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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0828**

In re the Marriage of: Terry Anne Boggs, petitioner,
Appellant,

vs.

David Carl Boggs,
Respondent.

**Filed May 7, 2018
Affirmed
Reyes, Judge**

Wright County District Court
File No. 86-FA-14-1165

Kathryn A. Graves, Jaime Driggs, Anne R. Haaland, Henson & Efron, P.A., Minneapolis,
Minnesota (for appellant)

Amy D. Joyce, William R. Skolnick, Skolnick & Joyce, P.A., Minneapolis, Minnesota (for
respondent)

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant-wife Terry Anne Boggs (wife) argues that the district court (1) abused its
discretion in determining the amount of her spousal-maintenance award; (2) abused its
discretion in declining to require respondent-husband David Carl Boggs (husband) to

obtain a life-insurance policy to secure his maintenance obligation; (3) erred as a matter of law by vacating the original judgment and staying it pending further order by the district court; (4) abused its discretion by deciding that wife is not entitled to receive interest on any unpaid balance on the cash portion of the property settlement until 180 days after entry of the dissolution judgment; (5) abused its discretion by declining to award wife need-based attorney fees; and (6) abused its discretion by allowing husband to claim the dependency exemption in his 2017 tax return. On cross-appeal, husband argues that the district court erred by placing the burden of proof on him to show that the increases in the values of husband's business and home were nonmarital property and by finding that husband failed to meet his burden to prove that the business's increase in value was marital property. We affirm.

FACTS

Wife and husband were married for 20 years from April 1994 to February 2014. Wife is now 48 years old, and husband is 60 years old.

Prior to their marriage, husband owned a business as well as a homestead in Wright County, Minnesota, that later became the parties' marital home. At the time of the marriage, the value of the home was \$325,000. The value of the home increased to \$1,320,000 by the time of their dissolution. The value of the business increased from \$1,261,954 at the time of the marriage to the May 2014 value of \$3,767,962.

In 2014, wife petitioned to dissolve the marriage. Following a court trial, the district court filed its order for judgment and decree on November 28, 2016. The order stayed

entry of judgment for 30 days, but contrary to that order, the court administrator entered judgment on the same date the order was filed.

In December 2016, each party moved for amended findings of fact or a new trial. On December 29, 2016, the district court noted the prematurely entered judgment, sua sponte vacated it, and stayed the entry of judgment pending further order from the district court. After a February 6, 2017 hearing on the parties' post-trial motions, the district court filed a March 31, 2017 order denying the parties' motions in their entirety but amending the requirement that the parties use a parenting consultant. The district court filed an amended order for judgment and decree, and stayed the entry of the judgment for another 30 days. The judgment was entered on May 12. Wife's appeal and husband's cross-appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in determining the amount of spousal maintenance.

Wife argues that the district court abused its discretion by awarding her an inadequate amount of spousal maintenance. We are not persuaded.

A district court has "wide discretion" in setting a spousal-maintenance award, and its determination is "final" absent an abuse of that discretion. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). A factual finding is clearly erroneous only if it is "against logic and the facts on record," *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002), leaving the

reviewing court with “the definite and firm conviction that a mistake has been made.” *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted).

In its detailed findings of fact and conclusions of law, the district court found that wife had the ability to earn \$7,357 per month from her employment as an insurance-sales representative and on the projected investment earnings from the investment assets and the cash-equalizer payment awarded to her, which were payable to wife no later than 180 days from entry of judgment. The district court found wife’s monthly living expenses were \$10,588, taking into account the upper-middle-class standard of living that the parties enjoyed during the marriage. As a result, the district court awarded wife temporary spousal maintenance of \$5,000 per month for two years starting December 1, 2016, followed by permanent spousal maintenance of \$3,231 per month thereafter.

Wife first argues that the district court abused its discretion by overstating her ability to support herself by failing to consider her obligation to pay income taxes. We disagree.

A district court has discretion to consider tax consequences as part of its spousal-maintenance-award calculations, provided that it has a “reasonable and supportable basis for making an informed judgment as to [the] probable liability.” *Kampf v. Kampf*, 732 N.W.2d 630, 634-36 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). If considering tax consequences would be speculative, the district court should not do so. *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (citing *Maurer v. Maurer*, 623 N.W.2d 604, 607-08 (Minn. 2001)).

Here, although wife pointed to documents and testimony from several witnesses that predicted wife’s potential tax consequences, the district court, after being presented with

these documents and testimony, stated that “no clear evidence of the specific tax consequences was presented,” implicitly finding the documents and testimony not credible. The district court has discretion in weighing evidence and assessing credibility. *Sinsabaugh v. Heinerscheid*, 428 N.W.2d 476, 480 (Minn. App. 1988). And a review of the record reveals that these findings are not clearly erroneous. We discern no abuse of discretion by the district court.

Wife next argues that, because her cash-equalizer payment did not require payment until mid-November, 2017, 180 days after the May 12, 2017 entry of judgment, the district court abused its discretion by failing to consider wife’s reduced ability to earn investment income on the payment during the approximate one year delay from the commencement of spousal maintenance.

In her post-trial motion for amended findings, wife proposed modifying the spousal-maintenance award to reflect the potential nonpayment of the cash-equalizer payment for 180 days after entry of the judgment. However, wife did not support her proposal with written briefing, and the district court refused to consider it. We need not consider this argument as questions not properly presented to and considered by the district court are waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Finally, wife argues that the district court clearly erred by finding that wife will be able to rebuild her book of business in two years and therefore abused its discretion by including a step reduction from \$5,000 to \$3,231 per month in wife’s maintenance award. We are not persuaded.

District courts have “broad discretion in establishing maintenance plans, including the use of step reductions.” *Schreifels v. Schreifels*, 450 N.W.2d 372, 374 (Minn. App. 1990), *review denied* (Minn. Nov. 15, 2011). “Step reductions may be appropriate to provide employment incentives for a rehabilitating spouse.” *Passolt v. Passolt*, 804 N.W.2d 18, 25 (Minn. App. 2011). However, step reductions are inappropriate when the party’s future income is too speculative. *See Schreifels*, 450 N.W.2d at 374 (reversing the district court’s decision to use step reductions because wife’s income was too speculative, given her age, health, work history, and lack of marketable skills).

Here, wife’s future income is not speculative. The district court relied on wife’s employment history of 19 years as an insurance-company sales representative and a vocational expert’s testimony and report in finding that, after two years of rebuilding her book of business, wife will have an earning capacity of \$4,916 per month from her employment. We defer to the district court’s assessment of the credibility of witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Finally, the district court specifically noted that the purpose of using a step reduction after two years is to give wife incentive to build her book of business. The district court’s findings are not clearly erroneous. Therefore, we conclude that the district court did not abuse its discretion by including a step reduction in wife’s maintenance award.

II. The district court did not abuse its discretion in declining to require husband to obtain a life-insurance policy.

Wife argues that the district court should have required husband to obtain a life-insurance policy to secure his spousal maintenance and child-support obligations. We disagree.

“The district court ‘has discretion to consider whether the circumstances justifying an award of maintenance also justify securing it with life insurance.’” *Kampf*, 732 N.W.2d at 635 (quotation omitted). Such circumstances include the age, education, vocational experience, and employment prospects of the spousal-maintenance recipient. *Id.*

Here, the district court found that the circumstances did not justify requiring husband to maintain life insurance based, in part, on wife’s age, good health, employment as an insurance agent for 19 years, and earning capacity of at least \$59,000 per year. The record supports the district court’s findings. Therefore, the district court did not abuse its discretion in declining to require husband to secure his maintenance and support obligations with life insurance.

III. The district court did not err as a matter of law by vacating the prematurely entered judgment and staying it pending further order.

Wife argues that the district court erred in vacating the prematurely entered judgment and staying the entry of judgment pending further order on the grounds that the district court intended to enter judgment on December 28, 2016, 30 days after it filed its original order and decree. We are not persuaded.

Wife’s argument is premised on the assumption that the premature entry of judgment was a clerical error. A clerical error is an error of form made by the district court.

Wilson v. City of Fergus Falls, 181 Minn. 329, 332, 232 N.W.2d 322, 323 (1930). “Such a mistake ordinarily is apparent upon the face of the record”¹ *Id.* Here, it is apparent that the district court administrator prematurely entered judgement and that the court administrator’s mistake was an error of form rather than substance. For purposes of this appeal, we will assume that the entry of the judgment constitutes a clerical error.²

Minn. R. Civ. P. 60.01 provides that clerical mistakes in judgments may be corrected by the court at any time upon its own initiative. However, the correction of the clerical mistakes cannot state something other than what was originally pronounced. *Denike v. W. Nat’l Mut. Ins. Co.*, 473 N.W.2d 370, 372 (Minn. App. 1991).

Under Minn. R. Civ. P. 58.02, “[t]he court may order a stay of entry of judgment . . . for a period not exceeding the time required for the hearing and determination of a motion for new trial or . . . for amended findings, and after such determination may order a stay of entry of judgment for not more than 30 days.” The district court’s original

¹ A clerical error is distinguishable from a mistake, inadvertence, surprise, or excusable neglect that furnish grounds for relief under Minn. R. Civ. P. 60.02, which are errors of a more substantial nature that need to be corrected by the parties’ motions within a year. *Egge v. Egge*, 361, N.W.2d 485, 488 (Minn. App. 1985) (quotation omitted). A clerical error is different from a substantive judicial error as well. See *Carter v. Anderson*, 554 N.W.2d 110, 113 (Minn. App. 1996) (“Indeed, the drafters included Rule 60.01 to deal with clerical errors without making similar provision for substantive judicial errors.”), *review denied* (Minn. Dec. 23, 1996).

² We note that because, under *Wilson*, a “clerical error” is an error of form by the district court, a “clerical error” is a species of judicial error. 181 Minn. at 332, 232 N.W. at 323. Other caselaw distinguishes between ministerial error in the entry of a judgment and a judicial error in the content of a judgment: “An unauthorized judgment is born of ministerial error in its entry, but an erroneous judgment is born of judicial error.” *Lyon Dev. Corp. v. Ricke’s Inc.*, 296 Minn. 75, 79, 207 N.W.2d 273, 276 (1973). Because this distinction was neither presented to nor considered by the district court, we do not consider it here.

order for judgment stayed entry of judgment for 30 days. Accordingly, implicit in the original order and decree was the idea that the original findings of fact, conclusions of law, and order for judgment might be amended as a result of either or both parties' motions for new trial or amended findings, and were not final before December 28, 2016.

Here, the district court properly vacated the unauthorized and prematurely entered judgment. At the time of the vacation, both parties had previously filed motions for a new trial or amended findings. Therefore, according to Minn. R. Civ. P. 58.02, the court stayed entry of judgment pending further order, and after the determination of those motions, it stayed entry for another 30 days. The district court complied with the Minnesota Rules of Civil Procedure and did not err by vacating the prematurely entered judgment and staying entry of judgment pending further order.

IV. Wife waived the issue of whether interest should be paid on wife's cash-equalizer payment by not raising it before the district court.

Wife argues that the district court abused its discretion when it determined that wife was not entitled to receive interest on any unpaid balance on her cash-equalizer payment until 180 days from entry of judgment. Appellate courts generally only address questions presented to and considered by the district court. *Thiele*, 425 N.W.2d at 582. Here, wife did not present this question to the district court, and the district court did not address it. Therefore, we do not consider it for the first time on appeal.

V. The district court did not abuse its discretion by declining to award wife need-based attorney fees.

Wife argues that the district court abused its discretion by declining to award wife need-based attorney fees. We disagree.

A district court's award of attorney fees will not be reversed absent an abuse of discretion. *Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). Need-based attorney fees shall be awarded "in an amount necessary to enable a party to carry on or contest the proceeding" if the court finds (1) the fees are necessary for a good-faith assertion of rights; (2) the payor has the ability to pay the award; and (3) the recipient lacks the ability to pay his or her own fees. Minn. Stat. § 518.14, subd. 1 (2016). *See Geske v. Marcolina*, 624 N.W.2d 813, 816-18 (Minn. App. 2001) (addressing need-based attorney's fees).

Here, wife requested \$250,000 in need-based attorney fees. The district court found that the actual amount wife owed her attorney was \$116,920 and determined that an award of attorney fees to wife was inappropriate because she failed to submit any evidence to show that she does not have the ability to pay them. The record supports the district court's findings. The district court awarded wife a cash-equalizer payment in the amount of \$1,205,043, which the district court found was sufficient to cover the \$116,920 she incurred in attorney fees. *See Burns v. Burns*, 466 N.W.2d 421, 424 (Minn. App. 1991) (finding no abuse of discretion when \$37,000 cash equalizer payment was sufficient to cover \$9,800 in wife's attorney fees). This finding is not clearly erroneous, and the district court did not abuse its discretion by declining to award wife need-based attorney fees.

VI. The district court did not abuse its discretion by alternating the right to claim the dependency exemption each year and allowing husband to claim the dependency exemption in his 2017 tax return.

Wife argues that the district court abused its discretion by allowing husband to claim the dependency exemption for the parties' child in his 2017 tax return.³ As the district court properly noted, this issue was first asserted in a post-trial motion, and therefore was untimely. *Grigsby*, 648 N.W.2d 726. This court does not review issues that were not timely raised before the district court. *Id.*; see *Thiele*, 425 N.W.2d at 582.

VII. The district court did not err by placing the burden on husband to prove that the increase in the value of the homestead was nonmarital and by finding that the increase was marital.

In his cross-appeal, husband argues that wife had the burden to prove that the increase in the value of the homestead was actually marital property and that the district court erred by placing the burden on him to show that the increase was nonmarital property. Husband also argues that the district court erred in classifying the entire increase of the homestead's value as marital. Neither argument is persuasive.

"Identification of the applicable burden and standard of proof presents questions of law, which we review de novo." *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008). Generally, "[w]hether property is marital or nonmarital is a question of law we review de novo, but we will disturb the district court's underlying factual findings only if they are

³ The district court concluded that wife and husband can alternate the right to claim the dependency exemption each year. Under the judgment, husband received the dependency exemption in 2017. Wife initially argued that the district court abused its discretion by alternating the right to claim the exemption. However, at oral argument, she conceded that, in light of new tax law, that issue is now moot, and the only remaining issue is husband's dependency exemption claim for 2017.

clearly erroneous.” *Kerr v. Kerr*, 770 N.W.2d 567, 569 (Minn. App. 2009) (citation omitted). Further, we defer to the district court’s credibility determinations. *Sefkow*, 427 N.W.2d at 210.

Minn. Stat. § 519.11, subd. 5 (2016), states that an antenuptial agreement “shall be prima facie proof of the matters acknowledged therein and as to those matters, the burden of proof shall be and rest upon the person contesting the same.” Here, because the parties’ antenuptial agreement did not specifically cover increased value of the homestead,⁴ it is not clear whether it was a “matter” acknowledged in the antenuptial agreement. The parties did not litigate the issue before the district court, and the district court did not explicitly rule on the issue. However, we need not decide this issue because the same analysis applies regardless of whether the homestead’s increased value was a matter acknowledged in the antenuptial agreement.

Assuming that the homestead’s increased value was a matter acknowledged by the antenuptial agreement, Minn. Stat. § 518.54, subd. 5 (1992), governs its marital/nonmarital characterization. The parties’ antenuptial agreement incorporated Minn. Stat. § 518.54, subd. 5, to govern classification of properties as marital or nonmarital except for the properties specifically designated as nonmarital. Increased value of the homestead was not part of this exception.

⁴ The antenuptial agreement specifically provided that the business and its increase in value were not governed by section 518.54, subdivision 5, and that they were nonmarital properties. The agreement also provided that the homestead was nonmarital property.

Under Minn. Stat. § 518.54, subd. 5, property acquired during the marriage is presumed to be marital unless shown that it is nonmarital property. “The party seeking the non-marital classification must show by a preponderance of the evidence that the asset was acquired in exchange for non-marital property.” *Pearson v. Pearson*, 363 N.W.2d 337, 339 (Minn. App. 1985) (quotation omitted). The increase in the value of nonmarital property during a marriage retains its nonmarital characteristic if it is shown to be attributable solely to market forces or passive appreciation. *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 413 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000).

Because the homestead’s value increased during the marriage, the increased portion of the homestead’s value⁵ is presumed to be marital under section 518.54, subdivision 5, and husband bears the burden to show that the increase was solely attributable to passive appreciation.⁶ Therefore, the district court did not err when it placed the burden on husband to trace the increase of the homestead’s value to a nonmarital source.

If the increased value of the homestead is not a matter acknowledged in the antenuptial agreement, Minn. Stat. § 518.003, subd. 3b (2016), which generally governs the marital and nonmarital property, applies. Because the statutory language of Minn. Stat.

⁵ The district court found, and the parties do not dispute, that the original value of the homestead, which was classified as nonmarital property in the agreement, remains nonmarital.

⁶ This is also consistent with Minn. Stat. § 519.11, subd. 5, because it is husband, not wife, who is contesting the presumption of Minn. Stat. § 518.54 incorporated in the antenuptial agreement that the homestead’s increased value is marital.

§ 518.003, subd. 3b, and Minn. Stat. §518.54, subd. 5, is the same,⁷ our analysis does not change.

Here, the district court found that husband failed to present evidence or credible testimony to rebut the contrary evidence that marital assets were used to make improvements to the home. On this record, we conclude that the district court did not clearly err when it determined that the increased value of the homestead during the marriage was marital property.

VIII. The district court's determination that there was a marital component to the increase in the value of the business was not erroneous.

Husband similarly argues that the district court erred by identifying some marital interest in the business and by placing on husband the burden to prove that the increase was nonmarital. Again, we disagree.

The antenuptial agreement explicitly provided that the increased value of the business was nonmarital property not governed under section 518.54, subdivision 5. Therefore, under Minn. Stat. § 519.11, subd. 5, wife, who contested the antenuptial agreement's nonmarital classification of the increase in the value of business, bears the burden of proof. Here, it is not clear on whom the district court imposed the burden of proof.

However, we need not decide whether the district court erred on the burden of proof because the record shows that both parties submitted evidence to the district court

⁷ Minn. Stat. §518.54, subd. 5, was renumbered to Minn. Stat. § 518.003, subd. 3b, in 2006.

addressing the extent of the marital and nonmarital interests in the business and the increase of its value and that the district court considered both parties' evidence on that point.

Husband argued that the reinvestment of income was simply an offset which did not contribute to the increase in the value of the business, but the district court found this argument to be not credible. Instead, the district court found credible the spending analysis and testimony of wife's forensic accountant, which showed husband's reinvestment of marital income back into the business and a high degree of commingling of personal and business funds used to pay personal and business expenses. Ultimately, the district court concluded that the increase in the business's value attributable to husband's reinvestment of marital income in the business was marital, but that the rest of the value of the business was husband's nonmarital property. We defer to the district court's credibility determinations, and the district court's findings are supported by the record. *See Sefkow*, 427 N.W.2d at 210. Therefore, the district court's determination that a portion of the increase in the value of the business was marital property was not clearly erroneous.

Moreover, even assuming that the district court erroneously put the burden of proof on husband, wife nevertheless satisfied her burden to prove that the increase of the business's value was marital. We conclude that any error the district court may have made in its placement of the burden of proof is harmless and is not a ground for reversal. *See Minn. R. Civ. P. 61* (harmless error is disregarded).

Affirmed.