STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0658

In re the Marriage of: Jean Marie McQuay, petitioner,
Appellant,

vs.

Warren David McQuay,
Respondent.

Filed July 21, 2009
Affirmed; motion denied
Minge, Judge

Otter Tail County District Court
File No. 56-F0-06-000905

John E. Mack, Mack & Daby, P.A., P.O. Box 302, New London, MN 56273 (for appellant)

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Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the district court's division of property pursuant to a decree of dissolution that found (1) real estate in North Dakota retained its marital character and

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

could be awarded to respondent despite respondent's having deeded the property to appellant and her children; and (2) respondent did not improperly dispose of marital assets. We affirm.

FACTS

In 2003, during the parties' marriage, appellant Jean Marie McQuay and respondent Warren David McQuay purchased four parcels of land in North Dakota from respondent's family. In 2004, respondent deeded half of his interest in all parcels to appellant and his remaining half interest in each parcel to one of four adult children, the parties' two children, and appellant's two children from a previous relationship.

Appellant started divorce proceedings in April 2006. The district court found that the 2004 land transfer was not intended to nullify any marital interest for dissolution purposes but was completed as an estate-planning strategy and that, despite the transfer, the real estate was marital property. The district court allocated the North Dakota land so appellant retained her half interest in two parcels of property and respondent was awarded a half interest in the remaining two parcels.

Respondent was an official with the United States Postal Service. In 2003, he was transferred to Brainerd. The parties sold their home and deposited the net proceeds from the sale, approximately $101,000, into a joint credit union account. Respondent then moved to Brainerd, and appellant moved to North Dakota. Respondent opened a separate bank account in his name only and began depositing his paychecks into that personal account. Appellant opened an account in her name. Appellant drew funds from the joint

credit union account for living expenses. At the time of the dissolution, the joint credit union account contained approximately $2,000.

In the dissolution judgment, the district court also concluded that the various bank accounts were marital assets and divided them between the parties. Appellant argued to the district court that respondent had been expending money from his paychecks in excess of his current living expenses and argued that this should be considered an attempt to "spen[d] down" the marital assets. The district court rejected this claim, finding that, although the expenditure of some of his salary could not be accounted for, respondent did not impermissibly dispose of marital assets. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred in determining that one-half of the interest in the real estate in North Dakota was a marital asset that could be divided in the marriage dissolution. Whether property is marital or nonmarital is a question of law which this court reviews de novo. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). While this court independently reviews the issue of whether property is marital or nonmarital, we defer to the district court's findings of fact. *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008).

Marital property is real or personal property, acquired by either party at any time during the marriage relationship. Minn. Stat. § 518.003, subd. 3b (2008). The property acquired during the marriage is presumed to be marital property even if the title to the property is held individually. *Id.* Nonmarital property is property "acquired by either

spouse before, during, or after the existence of their marriage" which "is acquired as a gift, bequest, devise or inheritance *made by a third party to one but not to the other spouse*." *Id.*, subd. 3b(a) (emphasis added). To establish that the property is nonmarital, "[t]he party seeking a nonmarital classification must show by a preponderance of the evidence that the asset is readily traceable to a nonmarital source." *Hafner v. Hafner*, 406 N.W.2d 590, 593 (Minn. App. 1987); *see also Van de Loo v. Van de Loo*, 346 N.W.2d 173, 177 (Minn. App. 1984) ("The party wishing to establish the non-marital character of an asset has the burden of proof.").

Here, the North Dakota real estate was acquired by the parties during their marriage and respondent deeded half of his interest to appellant during the marriage.[1] Appellant argues that the district court erred in determining that respondent did not intend to divest himself of all marital interest in the property by his quitclaim deed. Because respondent was a party to the marriage, the interest deeded to appellant remained marital property. That deed did not in itself establish that respondent abandoned any marital interest for marriage dissolution purposes. On this record, we conclude that appellant has not met her burden rebutting the marital property presumption.

Once property is determined marital, a district court's division of marital property in a dissolution decree will not be overturned unless there was an abuse of discretion. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). "We will affirm the [district] court's division of property if it had an acceptable basis in fact and principle even though

[1] The other half interest in various parcels was deeded to various adult children of the parties. There is no claim that the children's interests are marital.

we might have taken a different approach." *Id.* (citation omitted). Appellant has not challenged the valuation of the property. We conclude that the district court did not err in determining that half of the interest in the real estate in North Dakota was a marital asset that could be divided in the marriage dissolution.

II.

The second issue is whether the district court had jurisdiction to award respondent a one-half interest in property located in another state. Appellant argues that the Minnesota district court did not have jurisdiction to transfer title to realty lying in North Dakota.

This court reviews legal issues concerning jurisdiction de novo. *McLain v. McLain*, 569 N.W.2d 219, 222 (Minn. App. 1997), *review denied* (Minn. Nov. 18, 1997). In the context of a marriage dissolution the Minnesota Supreme Court has stated:

> [T]he fact that real estate is situated beyond the jurisdiction of the court does not prevent it from acting in personam, and commanding, with reference thereto, its own citizens, of whom it has jurisdiction, whenever it is necessary to enable the court to do justice between the parties before it. It may in such cases compel a conveyance of real estate situated in another state.

Pavelka v. Pavelka, 116 Minn. 75, 78, 133 N.W. 176, 177 (1911); *see also Thompson v. Nesheim*, 280 Minn. 407, 421, 159 N.W.2d 910, 920 (1968) (holding a district court had jurisdiction to determine the ownership and interest in the farmlands located in the state of Iowa). In contrast, the district court would not have the authority to affect the legal title of property if it was solely in the name of a person who was not a party to the

dissolution.[2] *In re Marriage of Sammons*, 642 N.W.2d 450, 457 (Minn. App. 2002). Because the district court's order affected only appellant's one-half interest in the property of two parcels of North Dakota property, and did not affect the children's one-half interest in the property, appellant's challenge to the district court's jurisdiction fails.[3]

Appellant also argues that the district court's property division is "troublesome" because the courts of North Dakota would not enforce such a property division. The argument ignores two important considerations. First, the full faith and credit clause of the United States Constitution requires each state to recognize the judicial decisions of other states in actions where the court had jurisdiction. *See* U.S. Const., art. IV, § 1. Second, in this case, because the district court ordered appellant to execute a deed, North Dakota would not be "enforcing" the property division. It would be accepting a deed. There is no reason to believe the recording officials in North Dakota would refuse to accept a properly drawn and executed conveyance by appellant. At oral argument, this court was advised that such a deed was in the files of legal counsel. We conclude that the

[2] When it is determined that a third party may have *an interest* in a marital asset, the district court is not per se prohibited from dividing the property in a dissolution order. *See Danielson v. Danielson*, 721 N.W.2d 335, 339-40 (Minn. App. 2006) (ruling that, when a third party may have an interest in marital property, the district court may include the asset in the property division while recognizing that the judgment may be reopened and adjusted if the third party is determined to have an interest).

[3] Appellant also argues that, because she held two parcels of property as a cotenant with her children, it is improper to force the children to become cotenants with respondent. Because respondent had previously owned the property and deeded it to appellant and the children, because there is no evidence in the record of any objection by the children or family problem caused by the co-ownership, and because appellant does not cite any legal impediment to the district court's ordering appellant to transfer part of her interest in the North Dakota property to respondent, we do not further consider this argument.

district court did not err in ordering appellant to execute a deed transferring the North Dakota property.

III.

The third issue is whether the district court clearly erred in finding that the respondent did not impermissibly dispose of marital assets. A party to a marriage dissolution proceeding owes a fiduciary duty to the other party "for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets." Minn. Stat. § 518.58, subd. 1a (2008). If the district court finds

> that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets *except in the usual course of business or for the necessities of life*, the [district] court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

Id. (emphasis added). The party claiming improper disposition of a marital asset carries the burden of proving improper disposition. *Id.*

Whether section 518.58, subdivision 1a, has been violated presents a fact question. *See id.* ("If the court finds that a party to a marriage . . . [violated the statute], the court shall compensate the other party. . . ."). This court reviews the district court's determination that respondent did not improperly dispose of marital assets in violation of section 518.58, subdivision 1a, for clear error. Minn. R. Civ. P. 52.01. When there is

conflicting evidence, this court defers to the district court's credibility determinations. *Id*.; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Appellant argues that respondent "spent down" $120,000 in the "year or two" prior to the dissolution and that this exceeded his reasonable living expenses. According to appellant, respondent took excessive money from his personal bank account and the parties' joint credit union account and refused to account for his withdrawals at trial. Respondent testified that he used the money for normal living expenses and to aid the parties' son with medical bills and student loans. Further, respondent argues that he used funds from these accounts to pay appellant court-ordered spousal maintenance during the pendency of the dissolution proceeding, to provide appellant with additional cash, and to pay appellant's credit card bills.

The district court found that, although the expenditure of some amount by respondent was unaccounted for, respondent did not spend down the martial assets in violation of the district court's order. Further, the district court stated that it "[took] into account Respondent's financial resources versus Petitioner's financial resources while the parties had been separated when making the final property distribution in this matter." Although the district court's order could have been more detailed in its finding that respondent did not improperly dispose of the marital assets, the record contains sufficient evidence to support the district court's conclusion.

At oral argument, appellant argued that respondent failed to fully respond to discovery requests and that this violation of a discovery obligation prejudiced appellant's ability to meet her burden in demonstrating improper use of marital assets. Because

appellant does not cite any portion of the record that shows a discovery violation and our review of the record does not disclose any such discovery violation, we decline to presume such a violation on appeal.

Because the district court's findings will not be overturned unless clearly erroneous, because we defer to a district court's credibility determinations when faced with conflicting testimony, and because appellant carries the burden of proving improper disposition of marital assets, we conclude that the district court's determination that respondent did not violate section 518.58, subdivision 1a, was not clearly erroneous.

IV.

The fourth issue is whether this court should grant respondent's motion to strike a portion of appellant's brief because appellant has presented new issues and theories not presented and considered by the district court and because appellant's reply brief was not confined to new matters or issues raised in respondent's brief. Because this court has affirmed the result of the district court, the motions to strike are moot and are, therefore, denied. *See, e.g.*, *State v. Johnson*, 659 N.W.2d 819, 822 (Minn. App. 2003) (stating that when the holding of the case has rendered the motion to strike moot, the motion is denied), *review denied* (Minn. July 15, 2003).

Affirmed; motion denied.

Dated: