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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-709
A09-761

In re the Marriage of:

Gianfranco Scala, petitioner,
Respondent (A09-709),
Appellant (A09-761),

vs.

Brenda Lee Pearson,
Appellant (A09-709),
Respondent (A09-761).

Filed February 23, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File Nos. 27-FA-08-4887, 27-FA-08-686

Nancy Zalusky Berg, Allison Maxim Carlson, Walling, Berg & Debele, P.A., Minneapolis, Minnesota (for Brenda Lee Pearson)

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Considered and decided by Kalitowski, Presiding Judge; Larkin, Judge; and Crippen, Judge.[*]

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this consolidated appeal, appellant Gianfranco Scala challenges the district court's denial of his motion to vacate the judgment and decree dissolving the parties' marriage, arguing that: (1) the district court lacked jurisdiction to grant the dissolution because respondent Brenda Lee Pearson failed to satisfy the 180-day residency requirement; (2) respondent committed fraud on the court by misrepresenting her residency status; and (3) the district court abused its discretion when it denied appellant's request for attorney fees and costs. Respondent challenges the district court's separate award of attorney fees and costs to appellant pursuant to the International Child Abduction Remedies Act, arguing that the district court erred by failing to make necessary findings and consider her financial situation. We affirm.

DECISION

Appellant, an Italian citizen, and respondent, a dual Italian and U.S. citizen, married in Italy in 1998. The parties had a daughter, C.A.S., in January 1999. Respondent arrived in the United States with C.A.S. on June 26, 2007, and filed a petition for dissolution of marriage in Hennepin County District Court on February 1, 2008. The district court held a default hearing, at which appellant's attorney conceded that respondent met the 180-day residency requirement to obtain a dissolution. The district court filed its findings of fact, conclusions of law, order for judgment and judgment and decree (judgment and decree) on June 13, 2008, dissolving the parties' marriage and reserving the issues of custody, child support, property division, and attorney fees and

costs. Appellant filed a motion asking the district court to vacate the judgment and decree because respondent committed fraud on the court, and to dismiss the petition for dissolution for lack of jurisdiction. The district court denied appellant's motion.

On July 25, 2008, appellant filed a petition in district court for return of C.A.S. to appellant pursuant to the Convention on the Civil Aspects of International Child Abduction, part of the 1980 Hague Convention. Following an evidentiary hearing, the district court granted appellant's petition for the return of C.A.S. and awarded appellant attorney fees and costs of $48,713.65 and €2,165.

I.

Appellant argues that the district court erred in determining that respondent satisfied the 180-day residency requirement of Minn. Stat. § 518.07 (2008), and therefore the district court lacked subject-matter jurisdiction over the parties' dissolution. We disagree.

Questions of subject-matter jurisdiction are reviewed de novo. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001); *see In re Welfare of S.R.S.*, 756 N.W.2d 123, 126 (Minn. App. 2008) (stating that "[t]his court reviews questions of jurisdiction and interpretation of statutes de novo"), *review denied* (Minn. Dec. 16, 2008). "[A] finding of proper domicile to confer jurisdiction for commencement of a divorce action will not be reversed unless it is palpably contrary to the evidence." *Davidner v. Davidner*, 304 Minn. 491, 493, 232 N.W.2d 5, 7 (1975).

A marriage dissolution shall not be granted unless (1) one of the parties has resided in the state for at least 180 days immediately preceding the commencement of the proceeding; or (2) one of the parties has been a domiciliary of the state for at least 180 days immediately preceding the commencement of the proceeding. Minn. Stat. § 518.07 (2008). A dissolution granted without compliance with section 518.07 is void for lack of subject-matter jurisdiction. *Wyman v. Wyman*, 297 Minn. 465, 467, 212 N.W.2d 368, 369 (1973).

For purposes of section 518.07, residence means "the place where a party has established a permanent home from which the party has no present intention of moving." Minn. Stat. § 518.003, subd. 9 (2008). "Domicile is the union of residence and intention, and residence without intention, or intention without residence, is of no avail." *Davidner*, 304 Minn. at 493, 232 N.W.2d at 7.

A domicile is presumed to continue until the contrary is shown. *Id.* Whether a departure from an established domicile and residence in another state results in a change of domicile is a question of fact that generally depends on the purpose and intent of the change. *Id.* (holding that husband was a domiciliary of Minnesota although he completed a medical residency in Utah and eventually accepted a permanent position in Missouri, because he had lived his entire married life in Minnesota and had intended to return there when he filed for dissolution); *see Bechtel v. Bechtel*, 101 Minn. 511, 515, 112 N.W. 883, 885 (1907) (holding that the wife was a resident of Minnesota for purposes of the residency requirement where her residence in Massachusetts was compulsory and she had no intention of abandoning her residence in Minnesota).

The purpose of the residency requirement is to "prevent nonresidents from coming into our courts with their grievances, and to compel them to resort for relief from matrimonial entanglements to the courts of the place of their abode." *Bechtel*, 101 Minn. at 514, 112 N.W. at 884. In *Jones v. Jones*, the wife, a Chinese citizen living in Minnesota to study for a year at the Mayo Clinic, was a resident under the statute, even though it was not clear whether she intended to return to China or remain permanently in the United States, because the court stated that forum shopping was not a concern. 402 N.W.2d 146, 148 (Minn. App. 1987).

Here, appellant argues that the district court incorrectly calculated the 180 days based on its factual findings. The district court found that there was evidence indicating that respondent contemplated remaining in Minnesota permanently when she came to visit in the summer of 2007, and that this intent was revealed when she took "outward steps and actions to remain" on or about July 9, 2007. The district court further found that respondent formed the intent to remain in Minnesota permanently before she told appellant in August 2007, and concluded that respondent satisfied the 180-day residency requirement.

The statutory residency requirement is measured as 180 days before the date of commencement of the dissolution proceeding, designated as the date of service of the summons pursuant to Minn. R. Civ. P. 3.01. Appellant was served on December 31, 2007. Thus, in order to meet the 180-day residency requirement, respondent had to be a domiciliary or resident of Minnesota by July 4, 2007. Appellant contends that because the district court found that respondent revealed the requisite intent on or about July 9,

2007, respondent did not meet the 180-day requirement. But the district court's findings do not state that respondent lacked such intent before July 9, 2007, only that she *revealed* this intent through "outward steps and actions" on or about July 9, 2007. Thus, the record supports the district court's implicit finding that respondent formed the requisite intent on or before July 4, 2007.

Furthermore, the district court's implicit finding of domicile by July 4, 2007, is "not palpably contrary to the evidence." *See Davidner*, 304 Minn. at 493, 232 N.W.2d at 7. The record shows that when respondent left Italy on June 26, 2007, she was contemplating staying in Minnesota. At the Hague proceedings, respondent testified:

> I think it's true that when I left Italy, I made all the provisions to come back or not come back. I put my furniture in storage. I took the original medical records. I took the original deed to the house. I took the bank statements that proved I paid for the apartment. I took my daughter's school records. I took the evaluation. I took the baby pictures.

Respondent also testified that she put the furniture in storage before she left for Minnesota because she thought "there was a very big possibility" that she would not return to Italy, because "[her] marriage was over." Based on respondent's testimony, the district court's implicit finding that respondent established the requisite intent to remain in Minnesota by July 4, 2007, was not error. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that deference must be given to the district court to assess the credibility of the witnesses).

Moreover, the record supports respondent's contention that she was not forum shopping. Respondent had already rented an apartment and enrolled C.A.S. in school in

Minnesota when she filed for dissolution. Respondent had significant ties to Minnesota, maintaining a driver's license, voting, and spending summers annually in Minnesota. Given the evidence supporting respondent's intention to stay permanently in Minnesota, respondent was not a "nonresident[] . . . coming into our courts with [her] grievances." *See Bechtel*, 101 Minn. at 514, 112 N.W. at 884.

Finally, the district court did not make more specific findings regarding the exact date that respondent established the requisite intent to remain in Minnesota because at the default hearing, appellant's attorney conceded that respondent met the 180-day residency requirement.

We conclude that the district court did not err in denying appellant's motion to vacate the judgment and decree based on its determination that respondent satisfied the 180-day residence requirement.

II.

Appellant argues that the district court erred when it failed to find that respondent committed fraud on the court by misrepresenting her residency status in order to obtain a dissolution judgment in Minnesota. We disagree.

The district court's decision regarding whether to reopen a judgment will be upheld unless the district court abused its discretion; and the district court's findings as to whether the judgment was prompted by mistake, duress, or fraud will not be set aside unless they are clearly erroneous. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998).

"[F]raud on the court must be an intentional course of material misrepresentation or non-disclosure, having the result of misleading the court and opposing counsel and making the property settlement grossly unfair." *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989). In *Maranda*, the supreme court held that the husband committed fraud on the court where he systematically excluded the wife from access to financial information, misrepresented facts about marital property, and concealed significant amounts of money, making it impossible for the district court to approve a fair settlement. *Id*. at 166. In *Kornberg v. Kornberg*, on the other hand, the supreme court held that the husband did not commit fraud on the court where there was no evidence that the husband intentionally made misrepresentations to the wife, that the court was misled in any way, or that the property settlement was unfair. 542 N.W.2d 379, 388 (Minn. 1996).

Here, appellant cites the following representations as fraudulent: respondent's signature on the petition for dissolution of marriage verifying that she had been a resident for more than 180 days; respondent's testimony at the default hearing that she was a Minnesota resident since June 26, 2007; and respondent's statement in a November 2008 affidavit that she had "always maintained Minnesota as [her] residence for all purposes." Appellant contends these representations are belied by respondent's statements that she is a resident of Rome, Italy, and was only "on vacation" in Minnesota.

We cannot say that appellant has shown that the district court's refusal to find fraud on the court was clearly erroneous. As in *Kornberg*, there was no showing here that respondent intentionally misrepresented facts or that the court was misled in any way. And notably, there was no disposition regarding property, spousal maintenance, or

custody, so any alleged fraud did not result in an "unfair" result for appellant. Moreover, as discussed above, the district court's implied determination that respondent formed intent to remain in Minnesota on or before July 4, 2007, was based on facts and testimony that were consistent throughout the proceedings. Therefore, we conclude that the district court did not abuse its discretion when it declined to vacate the judgment and decree based on respondent's alleged commission of a fraud on the court.

III.

In its order denying appellant's motion to vacate the judgment and decree, the district court denied both parties' requests for attorney fees. Appellant argues that because respondent committed fraud on the court regarding her residency, appellant is entitled to an award of attorney fees and costs pursuant to Minn. Stat. § 518.14 (2008).

Conduct-based fee awards are "discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see* Minn. Stat. § 518.14, subd. 1 (stating that conduct-based fees may be awarded against a party who unreasonably contributes to the length or expense of the proceeding). Here, because appellant failed to show that respondent committed fraud on the court, the district court did not abuse its discretion when it denied appellant's request for attorney fees.

IV.

Respondent appeals from the district court's award of attorney fees and costs to appellant in the order and judgment granting appellant's petition for the return of a child under the Hague Convention. Respondent contends that (1) the district court abused its discretion by failing to make findings of fact to support the award; and (2) the district

court erred by failing to consider respondent's limited financial resources in its application of the Hague Convention provision regarding attorney fees. We disagree.

The Convention on the Civil Aspects of International Child Abduction (Convention), part of the 1980 Hague Convention, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained from their habitual residence. 42 U.S.C. § 11601(a)(4) (2008). Congress implemented the Convention by enacting the International Child Abduction Remedies Act, codified in 42 U.S.C. §§ 11601-11610 (2008).

Under the Convention, a petitioner must prove only that the child was "wrongfully" removed or retained. 42 U.S.C. 11603(e)(1)(A); *see Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995) (stating that a court applying the Convention may not adjudicate the merits of any underlying custody claims). And if the petitioner establishes wrongful removal or retention, the child must be promptly returned unless one of the narrow exceptions set forth in the Convention applies. 42 U.S.C. §§ 11601-11610.

Regarding the award of attorney fees and costs, section 11607, subdivision (b)(3), provides:

> Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

The district court has broad discretion in applying the attorney fee provision of the Convention consistent with local laws and standards. *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004). And the burden is on the respondent as the payor to show that an award is "clearly inappropriate." *Id.* This court reviews a district court's award or denial of attorney fees and costs awarded under the Convention for an abuse of discretion. *Rydder*, 49 F.3d at 373-74.

Findings of Fact to Support Award of Attorney Fees

Respondent argues that the district court abused its discretion by failing to make sufficient findings of fact to support its award of attorney fees to appellant. And respondent cites caselaw providing that a judgment based on insufficient findings will not be sustained on appeal. *See Becker v. Alloy Hardfacing & Eng'g*, 401 N.W.2d 655, 661 (Minn. 1987) (stating that on remand, the district court should provide its rationale for denying attorney fees so that the award can be reviewed for abuse of discretion).

Here, unlike *Becker*, the district court indicated the analysis it applied and stated its reason for granting the request. The district court stated, "Comparing the fee requests submitted by both parties, the Court finds that [appellant]'s request is reasonable. Moreover, [respondent] has failed to carry her burden of showing that awarding [appellant]'s request in the amount of $48,713.65 and €2,165 would be clearly inappropriate." With regard to respondent's request for need-based attorney fees under Minn. Stat. § 518.14, the district court indicated that the Minnesota statute did not apply to the Hague proceeding, and that respondent failed to support her argument with any information as to lack of income or appellant's ability to pay. Because the district court's

findings were sufficient to alert this court to the rationale behind the award, we conclude that the district court did not abuse its discretion by making insufficient findings to support its award of attorney fees.

Consideration of Respondent's Financial Resources

Respondent argues that the district court erred by failing to consider respondent's limited financial resources in awarding attorney fees and costs to appellant. In *Rydder*, the Eighth Circuit held that where the wife owned stock valued at $18,683 and worked sporadically as a substitute teacher, the award of $18,487.42 in fees and costs to husband under section 11607(b)(3) was so excessive as to constitute an abuse of discretion. 49 F.3d at 372, 373-74. The court further held that an award of $10,000 was "more equitable in this particular case." *Id*. at 374. *See Berendsen v. Nichols*, 938 F. Supp. 737, 739 (D. Kan. 1996) (stating that the court has the discretion to reduce any potential award to allow for the financial condition of the respondent and that any award that "unduly limited respondent's ability to support his children" would be "clearly inappropriate.").

Here, the district court's order indicates that it did consider respondent's arguments regarding ability to pay and concluded that respondent failed to meet the burden of showing that an award of attorney fees would be "clearly inappropriate." In her motion for attorney fees under Minn. Stat. § 518.14, respondent asserted that her income was "limited and sporadic" and that she had to pay attorney fees out of her retirement savings. But the district court found that respondent failed to provide the court with any information to support her alleged lack of income or ability to pay. Because the burden was on respondent to make the showing that an award of attorney fees was

“clearly inappropriate,” and because the district court has “broad discretion” in applying the provisions of the Convention, we conclude that the award of attorney fees and costs to appellant was not error.

Affirmed.