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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2021**

Paul Kulland Allison, petitioner,
Respondent,

vs.

Marcela R. Allison f/k/a Marcela Rosario Soto,
Appellant.

**Filed November 18, 2008
Affirmed in part, reversed in part,
and remanded
Stoneburner, Judge**

Hennepin County District Court
File No. 27FA000297173

Sandra K. Kensy, 5430 Carlson Road, St. Paul, MN 55126 (for respondent)

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In this dissolution action, wife, by appeal, and husband, by notice of review, challenge the amended judgment. Wife argues that the district court committed reversible error by, over the parties' objections, failing to assign posttrial motions to the

referee who was the original fact-finder. Wife also asserts that the referee to whom the motions were assigned erred by concluding that a 1996 note signed by husband is a postnuptial agreement and therefore is invalid under Minn. Stat. § 519.11 (2006), abused her discretion by failing to enforce the note under equitable principles, and abused her discretion in eliminating temporary maintenance awarded by the original fact-finder. Husband agrees that the parties were prejudiced by the district court's failure to assign posttrial motions to the original fact-finder, but argues that remand would not be in the best interests of either party. By notice of review, husband challenges the unequal distribution of property and the award of attorney fees to wife. We conclude that (1) assignment of the posttrial motions was not error; (2) the 1996 note is an invalid postnuptial agreement; (3) the division of marital assets and award of attorney fees were not abuses of discretion; but (4) the elimination of temporary maintenance was an abuse of discretion. Therefore, we affirm in part, reverse in part, and remand for reinstatement of temporary maintenance awarded by the original fact-finder.

FACTS

Appellant Marcela Rosario Soto, f/k/a Marcela R. Allison (wife), and respondent Paul Kulland Allison (husband) were married in 1982 and separated in 2001. Their marriage was dissolved in 2006. The parties stipulated to various financial and child-related issues, but submitted to the district court the issues of the effect of a 1996 note to wife signed by husband, maintenance, and attorney fees. A referee ("Referee 1"), presided over the dissolution trial on January 13 and March 31, 2006. For medical reasons, Referee 1 was not available to issue a decision. The parties agreed to waive a

new trial and stipulated that a second referee (“Referee 2”) would issue a decision based on the transcript of the trial, exhibits, and arguments of the parties. Referee 2’s findings of fact, conclusions of law, recommended order for judgment, and judgment and decree were confirmed by a district court judge and filed as a final judgment of the court in September 2006, and will be referred to as the original judgment.

At trial, a document titled “Indemnity Agreement and Promissory Note” (note) signed by husband in 1996 was introduced, and wife sought enforcement of the note. The parties presented evidence that the note resulted from circumstances surrounding husband’s joint bank account with, and receipt of funds from, a client, during husband’s employment at IDS Financial Services. Husband’s employment was terminated in 1993 as a result of his interaction with this client, and, at that time, husband retained counsel regarding potential civil, criminal, and tax liability created by the situation. Husband was never charged with a crime, and there was no civil action, however husband incurred attorney fees and additional taxes and tax penalties for failing to report the funds as income.

The note recites that (1) the parties had maintained separate checking accounts and financial records for an unspecified time; (2) wife did not know or have reason to know that husband received money from his client when the parties filed joint-income-tax returns for 1990–1992; (3) wife provided funds to pay the additional taxes incurred as a result of husband’s unreported income; (4) and that wife would be making additional payments of penalties and interest to protect the homestead. In consideration of those payments and anticipated payments, husband agreed to indemnify and hold wife harmless

from all tax claims and any claims of the client related to husband's involvement.

Husband also agreed to reimburse wife, with eight percent annual interest, all sums she expended for taxes, penalties, and interest incurred as a result of husband's unreported income; all obligations wife might incur with respect to claims asserted by the client; and all sums wife expended for attorney and/or accounting fees connected with taxes or the client's claims. The note acknowledges that these obligations covered by the note were incurred during the parties' marriage and "arise from a failure by [husband] to fulfill his fiduciary duties to his spouse." The note concludes:

In the event of a divorce between the parties before the obligations set forth herein shall have been paid in full, this agreement shall be construed to justify substantial maintenance in favor of [wife]. All payments of the obligations set forth herein shall be [wife's] separate property.

[Husband] acknowledges that he has had independent counsel and advice before signing this agreement and that he has done so freely and voluntarily on his part.

The district court found that wife expended \$112,102.40 in taxes, penalties, and interest, and \$17,094.45 in attorney fees as a result of husband's involvement with this client. Husband argued that the note is a postnuptial contract and is void because it was not executed in accord with Minn. Stat. § 519.11 (2006). Wife argued that the note is not a postnuptial contract and is not invalidated by Minn. Stat. § 519.11. The district court found that wife "failed to establish that the [note] constitutes a valid and binding contract between the parties," but also found that husband's actions had resulted in a dissipation of marital assets in the amount of \$129,196.85 and awarded wife one-half of that amount

(\$64,598.43). The marital estate was found to have a total value of \$565,200; \$347,198.43 was awarded to wife and \$218,001.57 was awarded to husband.

The district court rejected wife's request for permanent maintenance, finding that wife is fully capable of supporting herself, had not made good-faith efforts to find employment, and unreasonably limited the scope of her employment search. Nonetheless, based on findings that wife currently lacked sufficient property to meet her needs and that husband had the ability to pay temporary maintenance for an additional six months, wife was awarded temporary maintenance in the amount of \$1,800 per month terminating on March 1, 2007.

Wife was also awarded \$17,500 in attorney fees, to be deducted from husband's share of the marital estate: \$15,000 as need-based and \$2,500 previously awarded in the order for temporary relief and not yet paid by husband.

Both parties moved for amended findings of fact or a new trial and requested that the motions be heard by Referee 2. Despite the parties' objections, the motions were assigned to a third referee ("Referee 3"). Nothing in the record on appeal indicates why the posttrial motions were not assigned to Referee 2.

After a hearing on the motions, Referee 3, in relevant part, amended the findings to deny maintenance effective October 1, 2006. Referee 3 found that the note is "akin to a post-nuptial contract, and, as such, is invalid," but retained the equitable distribution of \$64,598.43 in marital assets to wife based on a finding that husband's "unlawful behavior . . . caused the marital property to decrease in value," making it "unfair, unjust and unreasonable to require [wife] to share in the [resulting] liability." Referee 3 did not

amend the findings regarding the award of attorney fees to wife. Referee 3's amended findings of fact, conclusions of law, recommended order for judgment, and judgment and decree, confirmed by a second district court judge, were filed in March 2007 and will be referred to as the amended judgment. Wife appealed, arguing that the district court erred by failing to assign the posttrial motions to Referee 2; erred in concluding that the note was not enforceable; abused its discretion by failing to enforce the terms of the note under equitable principles; and abused its discretion by terminating maintenance retroactive to October 1, 2006. Husband noticed review, challenging the property division as inequitable and asserting that the district court abused its discretion by failing to terminate maintenance retroactive to his first request and by awarding attorney fees to wife.

D E C I S I O N

I. Assignment of motions for amended findings

The extent of a successor judge's authority to perform judicial duties is a question of law reviewed de novo. *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996).¹

“The purpose of a motion for amended findings ‘is to permit the trial court a review of its own exercise of discretion.’” *Johnson v. Johnson*, 563 N.W.2d 77, 78 (Minn. App. 1997), *review denied* (Minn. June 30, 1997) (citing *Stroh v. Stroh*, 383 N.W.2d 402, 407 (Minn. App. 1986)). “In considering such a motion ‘the trial court

¹ *Kornberg* involved interpretation of Minnesota Rules of Civil Procedure 63.01, which addresses a successor judge's ability to perform judicial duties if the predecessor judge has become unable to perform those duties by reason of “death, sickness, or other disability” after a verdict is returned or findings of fact and conclusions of law are filed.

must apply the evidence as submitted during the trial of the case.” *Id.* (citing *Rathbun v. W.T. Grant Co.*, 33 Minn. 223, 238, 219 N.W.2d 641, 651 (1974). “A motion for amended findings necessarily should be heard by the judge who made the findings so that the judge can apply the evidence as submitted.” *Id.*

In *Johnson*, this court found that the availability of the trial judge to hear a motion for amended findings deprived another judge of authority to hear the motion. *Id.* at 79. We reversed the order of the second judge and remanded to the trial judge to hear a motion for amended findings.

In this case, the record does not reflect why, over the objection of both parties, motions for amended findings were assigned to Referee 3 rather than Referee 2. Nothing in the record refutes the assertion of each party that Referee 2 was not disabled or otherwise disqualified from hearing the motions.

In a somewhat analogous situation, the supreme court held that a third judge was able to hear a motion for amended findings of a second judge who, by stipulation of the parties, issued an opinion based on the trial record, after the death of the judge who had conducted the trial. *Great Northern Ry. Co. v. Becher-Barrett-Lockerby Co.*, 200 Minn. 258, 260, 274 N.W. 522, 523 (1937). In that case, unlike the present case, the second judge had resigned before defendant’s posttrial motions could be heard. *Id.* at 259, 274 N.W. at 522. The supreme court noted its previous holding that “the finding of fact cannot properly be altered or modified by any other judge than the one who heard the evidence,” but also noted that the reason for such a holding is “wholly absent where parties have submitted the cause of action upon . . . a transcript of the evidence in a

former trial.” *Id.*, at 261, 274 N.W. at 523. The supreme court concluded that the third judge did not lack authority to consider defendant’s motion on its merits because “[h]e is in the same position [the second judge] would have been [in] had the motion been presented to the latter.” *Id.* Similarly, in *Kornberg*, the supreme court affirmed that a third judge had authority to hear a motion to reconsider and reverse the ruling of a second judge who retired after vacating a dissolution judgment entered by another judge. The original judgment was based on a stipulated agreement of the parties. 542 N.W.2d at 385 (concluding that “other disability” as used in Minn. R. Civ. P. 63.01 includes retirement and noting that because the original matter was presented without testimony, the second judge was in the same position as the first judge to consider the motion).

In this case, because the parties stipulated that the case could be submitted to Referee 2 on the record, Referee 3, like the successor judges in *Great Northern* and *Kornberg*, was in the same position as Referee 2 to consider the motions.² Although we conclude that it is the better practice to assign motions for amended findings to the fact-finder in situations such as this where the fact-finder is not disabled from hearing the motions, no reversible error occurred in the assignment. We turn then to an examination of whether the amended findings and conclusions of law constitute error or abuse of discretion.

² We note that referees, unlike judges, do not have the authority to issue orders. A referee’s proposed order does not become the order of the district court until it is confirmed by a district court judge. Minn. Stat. § 484.65, subd. 10 (2006). *See Kiffer v. Kiffer*, 410 N.W.2d 454, 456 (Minn. App. 1987) (stating that a referee’s recommended order is not itself a final order, but after a district court judge confirms the recommended order under Minn. Stat. § 484.65, subd. 10, it is then a final, appealable order).

II. The amended finding that the note is a postnuptial agreement under Minn. Stat. § 519.11 (2006), is not erroneous

The parties agree that if the note they entered into in 1996 is a postnuptial agreement, it is invalid because it does not comply with the statutory requirements for postnuptial agreements contained in Minn. Stat. § 519.11. The construction and effect of an unambiguous contract are questions of law reviewed de novo. *Wolfson v. City of St. Paul*, 535 N.W.2d 384, 386 (Minn. App. 1995).

A postnuptial agreement is “[a]n agreement entered into after marriage defining each spouse’s property rights in the event of death or divorce.” *Black’s Law Dictionary* 1187 (7th ed. 1999). The note plainly defines wife’s interest in any payments made as wife’s separate property “[i]n the event of a divorce between the parties before the obligations set forth herein shall have been paid in full” We conclude that, at least as to the provision in the note dealing with husband’s obligation to reimburse wife for amounts expended, the note is a postnuptial agreement and is therefore invalid.

III. The equitable relief awarded was within the district court’s discretion

Wife argues that even if the note is not an enforceable contract, it would have been fair and equitable for wife to have been awarded the money that husband agreed to pay her. We do not disagree, but “[g]ranting equitable relief is within the sound discretion of the trial court. Only a clear abuse of that discretion will result in reversal.” *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). In this case, both the original judgment and the amended judgment contain findings that wife should be awarded one half of the marital funds that she expended due to husband’s actions covered by the note

in recognition that husband's conduct reduced the marital estate. We find no merit in husband's argument that the trial court "erred" in granting this equitable relief, but we cannot conclude, as wife argues, that the trial court abused its broad discretion by failing to conform the equitable remedy to the terms of the invalid note.

IV. Maintenance

On appeal, a district court's maintenance award is reviewed under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). If the statutory requirements for retroactive modification of maintenance are met, the district court's decision regarding the effective date of the modification is also reviewed under an abuse-of-discretion standard. *Kemp v. Kemp*, 608 N.W.2d 916, 920–21 (Minn. App. 2000).

Maintenance may be granted if the district court finds that the spouse seeking maintenance (1) lacks sufficient property to provide for reasonable needs considering the standard of living established during the marriage *or* (2) is unable to provide adequate self-support. Minn. Stat. § 518.552, subd. 1 (2006). An award of maintenance depends on a showing of need. *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (rejecting wife's argument that despite having sufficient property to support herself she should be awarded maintenance because she was not able to support herself through employment).

Referee 2 concluded that wife needed an additional six months of temporary maintenance to support herself because she lacked sufficient property to provide for her reasonable needs and was not yet self-supporting, even though she was found to be

capable of self-support and was found not to have diligently sought employment.

Referee 2 also found that husband is able to pay the temporary maintenance awarded.

Referee 3 did not amend any of these findings but concluded that the award of maintenance was “inconsistent” with the findings. We disagree because the district court may, in its discretion, conclude that a spouse who is capable of self-support but has not yet become self-supporting, and who lacks sufficient property to provide for support, demonstrates need sufficient to permit an award of temporary maintenance. We conclude that termination of the temporary maintenance was an abuse of discretion under the circumstances of this case. We acknowledge that a successor judge has the right to amend the conclusions of law to order the judgment called for by the findings of fact, but we conclude that it was an abuse of discretion for Referee 3 to substitute her discretion for that of Referee 2. Even this court does not have such authority. We therefore reverse the termination of temporary maintenance and remand with specific instructions to the district court to reinstate temporary maintenance from October 1, 2006 to March 1, 2007, as provided in the original judgment. Because of this decision, we do not reach husband’s argument that termination of maintenance should have been retroactive to the date of his letter first requesting termination of maintenance.

V. Attorney fees

An award of attorney fees under Minn. Stat. § 518.14, subd. 1 (2006), will not be reversed without a clear abuse of discretion. *Bogen v. Bogen*, 261 N.W.2d 606, 611 (Minn. 1977). Husband does not dispute that wife does not have the means to pay her attorney, but argues that the district court abused its discretion by awarding need-based

attorney fees because wife's "need" was self-induced and that he does not have the means to pay attorney fees. We disagree.

A portion of the attorney fee award (\$2,500) is attributable to fees awarded pre-trial: husband conceded that he had the ability to pay these fees but chose to disregard the order. And husband's assertions about his financial situation are not supported by the record. The district court found that husband's net monthly income is \$4,910, and his monthly expenses are \$2,861. The district court's finding that he has the ability to pay the amount of attorney fees awarded is not clearly erroneous.

To support his argument that income should be imputed to wife to establish that she does not need assistance in paying attorney fees, husband cites cases relating to maintenance. But the reality is that wife is not employed and she has incurred substantial attorney fees. The district court's finding of need is not clearly erroneous, and the district court did not abuse its discretion by awarding what is a very small portion of the fees wife incurred.

We find no merit in husband's argument on appeal that wife asserted claims in bad faith and therefore should not have been awarded attorney fees. The fact that wife did not prevail on all of her claims does not mean that the claims were asserted in bad faith.

Affirmed in part, reversed in part, and remanded.