**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0262**

In re the Marriage of:
Annette Lee DeRosier,
n/k/a Annette Lee Kelley, petitioner,
Respondent,

vs.

James Howard DeRosier,
Lower Court Respondent,

and re the motions of:
Lois M. DeRosier, et. al.,
proposed intervenors,
Appellants.

**Filed February 19, 2008**
**Affirmed**
**Huspeni, Judge**[*]

Aitkin County District Court
File No. F5-04-000589

Rebekah McDonald, Attorney Rebekah McDonald L.L.C., 270 Airport Road, Suite 121, St. Paul, MN 55107 (for respondent)

Kristian L. Oyen, P.O. Box 406, Brainerd, MN 56401 (for lower court respondent James Howard DeRosier)

John G. Westrick, Kirk M. Anderson, Westrick & McDowall-Nix, P.L.L.P., 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellants)

---

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

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.

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

**HUSPENI,** Judge

Appellants challenge the trial court's denial of their motion to intervene in the dissolution proceeding of respondents Annette Lee Kelley and James Howard DeRosier, and to vacate the dissolution decree. Appellants argue that the trial court erred in applying the intervention factors under Minn. R. Civ. P. 24.01 and misconstrued the discussion of nonparty jurisdiction in *Sammons v. Sammons*, 642 N.W.2d 450 (Minn. App. 2002). Because appellants' motion was untimely and because *Sammons* is distinguishable from the facts of this case, we affirm.

**FACTS**

This case arises from the marriage dissolution of respondents Annette Kelley and James DeRosier. Prior to the dissolution trial, the parties stipulated to all matters except property distribution. The trial was held on April 20, 2006, and the dissolution decree was entered on July 25, 2006. As part of the decree, the court awarded various items of marital and nonmarital property to each party, including property[1] now allegedly owned by appellants Lois DeRosier[2] and Iron Range Livestock Exchange. On August 31, 2006, more than a month after the trial court issued the dissolution decree, appellants, with the

[1] The property in dispute includes a vast array of items including housewares and farming equipment.

[2] Lois DeRosier is James DeRosier's mother.

support of James DeRosier, brought a motion to vacate the property allocation and to intervene as interested parties to the action. Appellants asserted that they were the proper owners of some of the property allocated in the judgment and decree. They also requested an evidentiary hearing and the opportunity to conduct discovery. Kelley opposed the motion claiming that "James DeRosier testified at trial that [the] items [in dispute] were marital property."

Appellants' motions were denied by the same court that conducted the dissolution proceedings. This appeal followed.

## D E C I S I O N

### I.

When reviewing the appropriateness of orders concerning intervention as a matter of right, appellate courts are not held to a standard of review requiring a clear abuse of discretion. *Erickson v. Bennett*, 409 N.W.2d 884, 886 (Minn. App. 1987). Instead, the challenged orders are independently assessed on appeal. *Id*. To intervene under Minn. R. Civ. P. 24.01, nonparty movants must establish:

> (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties.

*Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). All four factors must be established. *See Luthen v. Luthen*, 596 N.W.2d 278, 280-81 (Minn. App. 1999). Appellants argue that the trial court erroneously applied the factors.

## A. Timeliness

The timeliness of an application to intervene is measured by the surrounding circumstances including (1) how far the case has progressed; (2) the reason for the delay in seeking intervention; and (3) whether the existing parties will be prejudiced by the delay. *Erickson*, 409 N.W.2d at 886. Posttrial intervention is generally disfavored and is not allowed in cases where the proposed intervenor was aware of the suit yet permitted the trial to proceed in order to see if the district court's decision would yield a favorable outcome. *See Brakke v. Beardsley*, 279 N.W.2d 798, 801 (Minn. 1979) (posttrial intervention disfavored); *State Auto. & Cas. Underwriters v. Lee*, 257 N.W.2d 573, 576 (Minn. 1976) (indicating that one cannot wait to intervene in hopes of obtaining a favorable decision).

Kelley argues that the motion to intervene was properly denied because Lois DeRosier was intimately involved in the dissolution proceedings. Specifically, Kelley claims that DeRosier had knowledge of the property being apportioned as part of the dissolution because she testified as a witness at trial.[3] DeRosier disputes Kelley's characterization of her involvement and adamantly denies testifying at trial.

Unfortunately, the full extent of DeRosier's participation in the proceedings is not apparent from the record before us because the dissolution trial transcripts were not provided. On appeal, the appellant has the burden of providing an adequate record,

[3] Kelley also argues that DeRosier acted as her son's attorney-in-fact and was "copied on correspondence sent between attorneys, participated in negotiations and offered to pay her son's share of debts owed on the real property." There is no support for these assertions in the record.

including a transcript of pertinent proceedings, for review of the issues. *See Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). The record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented." *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964). When a transcript is not provided on appeal, this court's task is "limited to determining whether the [district] court's findings of fact support its conclusions of law." *Am. Family Life Ins. Co. v. Noruk*, 528 N.W.2d 921, 925 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

Appellants did not provide a trial transcript for review by this court, and we therefore do not have the benefit of a complete record. But we need not reach the question of whether DeRosier did, in fact, testify to evaluate the timeliness of the motion to intervene. We can conduct meaningful review by considering the trial court's findings and the evidence available in the record that we do have before us. That review convinces us that Lois DeRosier had notice that personal items she allegedly owned, which were in the possession of respondents, were subject to apportionment by the trial court, and was aware that while James DeRosier was claiming that an interest in Iron Range Livestock Exchange was his nonmarital property, that property was not claimed to belong to anyone not a party to the dissolution proceeding. The trial court observed that DeRosier, testifying or not, "was present during the court proceedings and was aware of the property issues in the case. Copies of cancelled checks from her account and promissory notes to her were received as exhibits at trial." In addition, Kelley submitted

an affidavit in opposition to the motion to intervene asserting that the property in dispute was never presented as anything but marital at trial.

With knowledge that the items in dispute were subject to distribution to either Kelley or James DeRosier, or to both in some proportion, Lois DeRosier was not entitled to sit idly by while both parties in the dissolution proceeding offered evidence as to whether Kelley or James DeRosier was the rightful owner of the property. Appellants did not claim an ownership interest until more than a month after the trial court issued the dissolution decree. No justification was given for the delay, and allowing intervention would prejudice Kelley. Additional legal expenses would be incurred in resolving the ownership dispute. And because some of the items at issue were deemed marital property, it is probable that the court, in granting the motion to intervene, would need to perform another equitable distribution of the marital estate if items distributed as marital property were later found to be the property of appellants. Additional prejudice could be incurred by Kelley.

After considering the three factors required in a timeliness determination, we conclude that all three disfavor intervention. The proceedings had progressed to the final judgment stage. No justification was given for delay in seeking intervention. Implicit in the trial court's findings is the conclusion that Lois DeRosier waited to see if property she now alleges was hers would be awarded to James DeRosier. That conclusion may explain why there was delay, but it cannot serve as justification for that delay. Finally, prejudice would almost certainly accrue to Kelley if intervention were permitted at this late stage. The factor of timeliness weighs heavily against appellants.

**B. Interest Relating to the Property**

Appellants also argue that they have an interest in some of the items of personal property awarded to Kelley. The trial court found that

> [n]owhere in the pleadings or evidence in the present case is there any indication that Lois DeRosier was a shareholder in Iron Range Livestock Exchange, Inc. or that she was the owner of or a secured party in any of the items of personal property listed on the attachment to her affidavit. The evidence reflected only non-secured loans from Ms. DeRosier to the parties and their businesses.

We agree with the trial court's assessment. Nothing in the record supports appellants' asserted interest in the property, and because appellants did not supply a trial transcript, we must assume that the evidence produced at trial is consistent with the trial court's conclusions. *See Noruk*, 528 N.W.2d at 925.

Appellants argue that their averments must be accepted as true. "In determining whether intervention is proper, the [district] court will, *absent sham or frivolity*, accept the allegations in the pleadings as true." *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981) (emphasis added). Although the general rule requires that appellants' averments be accepted as true, the trial court indicated that DeRosier's failure to intervene at an earlier time was a calculated effort to "wait for the outcome of the trial and then when that was not favorable to her son, move to vacate and intervene claiming a third party interest." Thus, under *Costley*, we decline to accept the facts as true because there is evidence that appellants acted in bad faith by bringing their motion to intervene. As such, this factor also weighs against intervention.

### C. Impairment of Property Interests

Appellants also claim that the trial court's property distribution will impair their ability to protect their interests in the property. If we were to assume appellants have an interest in the property, which we have already declined to do, this factor would weigh in favor of intervention. The parties to the dissolution could sell or dispose of the property before appellants have an opportunity to pursue their interests through the legal system.

### D. Adequate Representation

Finally, it does not appear that appellants' purported interests were adequately represented by the existing parties. There is no evidence that the parties to the dissolution recognized appellants' interests in the property during the proceedings, and Kelley disputes that they have any entitlement to the property. Therefore, appellants' interests, if any, were not represented during the dissolution.

In summation, we conclude that the trial court's denial of the motion to intervene was appropriate. We rely most heavily on the determination of the trial court that appellants' motion was untimely. Further, there is no evidence in the record before us that appellants have an interest in the property in dispute. Under the circumstances of this case, we cannot consider the averments of appellants to the contrary to be true. The possibility that factors three and four of the assessment of motions to intervene may be neutral, or even somewhat supportive of the motion, are clearly not sufficient to reject the trial court's decision.

**II.**

Appellants alternatively argue that they were not required to intervene to protect their interests and are entitled to partial vacation of the dissolution decree because, as nonparties, the trial court lacked authority to adjudicate their property rights. Generally, the denial of a motion to vacate a final judgment is not appealable. *Angelos v. Angelos*, 367 N.W.2d 518, 519 (Minn. 1985). But the supreme court has held that, in some cases, denials of motions to vacate may be appealable. *Spicer v. Carefree Vacations, Inc.*, 370 N.W.2d 424, 425 (Minn. 1985). If the person bringing the motion to vacate was not a party to the dissolution, and the decision affected that person's property interests, an appeal from the denial of a motion to vacate may be appropriate because it is the only way in which the argument may be presented for appellate review. *Sammons v. Sammons*, 642 N.W.2d 450, 455-56 (Minn. App. 2002). We shall review on the merits appellants' challenge to the denial of their motion to partially vacate the dissolution decree.

As in *Sammons*, review is appropriate here because appellants are claiming an ownership interest in property distributed by the trial court and they have no other means to perfect an appeal. The merits of the motion to vacate are, however, nonexistent in this case. Appellants cite *Sammons* for the proposition that a district court may not exercise jurisdiction over a nonparty's property. But as the trial court here recognized, the facts of this case stand in stark contrast to those in *Sammons*. In *Sammons*, the district court, as part of a dissolution decree, imposed a constructive trust on the home of husband's mother; a home clearly titled in her name. *Id*. at 454. This court ruled that the district

court lacked authority to impose the constructive trust because the mother, as the undisputed owner of the home, was not a party to the dissolution. *Id*. at 455-56. Unlike *Sammons,* in which property was titled in the name of one not a party to the proceeding, appellants in this case have not presented any evidence beyond DeRosier's affidavit to demonstrate that they own the property in dispute.

Appellants have requested an evidentiary hearing to have an opportunity to prove their case. But as the trial court noted, they have not offered any evidence to substantiate their claims. If no supporting evidence were required, any party who alleged an interest in property that is the subject of a court order could potentially compromise the validity of that order through unsubstantiated claims of ownership.

**Affirmed.**