STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0482

In re the Marriage of:

Laura Diane Hermer, petitioner,
Respondent,

vs.

Lawrence James Cisek, Jr.,
Appellant.

Filed March 13, 2017
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Hennepin County District Court
File No. 27-FA-14-1364

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

James J. Vedder, Moss & Barnett, Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Hooten, Judge.

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

RODENBERG, Judge

Appellant Lawrence James Cisek, Jr., appeals from the district court's award of permanent spousal maintenance to respondent Laura Diane Hermer, its division of the parties' marital assets, and its determination that appellant's child-support obligation to the mother of appellant's children born of a previous marriage is a nonmarital debt. We affirm

the district court except insofar as it computed spousal maintenance based, in part, on the child's educational expenses. We reverse the maintenance award and remand for further proceedings.

FACTS

Appellant's first marriage produced four children and ended in 1996. A Maryland court then ordered appellant to pay child support for these children. Appellant and respondent married in 1999. During his marriage to respondent, appellant failed to make full child-support payments for the children of his first marriage. In 2002, the Maryland court computed child-support arrearages and ordered appellant to pay them. Appellant still failed to make full child-support payments, and the child-support arrearage and an award of attorney fees was determined by order of the Maryland court on December 17, 2014.

In May 2001, appellant and respondent had their first and only joint child (Child). While the parties lived together, Child attended a private school for which the parties paid tuition. This dissolution action was commenced in Hennepin County in March 2014.

After trial, the district court ordered that appellant pay child support to respondent. It also ordered appellant to pay respondent permanent spousal maintenance in the amount of $3,375 per month. When it determined the parties' reasonable monthly expenses, the district court included expenses for Child in both parents' monthly budgets. It determined appellant's reasonable monthly expenses to be $12,356, including $38 in expenses for Child. It determined respondent's monthly expenses to be $10,050, including a tuition expense for Child of $2,100 per month (along with other expenses of Child).

The district court divided the parties' assets and debts, including their retirement accounts. The parties disagreed on how the district court should account for the future tax consequences of the property division, and specifically disagreed about the future tax consequences that would affect the retirement accounts. The district court determined that the future tax consequences affecting the present value of the retirement accounts was speculative, and it declined to discount the present value of the retirement accounts for future tax consequences.

Finally, when dividing the parties' debts, the district court found that appellant's child-support arrearages and obligations to his first wife were nonmarital debts. It allocated no part of the responsibility for those debts to respondent.

This appeal followed.

D E C I S I O N

I. Spousal Maintenance

Appellant challenges the district court's award of permanent spousal maintenance to respondent on several bases, including that the district court improperly included Child's private-school tuition in respondent's reasonable monthly expenses when it computed maintenance.[1] The parties agreed at trial that Child is flourishing at her private school. Both parents prefer that she continue to attend that school. Before the district court, the

[1] Respondent argues that appellant forfeited his arguments regarding the inclusion of Child's non-tuition expenses in her budget by not raising the issue below. Appellant argues that this challenge is not new. Regardless, and because of our decision reversing and remanding the maintenance award, we need not resolve this issue. Our disposition of appellant's challenge to the inclusion of Child's private-school tuition in respondent's reasonable monthly expenses obviates the need to further revisit these other claimed errors. Whether the district court reopens the record on remand is a matter within its discretion.

parties agreed to divide Child's private-school tuition in some fashion, despite appellant's expressed concern about whether they could afford the tuition. Respondent requested that appellant's share of Child's tuition be made part of her reasonable and necessary monthly expenses, and that Child's tuition should then be her obligation to pay as it comes due. Appellant proposed that the parties divide the tuition in some fashion, but did not agree that spousal maintenance was a proper enforcement vehicle for the tuition obligation. The district court opted to include Child's tuition in respondent's reasonable monthly expenses for maintenance purposes, ordered that respondent pay Child's tuition, and ordered appellant to pay spousal maintenance accordingly. It ordered permanent maintenance.

Appellant argues that using permanent spousal maintenance as the vehicle for enforcement of his obligation to pay half of Child's private-education expenses is improper. He argues that those expenses, if they are to be considered at all, should properly be part of child support. Minn. Stat. § 518A.26, subd. 4 (2016) (defining basic child support as support "for a child's housing, food, clothing, transportation, and education costs, and other expenses relating to the child's care"). He persuasively argues that, because the district court awarded respondent permanent spousal maintenance, and because the child will attain majority in two to four years,[2] he will continue to be obligated to pay permanent maintenance based in part on an expense that will surely end. This, he argues, is unfair to him because he will have to move the district court for modification of

[2] For child-support purposes, a child without physical or mental disabilities attains majority when she turns 18 years old and no longer attends secondary school or when she turns 20 years old regardless of whether she still attends secondary school. Minn. Stat. § 518A.26, subd. 5 (2016). The parties' child will turn 18 in 2019.

maintenance to eliminate the private-education expense from respondent's maintenance award after Child graduates high school. Minn. Stat. § 518.552, subd. 4 (2016). A child support obligation, by contrast, expires by operation of law. Minn. Stat. § 518A.39, subd. 5 (2016); s*ee also Beltz v. Beltz*, 466 N.W.2d 765, 768 (Minn. App. 1991) ("Minn. Stat. § 518.64, subd. 4, automatically requires a reduction in child support upon emancipation unless the statutory conditions allowing the support to continue are met."), *review denied* (Minn. Apr. 29, May 23, 1991).

Appellant's challenge raises an issue of law that we consider de novo. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). We need not resolve appellant's policy-based challenge to the district court's maintenance award, because the plain language of Minn. Stat. § 518A.43, subd. 1 (2016), requires the district court to consider the "extraordinary . . . educational needs of the child to be supported" when establishing child support. Moreover, the plain language of Minn. Stat. § 518.552, subd. 1(a) (2016), requires that, in making a maintenance award, the district court must consider the "reasonable needs of the spouse," and omits any reference to considerations of the educational needs of a minor child. On this record, the district court should not have included Child's educational expenses in computing respondent's reasonable monthly expenses for spousal-maintenance purposes.[3]

[3] Respondent argues that there is a beneficial tax effect to appellant by allowing him to pay his share of Child's private-school tuition by way of spousal maintenance. *See* 26 U.S.C. § 215(a) (2012) (providing that an individual may deduct from his or her gross income "an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year"). This tax-effect question was discussed before and by the district court. But whether a legal error might have been tax beneficial to the party asserting the error is not our proper concern. We are an error-correcting court. *Sefkow v. Sefkow*,

We reverse the permanent spousal-maintenance award, and remand for the district court to recalculate it. The district court may, on remand and in its discretion, reopen and reconsider child support and other provisions of the judgment and decree as it deems appropriate.[4]

II. Tax effect of retirement assets

Appellant challenges the district court's decision not to consider future tax implications when it valued and divided the parties' retirement assets. He argues that the district court abused its discretion by deeming the future tax effects to be speculative. Appellant argues that, because the parties disagreed at trial concerning only the degree or percentage of the future tax consequences, and not on whether the retirement assets would be taxed at all, the district court was required to discount for the future tax effect at some level.

District courts have broad discretion when dividing marital property, and we will not reverse absent a showing of clear abuse of that discretion. *Maurer v. Maurer*, 623

---

427 N.W.2d 203, 210 (Minn. 1988); *see also Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015) (quoting this aspect of *Sefkow*); *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that "[t]his court, as an error correcting court, is without authority to change the law"), *review denied* (Minn. June 17, 1998). It is not for us to overlook legal error for equitable reasons.

[4] Our holding is limited to the facts of the case now before us. We express no opinion on the propriety or effect of a *stipulation* by the parties that a child's tuition should be treated as an expense for maintenance purposes, nor do we consider whether we would reach a different result if appellant's maintenance obligation included a step reduction, in an amount equal to his share of Child's tuition, automatically effective upon Child's graduation. *See Passolt v. Passolt*, 804 N.W.2d 18, 25 (Minn. App. 2011) (stating that "[district] courts have broad discretion in establishing maintenance plans, including the use of step reductions" (alternation in original) (quoting *Schreifels v. Schreifels*, 450 N.W.2d 372, 374 (Minn. App. 1990)), *review denied* (Minn. Nov. 15, 2011).

N.W.2d 604, 606 (Minn. 2001). A district court is not required to consider future tax consequences in valuing marital property when considering those consequences "would force it to speculate." *Grigsby v. Grigsby*, 648 N.W.2d 716, 725 (Minn. App. 2002), *review denied* (Minn. Oct. 15, 2002). District courts may, however, consider future tax consequences of a property division when there is "a reasonable and supportable basis for making an informed judgment as to the probable [tax] liability." *Maurer*, 623 N.W.2d at 608 (quotation omitted). For example, district courts may consider the tax consequences of a property division when the sale of real estate awarded to one party must, or is likely to, occur within a short time. *Aaron v. Aaron*, 281 N.W.2d 150, 153 (Minn. 1979). The supreme court has only required district courts to consider the effect of taxes when "the transaction creating the tax consequences is 'required or is likely to occur.'" *Curtis v. Curtis*, 887 N.W.2d 249, 256 (Minn. 2016) (quoting *Aaron*, 281 N.W.2d at 153).

The parties agree that, under current federal tax law, their retirement accounts would result in tax liability on withdrawal. They also agree that the current tax rates can be ascertained. Their disagreement at trial was about such issues as the age at which each would retire, the amount that each would continue to pay into accounts before retirement, and the life expectancy of each of them. Appellant argued that he would not begin to withdraw retirement assets for "five and a half years," and that, if he works until the average retirement age in his field, he would not retire for another 25 years. The situation in this case, where the possible tax consequences are years—or even decades—in the future is unlike the situation in *Curtis*, where the likely tax consequence was imminent and certain. The future tax treatment of retirement-account withdrawals as much as a quarter century

in the future is the very definition of "speculative." The district court acted within its discretion in declining to speculate on what the tax code will be decades into the future, or how the parties' future investments and date-of-retirement decisions might affect the values and tax treatment of their individual retirement accounts.

III. Appellant's obligation to nonjoint children

Finally, appellant argues that the district court erred by concluding that his child-support obligation to his children from a previous marriage is his nonmarital obligation. Appellant makes two arguments. First, he argues that these debts are marital debts because they accrued after the parties were married.[5] Second, he argues that equity requires that respondent be responsible for a portion of the debt because, during the marriage, she benefitted from his nonpayment of the debt.

"All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses . . . ." Minn. Stat. § 518.003, subd. 3b (2016). Property acquired before the marriage is considered nonmarital property. *Id.*, subd. 3b(b). "In dissolution actions, debts are apportioned as part of the property settlement and are treated in the same manner as the division of assets." *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). "We independently review the issue of

[5] Although the parties and the district court at times referenced a judgment arising from appellant's child-support arrearages and attorney fees to his first wife, we are unable to independently ascertain whether the obligations ordered by the Maryland court in December 2014 have been reduced to judgment. Regardless, the obligation is a debt known and recognized by the parties and whether it has been reduced to judgment does not change our analysis.

whether property is marital or nonmarital, giving deference to the district court's findings of fact." *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008).

Appellant's obligation to support his nonjoint children arose before he married respondent. The fact that the amount of the original liability was determined while appellant was married to respondent does not change the nonmarital character of the debt that originated before this marriage. *See Rooney v. Rooney*, 782 N.W.2d 572, 576 (Minn. App. 2010) (holding that a payor of funds of a child-support obligation incurs liability for not withholding the obligor's funds before the obligation is reduced to judgment for nonpayment).

Appellant's second argument concerning the obligation to appellant's nonjoint children is not supported by the case law. He relies on our decision in *Chamberlain v. Chamberlain*, holding that the district court did not abuse its discretion by apportioning husband's personal tax debt between the spouses. 615 N.W.2d 405, 414 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). In *Chamberlain*, the husband's tax debt arose during the marriage, and benefitted both parties. *Id.* *Chamberlain* says nothing about premarital child-support obligations. Appellant provides no published authority for the notion that a district court errs by considering a premarital child-support obligation as a nonmarital debt of the party obligated to support the nonjoint children.

We see no error in the district court's characterization of this obligation as appellant's nonmarital debt.

Affirmed in part, reversed in part, and remanded.