

2000 WL 1809000

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480A.08(3).

Court of Appeals of Minnesota.

In re the Marriage of Judith CHMIELEWSKI,  
Petitioner, Appellant,  
v.  
Roger CHMIELEWSKI, Respondent.

No. Co-00-231.

|  
Dec. 12, 2000.

#### Attorneys and Law Firms

[Michael L. Perlman](#), St. Louis Park, MN, for appellant.

[Mark D. Luther](#), St. Louis Park, MN, for respondent.

Considered and decided by [HALBROOKS](#), Presiding Judge, [RANDALL](#), Judge, and [HOLTAN](#), Judge\*.

#### UNPUBLISHED OPINION

#### [RANDALL](#).

\*1 On appeal from a dissolution judgment, appellant argues the district court erred in dividing the parties' marital property. Appellant also challenges the district court's award of conduct-based attorney fees to respondent. We affirm.

#### FACTS

Appellant Judith Chmielewski and respondent Roger Chmielewski were married on November 22, 1962. Appellant completed high school but did not receive any college education. She was a traditional homemaker and raised the parties' three children. She also worked outside

of the home at various times while the children were growing up in order to supplement the family's income. Once the children reached adulthood, appellant worked almost full-time at various jobs, and she collected unemployment when she was unable to work. Respondent has a ninth-grade education but has received his General Education Development (GED) diploma. He is a machine-shop worker by trade, and he works 24-40 hours per week based on the variances in his employer's workload. He underwent quadruple-bypass surgery in the fall of 1998, which has limited his ability to work.

Appellant's petition for marital dissolution was filed in December 1997. She moved out of the parties' home and took most of the parties' household goods and furnishings with her. Appellant refused to return most of the items to respondent. Afterward, the parties battled for nearly two years over property division and spousal maintenance, even though the parties had limited assets.

In its September 1999 judgment, amended by its December 1999 posttrial order, the district court divided the parties' marital property and awarded respondent \$1,650 in conduct-based attorney fees. After the court entered its judgment, appellant filed a motion for a new trial or, in the alternative, for amended findings or conclusions of law. Respondent filed a cross-motion for \$950 in additional attorney fees. The district court's posttrial order denied appellant's motion for a new trial and made only minor changes to its conclusions of law.<sup>1</sup> Further, the order granted respondent's motion for additional attorney fees.

#### DECISION

##### I. Property Division

The district court has broad discretion with respect to the division of property. [Rutten v. Rutten](#), 347 N.W.2d 47, 50 (Minn. 1984). For this court to conclude that the district court abused its discretion, the district court's findings must be "against logic and the facts on [the] record." *Id.* (citation omitted). When dividing marital property, the district court "shall make a just and equitable division of the [parties' marital property] without regard to marital misconduct." Minn.Stat. § 518.58, subd. 1 (1998). A district court need not make a mathematically equal division of property; the property need only be equitably divided on all the facts in the record. See [Ruzic v. Ruzic](#), 281 N.W.2d 502, 505 (Minn. 1979) (concluding division of marital property need not be mathematically equal; it

need only be just and equitable).

\*2 Appellant argues that the district court abused its discretion in its division of the parties' marital property by: (1) finding that respondent did not spend \$15,237 of marital assets on the necessities of life; (2) requiring the sale of the parties' rental property; (3) awarding appellant two of respondent's Qualified Domestic Relations Order (QDRO) retirement accounts; and (4) awarding respondent \$2,000 in household goods without equally compensating appellant. Appellant also contends that the district court abused its discretion by awarding respondent conduct-based attorney fees.

It is worth noting that the district court made exceptionally detailed findings on the issue of property division, which resulted in a nearly equal split of marital assets.

#### A. Respondent's Necessities of Life Expenditures

Appellant argues that the district court should have found that respondent did not spend marital assets on the necessities of life. 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 [or] separation, \* \* \* disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party by placing both parties in the same position that they would have been in had the \* \* \* disposal not occurred.

[Minn.Stat. § 518.58, subd. 1a \(1998\)](#).

The district court found that respondent spent \$15,237 on the necessities of life. At trial, respondent testified that he used marital assets to pay for medical bills, property taxes, upkeep on the parties' homestead and rental property, and personal necessities. On cross-examination, appellant's attorney tried to show that respondent did not use the assets in the manner respondent said he did. Respondent testified that he redeemed a savings certificate to pay for property taxes, yet appellant introduced a check showing the taxes were paid from a different account. Although appellant was successful in showing respondent did not pay those particular taxes in the manner respondent said he did, appellant did not

provide evidence that respondent failed to spend the assets on the necessities of life. See [Minn.Stat. § 518.58, subd. 1\(a\)](#) (stating burden of proving a party dissipated assets is on the party alleging dissipation).

Later during cross-examination, appellant's attorney conceded that the court could make a credibility determination regarding respondent's testimony. Appellant's attorney asked respondent:

So, the Court, the Court's going to have to, you would agree, make a credibility decision as to whether or not it's true that you paid those bills, correct?

The district court did make such a credibility determination. The court noted:

The parties in this case were not by any means financially sophisticated and they did not have any system for regular bookkeeping. Both largely testified from memory and each professed a strong understanding of their respective, general financial circumstances. It was the Court's job to listen carefully to each testify and judge their credibility against other evidence. *Respondent was the far more credible.*

\*3 (Emphasis added.) The court found that respondent did not make enough money to have discretionary money left over. Further, the court found that respondent was out of work for substantial periods of time due to health problems or a lack of available work.

Based on respondent's testimony, there was adequate evidence for the district court to conclude respondent spent marital assets on the necessities of life.

#### B. Sale of Parties' Rental Property

Appellant argues that the district court erred by "refusing to award appellant the one asset that she most wanted—the rental house, which she could then use as her homestead." Appellant offers no further discussion regarding why the district court erred by not awarding the rental property to her. See *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (stating "assignment of error based on mere assertion and not supported by any argument or authorities \* \* \* is

waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection”) (citations omitted). We exercise our discretion to address this issue. See [Minn.R.Civ.App.P. 103.04](#) (stating appellate court may address any question as justice requires). As stated previously, a district court has broad discretion in dividing marital assets. [Rutten, 347 N.W.2d at 50](#). Discretion includes, when appropriate, ordering the sale of marital property. [Nardini v. Nardini, 414 N.W.2d 184, 188 \(Minn.1987\)](#).

Here, the district court determined that appellant would not be financially able to care for the parties’ rental property. The court was concerned with the high attorney fees both parties were facing due to the length of the dissolution proceedings. The court ordered the property to be sold based on the testimony of appellant that her monthly expenses exceeded her limited income. The court also considered respondent’s testimony regarding the cost of upkeep for the property. In addition, appellant had nonmarital living quarters available. See [Lossing v. Lossing, 403 N.W.2d 688, 692 \(Minn.App.1987\)](#) (concluding district court’s refusal to award property to party because financially unable to afford obligations where party already had nonmarital living quarters was not abuse of discretion). Accordingly, the court concluded that selling the property, awarding the first \$21,322 to appellant, and dividing the remaining proceeds from the sale equally between the parties was in the parties’ best interests. Again, there are adequate facts on the record for the district court’s finding and conclusion that it was in the parties’ best interests to sell their rental property.

#### C. QDRO Retirement Accounts

Appellant offers no argument regarding the Qualified Domestic Relations Order other than to say that awarding her respondent’s pensions in this manner is unfair because she will not be able to access the money for “many years.”

As stated previously, the district court made every effort to ensure that both parties received assets that would allow them to satisfy high attorney fees. The court also fashioned its property division in a manner that would best help the parties meet monthly expenses based on limited incomes. The division of property includes an allocation to appellant of \$21,233 in cash from the proceeds of the impending sale of the parties’ rental property, which she can use immediately. Also, appellant only had \$28,227 invested for retirement. The court awarded appellant \$102,694 worth of QDRO retirement plans from respondent’s pension. The parties had limited assets, and the district court painstakingly attempted to

divide the assets in a manner that would allow each to satisfy their current expenses as well as provide income in the future when they were no longer able to work. Appellant objected to receiving, as a large part of her assets, part of respondent’s pension that was not immediately transferable into cash. Respondent is a 57-year-old man in poor health. It is unlikely that he will work much past the age of retirement. It was reasonable for the district court to expect that appellant will not have to wait “many years” before she receives her share of the proceeds from those pensions. The evidence supports the district court’s decision to award appellant some of respondent’s QDRO retirement accounts.

#### D. Compensation for Household Goods

\*4 Appellant argues that the district court abused its discretion by failing to compensate her equally for the \$2,000 in household goods awarded to respondent. Appellant cites to the court’s judgment, which instructed appellant to return all household goods to respondent, “for which she will be awarded \$2,000 in other marital property.”

The court did not specifically designate \$2,000 worth of marital property to offset the household goods awarded to respondent. But the court did award appellant the first \$21,322 in proceeds from the sale of the house. It can reasonably be inferred that the \$2,000 worth of marital property is covered by this cash award. A court’s division of marital property does not have to be equal as long as it is equitable. [Ruzic, 281 N.W.2d at 505](#). The parties are close in age, education, and earning capacity. See [Minn.Stat. § 518.58, subd.1](#) (listing factors court should consider when dividing property, including health, occupation, vocational skills, and employability). Appellant has earned more money at times than respondent, and she has a high school diploma; respondent only has a GED. Respondent recently had quadruple bypass surgery that has left him unable to work on certain days. Based on these facts, the court reasoned that it divided the property in a manner fairly addressing the needs of the parties, and the record supports the court’s decision.

The record supports the district court’s decision as just and equitable on the division of marital property. The evidence supports the district court’s findings that respondent spent marital assets on the necessities of life, that sale of the parties’ rental property was logical based on the parties’ financial needs, that the award of the QDRO retirement accounts to appellant was equitable, and that appellant was adequately compensated for the \$2,000 worth of household goods received by respondent.

Accordingly, we affirm the division of the parties' marital property.

## II. Attorney Fees

Appellant argues that the district court erred in awarding \$1,650<sup>2</sup> in conduct-based attorney fees to respondent. An award of fees under [Minn.Stat. § 518.14, subd. 1 \(1998\)](#), is a decision within the district court's discretion and will not be disturbed absent a clear abuse of discretion. [Crosby v. Crosby](#), 587 N.W.2d 292, 298 (Minn.App.1998), review denied (Minn. Feb. 18, 1999); see also [Katz v. Katz](#), 408 N.W.2d 835, 840 (Minn.1987) (noting award for attorney fees lies in discretion of district court).

The district court may award "additional fees, costs, and disbursements against a party who unreasonably contribute[d] to the length or expense of the proceeding." [Minn.Stat. § 518.14, subd. 1](#). A fee award may be based on such conduct of a party "regardless of the relative financial resources of the parties." [Korf v. Korf](#), 553 N.W.2d 706, 711 (Minn.App.1996) (citations and quotation omitted). In making a conduct-based fee award, the district court must make adequate findings that allow an appellate court to review its decision. [Kronick v. Kronick](#), 482 N.W.2d 533, 536 (Minn.App.1992).

\*5 Appellant does not provide any argument or cite any caselaw supporting her assertion that the district court erred by awarding respondent conduct-based fees. Her only basis for raising the issue is that the court found both parties equally at fault for over-lawyering the case. Appellant is correct that the court did make this observation, but the court did so in its discussion of the parties' failure to deliver requested documents to each other promptly. Importantly, the court went on to discuss how appellant further prolonged the length and expense of the proceedings.

The district court awarded respondent \$1650 in attorney fees based on "[appellant's] preemptive strike regarding the personal property and her wholly unrealistic stance regarding maintenance," which unnecessarily prolonged the divorce proceedings. The court concluded that appellant contributed to the acrimony of the proceedings by resorting to self-help and removing the majority of the

parties' quality household goods and furnishings while respondent was on vacation. Appellant conceded under oath that she resorted to self-help regarding the parties' goods and furnishings. Respondent provided the court with before-and-after photos of appellant's exploits. Respondent testified that appellant would not return any of the furnishings or provide him with any of the family heirlooms in her possession. This made communication between the parties difficult. This evidence supports the district court's conclusion that appellant's conduct unreasonably prolonged the length and expense of the dissolution proceedings.

The court also awarded respondent conduct-based fees because it was "convinced based on the testimony that [the] case could not settle as long as [appellant] insisted on demanding maintenance at a level that [r]espondent was not able to pay." The record contains volumes of correspondence between the parties on this issue. After receiving a temporary spousal-maintenance award of \$500 per month, appellant demanded \$700 per month in temporary maintenance even though respondent, because of his limited income, was not able to comply with the \$500 per month payments. Despite respondent not being able to keep current on the \$500 per month, appellant later demanded \$900 per month in permanent spousal maintenance. Respondent submitted an itemization of his limited income, yet appellant refused to change her demands. Appellant's demands resulted in a blizzard of written exchanges between the parties, too numerous to recount, that impeded any possibility of settling the issue. The correspondence, which was received into evidence, coupled with respondent's testimony, supports the district court's conclusion that appellant's actions unnecessarily prolonged the litigation. The district court acted properly in awarding respondent a limited amount of attorney fees.

Affirmed.

## All Citations

Not Reported in N.W.2d, 2000 WL 1809000

## Footnotes

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

<sup>1</sup> The district court transferred \$1,850 of marital property (in the form of a debt owed to the parties) from appellant to respondent. The court also reduced respondent's original attorney fee award of \$3,500 to \$1,650.

- 2 In its posttrial order the district court reduced the fee award from \$3,500 to \$1,650. The court recognized how the fees would negatively impact appellant's cash flow, so it transferred \$1,850 of marital property from appellant to respondent and reduced the fee award by the same amount.

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