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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0708**

In re the Marriage of:  
Beth Ann Bersaw, petitioner,  
Respondent,

vs.

Richard George Bersaw,  
Appellant.

**Filed April 15, 2019  
Affirmed  
Smith, John, Judge\***

Blue Earth County District Court  
File No. 07-FA-16-4220

Julia Ketcham Corbett, Alyssa Thibert Nelson, Blethen Berens, Mankato, Minnesota (for respondent)

Karl O. Friedrichs, Friedrichs Law Office, P.A., Mankato, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Smith, John, Judge.

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

## **UNPUBLISHED OPINION**

**SMITH, JOHN**, Judge

We affirm the district court's judgment dissolving appellant-husband and respondent-wife's marriage because the district court did not deprive husband of due process; the district court did not err in denying appellant's nonmarital property claim; and the award of attorney fees was within the discretion of the district court.

### **FACTS**

Appellant-husband Richard George Bersaw and respondent-wife Beth Ann Bersaw were both previously divorced with children from prior marriages when they moved in together in late 1992 or early 1993. Wife moved into husband's home in Mankato (45 Mary Oak Lane). Late in 1993, husband sold 45 Mary Oak Lane, bought a new home in Kansas, and the parties moved to Kansas. The parties married in 1995 in Kansas.

Shortly after getting married, the parties sold the Kansas home, moved back to Mankato, and bought their first home as a married couple (Marwood home). Up until the time of their divorce, the parties acquired multiple properties, constructed new homes, and resold properties. They first bought a lot in a subdivision in Mankato in 2000 (Limestone lot). Using the proceeds from the sale of the Marwood home, they constructed a new home on the land. Two years later, they bought a second lot in the same subdivision (Cedar Meadows property).

In 2003, husband's father passed away and left husband as the successor trustee of his trust. According to the trust, all the trust real estate was to be distributed to husband. A month after his father's death, husband, as successor trustee, transferred 38 acres of real

estate from the trust to himself and wife as joint tenants. After selling the Limestone home, the parties built a home on this land (140 Mary Oak Lane). They lived at 140 Mary Oak Lane until their separation.

The parties separated in June 2014, following husband's arrest for criminal sexual conduct. In January 2015, he was convicted of two counts of criminal sexual conduct and was sentenced to 76 months in prison. He expects to be released in 2019.

In July of 2016, wife filed for divorce. In May of the following year, husband moved for summary judgment, arguing that he had a 57.65% nonmarital interest in their homestead (140 Mary Oak Lane) and a 100% nonmarital interest in the land transferred from his father's trust. Following a motion hearing, the district court denied husband's motion and awarded wife \$9,800 in need-based attorney fees.

A court trial was held on June 27 and 29, 2017. Husband did not personally appear for trial, but testified via telephone for one hour from prison. At the beginning of trial, husband's counsel informed the district court that the prison would only allow husband to testify for one hour. Because of husband's incarceration, the district court accepted, and considered as testimony, three affidavits submitted by husband.

At trial, wife testified that someone broke into her garage in 2014. She alleged that the intruder was husband and that he removed something of value from the garage attic. Following trial, husband informally requested that the district court reopen evidence to admit documentation of his conditional release that allegedly disproves the allegation. The district court denied his motion.

In October of 2017, the district court issued its judgment and decree for dissolution. The district court found that husband lacked credibility based on his felony convictions and his “insistence that his memory was accurate” when it appeared his claimed personal memories of the sales prices of the properties were actually derived from attempting to calculate sales prices from deed tax figures. The district court found wife’s testimony of the garage intrusion credible, as supported by the testimony of both her son and husband’s son. Based on their testimony, the district court found that it was “more likely than not” that husband broke into the homestead’s garage and removed something of value therefrom. Because of this, and his poor compliance with interrogatories and requests for documents, the district court sanctioned husband, awarding wife \$20,000 in attorney fees.

The district court then divided their property. Relevant to this appeal, the district court found that the land they owned in joint tenancy was marital property, which included their homestead. It ordered that the homestead be sold and the proceeds split evenly between them. It also distributed the proceeds from the sale of property held in joint tenancy between them.

Following the district court’s order, both parties submitted motions to the district court. Husband moved for amended findings and a new trial. Wife moved to correct clerical errors and for amended findings. Following a motion hearing, the district court denied husband’s motions, granted wife’s motions, and entered an amended judgment.

## DECISION

### I. Due process

Husband raises numerous allegations of due-process violations, arguing that their cumulative impact affords him the right to a new trial. These alleged violations arise from husband's incarceration during the time leading up to and during trial. Both the United States Constitution and the Minnesota Constitution provide that no person shall be deprived of property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Whether an individual's due-process rights have been violated is a question of law we review de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 785 (Minn. 2014).

Generally, “due process requires notice and a meaningful opportunity to be heard before a fair and impartial decision maker.” *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 794 (Minn. App. 2008). “The requirements of due process are flexible and call for such procedural protections as the particular situation demands.” *Baker v. Baker*, 494 N.W.2d 282, 287 (Minn. 1992).

Husband does not argue that he had an absolute right to be physically present at trial. Instead, he argues that he was denied a fair trial because of (1) “his inability to effectively participate in his defense”; (2) his limited time in prison to draft affidavits with his counsel to submit evidence to the court; (3) the short time he had to testify; (4) the inability to assist counsel during trial; (5) the lack of time to rebut evidence of the garage intrusion; and (6) the district court's finding that husband was not credible.

We acknowledge that representing an incarcerated defendant in a civil case can present various challenges. We agree that husband's counsel would have had an easier

time representing husband if he had not been incarcerated leading up to and during the trial. However, this does not lead us to the conclusion that husband was denied a fair trial.

During the entire trial, husband was represented and his counsel was present. The record shows that husband's counsel did not request that the district court provide an alternate means for husband to testify or to be present at trial, through live video or audio capabilities or a temporary release from prison. Instead, at the beginning of trial, husband's counsel informed the district court that the prison would only allow husband to testify for one hour. Counsel indicated that he believed this would be sufficient time. Furthermore, the district court accepted three affidavits to be considered in addition to husband's testimony. The district court also ensured that husband's counsel had time for redirect, during which husband's counsel asked about a number of issues. When the district court gave counsel a one-minute warning during redirect, counsel stated, "I don't have any more questions, Your Honor. I would be just beating a horse here." Counsel also had the opportunity to develop the record on the garage intrusion, but counsel merely asked husband, "[D]id you break into your garage?" and husband answered in the negative.

The district court expressed sympathy as to the difficulties of representing an incarcerated client. In its order considering husband's request to reopen the record, the court stated:

Husband's attorney has made much of the difficulties of preparing for trial while Husband is incarcerated. However, Husband's attorney previously explained that Husband was already incarcerated when Husband's Attorney agreed to represent Husband. This Court is sympathetic with the difficulties involved with the circumstances of this case, but to agree to represent an incarcerated client and then proceed with

complaints about said difficulties is not a proper justification for procedural exceptions and/or leniency. It is not lost on this Court that Husband's incarceration should not force Wife to delay the relief requested. . . .

Husband was represented throughout the dissolution proceedings and his counsel was present during both days of trial. The district court accepted husband's affidavits in addition to his testimony by telephone. The district court ensured that husband's counsel had time for redirect during his limited time to testify as allowed by the prison. His counsel never requested that the district court provide alternative means for husband's testimony. Accordingly, husband was not deprived of due process in his dissolution proceedings.

## **II. Tracing nonmarital property**

Husband argues that the district court applied a more stringent tracing standard to husband than is required to prove his nonmarital interest. "Whether 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 clearly erroneous." *Kerr v. Kerr*, 770 N.W.2d 567, 569 (Minn. App. 2009). "Whether a nonmarital interest has been traced is also a question of fact," which this court reviews for clear error. *Id.* at 571.

Property acquired during marriage is presumed to be marital property. Minn. Stat. § 518.003, subd. 3b. (2018). Property "acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse" is nonmarital property. *Id.* "[C]ourts may trace a current asset to a nonmarital source." *Senske v. Senske*, 644 N.W.2d 838, 841 (Minn. App. 2002). "To claim a nonmarital interest, a party must show by a

preponderance of the evidence that the asset was acquired in exchange for nonmarital property.” *Id.*

Nonmarital property must be kept separate from marital property or be readily traceable if commingled with marital property. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). “[T]racing property to its nonmarital source does not require intricate detail.” *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 697 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). “A nonmarital interest in property may be established on the basis of credible testimony.” *Kerr*, 770 N.W.2d at 570. And we defer to a district court’s credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Husband argues that the district court held him to a higher standard to prove tracing of his nonmarital funds and that this amounted to a clear error because it was induced by an erroneous view of the law. He argues that the district court required he provide closing documents when the district court should have relied on other documents he submitted, specifically mortgage documents and warranty deeds. Husband claims that he proved by a preponderance of the evidence that he traced his nonmarital funds from each home, starting with the two properties he purchased before the parties married, continuing through the construction of the parties’ homestead.

The district court made detailed findings regarding each purchase and sale of real estate property, starting with the home husband owned when they first moved in together in late 1992 or early 1993. Based on the documents husband submitted, the district court addressed each of husband’s claims regarding the sale prices of the homes and the amount husband paid from his alleged nonmarital funds. As an example, the district court indicated

that husband submitted mortgage documents and the warranty deed for 45 Mary Oak Lane to claim that the sales price was \$109,000 and that he profited \$82,000. The warranty deed shows that the deed tax due on November 12, 1993 was \$359.70. The mortgage documents show that in January 1993 husband took out a \$26,000 mortgage on the home and that in November of that year the mortgage was satisfied. The court reasoned that without documentation “on the record with which the Court could determine the actual financial circumstances of the sale of said property . . . [t]hese claims are not proven.” With each subsequent purchase and sale of real estate, the district court examined the documentation provided by husband to substantiate his claims. In each instance, the district court set out logical reasoning for its findings and conclusions that from one sale to the next purchase, husband failed to prove by a preponderance of the evidence that he could trace his nonmarital interest in the real estate properties owned during their marriage.

Additionally, the district court found that husband could not prove the amount it cost to build their homestead or to prove the amount of any nonmarital funds he used towards construction of the home. He alleged that it cost \$310,000 to construct the home and that he contributed \$157,161 in nonmarital funds to build it. But he provided no documentation of the actual costs to build the home or the source of those funds. We conclude that the lack of documentation to support husband’s tracing of nonmarital interest from 45 Mary Oak Lane to the Kansas home, from the Kansas home to the Marwood home, from the Marwood home to the Limestone lot, and from the newly constructed Limestone home to constructing 140 Mary Oak Lane precluded the district court from finding

husband's claims were proven by a preponderance of the evidence. We therefore hold that the district court did not err in its tracing analysis.

### **III. Transfer of property in joint tenancy**

Husband challenges the district court's classification of the transfer of 38 acres of real estate in joint tenancy as marital property. He argues that the district court erroneously placed the burden on him to prove that he did not gift the real estate to his wife. Again, we review the district court's division of property for an abuse of discretion. *McCulloch v. McCulloch*, 435 N.W.2d 564, 568 (Minn. App. 1989). The characterization of a type of property as marital or nonmarital is a question of law we review de novo. *Kerr*, 770 N.W.2d at 569.

The state of a title does not determine whether property acquired during marriage is marital or nonmarital. *Montgomery v. Montgomery*, 358 N.W.2d 169, 172 (Minn. App. 1984). Additionally, "merely transferring title from individual ownership to joint tenancy does not transform non-marital property into marital property." *Id.* But when more than a legal transference takes place, and a valid gift is given, then the property cannot be classified as nonmarital. *McCulloch*, 435 N.W.2d at 568. "[T]he party asserting that there was a gift must prove the requisite elements by clear and convincing evidence." *Id.* A valid gift requires (1) donative intent, (2) delivery, and (3) "absolute disposition of the property." *Id.* The conveyance of property in joint tenancy may be considered strong evidence of the intent to gift the property to both parties. *Olsen v. Olsen*, 552 N.W.2d 290, 292 (Minn. App. 1996), *aff'd* 562 N.W.2d at 797 (Minn. 1997).

Husband correctly asserts that wife carries the burden of proof to show that the transfer of property was a gift. In wife's closing argument memorandum to the district court, she pointed to record evidence to show that husband transferred the property in joint tenancy with the intent to gift the property to both parties. Wife showed by clear and convincing evidence that the property was a gift and husband attempted to refute this evidence by arguing that he merely transferred the property to himself and wife in joint tenancy for estate-planning purposes. Accordingly, the district court discussed the transfer of property:

Approximately 38 acres of real estate from the Trust is transferred to Husband and Wife as joint tenants. Husband claims this was done "solely" for estate planning purposes and he did not gift any interest to Wife. Although this Court finds that estate planning was a factor in transferring said property, Husband's claim that he did not intend to create any marital interest for Wife is not credible. After having been married for 8 years (and having cohabitated years before marriage), and having no sign that the marital relationship was in jeopardy, Husband voluntarily granted the property to himself and his Wife as joint tenants. The tax statements were sent to both Husband and Wife, and there is no documentation or suggestion that Husband solely financed the tax payments on said real estate. Husband and Wife managed the property by paying taxes out of their co-mingled incomes. Husband's claim that the property is non-marital is not proven. It has been clearly and convincingly established that the transfer to Husband and Wife from the Trust was meant to grant both Husband and Wife a mutual and indistinguishable property interest. This property is marital.

(Citations omitted.)

We conclude that the district court appropriately determined that the property held in joint tenancy was marital property. The district court did not erroneously place the

burden on husband to prove the property was not a gift, but instead made detailed findings and conclusions consistent with the law.

In support of his argument that he did not intend to gift a property interest to wife, husband attempts to distinguish this case from our decision in *McCulloch*. In *McCulloch*, husband also transferred his interest in the parties' homestead to himself and his wife as joint tenants. 435 N.W.2d at 566. At trial he testified that the parties had agreed on the transfer and that at the time he wanted his wife to have an interest in the property. *Id.* This court ruled that the transfer was a gift because husband intended that they both have an interest in the homestead. *Id.* at 568.

Here, husband argues that he only intended to transfer the property into joint tenancy for estate-planning purposes, but did not intend to gift her an interest in the property. He asserts that, unlike in *McCulloch*, the district court was precluded from finding he intended the transfer in joint tenancy as a gift because he did not testify that it was to care for his wife. But this argument goes against logic. At trial, the attorney who drafted the transfer to joint tenancy testified. He explained that husband's "estate planning theory" was that in the event husband died before wife, the property would easily transfer to wife and she would save money. The attorney also testified that he normally explains to his clients that "joint tenancy means that the other joint tenant would automatically inherit" following the other's death. Husband stated that he intended to plan for their futures, which implies that in the event he died before his wife, she would be the sole owner of the property and would be able to avoid probate. Husband's alleged non-gift purpose did not preclude the district court from concluding that the property held in joint tenancy was marital property,

especially in light of the marriage and their shared management and payment of taxes for the property. Therefore, the district court did not err in determining that the transfer of property to joint tenancy was intended to grant wife an interest in the property.

#### **IV. Award of attorney fees**

Husband argues that the district court inappropriately sanctioned him for the alleged garage break-in, awarding wife attorney fees of \$20,000.<sup>1</sup> We review a district court's imposition of a sanction for an abuse of discretion, which is only met "when it is clear that no reasonable person would agree with the trial court's assessment of what sanctions are appropriate." *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (quotation omitted).

"District courts possess inherent authority to impose sanctions as necessary to protect their vital function—the disposition of individual cases to deliver remedies for wrongs and justice." *Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454, 462 (Minn.

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<sup>1</sup> In response to wife's reply brief, husband argues that Minn. Stat. § 518.14, subd. 1 (2018) controls the award of attorney fees. Section 518.14, subdivision 1 provides for two types of fees: need-based and conduct-based. The district court must award need-based fees when it finds the fees are necessary and will not contribute unnecessarily to the length and expense of the proceeding, and that the party from whom they are sought has the means to pay them while the party to whom fees are awarded does not. *See Geske v. Marcolina*, 624 N.W.2d 813, 816-17 (Minn. App. 2001). The district court also has discretion to award conduct-based fees "against a party who unreasonably contributes to the length or expense of the proceeding." After deciding that husband could not pay need-based fees as he "has no legitimate income," the district court concluded that "Husband's conduct in failing to give detailed answers or documents in the discovery process" alone did not rise to the level to support conduct-based attorney fees. The district court then reasoned whether sanctions were warranted, separate from attorney fees under Minn. Stat. § 518.14, subd. 1. Thus, husband's argument that the district court awarded attorney fees under Minn. Stat. § 518.14, subd. 1 is incorrect.

App. 2010) (quotation omitted). This includes awarding attorney fees. *Id.* “Attorney fees may be an appropriate sanction when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 2133 (1991)). A finding of bad faith is necessary before awarding attorney fees under the court’s inherent power, and must be identified and supported by the record. *Id.* “The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the trial court.” *Patton*, 538 N.W.2d at 119.

Husband argues that the district court erroneously sanctioned him for the highly disputed garage intrusion. But the district court did not sanction husband for the garage incident alone. Instead, the district court reasoned,

Given Husband’s blatant willingness in this matter to disregard the discovery process, disregard Wife’s rights, disregard the integrity of the legal system, and continually claim personal recollections of transactions that he does not in fact recall (all to help bolster his non-marital claims), it is abundantly clear that a very large sanction will be required in order to properly dissuade Husband from engaging in similar conduct in the future.

The award of attorney fees was based on a number of factors, not just the garage intrusion as husband purports. Based on the district court’s determination that husband’s conduct was so severe that it required sanctions, we conclude that the award of attorney fees was within the district court’s broad discretion.

**Affirmed.**