

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1430**

In re the Marriage of: Lynn J. Dreger, petitioner,
Respondent,

vs.

Richard C. Dreger,
Appellant.

**Filed June 25, 2018
Affirmed
Reyes, Judge**

Ramsey County District Court
File No. 62-FA-15-2147

Randall S. Johnson, Randall S. Johnson Law Office, P.L.L.C., St. Paul, Minnesota (for respondent)

Tifanne E.E. Wolter, Henningson & Snoxell, Ltd., Maple Grove, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REYES, Judge

Appellant-husband argues that the district court abused its discretion (1) in awarding respondent-wife spousal maintenance based on an erroneous calculation of wife's monthly expenses; (2) by not considering his 50% survivor election in determining property division; and (3) by awarding wife (a) the parties' 2015 income-tax refund; (b) the funds

from husband's bank account as of the date of valuation; and (c) two Terry Redlin prints. Husband also argues that the district court erred by (1) determining his Public Employees Retirement Association (PERA) pension payments are marital income and (2) classifying the homestead as marital property. We affirm.

FACTS

Appellant Richard Dreger (husband) and respondent Lynn Dreger (wife) were married from 1996 to 2017. At the time of their wedding, husband was a 54-year-old police officer and wife was a 46-year-old bartender. Husband and wife both stopped working right after the marriage and have lived off of husband's PERA pension payments of \$6,831 per month. Husband elected the survivor annuity option with his PERA pension, which entitled wife to a 50% survivor annuity of \$3,415 per month after husband's death.

In April 1997, the parties moved to a cabin at Sturgeon Lake in Pine County (the cabin), which husband owned prior to the marriage. Husband and wife renovated the cabin during the marriage by taking out a mortgage loan. They repaid the loan with payments from husband's pension.

In 2005, the parties sold the cabin and bought a home in Pine County (the homestead) by using the proceeds from the sale of the cabin and taking out a mortgage loan. The parties paid the homestead mortgage with husband's pension payments and wife's social-security benefits, which she started receiving in 2013. The parties resided there until their separation in May 2015.

Wife petitioned for dissolution of marriage in September 2015, and the district court held a hearing in January 2017. At the time of trial, husband was 75 years old and wife

was 67 years old, and both had health issues. Wife has had a mild cognitive impairment since 2013, and husband has chronic obstructive pulmonary disease (COPD), diabetes, high blood pressure, and hip issues.

On April 19, 2017, the district court entered findings of fact, conclusions of law, order for judgment, and judgment and decree. Husband filed motions for a new trial and amended findings, which the district court denied. Husband appeals.

D E C I S I O N

I. The district court did not abuse its discretion in awarding wife spousal maintenance in the amount of \$2,850 per month.

Husband argues that the district court abused its discretion by awarding wife spousal maintenance based on an erroneous calculation of wife's monthly expenses. 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). "A district court abuses its discretion when it makes findings unsupported by the evidence or when it improperly applies the law." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009), *review granted* (Minn. Sept. 29, 2009), and *appeal dismissed* (Minn. Feb. 1, 2010). We will uphold the district court's findings of fact concerning spousal maintenance if they are not 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," *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016), leaving us with a "definite and firm conviction that a mistake has been

made.” *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We also defer to the district court’s credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Here, the district court awarded wife \$2,850 per month in permanent spousal maintenance. The district court reached this amount by finding that wife had a monthly income of \$734 per month and that her expenses of living on her own were \$3,357 per month, including \$1,100 in housing expenses and \$300 in transportation costs.

Husband first argues that wife never testified as to her plan to live independently, and claims that wife’s daughter, who was living with wife at the time of trial, testified that wife had no plans to move to another place. Husband’s arguments are based on an erroneous reading of the record.

Wife clearly and unequivocally testified at trial that she intended to live on her own, preferably in North St. Paul or Miltona, and submitted the estimated costs of an apartment rental in those areas. Based on wife’s testimony and the range of rent prices in North St. Paul and Miltona, the district court made detailed findings regarding wife’s housing expense of \$1,100 per month. Furthermore, daughter did not deny wife’s plan to move to Miltona. She simply said they never discussed it.

Husband also argues that including transportation costs in wife’s monthly expenses was erroneous because of wife’s inability to drive. The district court declined to award wife \$800 per month to buy and maintain a vehicle. However, the district court specifically found that she would still need some transportation, and set aside \$10 per day without

specifying the type of transportation wife can use. As these findings are supported by the record and are not clearly erroneous, the district court did not abuse its discretion.

II. The district court did not err by determining husband's PERA pension payments are marital income.

Husband argues that PERA pension payments are not “income,” but rather a distribution of the benefits he earned prior to the marriage. We disagree.

Husband's argument requires us to interpret the statute defining income. We review a question of statutory interpretation *de novo*. *Sanvik v. Sanvik*, 850 N.W.2d 732, 735 (Minn. App. 2014).

Minn. Stat. § 518A.29 (2016) states that “gross income includes any form of periodic *payment* to an individual, including . . . *pension . . . payments . . .*” (emphasis added). In *Lee v. Lee*, the Minnesota Supreme Court interpreted section 518A.29, stating that the payments from pension benefits earned prior to marriage are income. 775 N.W.2d 631, 638-39 (Minn. 2009). Because husband accrued all of his pension benefits before the parties married, the district court properly characterized husband's PERA pension payments received during the marriage as marital income¹ derived from husband's nonmarital pension.

¹ Income from a nonmarital asset received during the marriage is a marital asset. *Swick v. Swick*, 467 N.W.2d 328, 331 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). Here, husband does not dispute that income from a nonmarital asset becomes a marital asset if received during the marriage.

III. The district court did not err by classifying the homestead as marital property.

Husband argues that the homestead is nonmarital property because the funds used to purchase it were from the proceeds of selling the cabin and from his PERA pension payments. Husband's argument lacks merit.

Whether property is marital or nonmarital is a question of law that we review *de novo*, *Johnson v. Johnson*, 388 N.W.2d 47, 48-49 (Minn. 1986), but we defer to the district court's underlying findings of fact. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). The spouse claiming that property is nonmarital must prove the necessary underlying facts by a preponderance of the evidence. *Wiegers v. Wiegers*, 467 N.W.2d 342, 344 (Minn. App. 1991).

Under Minn. Stat. § 518.003, subd. 3b (2016), all property acquired during the marriage is presumed to be marital property. Although property acquired by one spouse before the marriage is nonmarital property, “[w]hen nonmarital and marital property are commingled, the nonmarital asset may lose that status unless the party can trace it to a nonmarital source.” *Swick*, 467 N.W.2d at 330; Minn. Stat. § 518.003, subd. 3b.

Here, we presume the homestead is marital property as it was purchased during the marriage. The parties partially financed the homestead using proceeds from the sale of the cabin. The cabin was originally nonmarital property, but the parties renovated it using pension payments, which were marital income. As a result, when the cabin was sold, it included a comingled combination of marital and husband's nonmarital interests. Therefore, absent husband's tracing of his nonmarital interest in the cabin, the renovated cabin and the proceeds from its sale were marital. In addition, the parties financed the rest

of the homestead's mortgage using husband's pension payments and wife's social-security benefits, which were both marital income. Because husband failed to trace the interests in the cabin and homestead to a nonmarital source, the district court did not err in determining that the entire homestead was marital property.

IV. The district court properly considered husband's PERA survivor-benefit election in determining the property division.

Husband claims that the district court abused its discretion by not considering husband's 50% survivor election in determining the property division.² We disagree.

"District courts have broad discretion over the division of marital property and appellate courts will not alter a district court's property division absent a clear abuse of discretion or an erroneous application of the law." *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005).

Minn. Stat. § 518.58, subd. 1 (2016), requires proper consideration of a broad range of factors in determining what is a "just and equitable division." *Nolan v. Nolan*, 354 N.W.2d 509 (Minn. App. 1984). The factors include each party's age, health, and the amount and sources of income. Minn. Stat. § 518.58, subd. 1.

Here, contrary to husband's argument, the district court took into consideration husband's 50% survivor election when determining the property division. The district

² In the issue statements of husband's brief, he states that the district court erred by not considering the 50% survivor election in determining spousal maintenance as well as property division. However, husband never discussed, analyzed, or argued the 50% survivor election in the context of spousal maintenance in his brief. Issues not argued in the briefs are deemed forfeited on appeal. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017).

court found that wife was significantly younger than husband, but “[t]he 50% survivor annuity for Wife reduces her need to save to support herself following Husband’s death.” In dividing the marital property, the district court accordingly decreased her reasonable monthly living expenses in consideration of the 50% survivor election. Because the district court properly considered wife’s future income in deciding the property division as section 518.58 directs, it did not abuse its discretion.

V. The district court did not abuse its discretion by awarding wife the parties’ 2015 income-tax refund.

Husband argues that the district court abused its discretion by awarding wife the parties’ 2015 income-tax refund because they agreed at a pre-trial hearing that husband would retain the refund. Husband’s argument is meritless.

Nothing in the record supports husband’s interpretation. Although husband argues that such an agreement was read into the record, he fails to point out the relevant part of the record. The party asserting error has the burden of demonstrating it. *White v. Minn. Dep’t of Nat. Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). We discern no abuse of discretion by the district court.

VI. The district court did not abuse its discretion by awarding wife the funds from husband’s bank account as of the date of valuation.

Husband argues that the district court abused its discretion by awarding wife \$11,430 for her share in the marital bank accounts, because husband already paid her \$6,000 from the bank accounts that contained the \$11,430. We disagree.

Minn. Stat. § 518.58, subd. 1, states that the district court “shall value marital assets for purposes of division . . . as of the day of the initially scheduled prehearing settlement

conference. . . .” If there is a substantial change in the value of an asset “between the date of valuation and the final distribution, the court *may* adjust the valuation of that asset as necessary to effect an equitable distribution.” Minn. Stat. § 518.58, subd. 1 (emphasis added). The statutory word “may” is permissive, not mandatory. *Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson*, 272 Minn. 156, 165, 136 N.W.2d 861, 868 (1965); Minn. Stat. § 645.44, subd.15 (2016).

Nothing in the record indicates that the \$6,000 of advanced payment should be counted toward satisfying husband’s obligation of \$11,430, and husband did not point to such evidence. In *Hortis v. Hortis*, this court held that the district court did not abuse its discretion in choosing to disregard depletions in the savings account after the valuation date. 367 N.W.2d 633, 636-37 (Minn. App. 1985). The district court’s decision to disregard the payment is well within its discretion.

VII. The district court did not abuse its discretion by awarding wife two Terry Redlin prints.

Husband argues that the district court abused its discretion by awarding wife two Terry Redlin prints, because the district court classified them as husband’s nonmarital property in its findings of fact. We are not persuaded.

In its findings of fact, the district court found that husband’s nonmarital personal property was set forth in trial Exhibit 106, which included the prints. However, in another paragraph in the findings of fact, the district court classified the prints as marital property in dispute and awarded them to wife. In its conclusions of law, the district court awarded wife both Terry Redlin prints.

Appellate review is generally limited to issues that were presented to and considered by the district court in deciding the matter before it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, husband did not raise this issue before the district court and therefore forfeited it. Even if husband did not forfeit the issue, his argument lacks merit. This court recognized in *Dailey v. Chermak* that there can be “conflicts between findings and conclusions, or inconsistencies, or omissions.” 709 N.W.2d, 626, 631 (Minn. App. 2006), *review denied* (Minn. May 16, 2006). When a conflict between statements in a finding of fact and a conclusion of law remains after the expiration of all opportunities for corrective actions,³ conclusions of law prevail over an inconsistent statement in the findings of fact. *Id.* Therefore, the district court’s conclusions of law that the Terry Redlin prints should go to wife prevails.

Affirmed.

³ We noted in *Dailey*, 709 N.W.2d at 631, that the parties should promptly correct the inconsistencies through post-trial motions and appeals to resolve issues arising from such irregularities. Here, as noted, husband did not raise this issue in his motions for amended findings and a new trial.