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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-975

Christine Marie Strop, petitioner,
Respondent,

vs.

Timothy James Clarkson,
Appellant.

Filed February 21, 2012
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-000213129

Ben M. Henschel, Henschel Moberg, P.A., Minneapolis, Minnesota (for respondent)

Karim El-Ghazzawy, Donald L. Enockson, El-Ghazzawy Law Offices, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of his posttrial motion for amended findings or a new trial. Because we conclude that the district court acted within its discretion, we affirm.

FACTS

Appellant Timothy Clarkson and respondent Christina Strop were married on August 14, 1982. They have one child together, who was born on April 14, 1991. Appellant is employed as an independent stock broker with R.J. Steichen. Respondent, who is legally blind and unemployed, receives Social Security disability benefits.

Respondent petitioned for divorce on May 26, 1995. The district court placed the dissolution proceedings on inactive status for one year to allow the parties to mediate the issues of child support, spousal maintenance, and attorney fees. Three years later, in September 1998, the parties signed a stipulated marital termination agreement (MTA). The district court entered judgment based on the MTA on January 19, 1999.

Pertinent as background for this appeal, appellant was ordered under the terms of the judgment to pay, inter alia, monthly spousal maintenance of $4,900. Regarding the duration of the spousal-maintenance award, paragraph 15 of the judgment incorporated the parties' agreed-upon language:

> a. AMOUNT: Beginning January 1, 1999, [appellant] is hereby ordered to pay to [respondent] $4,900/month in spousal maintenance.
>
> b. DURATION: Maintenance shall terminate upon the death of either party or the remarriage of [respondent], whichever happens first.
>
> 1) Income via maintenance: Maintenance shall continue, subject to cost-of-living adjustments (COLA) until [appellant] has increased [respondent's] investment account to $500,000 *and* [respondent] is able to regularly meet her monthly needs (net $4,900 or adjusted amount) without invading principal of $500,000.00. If *both* conditions exist then, [appellant] is not required to pay maintenance. When

> [respondent] is of a sufficient age to access money from her retirement account, without penalty, then both her retirement account and her investment account shall be included to determine if maintenance should terminate.

Neither party appealed from the judgment.

In August 2009, respondent moved the district court for an order to show cause and to hold appellant in constructive civil contempt based on his failure to pay child support, unreimbursed and uninsured medical and dental and college expenses for the child, and spousal maintenance. Respondent also sought to remove appellant as the stock broker on her investment accounts and requested attorney fees. Appellant filed a responsive motion, asking the district court to (1) deny respondent's motion in its entirety, (2) find that respondent is "of a sufficient age to access money from her retirement account, without penalty" pursuant to the parties' judgment, (3) determine the aggregate value of all of respondent's investment and retirement accounts, (4) find that respondent is not in need of on-going monthly spousal maintenance, (5) determine respondent's reasonable monthly budget, (6) appoint a special master to reconcile accounts and determine whether appellant owes any child support or spousal maintenance arrears, and (7) order respondent to pay appellant's reasonable attorney fees.

The parties were unsuccessful in resolving the disputes in mediation. As a result, they agreed that the district court would hear testimony limited to the meaning of the language in paragraph 15.b.1, the income-via-maintenance provision, of the judgment, focusing specifically on the sentence: "When [respondent] is of sufficient age to access money from her retirement account, without penalty, then both her retirement account

and her investment account shall be included to determine if maintenance should terminate."

Following a hearing, the district court found that the parties' agreed-upon language was unambiguous. The district court stated that "[t]he parties' intent was to allow [respondent's] retirement account to grow without distribution for a period of time, specifically until [respondent] reached the statutory age at which time she could withdraw from her IRA without penalty, without regard to her disability." The district court denied appellant's motions that were based on his arguments as to how paragraph 15 should be interpreted and scheduled trial on the remaining issues.

Following a two-day trial, in an extensive and thorough order discussing the issues and the evidence, the district court concluded, inter alia:

> 1. [Appellant] has failed to comply with the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree of this Court, entered on January 15, 1999 . . . .
>
> 2. Said failure on the part of [appellant] constitutes constructive civil contempt of court . . . .
>
> 3. [Appellant] owes monthly spousal maintenance arrearages from 2002 through August 2010 in the amount of $272,322.
>
> 4. [Appellant] owes upward adjustments for spousal maintenance, net of downward adjustments, in the amount of $47,407.
>
> . . . .
>
> 7. [Respondent] did not commit fraud on the court prior to or at the time of the entry of the Judgment and Decree on January 15, 1999. . . .

> 8. [Respondent] did not commit fraud on the court after the entry of the Judgment and Decree on January 15, 1999 by not providing updated reports of her savings or acquisition of assets to [appellant]. . . .
>
> . . . .
>
> 13. Conclusion of Law Paragraph 28 of the Judgment and Decree is a legally enforceable provision requiring an award of attorney's fees to [respondent]. In addition, [appellant's] conduct of not following the Judgment and Decree and his conduct in these proceedings have unreasonably contributed to the length and costs of these proceedings. An award of attorney's fees is appropriate in the amount of $125,000.

The district court subsequently denied appellant's posttrial motion for amended findings or a new trial. This appeal follows.

D E C I S I O N

I.

A. Motion for amended findings

A party may move the district court to amend its findings or make additional findings. Minn. R. Civ. P. 52.02. A motion to amend must be based only on the evidence that is part of the record. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). To bring a motion, the party "must both identify the alleged defect in the challenged findings and explain why the challenged findings are defective." *State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 178 (Minn. App. 2003), *review denied* (Minn. Mar. 16,

2004). This court reviews the denial of a motion to amend for abuse of discretion. *Zander*, 720 N.W.2d at 364.

In his posttrial motion, appellant listed 80 findings that he wanted the district court to strike or amend. But appellant did nothing more. He did not provide any explanation of the alleged defects in the challenged findings or any proposed findings. The district court denied appellant's motion to amend, stating, in part:

> [Appellant]'s submissions do not identify the alleged defect in each [of] the findings he attacks *and* explain *why each* challenged finding is defective. He does not (1) address the record evidence related to each specific finding challenged, (2) explain why the record does not support that specific finding, and (3) explain why the proposed findings are appropriate for each of the findings attacked . . . .
>
> [Appellant]'s Motion makes eighty requests to simply strike findings, or amend them in some unspecified manner in keeping with [his] understanding of this case. His Memorandum lays out in broad strokes the issues and disagreements that [he] has with the Court's November 30 Order generally. . . . [H]is Motion and Memorandum represent a reiteration of his original view of the case.

The alleged defects that appellant identified reflect his disagreement with the district court, but he ignores the evidence that supports the district court's findings and the credibility determinations made by the district court. Even if there is conflicting evidence on certain points, the district court is not required to amend its order. *Fort Snelling*, 673 N.W.2d at 178. Because appellant failed to properly identify and support his alleged defects, the district court acted properly by denying the motion to amend the findings and conclusions of law.

B. Motion for a new trial

Appellant moved for a new trial under Minn. R. Civ. P. 59.01(a), (f), and (g). A party may seek a new trial when there are errors of law at trial, when a party is deprived of a fair trial due to irregularities in the proceedings, or if the decision is not justified by the evidence or is contrary to law. Minn. R. Civ. P. 59.01(a), (f), (g). The district court has the discretion to grant a new trial, and this court will not disturb that decision absent a clear abuse of discretion. *Willis v. Ind. Harbor Steamship Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010) (citing *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990)), *review denied* (Minn. Dec. 22, 2010).

Appellant argued that a new trial was necessary because the district court, by adopting respondent's proposed order almost verbatim, failed to conduct its own fact finding and legal analysis. While the "verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se[,] . . . we have strongly cautioned that this practice raises the question of whether the [district] court independently evaluated each party's testimony and evidence." *Cnty. of Dakota v. Blackwell*, ___N.W.2d___, ___, 2011 WL 3654529, at *4 (Minn. App. Aug. 22, 2011) (quotations omitted); *see also Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 n.1 (Minn. 2006) ("We discourage district courts from adopting proposed findings of fact and conclusions of law verbatim because it does not allow the parties or a reviewing court to determine the extent to which the court's decision was independently made.").

But having thoroughly examined this record, we conclude that the district court did not adopt respondent's proposed findings and conclusions of law verbatim.

Respondent presented a comparison of her proposed order with that of the district court's order to illustrate the differences. The district court made 478 insertions, 542 deletions, and moved text to and from different places 50 times for a total of 1,070 changes to respondent's proposed findings of fact and conclusions of law. The district court also made multiple credibility determinations and discussed the weight of the evidence throughout its extensive, detailed order. The district court's significant effort, careful consideration of the many issues raised by appellant at trial, and attention to detail is very evident from this record. The district court acted within its discretion by denying appellant's motion for a new trial.

II.

Appellant contends that the district court erred by determining that respondent did not commit fraud on the court based on his allegation that she did not disclose a Norwest (now Wells Fargo) account that was in her name at the time of the MTA and the judgment. Appellant argues that he should not have to pay the spousal-maintenance arrears or be held in contempt because of respondent's alleged fraud. In addition, he asserts that the dissolution judgment should be reopened and that he should be awarded an equitable amount of respondent's Norwest account. Alternatively, appellant contends that the account should be included as part of respondent's resources available to meet her needs.

In marital dissolution cases, the district court favors the parties' stipulations to the facts, and this court will not disturb the district court's decision not to vacate a stipulation unless there is an abuse of discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164

(Minn. 1989). This court applies an abuse-of-discretion standard to the district court's evaluation and division of property in marital dissolution cases. *Id.* The district court can set aside a stipulation when there is fraud on the court. Minn. Stat. § 518.145, subd. 2 (2010). To constitute "fraud on the court," the inquiry is on "whether the offending party engaged in an unconscionable scheme or plan to influence the court improperly." *Maranda*, 449 N.W.2d at 165. The parties in a marital dissolution case "have a duty to make a full and accurate disclosure of all assets and liabilities to facilitate the [district] court's property distribution." *Id.* Therefore, "fraud 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." *Id.*

The district court found that respondent disclosed the initial existence of the Norwest account in the summons and dissolution petition on May 26, 1995. Respondent then listed the account on her informational statement filed on August 17, 1995. The district court further noted that appellant testified that he knew that respondent banked at Norwest, that the account was in both of their names at the time of the dissolution, and that he voluntarily removed his name from the joint account sometime in 1996. All of the funds used to grow the account came from sources known to appellant—$40,000 from distributions that respondent received from the dissolution proceedings and $35,000 from respondent's Social Security benefits over a two-year period (benefits in which appellant had abandoned all interest).

Nevertheless, appellant claims that there was fraud because he did not realize how much the account grew during those years and because there is more than $20,000 that

cannot be accounted for based on the distributions from the dissolution proceedings and respondent's Social Security benefits. Any discrepancy in this circumstance does not amount to fraud on the court for two reasons. First, the alleged fraud on the court occurred no later than December 31, 1998. It took appellant 11 years to bring his motion to vacate. The supreme court has opined that it should not take more than a year or two to discover any fraud and that six years is an extreme that reaches "the outer limits of reasonableness." *Id.* The delay in time reduces the ability to reconstruct the value of a marital estate at the time of the dissolution, and there is a strong policy for dissolution decrees to be final. *See id.* Second, there could have been additional distributions that respondent failed to recall. The district court reasoned that respondent's failure to include the Norwest account on the MTA was a simple oversight; appellant also had assets that were not specifically listed, such as his bank account, a vehicle he purchased with a $20,000 distribution from the parties' joint account, and his book of business. The district court acted within its discretion by determining that respondent did not commit fraud on the court.

III.

As a related argument, appellant contends that because the proceeds for the Norwest account were never taken into consideration in determining respondent's total financial situation, they should now be included to reduce his spousal-maintenance obligation. The terms of a stipulated dissolution judgment are construed using contract-law principles. *In re Estate of Rock*, 612 N.W.2d 891, 894 (Minn. App. 2000). The construction and effect of an unambiguous contract are questions of law, which this court

reviews de novo. *Dorsey & Whitney, LLP v. Grossman*, 749 N.W.2d 409, 417-18 (Minn. App. 2008). "[T]he primary goal of contract interpretation is to determine and enforce the intent of the [contracting] parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a written instrument, we use the plain language to determine the intent of the parties. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004).

Appellant contends that the Norwest account should be combined with respondent's investment account to reach the $500,000 threshold that is one of the factors referred to in paragraph 15.b.1 ("income via maintenance") to evaluate the respondent's ongoing need for spousal maintenance. The district court disagreed, reasoning that the judgment is unambiguous in that the only account included to reach the $500,000 threshold is respondent's investment account, which appellant controlled. The district court also noted that there is no language either limiting the amount of money that respondent could save or requiring her to turn over any savings to appellant's control. Respondent was only limited to the amounts that she could withdraw from her accounts under appellant's control; she was not required to add to the accounts under his control.

The district court's interpretation of the conditions regarding the income-via-maintenance paragraph is correct as a matter of law. The language of the judgment is clear. Appellant must pay spousal maintenance "until [he] has increased [respondents]'s investment account to $500,000." No other funds are included in this calculation. This conclusion is further strengthened by the subsequent language which specifically identifies the retirement account as being included once respondent reaches "sufficient

age." If any other funds were to be included in reaching the $500,000 threshold, the parties would have included them, as evidenced by their ability to do so with the retirement account. The district court properly interpreted this argument to be a request for a retroactive modification of his spousal-maintenance obligation that is prohibited by Minn. Stat. § 518A.39, subd. 2(c). Because the district court followed the plain language of the judgment, there was no error in excluding the Norwest account from the calculation of the $500,000 threshold.

IV.

Appellant also contends that the terms and conditions under which he has to pay spousal maintenance as provided by the judgment are unambiguous. He argues that if the district court properly applied the terms, the conditions would be satisfied, relieving him of his obligation. Whether a dissolution judgment is ambiguous presents a question of law, which we review de novo. *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005). Parol evidence may be admitted to clarify the intent of the parties expressed in an ambiguous dissolution provision. *Webb v. Webb*, 360 N.W.2d 647, 649 (Minn. App. 1985). The district court's construction of ambiguous language is a finding of fact, which we review for clear error. *Tarlan*, 702 N.W.2d at 919.

The specific term at issue involves the meaning of "sufficient age" from the income-via-maintenance provision. It provides, "When [respondent] is of a sufficient age to access money from her retirement account, without penalty, then both her retirement account and her investment account shall be included to determine if maintenance should terminate." Because of respondent's disability, she can withdraw money from her

retirement account without penalty under IRS code provisions. As a result, appellant argues that respondent has reached "sufficient age" to withdraw the funds without penalty, so the retirement account should be aggregated with the investment account to calculate whether the $500,000 threshold has been met. Respondent argues that this interpretation would strip "sufficient age" of any meaning. She contends that the retirement account cannot be aggregated with the investment account until she reaches the age at which she could withdraw money without penalty if she were not disabled. Because the term "sufficient age" is ambiguous based on the language in the judgment, we look to extrinsic evidence to give effect to the parties' intent, reviewing the district court's findings of fact for clear error.

The district court reviewed the MTA and the judgment to determine the parties' intent as to the meaning of "sufficient age." It concluded, "The parties' intent was to allow [respondent]'s retirement account to grow without distribution for a period of time, specifically until [respondent] reached the statutory age at which time she could withdraw from her IRA without penalty, without regard to her disability."

In making its conclusion, the district court made several factual findings. First, it noted that appellant originally proposed inserting a reference to January 8, 2016, in the MTA as the "triggering date" for the aggregation of accounts. But respondent rejected the specific date because laws could change, and the parties adopted the language of "sufficient age to access money from her retirement account, without penalty" to better articulate their intent.

Second, the district court reasoned that "under the current IRS Code and the IRS Code in effect at the time of the execution of the parties' Marital Termination Agreement and Judgment and Decree, the phrase . . . 'sufficient age to access money . . . without penalty' means 59½ years of age." Third, the district court found that the parties engaged in lengthy discussions about the date the retirement account could be combined with the investment account. Respondent wanted to use the date when she turned 70½ years old—the date that a person must begin drawing money out of an IRA. Appellant wanted the date when respondent turned 59½. They ultimately agreed on the language of "sufficient age to access the money . . . without penalty." Finally, appellant testified that he assumed that respondent could not access her IRA until she was 59½, and he intended the phrase "sufficient age" to have meaning. Appellant also testified that he discovered that respondent could withdraw from her retirement account in 2006, but he made payments through 2007.

The district court reasoned that if appellant had intended "sufficient age" to mean the date that respondent could withdraw funds without penalty due to her disability, it was doubtful that appellant would have continued to make payments as late as 2007. Because the record supports the district court's finding of fact as it relates to determining the meaning of "sufficient age," we conclude that the district court did not clearly err in holding that the retirement account could not be aggregated with the investment account until respondent is 59½ years old.

V.

Appellant argues that the district court abused its discretion in structuring his spousal-maintenance arrearage payments as an IRA-to-IRA property transfer to purge his constructive civil contempt. Civil-contempt orders are remedial and "are designed to induce future performance of a valid court order, not to punish past failure to perform." *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989). When issuing a contempt order, the district court must determine that the obligor has the ability to pay the obligations as they come due and set purge conditions that the contemnor has the ability to meet. *Hopp v. Hopp*, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (1968); *see also* Minn. Stat. § 588.12 (2010) (providing that imprisonment for contempt is dependent upon the act required being "in the power of the person to perform" at the time the imprisonment is ordered). The district court has broad discretion to hold an individual in contempt, which this court reviews for an abuse of discretion. *Crockarell v. Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Appellant paid spousal maintenance in full from 1999-2001, but made only partial payments from 2002-10. He did not make any spousal maintenance payments in 2008 or 2010. From 2002-09, appellant's annual income dipped just below $200,000 once and exceeded $300,000 once, triggering downward and upward adjustments. The district court ordered appellant to show cause for failing to make the payments and held him in constructive civil contempt on August 13, 2009. Appellant still did not make his spousal-maintenance payments. In its November 30, 2010 order, the district court found that appellant owed $272,322 in base monthly spousal-maintenance arrears and $47,407 in a

net upward adjustment, for a total of $319,729. To pay his arrearages, the district court provided:

> This payment may be made as an IRA to IRA transfer subject to the consent of both parties or through the entry of a Qualified Domestic Relations Order (QDRO) transferring said sum to [respondent] from [appellant]'s Van Clemens 401(k)/Profit Sharing Plan. In the event [appellant] will not agree to a transfer from his IRA, then [respondent] may submit a QDRO to this Court for entry and processing.

The district court established that appellant has the ability to pay the arrears based on his income, and the method of payment to purge the contempt was designed to give appellant options from which to choose. The district court provided the option of an IRA-to-IRA transfer through permissive language, by using such terms as "may," "subject to the consent of both parties," and "in the event [appellant] will not agree." *See* Minn. Stat. § 645.44, subd. 15 (2010) ("'May' is permissive."). Appellant had the option to refuse the IRA-to-IRA transfer. Because the district court established that appellant has the means to pay and the IRA-to-IRA transfer is an option to purge his civil contempt, the district court did not abuse its discretion.

VI.

Appellant challenges the district court's award of conduct- and need-based attorney fees to respondent. This court reviews an award of attorney fees for an abuse of discretion. *Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). A district court may award conduct-based attorney fees "in its discretion . . . against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2010). A district court may award

conduct-based fees regardless of the recipient's need for fees and the payor's ability to pay, but the award must be based on specific behavior that occurred during litigation. *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). But a district court must award need-based attorney fees if it finds that an award is necessary for a party to assert his or her rights in the action, the payor has the financial means to pay the attorney fees, and the payee lacks the means to pay the attorney fees. Minn. Stat. § 518.14, subd. 1. A district court has "considerable discretion" when awarding need-based attorney fees under section 518.14, particularly when the record demonstrates disparate financial circumstances of the parties. *Beck v. Kaplan*, 566 N.W.2d 723, 727 (Minn. 1997).

Respondent asked the district court to award her $205,290.08 in attorney fees and costs. The district court awarded respondent a total of $125,000 in attorney fees—$110,449.08 in conduct-based attorney fees and $14,550.92 in need-based attorney fees. The district court awarded conduct-based attorney fees under paragraph 28 of the judgment, which provides that "if either party fails to comply with the provisions of this judgment and decree, the non-complying party shall pay the attorney fees and court costs incurred by the other party in obtaining compliance." The district court found that appellant violated the terms of the judgment by his failure to pay spousal maintenance.

The district court also found that conduct-based attorney fees are appropriate because appellant ran up the costs and time involved by "embarking on extensive discovery and forcing [respondent] to respond to allegations of fraud on the court as far back as 1998 and 1999; none of which were found by this Court to be true." The district court quantified the extra costs based on the work done by respondent in response to the

allegations of fraud on the court. It reasoned that respondent incurred $205,290 in attorney fees from June 1, 2009, through August 5, 2010. Respondent incurred $94,841 of the total amount in connection with her initial attempts to obtain compliance with the judgment between June 4, 2009, and March 29, 2010. She incurred $110,449 from April 2, 2010, through August 5, 2010, when forced to respond to appellant's motion alleging fraud on the court. Because the record supports the district court's findings that appellant unreasonably contributed to the length and expense of the proceedings, the award of conduct-based attorney fees in the amount of $110,449.08 is not an abuse of the district court's discretion.

The award of $14,550.92 in need-based attorney fees is also within the district court's discretion. Appellant has the ability to pay. His income from 1999 to 2009 ranged from $199,900 to $411,321, with an annual income greater than $290,000 from 2007 to 2009. In the MTA, appellant received $536,755 in IRA retirement accounts and $285,245 in investment accounts. While respondent has some retirement funds that she has accumulated through savings and investment, and receives Social Security disability income, the district court found that she lacks the means to pay the attorney fees. The district court reasoned that respondent "has no source of income other than her Social Security Disability payments. She is unemployed and has no prospects of employment. [Respondent] is legally disabled and is unable to earn income." When appellant made only partial spousal-maintenance payments starting in 2002 and no payments in 2008 and 2010, respondent was faced with financial uncertainty. The hardship on respondent

became more severe with simultaneous increased expenses.[1] The record demonstrates disparate financial circumstances between appellant and respondent. Based on respondent's financial needs and appellant's ability to pay, the district court did not abuse its discretion in awarding respondent $14,550.92 in need-based attorney fees. *See Beck*, 566 N.W.2d at 727.

Affirmed.

[1] The district court found that her home-association dues have increased, she has foregone necessary home improvements, her medical insurance rates have become more expensive, and her medical condition worsened.