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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0448**

Jodi M. Zimmerman, petitioner,
Respondent,

vs.

Thomas M. Zimmerman,
Appellant.

**Filed May 6, 2008
Affirmed
Ross, Judge**

Dakota County District Court
File No. F2-05-8665

Wayne A. Jagow, 350 West Burnsville Parkway, Suite 500, Burnsville, MN 55337, and

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55337 (for respondent)

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(for appellant)

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

On appeal from the district court's denial of Thomas Zimmerman's motion to find
Jodi Zimmerman in contempt of court for her failure to comply with the property-
settlement portions of their divorce decree, Thomas Zimmerman argues that the district

court abused its discretion when it denied his contempt motion and when it allegedly amended the divorce decree. Because we conclude that the district court did not abuse its discretion regarding the contempt motion and it did not substantially alter the decree, we affirm.

FACTS

This appeal arises from a dispute over the marital property of Thomas Zimmerman and Jodi Zimmerman, whose twelve-year marriage was dissolved by judgment and decree on July 10, 2006. The decree gave Jodi Zimmerman possession and all rights to the marital home and made her responsible for mortgage payments, taxes, and insurance.

The court ordered that the Zimmermans' marital debt be split equally between them and that any proceeds from refinancing the home be shared equally after paying the marital credit card debt incurred before the parties separated on June 7, 2005. Alternatively, if Jodi Zimmerman sold the home within 90 days after entry of the decree, the parties would first satisfy their mortgage obligations, then pay off the marital credit card debt, and then split any proceeds equally. The decree mandated that Jodi Zimmerman return a television, speaker system, and stereo equipment to Thomas Zimmerman and pay him \$5,660 to equalize the value of the divided personal property. The court also ordered that Jodi Zimmerman pay Thomas Zimmerman \$6,942 from her IRA to equalize the parties' retirement funds.

In October 2006, Thomas Zimmerman moved the court to find Jodi Zimmerman in contempt for four alleged failures: (1) failure to pay one-half of the equity of the homestead 90 days after the divorce decree was entered; (2) failure to pay \$6,942 to equalize the parties' retirement accounts; (3) failure to pay one-half of the parties' marital

debt through the refinance or sale of the home; and (4) failure to give him the television, stereo system, and electronics listed in the divorce decree and pay him the ordered amount of \$5,660 to equalize the value of personal property. The district court held an evidentiary hearing on the motion for contempt on October 26, 2006.

The district court denied Thomas Zimmerman's motion to find Jodi Zimmerman in contempt but ordered Jodi Zimmerman to (1) pay Thomas Zimmerman \$6,942 by January 1, 2007, to equalize the parties' retirement funds; (2) allow Thomas Zimmerman to retrieve the television, speaker system, stereo equipment; and (3) to pay Thomas Zimmerman \$5,660 by November 10, 2006, to equalize the value of the parties' personal property. The court was unable to interpret the decree's requirement for distribution of homestead equity and any timing requirement regarding the sale or refinancing of the homestead. The district court submitted the issues regarding the distribution of home equity and the deadline for sale or refinancing of the home to the district court judge who had issued the divorce decree. The district court ordered the parties to refrain from selling or refinancing the home until the court issued an order regarding the distribution of home equity and the determination of marital debt. All other issues in the case were to be scheduled for hearing before the original district court judge.

On November 17, 2006, the original district court judge issued an order amending the July 2006 decree. The order awarded each party fifty percent of the equity in the marital home. Jodi Zimmerman was ordered to refinance the home and pay Thomas Zimmerman \$37,622, which was one-half of the equity in the home, by December 31, 2006.

On November 30, 2006, Jodi Zimmerman's attorney sent a letter to Thomas Zimmerman's attorney, advising that Jodi Zimmerman was unable to pay the November 2006 mortgage payment and that she planned to sell the home and split the proceeds with Thomas Zimmerman. On December 12, 2006, Thomas Zimmerman served a second motion for contempt and award of attorney fees because Jodi Zimmerman had failed to make mortgage payments and to pay Thomas Zimmerman \$5,660 as ordered by the district court.

At an evidentiary hearing on January 9, 2007, Jodi Zimmerman testified about the equalizer payment and the mortgage payment. She informed the court that she did not pay Thomas Zimmerman the full personal property equalizer because she deducted her half of the parties' 2005 tax refund before paying Thomas Zimmerman \$4,966. She explained that the Zimmermans had filed jointly in 2005 and the tax refund check was issued to both parties. She produced an email from Thomas Zimmerman promising that he would send her a check for her half of the refund. Regarding the home, she acknowledged that she was behind in her mortgage payments, but she testified that she could not bring herself current. She explained that the payments due for the first mortgage, second mortgage, and home association fees total \$2,346 each month, but that her monthly income is only \$2,400. She has a balance on five credit cards, for which she must pay approximately \$1,200 a month. She also is responsible for a \$425 monthly car payment, a \$100 monthly car-insurance payment, and utilities. She is not able to cover all of these expenses with her monthly income and has depleted her savings accounts. She testified that the marital home was currently listed for sale, in an attempt to pay the

mortgage debt. At the time of the hearing, she testified that she could not obtain feasible refinancing.

Thomas Zimmerman also testified. He opined that to the best of his knowledge, Jodi Zimmerman had the ability to pay the mortgages. Although he made the mortgage payments in July, November, and December of 2006, Jodi Zimmerman had paid the mortgage for the first fifteen months that they were separated. He testified that he believed that between Jodi Zimmerman's monthly income and his monthly spousal maintenance payments to her, she could afford to make the mortgage payments, although she would have to avoid making credit card payments and contributions to her 401(k). He speculated that Jodi Zimmerman had accumulated approximately \$48,000 in debt since the end of their marriage. He agreed that Jodi Zimmerman's expenses exceeded her monthly income.

Scott Carr, a mortgage loan officer who worked with Jodi Zimmerman to complete a mortgage-loan application for refinancing, testified that although Jodi Zimmerman qualified for a loan, the monthly payment would have been "a little bit high for her budget." Carr testified that after refinancing, Jodi Zimmerman's total monthly home payment would have been approximately \$3,100. He testified that she also qualified for an interest-only adjustable rate mortgage that would have allowed her to make lower monthly payments.

On January 16, 2007, the district court found that Jodi Zimmerman's payment of \$4,966 to Thomas Zimmerman satisfied her obligation to equalize the value of the parties' divided personal property. The court found that she had accumulated approximately \$48,000 in credit card debt since the date of the parties' separation and

pays approximately \$1,200 a month toward that debt, and that Jodi Zimmerman lacks the financial ability to meet her monthly expenses and service her first and second mortgages.

The court found that the original judgment and decree filed on July 10, 2006, gave Jodi Zimmerman two options regarding the home: (1) sell it and split the net proceeds with Thomas Zimmerman; or (2) refinance it and “buy out” Thomas Zimmerman by paying him one-half the equity in the home. The court noted that the refinancing option that Jodi Zimmerman pursued through Carr would have required her either to make monthly mortgage payments of \$3,100, which exceeded her monthly income, or take out a risky, interest-only loan. Based on these findings, the court determined that Jodi Zimmerman did not have the financial ability to comply with the previous court order and that the court’s determination of home equity was no longer accurate due to a decline in the residential real-estate market.

The court denied Thomas Zimmerman’s motion for contempt, and it ordered Jodi Zimmerman to sell the marital home, pay off all outstanding mortgage obligations, and split the remaining proceeds equally with Thomas Zimmerman. The court ordered Jodi Zimmerman to reimburse Thomas Zimmerman for the mortgage payments he made in November and December 2006, in addition to any later mortgage payments made by him.

Thomas Zimmerman appeals from this order, contending that the district court abused its discretion when it denied his motion to find Jodi Zimmerman in contempt of court and that the district court’s January 2007 order allowing Jodi Zimmerman to sell the home improperly amended the prior order.

I

Thomas Zimmerman argues that the district court should have found Jodi Zimmerman in contempt of court because she did not pay Thomas Zimmerman \$5,660 as ordered, subtracting \$693 to recover her half of the parties' 2005 tax refund, and because she did not pay the mortgage in November or December of 2006. The district court has broad discretion in determining whether to invoke its civil contempt powers. *Kielly v. Kielly*, 674 N.W.2d 770, 780 (Minn. App. 2004). This court reviews the district court's determination for an abuse of discretion. *Id.* Civil contempt cannot be used to punish a person for past misconduct. *Hopp v. Hopp*, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968).

Thomas Zimmerman argues that complete compliance with the district court's prior orders is required to avoid a finding of contempt and that because Jodi Zimmerman subtracted from the amount ordered to equalize the value of the parties' personal property, she was not in compliance with the order that she pay \$5,660. The district court has broad discretion to find that Jodi Zimmerman complied with the court's order. *Id.* at 174, 156 N.W.2d at 216 ("Because of the limited and essential purpose of civil contempt proceedings . . . we must recognize . . . a measure of authority and discretion in the trial judge far in excess of that which exists in criminal cases."). The court specifically found that Thomas Zimmerman owed Jodi Zimmerman the amount she deducted from the ordered payment. It was therefore not an abuse of discretion for the court to conclude that Jodi Zimmerman had substantially complied with that part of its order and was not in contempt.

Thomas Zimmerman also maintains that the district court abused its discretion when it concluded that Jodi Zimmerman was not in contempt for failing to pay the mortgage. He contends that because Jodi Zimmerman admitted at the hearing that she had not complied with all requirements of the order, there was sufficient evidence to sustain a finding of contempt. It is “proper for the trial judge in civil contempt proceedings to give consideration, in determining a defendant’s ability to comply with an order for payment, to his earning capacity as well as his financial status and earnings history.” *Id.* at 177, 156 N.W.2d at 218. The district court followed that approach here. Its findings of fact reflect that Jodi Zimmerman’s monthly income is insufficient to meet her monthly expenses and the first and second mortgage payments. We review a court’s factual findings in a contempt order for clear error. *In re Marriage of Crockarell*, 631 N.W.2d 829, 837 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

The court’s findings are supported by Jodi Zimmerman’s testimony that she is in debt, has depleted her savings accounts, and cannot cover the mortgage payments and her monthly expenses on her income. She substantiated these claims with evidence. And Thomas Zimmerman agreed at the hearing that Jodi Zimmerman’s expenses exceed her income. Carr testified that Jodi Zimmerman ultimately decided not to refinance her home because the monthly mortgage payments alone would have exceeded her income by nearly \$1,000. This evidence supports the court’s findings that Jodi Zimmerman was financially unable to make the mortgage payments. These findings were therefore not made in error and support the district court’s denial of Thomas Zimmerman’s contempt motion based on the failure to make the mortgage payments.

II

Thomas Zimmerman argues that the district court improperly amended the November 17, 2006, amended findings of fact, conclusions of law, and order. He challenges the district court's authority to do so, contending that it did not have a motion to amend before it. His principal concern is that the latest order allows Jodi Zimmerman to avoid paying him the equity in the home as it was estimated at the time of the decree.

The judgment and decree directed that the proceeds of refinancing the home should be divided equally and that if the marital home was sold, the proceeds after mortgage retirement should be divided equally. The amended order also awarded each party one-half of the equity in the home, considered to total \$37,622 at the time of the judgment and decree.

Thomas Zimmerman contends that the court did not have the authority later to allow that Jodi Zimmerman sell rather than refinance the home. Although a property division in a judgment and decree is final once the time for appeal has expired, the district court maintains the power to clarify and construe a dissolution judgment so long as it does not change the parties' substantive rights. *Hanson v. Hanson*, 379 N.W.2d 230, 233 (Minn. App. 1985). Although we are concerned with the sua sponte nature of the January 16, 2007, order, we conclude that the order was interpretive and did not result in any prejudice to Thomas Zimmerman. So understood, the order put the parties in the same position they were in when the final decree was issued in July 2005 and amended in November 2006. The decree permitted Jodi Zimmerman either to sell or refinance the marital home. The 2007 order implemented this provision by ordering that Jodi Zimmerman sell the property, because refinancing the home was not viable. Although

Thomas Zimmerman challenges the determination that refinancing is not a feasible option, the district court's order was based on factual findings that firmly demonstrated that Jodi Zimmerman was financially unable to make her mortgage payments and that the monthly principal and interest payments after refinancing would have exceeded her monthly income. We are mindful that more diligent action by Jodi Zimmerman may have resulted in an earlier sale and possibly more revenue to both parties on the divided equity. But we cannot conclude that the district court was bound to interpret and apply its decision with less leniency than it allowed.

The challenged order enforces one of the two options in the amended judgment and decree for dividing the equity in the marital home. *See Graff v. Graff*, 472 N.W.2d 882, 884 (Minn. App. 1991) (affirming the district court's modification of an original decree because the amended decree merely changed the form of the award and it was an appropriate means of enforcing the original decree), *review denied* (Minn. Sept. 13, 1991). We hold that the district court did not act beyond its discretion by ordering that Jodi Zimmerman sell the home so the equity may be evenly divided between the parties, rather than to require her to pay the amount of equity as previously estimated but never realized through refinancing.

Affirmed.