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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0713**

In re the Marriage of:

Kathleen Marie Wilson, petitioner,  
Respondent,

vs.

Todd Joseph Wilson,  
Appellant.

**Filed May 13, 2019  
Affirmed as modified  
Smith, Tracy M., Judge**

Washington County District Court  
File No. 82-FA-15-4355

Kevin S. Sandstrom, Mark J. Vierling, Eckberg Lammers, P.C., Stillwater, Minnesota (for respondent)

Paul E. Overson, Coodin & Overson, PLLP, Lake Elmo, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;  
and Larkin, Judge.

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

**SMITH, TRACY M., Judge**

Appellant Todd Joseph Wilson (husband) and respondent Kathleen Marie Wilson (wife) challenge various aspects of the district court's division of property and its award of attorney fees in their marital dissolution proceeding. Because the district court did not make

a reversible error or abuse its discretion in any of the challenged decisions, but because a clerical error appears in the district court's order, we affirm as modified.

### **FACTS**

Husband and wife were married in November 2004. Husband is self-employed by and owns Minnesota Residential Aquatics Inc. (MRA). MRA provides maintenance services for residential pools and sells related products. Husband started MRA in 1991 and has overseen the business ever since. He used to perform the physical labor of the business himself, but, because it has taken a toll on his body, he now only runs the business. He does so from his home office. The pool business is seasonal; most of its revenues are generated during warmer months, while some expenses continue to be incurred during winter. Wife works full-time for an unrelated company. The parties are each capable of self-support, and they do not have any joint children. In September 2015, wife commenced this dissolution action. The initial case management conference was held on December 11, 2015.

The primary issue of the dissolution proceeding was the division of property. The parties retained a certified public accountant as a neutral expert. The neutral expert valued the parties' assets as of December 31, 2015 and traced the nonmarital interests that each party held in those assets. The expert's reports were admitted into evidence by stipulation.

In September 2017, husband moved to remove the district court judge. Husband's motion was heard and denied by the district court on the first day of the trial. The trial proceeded, and the parties offered their respective valuation opinions and proposals for how the marital property should be divided between them. In valuing many of the assets,

wife relied on a Quicken<sup>1</sup> report that husband kept in his computer and used to monitor his financial position. The Quicken report did not reflect depreciation for the listed assets.

The dissolution judgment, filed in March 2018, resolved various disputes on the division of property and awarded wife attorney fees that she incurred due to husband's motion to remove the judge. Both parties moved for reconsideration under Minn. R. Gen. Prac. 115.11, after which the district court made some minor amendments to the judgment.

Husband appealed, and wife cross-appealed.

## **D E C I S I O N**

### **I. Identification of marital property**

Husband argues that three of his nonmarital assets were erroneously identified as marital. Marital property is property “acquired by the parties, or either of them, to a dissolution . . . proceeding at any time during the existence of the marriage relation between them . . . but prior to the date of valuation.” Minn. Stat. § 518.003, subd. 3b (2018). In this case, the undisputed valuation date was December 11, 2015. Generally, nonmarital property is not subject to property division. Minn. Stat. § 518.58, subds. 1, 2 (2018); *see Gill v. Gill*, 919 N.W.2d 297, 302 (Minn. 2018) (defining and explaining marital property).

“Whether property is marital or nonmarital is a question of law, but a reviewing court must defer to the [district] court’s underlying findings of fact.” *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). “When marital and nonmarital assets have been

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<sup>1</sup> “Quicken” is a brand of accounting software.

commingled, the party asserting the nonmarital claim must adequately trace the nonmarital funds in order to establish their nonmarital character. Whether a nonmarital interest has been traced is also a question of fact.” *Kerr v. Kerr*, 770 N.W.2d 567, 571 (Minn. App. 2009) (citation omitted).

**A. Cash in the home safe**

Among the parties’ assets was \$256,003 in cash in a safe located in the marital homestead. Based on the neutral expert’s report, the district court concluded that \$204,608 was marital, with nonmarital amounts of \$45,120 and \$6,275 attributable to husband and wife, respectively. Husband argues that the marital value of the cash in the safe was lower. However, at trial, husband said that he was not proposing any change to the neutral expert’s tracing of the interests in the cash in the safe, and the district court adopted the expert’s report as to the cash. Generally, “litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below[.]” *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957), and an appellate court generally will not consider matters not argued to and considered by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We decline to deviate from this general rule here. Husband has forfeited his arguments against the district court’s valuation of the marital interest in the cash in the safe.

**B. 2005 Chevrolet Tahoe**

The parties owned a 2005 Chevrolet Tahoe. Husband argues that the Tahoe is not marital property—that it has zero marital value—because it was given to one of his sons as a gift. But this argument, too, is not properly before this court because husband did not

present it to the district court. The only time that husband even vaguely referred to the idea that the Tahoe is not subject to property division was when he testified: “I think the kids’ vehicles should be their vehicles.” But when asked specifically about the Tahoe, husband testified that he thought the Tahoe was worth \$5,500 and that the court could award the vehicle to wife if it were to adopt wife’s valuation opinion. He said he “would have to figure something out for [his son]” if the Tahoe went to wife. Also, when asked what “[his] suggestion [was] as far as what to do with the Tahoe,” husband unequivocally proposed that the district court order a sale of the Tahoe and split the proceeds equally. In light of this testimony, husband forfeited the argument that the Tahoe is not subject to division. Husband’s reconsideration letter, in which he argued that the value of the vehicle should not be “allocated to either party,” does not change that result. An issue is raised too late if it is first raised in a posttrial motion. See Minn. R. Gen. Prac. 115.11 1997 advisory comm. cmt. (“Motions for reconsideration are not opportunities for presentation of facts or arguments [that were previously] available . . . .”); *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002).

### **C. Savage rifle**

Husband argues that a Savage rifle is not marital property because he bought it after the valuation date of December 11, 2015. The record establishes that husband paid for the rifle on December 15. But the record also suggests that the neutral expert valued some of the parties’ liquid assets, including their bank accounts, after husband had purchased the rifle. Thus, to demonstrate error, husband has to show that the money used to buy the rifle was captured in the valuation of the liquid assets and was not drawn from the funds that

were yet to be valued. See *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (holding that, on appeal, one who relies upon error has the burden of making it appear affirmatively). Husband makes no such showing. The district court's characterization of the rifle as marital is not erroneous. Moreover, even if it is erroneous, we are not persuaded that the error warrants reversal. Although \$3,000—the value assigned to the rifle—is not a negligible amount, over a million dollars' worth of property was subject to division in this case. The rifle is worth less than 0.3% of the total marital assets, and, because the value of the rifle was divided equally, the alleged mischaracterization of it prejudices husband by only \$1,500. This error alone is de minimis. See *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690, 694 n.1 (Minn. App. 2010) (citing *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985)) (holding that the district court's failure to account for what amounted to be approximately 0.5% of the total marital property was de minimis), review denied (Minn. Nov. 16, 2010).

## **II. Market values of items of marital property**

Husband challenges the district court's valuation of three items of marital property. A district court's valuation of property is a finding of fact, and it will not be set aside unless it is clearly erroneous on the record as a whole. *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001). "Thus, the market valuation determined by the trier of fact should be sustained if it falls within the limits of credible estimates made by competent witnesses even if it does not coincide exactly with the estimate of any one of them." *Hertz v. Hertz*, 229 N.W.2d 42, 44 (Minn. 1975). "[I]t is only necessary that the value arrived at lies within a reasonable range of figures." *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979).

### **A. Tandem trailer**

The district court found that the value of a tandem trailer in the marital assets was \$11,250, averaging the parties' valuation opinions of \$17,500 and \$5,000. Wife argued that the tandem trailer was worth \$17,500. She based her opinion on the amount that husband had assigned to the tandem trailer on his Quicken report. Husband, on the other hand, testified that he bought the trailer for \$8,000 in 2012 and that the trailer depreciated to \$5,000 by the end of 2015. Husband argues that the district court clearly erred in averaging the competing values because wife's opinion at \$17,500 was "fictitious," "incompetent," and "against all logic." The alleged defect in wife's opinion is that it did not account for depreciation. However, it is not clear whether husband's opinion at \$5,000 accurately reflected depreciation, either. And that is precisely why the district court decided to average the two values. The court justified its method of valuation by stating that "[n]either party provided corroboration for their respective valuation opinions for the Trailer." Moreover, wife's opinion was not a product of pure speculation; rather, \$17,500 is what husband, who bought and used the trailer for business purposes, put in his own books. Although husband does not seem to have incorporated depreciation schedules into his Quicken report, he did update it on a daily basis. The district court's valuation of the tandem trailer at \$11,250 is within a reasonable range of figures.

### **B. Motorcycle**

The district court found that a motorcycle in the parties' marital assets was worth \$10,541, averaging the parties' valuation opinions. Wife valued the motorcycle at \$13,447. She relied on the amount that appears on the Quicken report. Husband's valuation was

\$7,635. He testified that his valuation opinion was based on the Kelley Blue Book for the motorcycle. As with the tandem trailer, and following similar reasoning, the district court averaged the parties' valuation opinions. While wife's opinion did not account for depreciation at all, husband's opinion could not be traced back to any documentation because he failed to provide a copy of the relevant Kelley Blue Book entry. Also, the district court seems to have given some weight to the relevant NADA Guides page in the record. Refusing to adopt wife's opinion at \$13,447, the court noted that, according to the NADA Guides, the retail price for the motorcycle is \$9,050.

Husband focuses on the district court's seeming reliance on the NADA Guides. He argues that a private seller like him cannot obtain a retail price listed in the guides and has to compromise for a trade-in value or private-sale value, which are both lower than retail. The NADA Guides confirm husband's contention. They state: "Prices shown . . . are retail consumer values and are to be considered as selling prices. Trade-in values are to be determined by local dealers and are generally lower than values shown." However, husband's argument still does not show that the valuation at \$10,541 is out of a "reasonable range of figures." First, the district court barely relied on the NADA Guides in determining the market value of the motorcycle. The court's only reference to the guides was to show that adopting wife's opinion would be unreasonable. The court's eventual valuation at \$10,541 is not substantively tied to the NADA Guides in any way. Second, it is not clear from the record what a trade-in value for the motorcycle would be. Given that the district court did not fully credit husband's bare testimony on the value of the motorcycle, nothing in the record suggests that the trade-in or private-sale discount for the motorcycle would

be so significant that it would render the district court's valuation at \$10,541 unreasonable. The district court's valuation of the motorcycle at \$10,541 is within a reasonable range of figures.

### **C. Savage rifle**

To the extent that the Savage rifle is marital property (which we affirm it is), husband argues that the district court clearly erred by valuing the rifle at \$3,000. The only evidence regarding the market value of the rifle seems to be the receipt for husband's purchase of the rifle and his testimony based on that receipt, which together show that husband bought the rifle for \$2,500.85. But the district court found, without any explanation, that the market value of the rifle was \$3,000. On this record, we conclude that any error is de minimis and does not warrant reversal. *See Wibbens*, 379 N.W.2d at 227 (refusing to remand for a de minimis, technical error).

### **III. Just and equitable division of marital property**

Husband and wife both challenge the district court's division of marital property. A court "shall make a just and equitable division of the marital property . . . , after making findings regarding the division of the property." Minn. Stat. § 518.58, subd. 1. The relevant findings include: "the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." *Id.* "The court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker," applying a conclusive

presumption “that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife.” *Id.*

“A [district] court has broad discretion in . . . dividing property in a marital dissolution and will not be overturned except for abuse of discretion.” *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). A district court abuses its discretion in dividing property if it resolves the matter in a manner “that is against logic and the facts on record.” *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

#### **A. 70/30 division of MRA**

The district court awarded 70% of the marital value of MRA to husband and 30% to wife. Wife argues that MRA should have been divided equally. The district court decided that “[f]airness and equity dictate” the 70/30 division for two reasons. Each reason, and wife’s disputation of it, will be addressed in turn.

##### **1. Contribution to MRA**

First, the district court found that husband had contributed much more to the growth of MRA than wife had. To demonstrate an error in this finding of fact, wife argues that the focus of the property-division statute is “the contribution of the spouses to the totality of all of the marital property,” “not whether a particular asset was generated from the principal efforts of either spouse.” She then concludes that the 70/30 division of MRA is “fatally flawed” because “all other assets were apportioned on a 50/50 basis.” We are not persuaded. There is no authority holding that Minn. Stat. § 518.58, subd. 1, must be applied to the marital property as a whole and not to specific assets. In *Ziemer v. Ziemer*, the district court did not award any of the homestead or the wife’s pension to the husband even though

both were marital property. 386 N.W.2d 348, 350 (Minn. App. 1986), *review denied* (Minn. July 16, 1986). This court reversed the award of the entire homestead to the wife but affirmed the district court’s decision awarding all of the wife’s pension to her. *Id.* at 351. This case suggests that courts can apply the statutory factors to a particular asset and divide it differently from other assets.

Wife makes the alternative argument that a 30% share does not accurately reflect her contribution to MRA. She argues that a “substantial contribution”—which she must be conclusively presumed to have made, *see* Minn. Stat. § 518.58, subd. 1—entitles her to more than 30%. Her only support for a higher percentage is that the district court equally divided the retirement account generated by her employment during the marriage. According to wife, because husband “made no more contribution to [her] employment with her employer . . . than she made to his business,” MRA should likewise be divided equally. But wife does not point to any evidence to support this factual assertion, and the record contains evidence to the contrary. Wife herself testified that, “[a]s part of [husband’s] management of family finances, . . . he also help[ed] [wife] with investment decisions for” her retirement account. She also stated that she believed the investment returns during the marriage on the retirement account were “pretty good,” though she did not pay close attention to them. As for wife’s contribution to MRA, husband testified that wife did not help MRA in any way except that she made some phone calls for him. It is not against logic and the facts to find that husband made a greater contribution to wife’s retirement account than wife made to MRA.

## **2. Disparate financial positions**

Second, the district court found that “[husband] is in a less advantageous financial position than [wife].” The court credited husband’s corroborated testimony “regarding his work related physical challenges and ailments, including multiple spine surgeries, back pain, cortisone injections, and other permanent physical disabilities.” And it also considered husband’s “mental health conditions, including . . . depression, and anxiety.” Wife does not dispute husband’s health problems but argues that, based on the evidence, his current work-related duties in the office are not “impaired in any way by his past or present medical issues.” But husband testified that his disabilities do negatively affect his ability to carry out his responsibilities in the office; that he has soreness at the end of a workday; that he had pain-relieving injections on his shoulder a few weeks before trial; and that he would be having a surgery on his shoulder. Also, husband wore a lumbar brace at trial and suffered neck pain while testifying. It is not against logic and the facts to find that husband’s physical ailments and his mental health problems will likely worsen as husband ages and will diminish his earning capacity. Contrary to wife’s argument, the absence of a medical or vocational expert’s opinion does not compel a contrary result. Wife has presented no authority holding that findings as to a person’s earning capacity have to be based on an expert opinion.

### **B. 50/50 division of nonoperating assets of MRA**

Although the parties disagree on the division of MRA, the valuation of the business is not in dispute. The district court valued MRA at \$360,000, adopting the neutral expert’s report. But certain assets, ostensibly owned by MRA, were excluded from this valuation.

These excluded assets were the cash in the safe, the tandem trailer, a gun collection (including the Savage rifle), jewelry, a race car (2009 Dodge Challenger), a 2015 Dodge Challenger, and a vacation-club membership. The district court divided the marital values of these assets 50/50 while, as discussed above, dividing MRA 70/30.

Husband argues that the excluded assets, except for the vacation-club membership, should also have been divided 70/30 because they “are owned by [MRA] and are thus part of [MRA].” He relies on corporate-law cases holding that “the property and the rights of a corporation belong to it as a legal entity, distinct from its stockholders.” *Belle City Malleable Iron Co. v. Clark*, 215 N.W. 855, 856 (Minn. 1927). According to husband, the district court abused its discretion by ignoring the “important distinction” between a corporation and its shareholders. But the district court did recognize that the excluded assets were “business assets” purchased by MRA. To the extent husband argues that the distinct identity of a corporation necessitates the same proportional division of all of its assets, he cites no authority supporting such proposition. Again, a district court can divide a particular asset differently from other assets. *See Ziemer*, 386 N.W.2d at 351.

Husband also argues that a 50/50 division of the excluded assets was not just and equitable, asserting that some of the excluded assets—the cash in the safe and the race car—are connected to the operations of MRA and therefore must be divided 70/30 like the rest of the business. There is some evidence that at least some of the excluded assets are in fact used in furtherance of the business. For example, husband testified that the cash in the safe fluctuates with the business cycle—it accumulates during pool season and is depleted during the off-season paying for business expenses. But countervailing evidence also

exists. First, while acknowledging that the excluded assets were purchased by MRA, the neutral expert characterized them as “nonoperating assets” and testified that they are separate and distinct from the operation of the business. Second, the excluded assets do not seem to have been accounted for on MRA’s balance sheets incorporated in husband’s tax returns. Husband admits that, on December 31, 2015, the company had, among other things, \$256,003 of cash in the safe. And he argues that the cash in the safe was a business asset necessary to MRA’s operation. However, according to the neutral expert’s report, completed based on husband’s tax returns, MRA’s total assets including liabilities were only \$106,006 as of December 31, 2015. Similarly, the gun collection, the jewelry, and the race car, which total \$102,765 according to husband’s opinions, do not appear on MRA’s balance sheet as of December 31, 2015. If some of the assets purchased by MRA were kept off the business’s balance sheet, it is not unreasonable to find that they are not germane to the operation of the business and should be treated differently. The equal division of the excluded assets was not against logic and the facts.

#### **IV. Disposition of items of marital property**

Husband challenges the dispositions of several items of marital property ordered by the district court.

##### **A. Race car**

The district court directed husband “to sell the [race car] and equally divide the proceeds of the sale with [wife]” and to “bear the costs, if any, of the sale of the [race car].” Husband argues that the district court abused its discretion by making him pay the selling expenses. The only authority he cites in support is *Reynolds v. Reynolds*, 498 N.W.2d 266

(Minn. App. 1993). In *Reynolds*, the district court, in dividing an apartment building, refused to consider capital gains taxes that the husband would incur by selling the building. 498 N.W.2d at 271. This court remanded, holding that “where the sale of real estate is required or is likely to occur within a short time after the dissolution, the trial court should consider the tax consequences therefrom.” *Id.* (quotation omitted). Here, the district court considered the selling expenses and found it appropriate that husband bear them. *Reynolds* does not suggest, and husband fails to show, that the district court’s decision is an abuse of discretion. See *Maurer*, 623 N.W.2d at 608 (holding that whether to account for the tax consequences of a property distribution lies within the district court’s discretion).

**B. Tahoe and vacation-club membership**

The district court awarded the Tahoe to husband. Husband argues that, as long as the Tahoe is marital property (which we affirm it is), the court should have ordered that it be sold and the proceeds be equally divided. Also, as to the vacation-club membership, which was awarded to wife, husband argues that the district court should have let the parties share the membership, each using half of the days of residence allowed under the terms of the membership. But husband does not explain why the district court’s decisions constitute reversible errors. An assignment of error in a brief based on “mere assertion” and not supported by argument or authority is forfeited unless prejudicial error is obvious on mere inspection. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), review denied (Minn. Apr. 26, 2017).

## **V. Payment schedule**

Husband argues that the payment schedule ordered by the district court is “unrealistic.” Again, a district court “has broad discretion in evaluating and dividing property in a marital dissolution . . . . [An appellate court] will affirm the [district] court’s division of property if it had an acceptable basis in fact and principle even though [the appellate court] might have taken a different approach.” *Antone*, 645 N.W.2d at 100 (citation omitted).

### **A. Lien payoff**

The district court awarded the marital homestead to husband “subject to a lien in favor of [wife] in the amount of \$107,500” “payable, without interest, within [90] days.” Husband argues that he is unable to pay off the lien according to the schedule because he would have to sell the property to do so. Selling the property, he continues, would leave him homeless and jeopardize his business.

The payment schedule ordered by the district court is not an abuse of discretion. First, the record reasonably lends itself to the conclusion that husband would not have to sell the house to pay off wife’s lien. The marital homestead, which is worth \$315,000, is not encumbered with a mortgage. Husband is not prevented from obtaining a home-equity loan to pay off the lien and then repaying the loan on a longer schedule. Second, selling the home would not jeopardize husband’s living arrangements or business. Husband has not shown that he would be unable to buy a new house that meets his needs with the proceeds of selling the marital homestead, less the lien payoff. And husband does not argue that the business operations within the marital homestead are anything more than working

at a computer and making phone calls—tasks that have no inherent connection to that particular house. It is therefore reasonable to conclude that selling the house will not leave husband homeless or jobless. Although the cases husband cites show that certain facts may support a protracted payment schedule, those facts are not present here. *Cf. Schultz v. Schultz*, 383 N.W.2d 379, 382 (Minn. Ct. App. 1986) (affirming a lien payable in five years because the house would have to be sold otherwise and it was being used as the home for the children.).

#### **B. Buyout of wife’s interest in MRA**

The district court ordered husband to buy out wife’s 30% interest in MRA in equal installments over three years—specifically, \$27,625 a year. Husband argues that “he simply cannot afford to pay [wife] \$27,625 per year . . . and still keep the business afloat.” But the record suggests that MRA generates enough annual income to buy wife’s interest. According to the neutral expert’s report based on husband’s tax returns, MRA’s after-tax net income from 2011 to 2015 was \$32,116 on average, and husband’s average salary for those years was \$75,400. At trial in October 2017, husband testified that his annual salary was \$95,000. Paying \$27,625 a year to wife would substantially reduce the after-tax margin of MRA and/or husband’s salary, but it would not make MRA bankrupt. Husband does not explain why MRA cannot operate on a thinner margin for three years or why his salary cannot be cut accordingly. As with the lien on the marital homestead, nothing in the record suggests that the district court’s three-year schedule is against logic and the facts. *Cf. Nolan v. Nolan*, 354 N.W.2d 509, 513 (Minn. App. 1984) (affirming a payment period of four

years because of the unprofitability of husband's businesses and his negative "cash flow position").

### **C. Cash equalizer**

Husband challenges the court-ordered payment schedule<sup>2</sup> for the cash equalizer of \$266,587.75, arguing that it would force him to "sell his remaining interest in [MRA] and give [wife] nearly all of the resulting funds . . . , leaving him financially unrecoverable, unemployed and unemployable." But husband does not explain why that is. First, the \$266,587.75 includes the \$107,500 lien payoff on the marital homestead. As discussed above, husband can pay off the lien by mortgaging or selling the house. Also, \$105,441.50 of the cash equalizer is a portion of the cash in the safe allocated to wife. The only piece of evidence that tends to explain why \$105,441.50 cannot simply be paid out of the cash in the safe is husband's testimony that that cash fluctuates with the business cycle. According to him, because almost the entirety of the cash in the safe so fluctuates, the cash at any given time cannot be used to pay for the property division. But the district court was not required to believe this testimony. In light of the neutral expert's characterization of the cash in the safe as a nonoperating asset and the fact that husband kept the cash off-balance-sheet, it is not an abuse of discretion to conclude that \$105,441.50 of the cash equalizer could be paid from the cash in the safe in a short span of time.

The rest of the cash equalizer is \$53,646.25. The cash equalizer means that the district court overcompensated husband by awarding him a disproportionate amount of

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<sup>2</sup> See *infra* Part VIII.

marital property. Husband does not show why he cannot liquidate some of the property and pay the equalizer. We affirm the payment schedule for the cash equalizer.

## **VI. Equitable liens**

Wife argues that the district court abused its discretion by not securing, with liens, much of husband's obligations to her under the decree. The only authority that she relies on is *Kitchar v. Kitchar*, 553 N.W.2d 97 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). In *Kitchar*, part of the marital property was the rights to a sand and gravel deposit located within an 80-acre homestead. 553 N.W.2d at 99-100. The district court awarded the wife 50% of the proceeds from a two-year contract to sell the sand and gravel. *Id.* at 100. On appeal, the husband conceded that the wife was entitled to half of the proceeds for as long as husband owned the property and was selling gravel. *Id.* at 101. But he also conceded that "there [was] no protection for [the wife] should [the husband] choose not to sell any more gravel after [the] two-year contract expires or should [the husband] sell the property to someone who would pay an enhanced value so the new buyer could mine the gravel." *Id.* This court decided that this was not equitable. The husband could too easily eliminate wife's interest in the sand and gravel without any consequences. In reversing and remanding, we directed the district court to fashion an equitable lien for the wife in the sand and gravel. *Id.*

This case is unlike *Kitchar*. Here, the district court determined the values of assets subject to division and awarded wife portions of the determined values. Wife's entitlement to those values is not subject to husband's ability or willingness to sell the assets awarded

to him. Husband has a set monetary obligation to wife under the judgment. The district court did not abuse its discretion by not securing these obligations with liens.

## **VII. Attorney fees**

A court, “in its discretion,” may award “additional fees, costs and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2018). “A motion for conduct-based attorney fees [under section 518.14] may be based on the opposing party’s pursuit of frivolous or bad-faith claims.” *Baertsch v. Baertsch*, 886 N.W.2d 235, 239 (Minn. App. 2016). The district court awarded wife attorney fees in the amount of \$1,107 because of husband’s “baseless motion” to remove the district court judge.

Husband argues that the district court abused its discretion by awarding the attorney fees because his motion to remove the judge was not frivolous. “Minn. R. Civ. P. 63.03 provides that a party must file its notice to remove a judge before the judge first presides in an action, unless the party makes an *affirmative showing of the judge’s prejudice or implied or actual bias*.” *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002) (emphasis added).<sup>3</sup> In an affidavit attached to the notice of motion to disqualify, husband complained of the district court’s decisions against him on the issues of bifurcation and the validity of a postnuptial agreement. He argued that the decisions did not “fall in line with

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<sup>3</sup> The relevant portion of Minn. R. Civ. P. 63.03 was amended in 2018. It now provides: “A judge or judicial officer who has presided at a motion or other proceeding . . . may not be removed except upon an affirmative showing that the judge or judicial officer is disqualified under the Code of Judicial Conduct.” Minn. R. Civ. P. 63.03.

the laws” and that different pieces of evidence underlying the decisions were not adequately weighed. At trial, when the motion was heard, husband’s attorney reiterated the points raised in the affidavit and then summarized them as follows:

So every time he approached the court to have any relief in his favor on what he sees as being reasonable issues or reasonable positions to be taken in this case, he hasn’t gotten anywhere with that, doesn’t feel he has been treated fairly, so that’s why he seeks a recusal by yourself.

Thus, the basis for husband’s request for the district court judge to remove himself was the combination of husband’s assertions that the judge’s rulings were thoroughly wrong and husband’s inference that the only possible reason the decisions could be that wrong was that the judge was biased against husband. But neither in the affidavit nor at trial did husband affirmatively show that the district court’s decisions in fact defied the clear weight of authority or the facts. And, on this appeal, husband is not even challenging the decisions that he argued were so erroneous that they are demonstrative of the court’s prejudice or bias. The district court did not abuse its discretion by finding husband’s motion to disqualify frivolous and awarding attorney fees to wife.

Wife, on the other hand, argues that the district court should have awarded her even more attorney fees. However, Minn. Stat. § 518.14, subd. 1, clearly states that an award of conduct-based fees is left to the district court’s discretion, and wife cites no authority holding that a court must award conduct-based fees in certain situations.<sup>4</sup> The district court did not abuse its discretion.

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<sup>4</sup> Wife’s reliance on section 518.58 is misplaced. That section is about property division, not attorney fees.

### **VIII. Clerical error**

The parties demonstrate no reversible error. But the district court apparently made a clerical error when it wrote in its order that the cash equalizer should be paid within “sixty (90) days.” The correct schedule is apparently “ninety (90) days,” given that the cash equalizer includes the payoff of the lien on the marital homestead, which has a 90-day schedule. Thus, we modify the order accordingly.

**Affirmed as modified.**