STATE OF MINNESOTA
IN COURT OF APPEALS
A10-62

In re the Marriage of: Mary Melissa Martin, petitioner,
Respondent,

vs.

Kurt Wayne Martin,
Appellant.

Filed November 2, 2010
Affirmed
Connolly, Judge

Crow Wing County District Court
File No. 18-F1-01-000250

Mary Martin, Brainerd, Minnesota (pro se respondent)

Kurt W. Martin, Brainerd, Minnesota (pro se appellant)

Donald F. Ryan, Crow Wing County Attorney, David Hermerding, Assistant County Attorney, Brainerd, Minnesota (for Crow Wing County)

Michael J. Ford, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for Crow Wing County Attorney)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

CONNOLLY, Judge

Pro se appellant, a child-support obligor, challenges the denial of his motion (1) to make modification of his child-support obligation retroactive to June 19, 2008; (2) to apply his intercepted tax refunds to his ongoing child-support obligation, not his arrears; (3) to enjoin Crow Wing County Child Support Services (CWCCSS) from any collection actions without the district court's consent; (4) to refund money owed by two counties to appellant's business and taken by CWCCSS; (5) to enable appellant to take his children as tax exemptions; and (6) to impose sanctions on respondent Crow Wing County (CWC) and its attorney. Because we see no error of law and no abuse of discretion in the denial, we affirm.

FACTS

Appellant Kurt Martin and respondent Mary Martin were married in 1990.[1] Their daughter N. is now 24; their daughter M. is 18. The marriage was dissolved in 2002. In 2003, appellant was awarded the tax exemption for the children, and his child-support obligation was modified to $1,375.90.

In 2005, appellant was found in contempt of court for defaulting on child support; his sentence was stayed when he paid a purge amount of $14,232.40. His child-support obligation was modified, but his motions to require respondent to enroll M. in a private school, to find her in contempt of court, and to reopen the dissolution judgment were

[1] Respondent takes no part in this appeal; CWC and the CWC attorney responded.

denied. The denial was affirmed in *Martin v. Martin*, No. A04-1977 (Minn. App. Aug. 9, 2005).

In 2005, appellant moved for further modification; the child support magistrate (CSM) denied the motion, and the district court affirmed. CWC filed an affidavit of appellant's noncompliance with the condition of the 2003 agreement that he remain current in child-support payments, and the district court revoked its stay of the sentence for contempt. The denial of appellant's modification motion and the revocation of the stay were affirmed in *Martin v. Martin*, No. A06-300 (Minn. App. Dec. 5, 2006).

In 2006, appellant signed an agreement with CWC Social Services (CWCSS) that gave CWCSS the right to proceed with suspending appellant's driver's license if he failed to make child-support payments when due. Appellant's tax refunds were intercepted for payment of his child-support arrears. Appellant challenged the application of the intercepted amounts to his arrears rather than to his current obligation.

In 2007, appellant's tax refunds were again intercepted for payment of child-support arrears. Appellant notified CWCCSS that he considered the intercepted amounts to be his monthly payments and was therefore not in default. CWCCSS replied that appellant was in breach of the 2006 agreement because the intercepted amounts were being applied to his arrears. He again moved to modify his child-support obligation, and the CSM denied the motion. The denial was affirmed in *Martin v. Martin*, No. A07-1295 (Minn. App. June 17, 2008). CWCCSS filed an affidavit of warrant for appellant's failure to comply with court's 2005 order. The district court issued a warrant for appellant's arrest, and a hearing was first continued, then held.

In 2008, the district court found that appellant had failed without excuse to comply with the purge conditions and granted CWC's motion to impose penal provisions unless appellant did pay. Appellant paid the purge amount. He later attempted to file, simultaneously, a motion to modify child support and a motion to remove the CSM. Because the CSM could not hear a motion to modify child support while a motion to remove him was pending, both of appellant's motions were returned unfiled.[2] Six months later, appellant properly filed the motion to modify child support.

In 2009, another CSM granted that motion and set child support at $671 per month as of January 1, 2009. Appellant's business, Martin Communications, Inc. (MCI), was owed money by CWC and by Aitkin county (AC). CWCCSS served income withholding orders for $11,954.94 on CWC and for $4,642.31 on AC for payment of appellant's arrears. Appellant moved the district court to (1) make modification retroactive to June 19, 2008; (2) apply his intercepted tax returns to his ongoing child-support obligation, not his arrears; (3) enjoin CWCCSS from any collection actions without court's consent; (4) refund money owed to MCI and withheld by CWCCSS; and (5) enable appellant to claim the children as tax exemptions. In a separate motion, he sought the imposition of sanctions on CWC and its attorney.

[2] The record indicates that the request to remove the CSM, the Affidavit in Support of Motion to Modify Child Support, and the Financial Affidavit for Child Support were filed in June 2008; there is no indication of a motion to modify child support. The affidavits of service indicate that only the request to remove the CSM was served: the words "Notice of Motion and Motion to Modify Child Support, Affidavit in Support of Motion to Modify Child Support, Financial Affidavit for Child Support" appear on the affidavits of service but have been crossed out.

His motions were denied, and appellant challenges that order.[3] He argues that the district court abused its discretion in not making the modification of child support retroactive to the date on which appellant first attempted to file the motion, that the district court erred in not requiring the return of the funds taken from MCI, that appellant is not precluded from raising the issue of whether the funds intercepted from his tax refunds should be applied to his arrears rather than to his ongoing obligation, and that the district court abused its discretion by not imposing the sanctions appellant requested.

D E C I S I O N

1. Retroactive modification

"A modification of support . . . may be made retroactive 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 . . . ." Minn. Stat. § 518A.39, subd. 2(e) (2008). In accord with the statute's use of the word "may," a district court has discretion to set the effective date of a child-support modification. *Finch v. Marusich*, 457 N.W.2d 767, 770 (Minn. App. 1990); *see also* Minn. Stat. § 645.44, subd. 15 (2008), (defining "may" as permissive). Absent any statutory basis for another date or any indication that the district court has selected another date, the effective date of a child-support modification is the date the motion to modify was served. *Bormann v. Bormann*, 644 N.W.2d 478, 482-83 (Minn. App. 2002).

[3] Appellant also moved to set aside three child-support judgments, totaling $33,180.20 exclusive of accrued interest. He does not challenge the denial of this motion on appeal.

In June 2008, appellant attempted to file both a motion to modify his child-support obligation and a motion to remove the CSM. His filings were rejected as incompatible: the CSM could take no action on the motion to modify once his own removal was sought. Appellant successfully served and filed the motion to modify in December 2008; neither the motion nor the supporting affidavit mentioned retroactive modification. The motion was granted in April 2009; it reduced appellant's monthly obligation to $671 and made the reduction retroactive to January 1, 2009 (the day after the motion had been served). Appellant did not appeal from the April 2009 order.

In September 2009, appellant first moved to make the April 2009 order retroactive to June 19, 2008. In the affidavit accompanying the motion, he said he "had correctly filed his Motion to Modify Child Support pursuant to the rules of procedure and court administration erred in returning it" and he therefore sought "a retroactive modification of the Order . . . to the previous filing date of June 19, 2008." The district court denied the motion, noting that appellant "could have properly requested retroactive modification of child support to the date of filing his motion in the expedited child support hearing with [the CSM] and this Court declines [to] modify that court's Order."[4]

On appeal, appellant notes that the CSM had no authority to overrule the court administrator's rejection of appellant's first attempt to file his motion or to grant

[4]Although the district court did not use the term, it was in fact invoking res judicata when it observed that appellant could have sought to make the April 2009 order modifying child support retroactive to June 19, 2008, when he moved for modification, but did not do so. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) ("Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in an earlier action."). Thus, appellant's effort to make the modification retroactive was, and is, barred by res judicata.

modification prior to the actual date of filing, i.e., January 1, 2009. But he argues that the district court did have the authority to overrule the court administrator and abused its discretion by not doing so. He provides no support for either argument or for the underlying implication that the date on which filing is first attempted, not the date of service, is the presumed date for modification. *See Kemp v. Kemp*, 608 N.W.2d 916 (Minn. App. 2000) (finding no abuse of discretion and affirming decision to make modification of maintenance retroactive to March 1, 1999, rather than the December 4, 1998, date of service when motion to modify was not filed until February 18, 1999, and was not heard until March 4, 1999).

The district court acted in accord with caselaw and did not abuse its discretion when it denied appellant's motion to make modification retroactive to the date when appellant first attempted to file the motion for modification.

2. Seizure of funds owed by counties to MCI

MCI, appellant's business, was owed $11,954.94 by CWC and $4,642.31 by AC. CWCCSS directed the CWC auditor's office to withhold those amounts from appellant to pay his child support. The amounts were duly withheld and paid to CWCCSS. Appellant's motion for a refund of the withheld funds was denied.

Income withholding for child-support purposes is governed in part by Minn. Stat. § 518A.53, subd. 1(b) (2008) (defining "payor of funds" as a person or entity that provides funds to an obligor) and Minn. Stat. § 518A.53, subd. 5(a) (2008) (obliging payors of funds to withhold upon receipt of an order to withhold). Statutory construction is reviewed de novo. *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007).

Appellant argues that CWC and AC were not "payors of funds" within the meaning of Minn. Stat. § 518A.53, subd. 1(b), because appellant, not MCI, is the obligor, and the funds were owed to MCI. The district court found that:

> [appellant] has produced no information . . . that he is anything but the sole owner of [MCI. He] has not produced paystubs to show . . . that he receives a paystub from [MCI] so as to verify his income. [He] has not produced recent corporate or personal tax returns . . . verifying any of the financial information regarding [MCI] or [his] personal finances. This Court has no information . . . that would persuade it that [MCI] is a separate legal entity from [appellant] as an individual.

Appellant does not refute the district court's findings. He has acknowledged that MCI's corporate tax returns for some years showed that MCI's entire corporate profits were appellant's compensation. Moreover, as counsel for CWC noted at the hearing, MCI was a corporation and could appear only through an attorney to challenge CWCCSS's withholding of funds. MCI did not appear; appellant, not MCI, challenged the withholding.

Appellant offers no support for his view that obligors may shield their incomes from withholding by acquiring corporate identities, and caselaw indicates the contrary. *See Hubbard Cnty. Health and Human Servs. v. Zacher*, 742 N.W.2d 223, 227 (Minn. App. 2007) (holding that corporations may not retain earnings "to enable the [child-support] obligor to 'shield income' or 'manipulate' the amount of money he receives in order to reduce or avoid his child-support obligation").

Appellant also argues that he did not receive proper notice of the withholding. CWC and CWCCSS asserts that this argument is raised for the first time on appeal; the

record supports this assertion, and appellant does not refute it in his reply brief. Thus, the issue is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, if appellant wanted to contest the withholding orders issued on May 18, 2009, he had until 15 days after the lump-sum payment was made. *See* Minn. Stat. § 518A.53, subd. 8 (2008). He did not contest the orders by that date. In any event, the income-withholding orders provide appellant's name and tell him whom to contact if he has questions; the orders thus support the inference that appellant received copies of the orders. His argument that he did not receive notice fails.

CWCCSS did not act illegally when it withheld funds owed by CWC and AC to appellant's business.

3. Application of intercepted tax refunds

In 2003, the district court awarded appellant the tax exemption for the parties' children provided that he remained current in his child-support obligations. In January 2006, appellant signed an agreement with CWCCSS promising that he would pay his child-support obligation on the last day of every month and acknowledging the legal right of CWCCSS to have his driver's license suspended if he failed to make a payment. He failed to make about seven payments. His 2006 tax refunds were intercepted and applied to his arrears. In 2007, child support was reset to $1,257 per month; appellant failed to make this payment about 15 times. His 2007 tax refunds were intercepted and applied to his arrears. He notified CWCCSS that he considered the tax refunds to be his monthly payment. CWCCSS continued to apply his tax refunds to his arrears in accord with Minn. Stat. § 289A.50, subd. 5(a) (2008) ("[when a child support obligor] is delinquent in

making payments, the amount of child support . . . unpaid and owing . . . must be withheld from a refund due the [obligor] under chapter 290"; *see also St. Louis Cnty. ex rel. Anderson v. Philips*, 380 N.W.2d 891, 894-95 (Minn. App. 1986) (withholding tax refund is appropriate means of obtaining payment for child-support arrears).

Appellant argues that his tax refunds should have been applied to his current obligations, not to his arrears. He raised the same argument to another district court judge when he opposed CWCCSS's October 2007 motion to revoke the stay of the penal provisions in the December 2005 order. That judge granted the motion and rejected appellant's argument in an order filed January 18, 2008:

> The first [issue] is whether tax intercept funds should be applied to current child support obligations, or whether they are applied to arrears.
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> . . . .
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> In this case, [appellant] still owed $39,761.35 in arrears. Under the above Federal and State law . . . until that whole amount is paid off, no portion of the tax intercepts can be applied to current or future monthly child support amount of $1,257.00. Once all arrears are paid in full, [appellant] would be able to use any overpayments one month to reduce his current monthly child support payment up to 20% of the next month[']s amount.
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> . . . .
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> . . . [Appellant] is hereby ordered to serve 180 days in the Crow Wing County Jail or pay the current purge amount of $5,267.00. In addition, any tax intercepts that are seized and obtained shall only be applied towards arrears and not attributed towards any current monthly child support payments until all arrearages are fully paid.

At the September 2009 hearing, the district court asked appellant if he had ever filed an appeal from the January 2008 order, inferred from appellant's response that "no appeal was taken," and stated in its order that it "decline[d] to address this matter further

as it has been fully litigated by another court." Appellant claims that the district court "abused [its] discretion by failing to address the issue."

> [But t]he doctrine of collateral estoppel, or issue preclusion, prohibits a party from litigating a previously adjudicated issue. Collateral estoppel applies when (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Opheim v. Cnty. of Norman, 784 N.W.2d 90, 96 (Minn. App. 2010) (quotation omitted) (citation omitted) *review denied* (Minn. Sept. 29, 2010). The district court did not err in declining to consider an issue previously raised by appellant in this matter and adjudicated by another district court.

Appellant implicitly argues that collateral estoppel does not apply because "the issue of the proper allocation, under federal law, of intercepted funds had not been raised in the prior hearing." The January 2008 order shows that federal law was considered, although the order does not address 42 U.S.C. § 657 (a)(2)(A) (2006), the provision on which appellant relies. But that section applies to current support; 42 U.S.C. § 657(a)(2)(B) (2006) applies to arrears. The district court correctly relied on 42 U.S.C. § 664 (a)(1) (2006) (requiring Secretary of the Treasury to withhold from federal tax refunds of an individual owing past-due support assigned to a state an amount equal to the past-due support and to pay the amount to the state agency).

The district court did not err in declining to reconsider the application of appellant's intercepted tax refunds to his child-support arrears and in concluding that he was therefore in breach of his agreement to make current payments.

4. Sanctions

Appellant sought sanctions against the CWC attorney's office of $30,000 to compensate appellant for losses as a result of the penal provisions sought by the CWC attorney's office, of $7,863.38 to compensate him for loss of business revenue while he was attending court appearances, of $7,863.38 to compensate him for loss of business revenue while he was researching the law and preparing pleadings, as well as other miscellaneous amounts. The district court denied appellant's motion for sanctions. This court will not disturb a district court's findings or decision on sanctions absent an abuse of discretion. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 787 (Minn. App. 2003).

The district court found:

> This Court has no other evidence before it but the written payment agreement entered into by [appellant] with [CWCCSS] . . . which explicitly states [CWCCSS] . . . [is] not prevented from utilizing other methods to collect [appellant's] past due child support. Furthermore, the Court has no evidence before it that [appellant] was compliant in any way, much less fully compliant, with the payment agreement between himself and [CWCCSS] in this matter. [CWCCSS] was justified in suspending [appellant's license, intercepting [appellant's] tax returns as well as intercepting invoices to [appellant's] company, [MCI].
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> . . . .
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> Based upon the entire record before it, the Court finds that the [CWC] Attorney, the [CWC] Attorney's Office and [CWCCSS] did not act to harass [appellant] in these matters.

> . . . The Court finds that the [CWC] Attorney, the [CWC] Attorney's Office and [CWCCSS] did not involve [appellant] in frivolous action or litigation in these matters.
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> . . . The Court finds that the [CWC] Attorney, the [CWC] Attorney's Office and [CWCCSS] acted properly in this matter using proper discretion given to each by the statutes of the State of Minnesota.

Appellant does not refute the district court's findings on his motion for sanctions. Instead, he argues (admittedly for the first time on appeal) that the county attorney was guilty of an abuse of process. This issue is not properly before us. *See Thiele*, 425 N.W.2d at 582.

In any event, appellant's abuse of process argument lacks merit. He relies on *Winnick v. Chisago Cnty. Bd. of Comm'rs*, 389 N.W.2d 546, 548-49 (Minn. App. 1986) (reversing denial of request for fees brought under Minn. Stat. § 549.21 (1984)) based on conclusion that appellant had been a victim of township's "flagrant abuse of process"). *Winnick* concerned a property owner whose applications for rezoning and a special use permit were approved by the county board of commissioners. 389 N.W.2d at 547. But the approval of his applications was then appealed by the township to the board of adjustment, and the zoning administrator refused to issue the necessary permits. *Id.* This court observed that "[f]or an attorney, learned in the law, to even suggest that a review board (consisting of private citizens appointed by an elected and governing county board) can overrule the final legislative decisions of that elected governing body is simply incredible." *Id.* at 549. "No other conclusion can be drawn but that [the township's] actions and defenses were brought and maintained in bad faith, vexatiously, frivolously,

for delay, and for oppressive reasons." *Id*. Appellant can show no analogous conduct on the part of CWC or CWCCSS.

The district court did not abuse its discretion in denying appellant's motion for sanctions or in refusing to make the modification of his child-support obligation retroactive to the date when he first attempted to file the motion; the district court did not err in denying the motion to refund the funds withheld from MCI or in refusing to revisit the application of the intercepted tax refunds to appellant's child-support arrears.

Affirmed.