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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0064

In re the Marriage of:

David Allan Kotz, petitioner,
Respondent,

vs.

Edna Vassilovski,
Appellant.

Filed August 21, 2017
Affirmed
Reilly, Judge

Carver County District Court
File No. 10-FA-09-217

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Valerie Arnold, Micaela Wattenbarger, Arnold, Rodman & Kretchmer, PLLC, Bloomington, Minnesota (for appellant)

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Considered and decided by Reilly, Presiding Judge; Johnson, Judge; and Kalitowski, Judge.[*]

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

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

REILLY, Judge

Appellant-wife argues that the district court erred by (1) acting outside of its authority by affirming a Parenting Time Expeditor's decision, awarding compensatory parenting time and assessing costs and PTE fees against wife, awarding respondent-husband unblocked telephone access to the couple's children, and ordering wife to provide sporting equipment for the children; (2) finding wife in contempt of court for her disregard of district court orders; (3) ordering wife to respond to outstanding discovery requests; and (4) awarding conduct-based attorney fees to husband. We affirm.

D E C I S I O N

The factual background of this protracted and highly contentious marital dissolution dispute is set forth in two previous appeals. *Kotz v. Vassilovski*, No. A11-0495, 2011 WL 6141641, at *1 (Minn. App. Dec. 12, 2011) and *Kotz v. Lynch*, No. A13-0897, 2014 WL 801992, at *1 (Minn. App. Mar. 3, 2014). On her third appeal, wife argues that the district court erred by acting outside of its authority in ruling on the parties' postdecree motions, finding wife in contempt of court for failing to abide by the district court's orders, ordering wife to fully comply with discovery, and awarding conduct-based attorney fees to husband. The district court has broad discretion in family-law matters and will not be reversed absent an abuse of that discretion. *Prahl v. Prahl*, 627 N.W.2d 698, 702, 704, 707 (Minn. 2001). "A district court abuses [its] discretion by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App.

2010). We review de novo questions of law, including the legal standard applicable to changes in parenting time. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

I. The District Court Had the Authority to Rule on Postdecree Motions Without First Referring the Parties to the Services of a Parenting Consultant, a Parenting Time Expeditor, or a Mediator.

At the crux of this appeal is wife's argument that the district court lacked authority to rule on the parties' postdecree motions without first referring the parties to the services of a Parenting Consultant (a PC), a Parenting Time Expeditor (a PTE), or a mediator. The marital dissolution judgment and decree dissolved the parties' marriage and awarded legal and physical custody of the minor children to wife, with parenting time to husband. The judgment and decree ordered the parties to utilize the services of a PC or a PTE to resolve parenting-time disputes. Any claims that could not be resolved through a PC or a PTE were referred to mediation. Several years later, the district court granted wife's motion to relocate to Massachusetts with the minor children and modified parenting time to reflect the move. Wife argues that the district court acted outside of its authority by (A) upholding a PTE's decision regarding modified parenting time; (B) awarding compensatory parenting time and assessing costs and PTE fees against wife without first referring those issues to a PC or a PTE for consideration; (C) ordering wife to provide husband with unblocked access to the children's cell phones; and (D) ordering wife to provide sporting equipment for the children and to repay husband $1,000. Wife argues that the district court lacked authority to consider these issues because they should have been raised in the first instance to a PC, a PTE, or a mediator.

Wife is wrong. A PTE is a "neutral person authorized to use a mediation-arbitration process to resolve parenting time disputes." Minn. Stat. § 518.1751, subd. 1b(c) (2016). And while the term "parenting consultant" is not used in the Minnesota statutes, "[i]n practice, the term refers to a creature of contract or of an agreement of the parties which is generally incorporated into . . . a district court's custody ruling." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). The district court retains authority over parenting issues, irrespective of the appointment of a PC or a PTE. *See id*.; *see also* Minn. Stat. §§ 518.175, .1751 (2016) (recognizing district court's continuing authority to decide and modify parenting time, appoint or remove a PTE, and review PTE decisions); Minn. Stat. § 518.18 (2016) (authorizing district court to modify custody orders or parenting plans); Minn. R. Gen. Pract. 114.04(b) (permitting court, at its discretion, to order parties to participate in alternative dispute resolution). To the extent wife's appeal is based on the assertion that the appointment of a PC or a PTE divested the district court of authority, we reject it as meritless.

A. The PTE Did Not Have Authority to Modify Parenting Time.

Wife challenges the district court's order upholding a decision from a PTE dated June 23, 2015. Wife requested that a PTE modify the children's summer 2015 parenting-time schedule to accommodate a summer hockey program in Massachusetts. A PTE denied the request based on her determination that "[i]t is not within a PTE's authority to override or modify one parent's court-ordered parenting time." The district court upheld the decision, and wife argues that the district court erred because the hockey program was an "unforeseen circumstance." We disagree. A PTE shall not make decisions inconsistent

with an existing parenting-time order, "unless the parties mutually agree." Minn. Stat. § 518.1751, subd. 3(c) (2016). The parties stipulated to the "exact parameters for both summer and school year parenting time" in spring 2014, and have not mutually agreed to alter that existing order. The PTE was not permitted to render a decision "inconsistent with" that existing parenting-time order. *Id.* The court did not err by applying the plain language of the statute and upholding the decision.

B. The District Court Had the Authority to Award Compensatory Parenting Time and Assess PTE Fees and Travel Costs Against Wife.

Following the PTE's decision, discussed above, husband moved the district court to uphold the decision regarding parenting time, which the court did. Husband also asked the court to award compensatory parenting time, assess costs against wife, and pay a proportionate share of travel costs. The PTE's decision did not address these issues. The district court ruled that wife failed to abide by the stipulated parenting-time order, assessed PTE costs, and awarded husband compensatory parenting time and travel costs. Wife alleges that the district court was not authorized to consider these issues until they were first addressed by a PTE.

We disagree. A district court may appoint a PTE to resolve parenting-time disputes. Minn. Stat. § 518.1751, subd. 1. Upon notice of a parenting-time dispute, a PTE "shall make a diligent effort to facilitate an agreement to resolve the dispute." *Id.*, subd. 3(a). If the parties cannot reach an agreement, a PTE "shall make a decision resolving the dispute." *Id.*, subd. 3(b). A PTE may award compensatory parenting time under section 518.175, subdivision 6, and may recommend to the district court that the noncomplying party pay

certain fees and costs. *Id.* A plain reading of Minnesota Statutes sections 518.175 and 518.1751 reveals that while a PTE *shall* make a decision regarding the underlying dispute, she is not required to make a recommendation on fees or compensatory parenting time. *Compare* Minn. Stat. § 645.44, subd. 15 (2016) ("'May' is permissive.") *with* Minn. Stat. § 645.44, subd. 16 (2016) ("'Shall' is mandatory."). Section 518.175 authorizes the district court to "provide compensatory parenting time when a substantial amount of court-ordered parenting time has been made unavailable to one parent." Minn. Stat. § 518.175, subd. 6(a). The district court may also "require the party who violated the parenting time order . . . to reimburse the other party for costs incurred as a result of the violation of the order." Minn. Stat. § 518.175, subd. 6(d)(4). Because the district court's decision to award compensatory parenting time, award travel costs, and assess PTE costs against wife was supported by the evidence and properly applied the law, it does not constitute an abuse of discretion. *See Hagen*, 783 N.W.2d at 215 (defining abuse of discretion).

C. The District Court Had the Authority to Order Wife to Provide Husband with Unblocked Telephone Access to the Children.

We also reject wife's argument that the district court erred by requiring her to provide husband with unblocked telephone access to the children because it lacked authority to do so. The judgment and decree ordered that "[e]ach parent shall exert every reasonable effort to maintain free access and unhampered contact and communication between the children and the other parent." Exhibit A, which was incorporated into the judgment and decree, provided that each parent "has the right of reasonable access and telephone contact with the minor children." The modified parenting-time order also

included an exhibit which reiterated that "[e]ach party has the right of reasonable access and telephone contact with the minor children." After moving to Massachusetts, wife blocked the children's cell phones and husband was unable to make or receive telephone calls with the children. The court, acting on husband's motion, ordered wife to allow husband unblocked access to the children's cell phones, stating that husband "shall not be blocked from placing calls in any capacity," and that "the children shall not be blocked from contacting [their father] as they desire." In reaching this decision, the court reviewed husband's affidavit and supplemental materials outlining wife's attempts to interfere in his communication with the children and found husband's statements "credible in their consistency and theme." We defer to the court's credibility determinations and the resolution of conflicting evidence in family-law matters. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("Deference must be given to the opportunity of the [district] court to assess the credibility of the witnesses."). On this record, we discern no abuse of discretion in the court's order regarding unblocked telephone access.

D. The District Court Had the Authority to Issue a Decision Related to Sporting Equipment.

Wife challenges the district court's decision regarding sporting equipment for the children. Following the judgment and decree, a PC issued a decision related to the division of expenses for the children's sporting equipment. After wife and the children moved to Massachusetts, husband requested an order requiring wife to provide sporting equipment for the children during his parenting time in Massachusetts, and to repay $1,000 he had previously paid wife. The court granted husband's motion and ordered wife to repay

husband $1,000, and to "provide all sporting equipment for the children for participation in activities in Massachusetts—regardless of whether [husband] has parenting time with the children in Massachusetts or not." Wife argues that the district court "nullified" an earlier PC decision. But we agree with the district court's reasoning that, because the children now play all of their sports in Massachusetts, "this PC decision no longer is appropriate." Because the district court's decision has support in the record and appropriately applies the law, it does not constitute an abuse of discretion.

II. The District Court's Contempt Order Was Not Erroneous.

The district court granted husband's contempt motion finding wife in contempt for her failure to abide by the stipulated parenting-time order and for her failure to sign IRS tax forms. Wife challenges the district court's contempt findings as erroneous. The district court has broad discretion to hold a party in civil contempt and we review the district court's decision for an abuse of discretion. *Crockarell v. Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Factual findings of a contempt order will be reversed only if they are "clearly erroneous." *Id.* Because the alleged disobedience here did not occur in the presence of the court, it constitutes constructive contempt and certain procedural safeguards apply. *See In re Cascarano*, 871 N.W.2d 34, 37-38 (Minn. App. 2015) (distinguishing between contempt committed in the presence of the court, which may be summarily punished, and constructive contempt, which may not).

First, wife challenges the order on the ground that husband's motion was defective. We disagree. In family-law matters, contempt proceedings may be initiated by motion and served upon the nonconforming party with appropriate supporting affidavits. Minn. R.

Gen. Pract. § 309.01(a). The motion must refer to the "specific order or judgment of the court alleged to have been violated" and put the contemnor on notice as to the alleged violations. *Id*. at (b). The moving party's affidavit must "set forth each alleged violation of the order with particularity." *Id*. at (c). Husband's motion properly complied with rule 309.01. The motion set forth in detail wife's alleged violations of the stipulated parenting-time order and wife's failure to sign IRS form 8332 for 2012, 2013, and 2014. Husband further detailed wife's alleged contemptuous conduct in his brief and in his affidavit, and he attached a copy of the district court's orders as exhibits to the brief. Husband's contempt motion was adequately supported and satisfied the requirements of rule 309.01.

Next, wife argues that the contempt order was erroneous. Before finding a party in civil contempt, the district court considers eight factors articulated in *Hopp v. Hopp*: (1) the court has jurisdiction; (2) the acts to be performed by the contemnor are clearly defined; (3) the contemnor had notice of the decree and reasonable time to comply; (4) the injured party applied to the court and specified the grounds for the complaint; (5) the court held a duly-noticed hearing at which the contemnor had an opportunity to show compliance or reasons for her failure to comply; (6) after the hearing, the court must determine whether the party failed to comply with court orders; (7) the court may not compel the contemnor to perform something she is wholly unable to do; and (8) when confinement is directed, the contemnor has an opportunity to effect her release. 279 Minn. 174-75, 156 N.W.2d 212, 216-17 (1968).

Each factor is satisfied here. First, the district court has jurisdiction. Second, the acts to be performed regarding parenting time and wife's obligation to sign tax forms are

clearly defined in the district court's orders. Third, wife had notice of the decree and a reasonable time within which to comply. Fourth, husband filed a contempt motion and adequately specified the grounds for the complaint. Fifth, the court held a duly-noticed hearing. Wife did not appear in person and chose instead to be represented by local counsel. Although wife's counsel informed the district court that wife could be made available by telephone, if necessary, counsel made no attempt to contact her during the hearing. Sixth, the district court determined that wife failed to comply with the court's orders. With regard to the stipulated parenting time, the district court determined that wife failed to "abide by the Stipulated Parenting Time Order . . . by failing to have the children travel to Minnesota on numerous occasions and failing to pay ½ of the travel costs of the children." The district court stated that its order made "abundantly clear" the "exact parameters for both summer and school year parenting time," and noted that "[t]hose *exact* parameters shall be followed by the parties—not the least of which are the exact dates and times of the parenting time, the location of the parenting time, and each party's responsibility to pay ½ of air travel costs." With regard to the tax forms, the district court determined that wife was in contempt of court for her ongoing refusal to sign IRS tax forms as ordered. Seventh, the district court did not compel wife to do something she was unable to do. Eighth, the district court elected to "not impose jail time," despite its contempt finding.

In sum, we determine that the *Hopp* factors have been satisfied and the district court did not abuse its discretion by holding wife in civil contempt.

III. The District Court's Discovery Orders Were Not an Abuse of Discretion.

Wife challenges the district court's order directing her to respond to outstanding discovery requests regarding her income and expenses. Rule 37.01(b)(2) authorizes a party to request an order compelling discovery in the event of incomplete or nonresponsive discovery requests. Minn. R. Civ. P. 37.01(b)(2). The district court has broad discretion to issue discovery orders and its orders will not be disturbed absent a clear abuse of that discretion. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). A misapplication of the law constitutes an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997).

In December 2014 and in January 2015, husband requested financial information from wife. Wife contested the discovery demands and husband moved for an order requiring her to respond to discovery requests regarding her net income and expenses. The court partially granted husband's discovery request and ordered wife to respond to discovery pertaining to her income and expenses. The district court reminded the parties that they were "required to respond to discovery requests when there is a pending motion, or as otherwise ordered by the Court," and that "[d]iscovery must be fully complied with, subject to sanctions." Husband filed another discovery motion in January 2016, to which wife objected. The district court ordered wife to respond to outstanding discovery requests regarding her income and addressed the parties' ongoing discovery disputes, reiterating its earlier admonition that discovery requests "must be fully complied with, subject to sanctions."

Wife characterizes the district court's May 2016 discovery order as a "general declaration of cooperation," rather than as an order requiring discovery. We disagree. The district court ordered wife to respond to husband's outstanding discovery requests, and reminded the parties of their obligation to fully comply with discovery requests, subject to sanctions. The court's order is proper under Minnesota Rule of Civil Procedure 37.01 and does not constitute an abuse of discretion.

IV. The District Court's Attorney Fee Order Was Not Abuse of Discretion.

Wife argues that the district court abused its discretion by awarding conduct-based attorney fees to husband, and by not awarding attorney fees to wife. "A conduct-based attorney-fee award is reviewed for an abuse of discretion." *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014).

The district court granted husband's motion for an award of attorney fees and costs and ordered wife to pay husband's law firm $2,500 in conduct-based attorney fees and costs pursuant to Minnesota Statutes section 518.14, subdivision 1 (2016). This statute authorizes the district court to award attorney fees and costs "against a party who unreasonably contributes to the length or expense of [a] proceeding." Minn. Stat. § 518.14, subd. 1. A party moving for conduct-based fees bears the burden of proof. *See Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016) ("[A] party moving for conduct-based attorney fees . . . has the burden to show that the conduct of the other party unreasonably contributed to the length or expense of the proceeding."). "Generally, conduct-based attorney fees are to be based on the party's behavior occurring during the litigation process." *Id*. Here, the district court determined that husband made an "adequate

showing of unreasonable contribution to the length and expense in this lawsuit by [wife]," meriting an award of costs and fees. The court did not make any similar findings with respect to husband's conduct. We discern no abuse in the district court's order awarding conduct-based attorney fees and costs in husband's favor.

Affirmed.