STATE OF MINNESOTA
IN COURT OF APPEALS
A09-731

In re the Marriage of: Kim Irene Augustine Postell n/k/a Kim Irene Malloy, petitioner, Appellant,

vs.

Jamie Gordon Postell,
Respondent.

Filed April 13, 2010
Reversed
Connolly, Judge

Hennepin County District Court
File No. 27-FA-000289349

Kim Irene Malloy, Lexington, Minnesota (pro se appellant)

Scott M. Rodman, Tuft & Arnold, PLLC, Maplewood, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's order vacating the default judgment she received for unpaid spousal maintenance owed to her by respondent. The district court lacked authority under Minn. Stat. §§ 518.145, subd. 2(5), and 518A.39, subd. 2(e)

(2008), to retroactively modify spousal maintenance. It therefore abused its discretion in vacating the judgment, and we reverse.

FACTS

Appellant Kim Irene Augustine Postell, now known as Kim Irene Malloy, and respondent Jamie Gordon Postell were married in October 1999. They separated in June 2002. The district court dissolved their marriage by judgment and decree in September 2004, and ordered respondent to pay appellant $600 per month in temporary spousal maintenance for 30 months. Respondent did not appear at the hearing because he was in jail on charges of possession of a controlled substance. Respondent was ultimately incarcerated from August 21, 2004, to June 5, 2006. He never made any maintenance payments.

Appellant later obtained a default judgment against respondent in the amount of $18,000; this was the total amount of maintenance payments that had become due and that respondent had failed to make, and it amounted to the entire temporary-maintenance award. Appellant subsequently received a writ of execution in the amount of $18,613.81, which included a $40 execution fee and $573.81 in interest. The Hennepin County Sheriff executed the writ and served a levy on respondent's bank account for $19,652.66, which included additional interest and fees. At a hearing in November 2008, respondent's counsel informed the district court that the bank account contained more than $40,000, half of which belonged to respondent.[1]

[1] Respondent and his brother inherited the money, and each of them owned 50% of the money in the account.

Appellant filed a motion for contempt for failure to pay spousal maintenance and to modify spousal maintenance. Respondent filed a motion to contest the writ of execution and levy and to reopen the judgment. On February 13, 2009, the district court issued an order vacating the maintenance judgment, quashing the writ of execution, removing the levy on respondent's bank account, and denying appellant's motion to modify maintenance. This pro se appeal follows.

D E C I S I O N

We review a district court's decision whether to reopen a dissolution judgment or maintenance order for an abuse of discretion. *Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996). A district court's findings of fact are not set aside unless clearly erroneous. Minn. R. Civ. P. 52.01.

By its February 13 order, the district court vacated the default judgment obtained by appellant against respondent for maintenance payments that respondent failed to make despite his obligations pursuant to the parties' judgment and decree. The basic effect of the February 13 order was to eliminate the previously ordered maintenance payments, all of which were in arrears. A district court has prescribed statutory authority to reopen or vacate a judgment and decree, order, or other proceeding pursuant to Minn. Stat. § 518.145, subd. 2 (2008).

On motion, a district court may grant relief from a maintenance order or judgment for one of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;
>
> (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment and decree or order is void; or
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.

Minn. Stat. § 518.145, subd. 2. The motion must be brought within a reasonable time. *Id.*

"The moving party bears the burden of establishing a basis to reopen the judgment and decree." *Thompson v. Thompson*, 739 N.W.2d 424, 428 (Minn. App. 2007). The district court may only grant relief if circumstances meeting the statutory requirements have been demonstrated. *Shirk v. Shirk*, 561 N.W.2d 519, 523 (Minn. 1997). Respondent contends that subdivision 2 "provide[s] the district court with explicit catchall authority to relieve a party from a judgment when extraordinary circumstances warrant." This argument is foreclosed by *Shirk*, which makes clear that the statute "was carefully crafted by the legislature to provide limited areas of relief to those seeking vacation of judgment and decrees." *Id.* at 522 n.3 (emphasizing the contrast with Minn. R. Civ. P. 60.02, which permits relief from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment").

In its order vacating the default judgment, the district court indicated that its decision was based on fairness concerns. Section 518.145, subdivision 2, is the only legal authority authorizing a district court to vacate a maintenance judgment, and based

on our review of the record, we conclude that the district court rendered its decision pursuant to subdivision 2, clause (5).

Clause (5) permits reopening of a judgment that "has been satisfied." Minn. Stat. § 518.145, subd. 2(5). The district court found that respondent had satisfied his obligation to pay temporary maintenance during the time period following his incarceration, when he lived with appellant, by contributing to rent and other living expenses. It did not make any findings as to exactly how much respondent contributed during this time. The district court also did not make a finding as to respondent's ability to pay maintenance during this time, although it noted that respondent asserted that he had no ability to pay maintenance after providing for his own needs.

Clause (5) also permits a district court to reopen a maintenance judgment if "it is no longer equitable that the judgment and decree or order should have prospective application." *Id.* The district court found that respondent's incarceration was a substantial change in circumstances that rendered him unable to pay maintenance because he had minimal or no income, and that it would therefore be unfair to require respondent to pay $600 per month in maintenance while he was incarcerated. It did not make any findings with respect to appellant's financial needs, stating that appellant "demonstrated that she may have some need for spousal support" but failed to demonstrate respondent's ability to pay. This misstates appellant's burden, both because a district court has to find facts and because respondent bore the burden of showing that the court had a basis to vacate the judgment. *See Thompson*, 739 N.W.2d at 428 (stating burden).

In this case, we conclude that the district court lacked the authority to reopen the default judgment to retroactively vacate past-due maintenance payments. The district court's analysis under Minn. Stat. § 518.145, subd. 2(5), is misplaced. By its plain language, clause (5) applies to a judgment that has *prospective* application. *See* Minn. Stat. § 518.145, subd. 2(5) (district court may grant relief when "it is no longer equitable that the judgment and decree or order should have prospective application"). Because forgiveness of arrearages is a retroactive modification, *Allan v. Allan*, 509 N.W.2d 593, 597 (Minn. App. 1993), and because all of respondent's maintenance payments were in arrears, respondent's maintenance obligation—and the default judgment and the writ of execution and levy arising out of his obligation to pay temporary maintenance—was solely retrospective, and did not have prospective application. Thus, the district court abused its discretion by vacating the default judgment.

The district court also stated that it had the authority to retroactively modify respondent's maintenance obligation under Minn. Stat. § 518A.39, subd. 2(e), because respondent's incarceration was a substantial change in circumstances rendering his maintenance obligation unreasonable and unfair. We disagree. A district court may retroactively modify maintenance "only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party." Minn. Stat. § 518A.39, subd. 2(e). The district court suggested, and respondent asserts, that respondent's December 2004 motion was still pending as of the issuance of the February 13, 2009 order from which this appeal was taken. While we agree that the December 2004 motion can be construed as a

motion to modify maintenance, we do not believe that it was still pending. Furthermore, a motion is deemed abandoned and cannot provide a retroactive date for modification when the movant merely files but fails to otherwise pursue it. *See Hicks v. Hicks*, 533 N.W.2d 885, 886 (Minn. App. 1995). Thus, the district court did not have the authority under section 518A.39 to retroactively modify maintenance dating back to December 2004. Because the last payment of the temporary-maintenance award was due in March 2007, and the only pending motion for modification was served and filed after that date, the district court lacked the authority to make a retroactive modification of the maintenance award.

Additionally, we note that even if the district court did have the authority to retroactively modify or vacate the maintenance award, its factual findings would be inadequate. Determination of whether a maintenance award is fair in light of changed circumstances requires consideration of the factors relevant to any maintenance award. As an initial matter, a district court may grant maintenance if the party seeking maintenance lacks sufficient property to provide for his or her reasonable needs or is unable to provide adequate self-support. Minn. Stat. § 518.552, subd. 1 (2008). The district court shall consider all relevant factors before granting maintenance in the amount it deems just. *Id.*, subd. 2 (2008) (stating factors). "[T]he essential consideration is the financial need of the spouse receiving maintenance, and the ability to meet that need, balanced against the financial condition of the spouse providing the maintenance." *Novick v. Novick*, 366 N.W.2d 330, 334 (Minn. App. 1985). Here, the district court did

not make findings pertaining to appellant's financial need or her ability to meet that need, nor did it balance that against respondent's ability to pay.

Effective appellate review of a district court's exercise of its discretion is only possible when the district court "has issued sufficiently detailed findings of fact to demonstrate its consideration of all factors relevant" to its decision pertaining to a maintenance award. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). A district court may not merely recite the parties' claims, but must make its own findings by affirmatively stating them as findings of the district court. *Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989). "[A]n appellate court will reverse when it is unable to determine from the findings whether the statutory requirements were properly considered." *Dougherty v. Dougherty*, 443 N.W.2d 193, 194 (Minn. App. 1989). Thus, even if the district court had the authority to retroactively modify or vacate the maintenance award, it is impossible to determine whether the district court considered the appropriate factors, and the lack of sufficient findings would warrant reversal.

Reversed.