 606 (three-and-one-half years); *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359, 363 (Minn. App. 1987) (five years), *review denied* (Minn. Oct. 28, 1987).

The record supports the district court's findings regarding husband's income, which is an average of \$388,741.40 per year. The record contains evidence of the amount of husband's production stock bonus only for 2004. Subtracting the \$37,501.27 production stock bonus earned in 2004 from husband's average earnings of \$388,741.40 during 2000 through 2004 results in an earning capacity of \$351,240.13, which is greater than the \$350,000 earning capacity found by the district court.

In dividing the marital property, the district court awarded wife one-half of the production stock bonuses that were earned during the marriage but will be paid in 2005 through 2008. Husband argues that by including the production stock bonuses in his income and also including them in the property award, the district court improperly double counted the bonuses. But the production stock bonuses awarded to wife are essentially investments that husband's employer required him to make with a specific portion of his income. Except that husband had no choice in the matter and initially received the bonus income in the form of stock, the Morgan Stanley stock that is currently being held by husband's employer is comparable to other investments that husband chose to make using income earned during the marriage. Husband earned a bonus each year, and the bonus was required to be invested in Morgan Stanley stock for a number of years. When the required investment period ends, the stock will have an identifiable value, and wife will receive one half of the value. Treating the production stock bonuses in the same manner as other investments purchased with income earned during the marriage is not against logic and the facts on the record. The district court did not double count the production stock bonuses.

## **II.**

Husband argues that the district court erred in failing to award him his nonmarital interests in several property items. Whether property is marital or nonmarital is a question of law, but this court defers to the district court's underlying findings of fact. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). All property, real or personal, is presumed to be marital if "acquired by the parties, or either of them . . . at any time

during the existence of the marriage relation between them, or at any time during which the parties were living together as husband and wife.” Minn. Stat. § 518.003, subd. 36 (2006). Nonmarital property is real or personal property “acquired by either spouse before, during, or after the existence of their marriage, which (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse; (b) is acquired before the marriage [or] (c) is acquired in exchange for or is the increase in value of” nonmarital property. *Id.* “A party seeking to establish the nonmarital character of an asset must do so by a preponderance of the evidence. In order to maintain its nonmarital character, nonmarital property must be kept separate from marital property or, if commingled, must be readily traceable.” *Wopata v. Wopata*, 498 N.W.2d 478, 484 (Minn. App. 1993) (citation omitted); *see also Carrick v. Carrick*, 560 N.W.2d 407, 413 (Minn. App. 1997) (noting that the standard required is not “strict tracing,” but a preponderance of the evidence).

The supreme court has held

that the increase in the value of nonmarital property attributable to the efforts of one or both spouses during their marriage, like the increase resulting from the application of marital funds, is marital property. Conversely, an increase in the value of nonmarital property attributable to inflation or to market forces or conditions, retains its nonmarital character.

....

... [A] stock dividend or split is nonmarital property: a stock dividend or split, the value of which is determined by market forces, does not increase the shareholder’s proportionate ownership interest in the corporation and is not usually regarded as income. Cash dividends, on the other hand, would be considered a return on the investment or income and, therefore, be marital property.

*Nardini v. Nardini*, 414 N.W.2d 184, 192-94 (Minn. 1987).

In denying husband's motion to amend the findings on his nonmarital claims to the Morgan Stanley 401K plan, the Morgan Stanley ESOP plan, and the Morgan Stanley account number 241, the district court stated:

[Husband] did not meet his burden to establish the existence and value of various non-marital claims. In part, there was commingling with their marital contributions making it difficult if not impossible to properly trace the premarital claims. There was increase in value of non-marital property attributable to their joint efforts to avoid debt and maintain value by a purchase and hold method. In addition, some liquid assets produced dividends and reinvestment options. Their investment strategy allowed the same to grow. Moreover, there was sufficient evidence to show active management of these assets on the part of [husband] during the marriage to evince marital effort.

*Morgan Stanley 401K plan*

In December 1990, husband had stock shares with a market value of \$22,287 in a Morgan Stanley 401K plan. Husband testified that Morgan Stanley's headquarters were in the World Trade Center, so statements for the account were lost in the wreckage when the building was destroyed in 2001. For trial, husband prepared a document that he claimed showed the growth of his nonmarital interest in the account. Husband testified that in making the calculations, he used a computer program that is used in the securities industry to calculate the past performance of investment funds. Although he labeled his charts as "hypothetical illustrations," husband testified that they showed the actual returns on the funds. Over the years, husband made changes in his investments. Husband

testified that his calculations included only his nonmarital interest in the account and claimed a nonmarital interest of \$78,232.

The starting point for husband's testimony was a December 31, 1990<sup>1</sup> statement, which showed that he had 1,049.294 shares of a dividend growth fund in his 401K plan. By June 30, 1993, unrealized income and gain that had been reinvested in the fund increased the number of husband's shares to 1,124, which had a market value of \$33,486. On June 30, 1993, husband moved his investment from the dividend growth fund into a strategist fund. His \$33,486 allowed him to purchase 2,275 shares in the new fund. As of June 30, 1996, unrealized income and gain that had been reinvested in the strategist fund increased the number of husband's shares to 2,773, which had a market value of \$45,758. Husband's actual June 30, 1995 statement for his 401K showed that he held 2,760 shares of the strategist fund. Husband testified that in June 1996, he moved his \$45,758 from the strategist fund and used it to purchase 3,572 shares in a global dividend growth fund. But the actual December 31, 1996 statement for husband's 401K indicates that on that date, husband owned no shares of dividend growth securities and, instead, owned 3,510 shares of a world-wide investment trust. The documents that husband created showed that as of March 31, 2001, unrealized income that had been reinvested in the global dividend growth fund increased the number of husband's shares to 5,648 shares, which had a market value of \$62,803. An actual March 7, 2001 statement for husband's 401K indicates that on that date, husband owned 7,290.7369 shares of the

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<sup>1</sup> December 31, 1990, was less than one month before the parties married.



global dividend growth fund. Husband testified that the additional shares beyond his 5,648 nonmarital shares were purchased with marital assets going into the fund. Husband testified that in March 2001, the name of the global dividend growth fund changed to the Morgan Stanley international equity fund. The documents that husband created show that \$62,803 invested in the Morgan Stanley international equity fund on February 28, 2001, grew in value to \$78,232 as of May 31, 2004. On the valuation date, the 401K account was invested in three different funds and had a total value of \$322,933. The international equity fund had a total value of \$130,934.59, and husband claims a nonmarital interest of \$78,232 in that fund.

The district court found that husband

actively traded in this account, changing investment selections periodically; he presented several hypothetical illustrations attempting to trace his initial \$22,287 balance through the various stages of those fund changes; his non-marital tracing calculations included income, capital gains and dividends which were reinvested to buy more shares; he did not produce any monthly, quarterly or annual statements to reflect salary deferrals and matches deposited into the plan since inception or market increases and/or decreases in fund values relative to his interest in the plan over time; he incorrectly added marital appreciation in the form of dividends to his claimed non-marital value; arguably, in the years following the parties' marriage, his earnings were greater and his deferrals and matches into the plan were greater than they were prior to the marriage; he produced no evidence of his deferrals (or matches) either before or following the [marriage] and did not offer any substantive evidence of the evolution of the various retirement benefits from the date of marriage to the present either by the testimony of an expert or someone from Morgan Stanley; in their absence and the opportunity to cross-examine with regard thereto, [husband's] exhibits are confusing, insufficient and incomplete to determine the value of

[husband's] non-marital interest, if any, in the plan; while [husband] may have had an interest in the 401k plan prior to the parties' marriage, he failed in his burden to properly trace his non-marital interest in that his non-marital claim is not supported by the evidence; his 401K plan is deemed wholly marital.

The record supports these findings. Husband's explanation of the value of his nonmarital interest in his 401K plan is primarily based on documents that he created, which show what the value of the interest would be if the amount that husband had in the account shortly before the parties married had been invested in certain investment funds during certain periods of time. But two actual statements for the fund were inconsistent with the documents that husband created, and the district court could reject husband's explanation of how the value of his nonmarital interest in the fund increased during the marriage.

*Morgan Stanley employee stock ownership plan*

Husband testified that he was awarded stock in the Morgan Stanley employee stock ownership plan (ESOP) before and during the marriage. As of December 30, 1990, husband had 148.3982 shares of Sears stock in the Morgan Stanley (formerly Dean Witter) ESOP plan. At that time, Sears owned Dean Witter. Husband testified that as a result of a 1993 spin-off of Dean Witter by Sears, he was given .39031 shares of Dean Witter stock for each share of Sears stock he owned, which totaled 57.92 shares of Dean Witter stock. On June 30, 2003, the fair market value of the Sears stock was \$40.375 per share, and the fair market value of the Dean Witter stock was \$37.185 per share. Husband converted his Sears stock to Dean Witter stock, which, based on these values,

gave husband 161.12 Dean Witter shares. Adding these shares to the 57.92 Dean Witter shares that husband received in the spin-off gave husband a total of 219.04 shares of Dean Witter stock, which husband claimed as his nonmarital property. Husband testified that as a result of a two-for-one stock split in 1997 and another two-for-one stock split in 2000, the number of nonmarital shares he owned increased to 876.16. Husband claimed that on August 10, 2004, 876.16 shares of the total 5,921.118 Dean Witter shares in the ESOP account were nonmarital property.

The district court found that the ESOP account had a value of \$283,377 on the valuation date. The district court rejected husband's claim of a nonmarital interest in the account:

[Husband] claims the value of his premarital interest in the plan has a current value of \$41,180; because he included stock appreciation in his calculations, which is marital appreciation, his calculations are flawed; he produced no evidence of his annual award of stock either before or following the parties' marriage, and he failed to produce any evidence in the form of monthly, quarterly or annual statements relative to his interest in the plan; in addition, no one from Morgan Stanley was called as a witness (for example, a human resources or benefits specialist, to testify with regard to [husband's] interest in the ESOP); without said testimony and the opportunity to cross-examine with regard thereto, [husband's] exhibits are confusing and leave the Court with insufficient and incomplete information to determine the value of [husband's] non-marital interest, if any, in the plan; arguably, [husband] was awarded more stock in recent years due to his increased productivity as he advanced and was more successful in his career; again, there is no convincing evidence as to [husband's] production or Morgan Stanley's profitability or how his ESOP awards were calculated over the years; the value [husband] ascribes to his non-marital claim in the ESOP is not supported by the evidence, therefore, [husband] has failed to trace said non-

marital interest, and the entire ESOP is deemed a marital asset.

We disagree with the district court's statement that husband's exhibits are insufficient to determine his nonmarital claim in the ESOP. Husband submitted a December 31, 1990 statement for the account that shows that husband had 148.3982 shares of Sears stock. Husband also submitted a Morgan Stanley document that explains the number of shares of Dean Witter stock that husband received for each share of Sears stock that he owned and a Morgan Stanley document that shows that there were two-for-one stock splits in January 1997 and January 2000. Finally, husband submitted a Morgan Stanley document that shows that the stock price on August 9, 2004, was \$46.95 per share, which means that 876.16 shares were valued at \$41,135.71.<sup>2</sup> These documents are sufficient to trace husband's ownership of the stock during the marriage. The district court also erred in determining that the appreciation in the value of this stock is marital property. The increase in the number of shares that husband claims as nonmarital property is not attributable to husband's actions. He received additional shares as a result of a change in ownership and stock splits. Husband sufficiently traced his nonmarital claim in the Morgan Stanley ESOP. Therefore, we conclude that husband shall be awarded \$41,136 for his nonmarital interest in his Morgan Stanley ESOP.

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<sup>2</sup> Husband states in his brief that due to a math error, his nonmarital claim at trial was for \$41,180 and that the correct value was \$41,136. Husband does not explain his math error, and we will not attempt to identify the cause of the \$44 difference, which is de minimus.

*Morgan Stanley account 241*

Husband claimed a nonmarital interest in Morgan Stanley account number 241. The claimed nonmarital interest includes an initial balance on the marriage date; a 2002 cash inheritance from husband's aunt and uncle; a 2003 cash inheritance from husband's aunt and uncle; Exxon and GlaxoSmithKline stock gifted from husband's uncle and aunt in 1997; and Qualcomm stock gifted from husband's parents in 1999. Husband claims that he received 150 shares of SmithKline stock in 1997 and that as a result of a stock split and the purchase of SmithKline by Glaxo, he had a nonmarital interest of 341 shares of Glaxo stock in account 241 on the valuation date. Husband claims that he received 25 shares of Qualcomm stock in 1999 and that as a result of stock splits, he had a nonmarital interest of 200 shares of Qualcomm stock in account 241 on the valuation date. Husband claimed that he received 250 shares of Exxon stock in 1997 and that as a result of a stock split, he had a nonmarital interest of 500 shares of Exxon stock in account 241 on the valuation date.

The district court found that husband

deposited the stocks he claims are his non-marital property into [the parties'] joint Morgan Stanley account and commingled them with other stocks owned by the parties.

Specifically, he claims the Exxon and Glaxo shares in the joint account, -which he received from an aunt and uncle and Qualcomm received from his father, are his non-marital assets. He asserts that Ex. 239, 240 and 241 include printouts that reflect the dividends accrued. Said exhibits do not provide any tracing of the stocks. [Husband] failed to provide any statements evidencing the deposit of inherited funds or the three stocks from date of receipt to the present. The assets identified on the various exhibits in evidence are deemed

marital. They were actively traded by [husband] while on deposit in the parties' joint account. [Husband] failed to trace the individual purchases and sales of securities during the marriage notwithstanding that he received shares of Exxon and Glaxo, as well as Qualcomm stock. [Husband] readily commingled all such assets with marital assets in their joint Morgan Stanley account #...241, thereby obliterating any non-marital character they may have had.

We have reviewed husband's testimony regarding his claimed nonmarital interest in account 241 and the exhibits cited by the district court, and we find no basis for reversing the district court's findings of fact or conclusions of law regarding account 241. The documents and testimony do not trace a nonmarital interest in the account.

#### *Homestead*

The parties purchased a house on Sedum Lane before the marriage. Husband provided \$50,000 for the down payment. Husband provided the following tracing of his nonmarital interest in the Sedum Lane property: In 1999, the parties sold the property for \$315,000 and used the proceeds to buy a new home on Arden Avenue. Husband's downpayment on the Sedum Lane home was 26.31% of the \$190,000 purchase price. Multiplying 26.31% by the sale price of \$315,000 results in a nonmarital interest of \$82,876.50, which is 15.35% of the \$540,000 purchase price of the Arden Avenue home. Multiplying 15.35% by the \$959,000 sale price of the Arden Avenue home results in a nonmarital interest of \$147,206.50.

The district court found:

The parties purchased the Sedum Avenue property in April of 1990, prior to their marriage. It was purchased in anticipation of their marriage the following January, and they lived there together until their marriage.

Together, they selected the home, jointly signed the purchase agreement, and both signed on the mortgage. Upon closing, the property was titled in their names as joint tenants even though the parties were not married until January 1991. [Husband] knowingly included [wife's] name on the title. Based on his actions, he essentially gifted half of the down-payment to her, and any claimed non-marital interest was transmuted into marital property. By his testimony it is clear that he intended for [wife] to share equally and have equal ownership in the Sedum Lane property and had she died, her heirs would inherit [wife's] half of the property. In addition, the parties agreed that [wife's] name would be on the mortgage. This would affect her credit rating. It is also a fact that as joint tenants had [husband] died, [wife] would have had title to the property, free and clear of any claims by [husband's] family. [Husband] failed in his burden to prove his non-marital claim to the parties' homestead property, and the Court finds that the equity in the Arden Avenue property is wholly marital.

In denying husband's motion to amend this finding, the district court stated:

The finding does not accept [husband's] non-marital claims to the 5018 Arden Avenue sale proceeds although it recognized his down-payment on their first home with premarital funds. The Court carefully examined the parties' pre-marriage relationship, [husband's] intent to place title in joint tenancy in the Sedum Lane homestead prior to the marriage, their joint efforts in selecting Arden Avenue, their financial relationships and their living arrangements. [Husband] clearly intended that [wife] would retain complete title upon his demise. There was all the requisite indicia of a gift in conjunction with a joint, financial endeavor.

The elements of a gift are: (1) delivery; (2) donative intent; and (3) the donor's absolute disposition of the intended gift. *Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn. App. 2001), *review denied* (Minn. June 27, 2001). Intent is a fact question. *Oehler v. Falstrom*, 273 Minn. 453, 457, 142 N.W.2d 581, 585 (1966). "Donative intent is

demonstrated by the surrounding circumstances, including the form of the transfer.” *Olsen*, 562 N.W.2d at 800. A party asserting that the transfer of property constituted a gift bears the burden of proving the elements of a gift by clear and convincing evidence. *Oehler*, 273 Minn. at 457, 142 N.W.2d at 585.

By itself, the fact that the parties held the Sedum Lane home in joint tenancy does not show that husband intended his nonmarital down payment as a gift to wife. *See Antone v. Antone*, 645 N.W.2d 96, 103 (Minn. 2002) (rejecting argument that party who had purchased homestead prior to marriage “withdrew his nonmarital equity in the homestead by refinancing the homestead”); *Pfleiderer v. Pfleiderer*, 591 N.W.2d 729, 733 (Minn. App. 1999) (holding that “transferring joint property into one party’s name for estate planning purposes does not convert marital property into nonmarital property”); *Montgomery v. Montgomery*, 358 N.W.2d 169, 172 (Minn. App. 1984) (stating that “the form of ownership is not dispositive of the property’s marital or non-marital nature” and that “merely transferring title from individual ownership to joint tenancy does not transform non-marital property into marital property”).

But the district court did not rely only on the joint tenancy to support its finding that husband’s nonmarital claim to the homestead was extinguished; the district court also relied on husband’s testimony regarding his intent when he placed the title to the Sedum Lane house in joint tenancy before the parties married. Husband testified that the parties owned the Sedum Lane house as “joint tenants in common.” Husband explained that he got this phrase from the financial industry and explained that “you can either have joint with rights of survivorship or joint tenants in common.” Husband explained further that



his understanding was that if wife had died, her share of the house would have gone to her heirs and if he had died, his share of the house would have gone to his heirs. Although husband's explanation of ownership of the Sedum Lane house reflects a misunderstanding of owning real estate as joint tenants or as tenants in common, it explains his intent when he paid the down payment for the house and he and wife took title as joint tenants.

In *McCulloch v. McCulloch*, 435 N.W.2d 564, 565 (Minn. App. 1989), husband bought a home three years before the parties' marriage. Three years after the parties married, husband, via a "straw conveyance" through his attorney, transferred his interest in the house to himself and wife as joint tenants. *Id.* at 566. In reversing the district court's finding that husband retained a nonmarital interest in the homestead, this court cited

[husband's] uncontradicted testimony that, at the time of the "straw conveyance," [he] wanted [wife] to have an ownership interest in the property, that he thought such an interest "was something that should be taken care of for [wife's] benefit," and that as a result of [wife's] status as a joint tenant "[s]he would own the house equally with [himself]." Such testimony clearly indicates that [husband] intended that he and [wife] both have an interest in the homestead.

*Id.* at 568. The *McCulloch* court distinguished the straw conveyance from a joint tenancy created at the time of purchase, explaining that the straw conveyance was an affirmative act to convey a property interest in wife. *Id.*

As in *McCulloch*, husband's testimony provided a basis for the district court to conclude that husband made an affirmative act to convey an interest in the Sedum Lane

property to wife when he paid the down payment but then took the property as a joint tenant with wife. Husband believed that in doing as he did, wife acquired a separate interest in the property that would go to wife's heirs if she died and he survived her. The district court's finding that this is what husband intended when the parties purchased the Sedum Lane property is sufficient to support the court's conclusion that husband failed to prove that his down payment created a nonmarital interest that carried forward to the Arden Avenue property.<sup>3</sup>

**Affirmed in part and reversed in part.**

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<sup>3</sup> Because the parties acquired the Sedum Lane property before the marriage, both had a nonmarital interest in the property. But because their nonmarital interests were equal, their interests in the Arden Avenue property were the same as if the Sedum Lane property had been acquired during the marriage.