

DEC 20 2006

STATE OF MINNESOTA  
IN COURT OF APPEALS  
No. A06-1453

FILED

Jamie Michael Thompson, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 Leah Marie Thompson, )  
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 Respondent. )  
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RESPONDENT'S BRIEF

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).

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STATEMENT OF LEGAL ISSUES

- I. WHETHER THIS APPEAL SHOULD BE DISMISSED BASED ON APPELLANT'S FAILURE TO FILE A BRIEF ON A TIMELY BASIS?
  
- II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER IT IS NO LONGER EQUITABLE THAT THE JUDGMENT AND DECREE SHOULD HAVE PROSPECTIVE APPLICATION?
  
- III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT A \$66,731.56 JUDGMENT?
  
- IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VACATE THE PROPERTY DIVISION AND PERMANENT SPOUSAL MAINTENANCE PROVISIONS OF THE DEFAULT JUDGMENT AND DECREE?
  
- V. WHETHER TRIAL COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO DELIVER SNOWMOBILE AWARDED TO RESPONDENT IN THE DEFAULT JUDGMENT AND DECREE?

## STATEMENT OF THE CASE

On April 7, 2006, the Honorable Galen Vaa, one of the judges of the Clay County District Court heard arguments of counsel in regards to Respondent's motion for a judgment against Appellant in the amount of \$66,731.56 based on Appellant's failure to answer discovery and based on property awarded to Respondent in the parties' default Judgment and Decree of dissolution entered January 3, 2005. The trial court took the matter under advisement. Appellant made a motion to vacate and re-open the parties' default Judgment and Decree of dissolution and made a request for an evidentiary hearing.

On April 27, 2006, the Honorable Galen Vaa, heard arguments regarding Appellant's motion. On May 5, 2006 by Order and Memorandum, the trial court granted Appellant an evidentiary hearing, continued the decision on Respondent's motion for a judgment pending final resolution of Appellant's motion, and ordered Appellant was not entitled to a hearing on the grounds that it is no longer equitable that the Judgment and Decree have prospective application.

On June 16, 2006, the parties tried the evidentiary hearing to the Honorable Galen Vaa on Appellant's motion to vacate and re-open the parties' Judgment and Decree on the issue of whether Respondent committed fraud on the court.

On July 19, 2006 by Findings of Fact, Conclusions of Law, Order and Memorandum, the trial court denied Appellant's motion to vacate and re-open the parties

Judgment and Decree, granted Respondent's motion for a judgment in the amount of \$66,731.56, and ordered Appellant to deliver a snowmobile to Respondent. Appellant appeals the Orders of April 27, 2006 and July 19, 2006.

## STATEMENT OF THE FACTS

The parties were married on March 1, 2003 in the City of Barnesville, County of Clay, State of Minnesota. The marriage of the parties was dissolved by the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (hereinafter Judgment and Decree) entered January 3, 2005 by the Honorable Galen Vaa, one of the judges at the Clay County District Court. See Appendix A-1. Appellant failed to answer the Summons and Petition for Dissolution of Marriage having been served upon him on September 8, 2004, and the Judgment and Decree was entered following his default. Appellant had failed to respond to Interrogatories and Request for Production of Documents having been served upon him on September 8, 2004. See Appendix A-83.

On February 1, 2005, Respondent made a motion for a judgment against Appellant for his failure abide by the property division provisions of the parties' Judgment and Decree, specifically for a judgment against Appellant in the amount of \$66,731.56 and for delivery of a snowmobile awarded to Respondent. Appellant made a motion to vacate and re-open the parties' Judgment and Decree and made a request for an evidentiary hearing.

On May 5, 2006 by Order and Memorandum, the trial court granted Appellant an evidentiary hearing, continued the decision on Respondent's motion for a judgment pending final resolution of Appellant's motion, and ordered Appellant not entitled to a hearing on the grounds that it is no longer equitable that the Judgment and Decree have

prospective application. See Appendix A-19. On July 19, 2006 by Findings of Fact, Conclusions of Law, Order and Memorandum, the trial court denied Appellant's motion to vacate and re-open the parties Judgment and Decree, granted Respondent's motion for a judgment in the amount of \$66,731.56, and ordered Appellant to deliver a snowmobile to Respondent. See Appendix A-23.

### ORDER OF MAY 5, 2006

In the May 5, 2006 by Order and Memorandum, the trial court discussed the following issue in its Memorandum:

The Entitlement Of Appellant To Evidentiary Hearing On Issue Of Whether It Is No Longer Equitable That The Judgment And Decree Should Have Prospective Application.

Specifically, in its Memorandum the trial court stated as follows:

“In addition to fraud, Respondent (Appellant here) argues he is entitled to an evidentiary hearing based on the alternative grounds that it is no longer equitable that the judgment and decree should have prospective application. However, Respondent has not shown or alleged a mutual mistake by the parties. *See Harding v. Harding*, 620 N.W.2d 920 (Minn. App. 2001)(recognizing that Minnesota courts allow re-opening of judgment by reason of mutual mistake). Respondent (Appellant here) alleges that it was only after the judgment was filed that Petitioner (Respondent here) became aware of the true nature of certain farm bank accounts and crop disaster payments. Assuming this is true, *it does not amount to a mutual mistake*, and so Respondent is not entitled to a hearing on the grounds that it is no longer equitable that the judgment and decree should have prospective application.”

(Order and Memorandum, May 5, 2006, Memorandum P.4; Appendix A-20)(emphasis added). At the hearing in this matter, Appellant argued that, “I’m arguing as an alternative that the Court could also grant relief in this case if it’s no longer equitable that

the Judgment Decree or Order should have prospective application.” (April 27, 2006 Trans. P.3.L.20-25; P.4.L.1-2). Appellant further argued that, “the way I read the case law, that that applies if there’s been change in circumstances that alters the information at the time the divorce decree was granted.” (April 27, 2006 Trans. P.4.L.20-25; P.4.L.3-8).

In his Brief in Support of His Motion to Vacate and Re-open the Divorce Decree filed before the trial court’s determination on this issue, Appellant states that “Petitioner (Respondent here) did not become aware until the post-judgment discovery she conducted, that the farm bank accounts \* \* \* are not actually property to be divided \* \* \*,” acknowledging the absence of mutual mistake before the Judgment and Decree was entered. (Appellant’s trial court brief, April 24, 2006; P.11-12); See Appendix A-131.

In a sworn Affidavit to the trial court, Respondent had testified that:

“because the Respondent (Appellant here) failed to answer the Summons and Petition and discovery, I was forced to do more discovery to find out what I was entitled to in accordance with the Judgment and Decree. I subpoenaed the Respondent’s bank records. I had the deposition of the Respondent’s (Appellant here) uncle, Steve Thompson taken. From this discovery I obtained documents and information I used as a basis for the motion pending before this court.”

and

“Contrary to the statements made by the Respondent (Appellant here), I was unaware of the farm operations and financial status. I had to do further discovery after the Judgment and Decree was entered in order to find out to what I was entitled.”

(Responsive Affidavit, of Leah Thompson, April 4, 2006) See Appendix A-139.

## ORDER OF JULY 19, 2006

On July 19, 2006 by Findings of Fact, Conclusions of Law, Order and Memorandum following the evidentiary hearing, the trial court made specific findings regarding the following issues:

### Entitlement Of Respondent To A Judgment Against Appellant.

Appellant acknowledged being served with the Summons and Petition on September 8, 2004 and discovery requests on the same date. (June 16, 2006 Trans. P.5.L.18-25; P.40). Appellant did not answer the Summons and Petition and failed to respond to discovery requests. (June 16, 2006 Trans. P.41.L.1-8).

Because of Appellant's default, Respondent had to decide how to divide the parties' real estate, and chose to let Appellant keep all his farmland and the parties home in Barnesville, Minnesota. (June 16, 2006, Trans. P.88.L.6-22). Because Respondent did not have knowledge regarding the bank and farm accounts, the Judgment and Decree simply awarded her half of those accounts. (June 16, 2006, Trans. P.89.L.14-25); See Appendix A-6.

Appellant acknowledged existence of bank and farm accounts of which Respondent did not have knowledge or access. (June 16, 2006 Trans. P.43). Appellant acknowledged there was no way for Respondent to know what the amounts of monies were included in Appellant's bank accounts and where they came from on September 8, 2004. (June 16, 2006, Trans. P.45.L.3-24). When initiating the dissolution action,

Respondent discussed with her attorney the need to do discovery because she did not know everything in regards to the parties' accounts. (June 16, 2006, Trans. P.75.L.15-25; P.76.L.2-17).

Respondent did do post Judgment and Decree discovery, discovering the existence and amount of certain bank and farm accounts. See Appendix A-38-60. Respondent included half of Appellant's interest in those accounts in her motion for a judgment against Appellant. See Appendix A-38-60.

Whether Respondent Committed Fraud Upon The Court Entitling Appellant to Vacate The Judgment And Decree.

At the evidentiary hearing, Appellant argued the Judgment and Decree was improperly entered because Respondent committed fraud upon the court by allegedly leading Appellant to believe that she was not going through with the divorce and by misrepresenting her need for spousal maintenance. See (June 16, 2006 Trans.).

*Alleged Fraud on the Court in Regards to Dissolution*

Appellant acknowledged being served with the Summons and Petition on September 8, 2004 and discovery requests on the same date. (June 16, 2006 Trans. P.5.L.18-25; P.40). After serving Appellant with Summons and Petition, Respondent gave Appellant an ultimatum in regards to reconciliation. (June 16, 2006, Trans. P.81.L.11-25). Appellant did not follow through, behaved inappropriately, and Respondent clearly communicated to him her intent to follow through with the dissolution. (June 16, 2006, Trans. P.83.L.1-19; P.84.L.9-25; P.85; P.86; P. 87;

P.88.L.1).

Appellant acknowledged he knew the Judgment and Decree had been entered on January 3, 2004. (June 16, 2006 Trans. P.33.L.4-13). Appellant stated he did nothing to respond to Respondent's motion to amend the Judgment and Decree which was served upon him. (June 16, 2006 Trans. P.32.L.2-24). Appellant acknowledged he was surprised that he received the Judgment and Decree in February of 2005, that he understood it, but that he did nothing. (June 16, 2006, Trans. P.50.L.9-25). Appellant's reason for doing nothing after receiving the Amended Judgment and Decree was because he was incarcerated in jail, he was depressed, and he really did not care. (June 16, 2006, Trans. P.56.L.8-21).

After getting served with the Judgment and Decree, Appellant never contacted Respondent stating he was not happy with the property division. (June 16, 2006, Trans. P.93.L.20-25; P.94.L.1). Appellant stated to Respondent, "you are not getting any of my money, that he was not going to say a word, he was going to be complicated, and that you (Respondent) can pay your lawyer's fees." (June 16, 2006, Trans. P.94.L.23-25; P.95.L.1-6).

Respondent was not trying to hide anything from the trial court and did request a hearing to prove up the Judgment and Decree. (June 16, 2006, Trans. P.92.L.19-24).

*Alleged Fraud on the Court in regards to Spousal Maintenance*

In regards to spousal maintenance, the default Judgment and Decree awarded

Respondent spousal maintenance in the form of Appellant providing health insurance for benefit of Respondent. See Appendix A-6. The parties were married for two years. (June 16, 2006 Trans. P.10.L.3-11). The parties were together for a total of eight (8) to 10 years including the years of marriage. (June 16, 2006, Trans. P.53.L.10-25).

Appellant acknowledged he knew Respondent's back surgery was for a tumor on her back. (June 16, 2006, Trans. P.51.L.1-15; P.78.L.1-25; P.79.L.1-14). Respondent was out of work for approximately six (6) weeks. (June 16, 2006, Trans. P.79.L.16-20). The surgery cost about \$50,000.00. (June 16, 2006, Trans. P.53.L.1-10; P.80.L.14-24).

The insurance that paid for Respondent's surgery was provided by Appellant. (June 16, 2006, Trans. P.52.L.13-25; P.80.L.4-24). Respondent was not in good physical health during the marriage. (June 16, 2006, Trans. P.62.L.4-6).

#### **Snowmobile Awarded to Respondent In Parties Judgment And Decree.**

Respondent was awarded the Polaris snowmobile, which was bought together and paid for by the parties together prior to marriage. (June 16, 2006, Trans. P.64.L.5-15). The parties Judgment and Decree awarded this snowmobile to Respondent. See (Judgment and Decree, January 3, 2004). The trial court simply ordered the following:

“The Respondent (Appellant here) is ORDERED to deliver the 2004 Polaris Snowmobile to the Petitioner (Respondent here) within 10 days of the date of this Order. If the Respondent (Appellant here) fails to do this, law enforcement is authorized to take possession of the snowmobile and deliver it to the Petitioner (Respondent here).”

See (Findings of Fact, Conclusions of Law, Order & Memorandum, July 19, 2006).

**Timeliness Of Appellant's Brief And Motion For Extension Of Time To Serve And File Brief.**

Appellant, Jamie Michael Thompson, through his attorney, James Lester, initiated this Appeal proceeding by serving and filing his Notice of Appeal to Court of Appeals and Statement of the Case of Appellant on August 2, 2006. See Appendix A-87. That attorney for the Appellant served the Certificate as to Transcripts, dated August 14, 2006, requesting a transcript of the proceedings held in the above-entitled action on February 27, 2006, April 7, 2006, and June 16, 2006 in accordance with Rule 110.02 of the Rules of Civil Appellate Procedure. See Appendix A-100-103.

Said Certificate as to Transcripts was completed and signed by the court reporter in this action, Jan Desautel on August 28, 2006. See Appendix A-102. The estimated date of completion for the transcripts was October 27, 2006. See Appendix A-102.

On October 16, 2006, the court reporter, Jan Desautel, mailed the applicable transcripts to the attorneys in this action as shown by the Certificate as to Transcript Delivery, which was served and filed that same day. See Appendix A-104. Appellant has failed to serve his Brief and Appendix.

That the deadline for service and filing of Appellant's Brief and Appendix was November 18, 2006. That Respondent's attorneys served upon Appellant their Notice of Motion and Motion for dismissal of this appeal matter based on failure of Appellant to serve and file his Brief and Appendix on November 27, 2006. See Appendix A-106. That Respondent's attorneys were served with the Appellant's Response, Motion, and

Alternative Motion on or about December 4, 2006. See Appendix A-108.

That Respondent's attorneys received no notice in regards to the problems alleged in Appellant's Response to Respondent's Motion. See (Supplemental Affidavit, December 7, 2006); See Appendix A-142. That Appellant's own Response, Motion, and Alternative Motion show that the address for the attorney for Appellant, Mr. James Lester, is exactly the same as the address for Mr. Richard J. Linnerooth, Minnesota Licensed Counsel, under whom Mr. Lester was admitted pro hac vice by this Court for this appeal proceedings. See Appendix A-133. The common address is 921 2<sup>nd</sup> Av. South, Fargo, North Dakota, 58106.

Based on the foregoing facts, the Appellant appeals the determinations of the trial court.

### ARGUMENT

There must be clearly erroneous conclusion that is against logic and the facts in the record before the Appellate Court will find that the trial court abused its discretion. Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). Even though the Appellate Court might have taken a different approach, it will not reverse the trial court's determination absent a clear abuse of its discretion. Miller v. Miller, 352 N.W.2d 738, 741-42 (Minn. 1984). The Appellate Court defers to the opportunity of the trial court to assess the credibility of witnesses. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988).

A trial court's findings of fact will be upheld on appeal unless they are clearly

erroneous. Prahl v. Prahl, 627 N.W.2d 698, 702 (Minn.Ct.App. 2001). In order to successfully challenge a trial court's factual findings, the party challenging the findings, "must show that despite viewing the evidence in the light most favorable to the [trial] court's findings, \* \* \* the record still requires the definite and firm conviction that a mistake was made." Vangsness v. Vangsness, 607 N.W.2d 468, 474 (Minn.Ct.App. 2000).

**I. APPELLANT FAILED TO SERVE AND FILE HIS BRIEF AND MOTION FOR AN EXTENSION ON A TIMELY BASIS.**

**A. Appellant's Motion should be denied in its entirety based on its untimeliness as contemplated by the Rules of Civil Appellate Procedure.**

The Rules of Civil Appellate Procedure provide strict guidelines on when a motion for extension of time may be served and filed with the Appellate Court. Subdivision 1 of Rule 131.02 is very clear and states as follows:

**"Rule 131.02 Application for Extension of Time**

**Subdivision 1. Motion for Extension**

*No extension of the time fixed for the filing of a brief will be granted except upon a motion pursuant to Rule 127 made within the time specified for the filing of the brief.* The motion shall be considered by a justice, judge or a person designated by the appellate court, acting as a referee, and shall be granted only for good cause shown. Only an original of the motion shall be filed.

\*\*\*"

Rule 131.02 of the Rules of Civil Appellate Procedure. (emphasis added). As the Appellant acknowledged in his Response to Respondent's Motion, the 1983 Comment to this Rule states as follows:

“This rule has been clarified to make explicit that a request for an extension of time to file a brief must be made within the time specified by the rule or court order for the filing.”

The 1998 Advisory Committee Comment to this Rule states as follows:

“Extensions of time to file briefs are not favored.”

1998 Advisory Committee Comment to Rule 131.02 of the Rules of Civil Appellate Procedure. If the Appellants’ Brief and Appendix were due on November 18, 2006, making a Motion to the Court on December 4, 2006 is not timely as contemplated by the clear Rules of Civil Appellate Procedure stated above. Appellant is not entitled to any extension whatsoever.

The Court of Appeals is generally reluctant to consider any requests for extension of time. To maintain its calendar it must require strict adherence to the time requirements of the rules. Swicker v. Ryan, 346 N.W.2d 367, 369 (Minn.Ct.App. 1984)(“The rules must be viewed as the guideposts for efficient court administration”).

Appellant’s attorney has simply failed to timely serve Appellant’s Brief and Appendix. Appellant’s attorney has simply failed to bring a timely motion for extension. Timely service of Appellant’s Brief and Appendix would have been on or before November 18, 2006. As of the date this brief was served and filed, Attorneys for Respondent have yet to receive an Appellant’s Brief and Appendix. The only notice received from Appellant’s attorney in regards to this appeal, since receiving the transcripts in this matter, was Appellant’s Response, Motion, and Alternative Motion

dated December 4, 2006. Clearly, this notice was made after and in response to Respondent's motion to dismiss. Appellant's attorney never communicated the alleged problems he was having regarding his computer to Respondent's attorneys prior to his untimely motion for extension.

Strict and serious penalties may arise from failure to timely serve and file an appellant's brief and appendix or motion for extension of time. Although Minnesota Rules of Civil Appellate Procedure do not contain the specific sanctions found in the Federal Rules of Appellate Procedure, a Minnesota Appellate Court may dismiss an appeal for appellant's failure to file a timely brief. Kalanges v. Brinington, 341 N.W.2d 899 (Minn.Ct.App. 1984)(appeal dismissed for failure to file a timely brief)(emphasis added).

Other remedies also exist for the Appellate Court in situations of untimely service of filing of briefs. The Appellate Court may also revoke the right to oral argument if a brief is not filed on time. See Minn.R.Civ.App.P. 134.01(b). The Appellate Court may refuse to accept a late brief, and consider the case only on the record and any timely filed briefs. See State v. Duncan, 316 N.W.2d 518 (Minn. 1982)(respondent failed timely to file a brief; court considered appeal on the record, and on appellant's brief).

Here, Appellant clearly failed to timely serve and file his Brief and Appendix or motion this Court for extension of time as contemplated by the Rules of Civil Appellate Procedure. Based on Appellant's untimeliness, Respondent respectfully argues that

Appellant is not entitled to an extension of time to serve his Brief and Appendix, nor is he entitled to an extension of time to motion this Court for an extension. Respondent also respectfully argues that she is entitled to dismissal of the appeal, or in the alternative, for this Court to disregard any Brief and Appendix filed and served by Appellant.

**B. Notwithstanding Appellant's untimeliness, Appellant has not shown good cause for an extension.**

Not only did Appellant fail to timely file his brief and appendix and fail to timely bring a motion for an extension, but Appellant has failed to show good cause for an extension. If a motion for an extension of time is made in a timely manner, the motion must show good cause for an extension as contemplated in the following:

**“Rule 131.02 Application for Extension of Time**

**Subdivision 1. Motion for Extension**

No extension of the time fixed for the filing of a brief will be granted except upon a motion pursuant to Rule 127 made within the time specified for the filing of the brief. The motion shall be considered by a justice, judge or a person designated by the appellate court, acting as a referee, *and shall be granted only for good cause shown*. Only an original of the motion shall be filed.

\*\*\*”

Rule 131.02 of the Rules of Civil Appellate Procedure. (emphasis added).

If it is necessary to request additional time from the Appellate Courts, good cause must be shown. “Unfamiliarity with the rules, a heavy workload, or overwork is not good cause.” Swicker, 346 NW.2d at 369.

Here, Appellant’s attorney argues that he is a sole practitioner, types his own

documents on a lap-top computer, and that this computer is the only computer he has access to. See Appellant's Affidavit and Brief dated December 4, 2006. Appellant's attorney further argues that he was going to serve and file a motion for extension prior to the deadline for serving Appellant's Brief and Appendix, but that his computer crashed and his schedule and deadlines to complete other legal matters for other clients. See Appellant's Affidavit and Brief dated December 4, 2006. Again, "a heavy workload, or overwork is not good cause." Swicker, 346 NW.2d at 369. (Emphasis added).

Appellant's attorney should not be able to successfully argue that because his computer crashed he should be allowed an extension. Appellant's attorney should not be able to successfully argue that this is the only computer he has access to. Interestingly, the address for Mr. James F. Lester, attorney for Appellant, is the exact same address as the address for Mr. Richard J. Linnerooth, the Minnesota Licensed Counsel, under whom Mr. Lester was approved Pro Hac Vice status by this Court. (Emphasis added). Both attorneys work at 921 2<sup>nd</sup> Av. South, Fargo, North Dakota 58106, which is clearly shown on Appellant's attorney's Response, Motion, and Alternative Motion dated December 4, 2006. Presumably, Appellant's attorney could have had access to a computer through other attorneys in his own office building, enough to make a timely motion for extension and not simply in response to Respondent's motion to dismiss.

By Appellant's own admission, Appellant's attorney received his laptop back on November 22, 2006. No motion for an extension was made until December 4, 2006, and

no notice was ever given to Respondent. Appellant's motion for extension was only made after receiving Respondent's motion to dismiss the appeal.

Moreover, the author's comments to this Rule state in § 131.5 as follows:

"It is advisable to seek and obtain the consent of opposing counsel before requesting additional time. Although the parties may not, by stipulation, enlarge the time periods of the rules, agreement of counsel substantially increases the likelihood of the appellate court considering such a request favorably. Such consent should be freely given by counsel, since he or she may need some similar act of cooperation at a later date."

Author's Comment § 131.5 to Rule 131.02 of the Rules of Civil Appellate Procedure.

Attorney for the Appellant never contacted Respondent's attorneys in regards to Appellant's Brief and Appendix, the problems he alleges in his Response to Respondent's Motion, or any motion for extension of time. The deadline for service and filing of Appellant's Brief and Appendix was on November 18, 2006, and Respondent's attorneys did not hear from Appellant whatsoever until his Response, Motion, and Alternative Motion, dated December 4, 2006, which followed Respondent's own motion to dismiss.

**II. TRIAL COURT PROPERLY DENIED APPELLANT AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER IT IS NO LONGER EQUITABLE THAT THE JUDGMENT AND DECREE SHOULD HAVE PROSPECTIVE APPLICATION.**

The trial court did not abuse its discretion in denying Appellant's request for an evidentiary hearing on whether it is no longer equitable that the Judgment and Decree should have prospective application. The scope of clause (5) of Minnesota Statute § 518.145, authorizing a reopening of the judgment where "it is no longer equitable that the

judgment and decree or order should have prospective application has been addressed and really only applies in certain situations. Regarding the ability to re-open judgments, Minnesota Statutes § 518.145, subd. 5, (with emphasis added) states as follows:

**Subd. 2. Reopening.** On motion and upon terms as are just, the court may relieve a party from a judgment and decree, order, or proceeding under this chapter, except for provisions dissolving the bonds of marriage, annulling the marriage, or directing that the parties are legally separated, and may order a new trial or grant other relief as may be just the following:

- (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.

The Court of Appeals has stated that this argument is not a “catchall” provision, but permitted a reopening because of mutual mistake before the entry of a judgment of decree of dissolution. Minn. Stat. § 518.145, subd. 2(5); Doering v. Doering, 629 N.W.2d 124 (Minn.Ct.App. 2001). The court held that unforeseen circumstances alone will not permit a reopening of a decree, but that something more must be at stake. Harding v. Harding, 620 N.W.2d 920, 923 (Minn.Ct.App. 2001).

Here, Appellant incorrectly interpreted the prospective application argument provided in Minnesota Statute § 518.145. At the hearing in this matter, Appellant argued that, “as an alternative that the Court could also grant relief in this case if it’s no longer equitable that the Judgment Decree or Order should have prospective application. (April 27, 2006 Trans. P.3.L.20-25; P.4.L.1-2). Appellant further argued that, “and the way I read the case law, that that applies if there’s been change in circumstances that alters the

information at the time the divorce decree was granted.” (April 27, 2006 Trans. P.4.L.20-25; P.4.L.3-8). In his Brief in Support of His Motion to Vacate and Re-open the Divorce Decree filed before the trial court’s determination on this issue, Appellant states that “Petitioner (Respondent here) did not become aware until the post-judgment discovery she conducted, that the farm bank accounts \* \* \* are not actually property to be divided \* \* \*.” (Appellant’s trial court brief, April 24, 2006; P.11-12).

Appellant’s own argument acknowledges the absence of mutual mistake before the Judgment and Decree was entered. Prospective application is more than just a change of circumstances.

Alternatively, the trial court correctly focused on the real issue when making a prospective application argument in accordance with Minnesota Statute § 518.145, namely, that there must be mutual mistake before the entry of a judgment of decree of dissolution. Again, the trial court stated in its Memorandum:

“In addition to fraud, Respondent (Appellant here) argues he is entitled to an evidentiary hearing based on the alternative grounds that it is no longer equitable that the judgment and decree should have prospective application. However, Respondent has not shown or alleged a mutual mistake by the parties. *See Harding v. Harding*, 620 N.W.2d 920 (Minn. App. 2001)(recognizing that Minnesota courts allow re-opening of judgment by reason of mutual mistake). Respondent (Appellant here) alleges that it was only after the judgment was filed that Petitioner (Respondent here) became aware of the true nature of certain farm bank accounts and crop disaster payments. Assuming this is true, *it does not amount to a mutual mistake*, and so Respondent is not entitled to a hearing on the grounds that it is no longer equitable that the judgment and decree should have prospective application.”

(Order and Memorandum, May 5, 2006, Memorandum P.4; Appendix A-17)(emphasis

added).

The trial court's determination is supported by the facts presented to the court. In a sworn Affidavit to the trial court, Respondent had testified that:

“because the Respondent (Appellant here) failed to answer the Summons and Petition and discovery, I was forced to do more discovery to find out what I was entitled to in accordance with the Judgment and Decree. I subpoenaed the Respondent's bank records. I had the deposition of the Respondent's (Appellant here) uncle, Steve Thompson taken. From this discovery I obtained documents and information I used as a basis for the motion pending before this court.”

and

“Contrary to the statements made by the Respondent (Appellant here), I was unaware of the farm operations and financial status. I had to do further discovery after the Judgment and Decree was entered in order to find out to what I was entitled.”

(Responsive Affidavit, April 4, 2006); See Appendix A-139.

Clearly, no mutual mistake existed before the entry of the parties' Judgment and Decree, and the trial court did not abuse its discretion in denying Appellant evidentiary hearing on this argument.

### **III. TRIAL COURT CORRECTLY AWARDED RESPONDENT A \$66,731.56 JUDGMENT.**

Because of Appellant's default and failure to respond to discovery requests, the trial court correctly awarded Respondent a judgment in the amount of \$66,731.56. As in the case at bar, the trial court may enter a default Judgment and Decree without a hearing. This is proper procedure in accordance with Minnesota Statute § 518.13, subd. 5, provided as follows with emphasis added:

**Subd. 5. Approval without hearing.** Proposed findings of fact, conclusions of law, order for judgment, and judgment and decree *must be submitted to the court for approval and filing without a final hearing in the following situation:*

- (1) *if there are no minor children of the marriage, and (ii) the parties have entered into a written stipulation, or (ii) the respondent has not appeared after service duly made and proved by affidavit and at least 20 days have elapsed since the time for answering under section 518.12 expired; or*
- (2) if there are minor children of the marriage, the parties have signed and acknowledged a stipulation, and all parties are represented by counsel.

Notwithstanding clause (1) or (2), the court shall schedule the matter for hearing in any case where the proposed judgment and decree does not appear to be in the best interests of the minor children or is contrary to the interests of justice.

A so-called pure default is available to the petitioner if the respondent does not answer or otherwise appear within thirty days of service of the petition and where no stipulation has been filed. Minn. Gen. R. Prac. 306.01, 306.02 § 518.13; See Minn. Stat. § 518.12; *Tovsland v. Tovsland*, 358 N.W.2d 700 (Minn.CT.App. 1984)(motion for new trial was properly denied where moving party had failed to answer and judgment had been entered after default hearing).

Counsel for the party seeking the default must prepare and submit proposed findings of fact, conclusions of law, order for judgment, and judgment and decree in advance of, or at, the final hearing, although the court is not bound by the proposed terms. Minn. Gen. R. Prac. 306.01(a); 306.02. The trial court may not award relief that the moving party did not request or give notice of to the defaulting party. *Nazar v. Nazar*,

505 N.W.2d 628 (Minn.Ct.App. 1993).

Here, the trial court properly entered the parties' default Judgment and Decree. Appellant acknowledged being served with the Summons and Petition on September 8, 2004 and discovery requests on the same date. (June 16, 2006 Trans. P.5.L.18-25; P.40); See Appendix A-83. Appellant acknowledged not responding to discovery requests and not answering the Summons and Petition. (June 16, 2006 Trans. P.41.L.1-8). The parties have no children. See Appendix A-1. Appellant was in default for the requisite period of time. See Appendix A-1; A-83.

Because of Appellant's default and failure to respond to discovery requests and based on Minnesota law, Respondent was forced to submit her proposed findings of fact, conclusions of law, order for judgment, and judgment and decree without all the parties' information. See Appendix A-1. She was extremely fair. Respondent had to decide how to divide the parties' real estate, and chose to let Appellant keep all his farmland and the parties home in Barnesville, Minnesota free and clear of any claim of her own. (June 16, 2006, Trans. P.88.L.6-22); See Appendix A-8. Because Respondent did not have knowledge regarding the bank and farm accounts, the Judgment and Decree simply awarded her half of those accounts. (June 16, 2006, Trans. P.89.L.14-25).

Appellant did not appeal or attempt to amend the Judgment and Decree. Appellant was properly served with the Judgment and Decree, but he did nothing. (June 16, 2006, Trans. P.50.L.9-25). Appellant then failed to provide to Respondent the accounts she was

entitled to in accordance with the judgment and decree, which forced Respondent to do post Judgment and Decree discovery. See Appendix A-38-60. Appellant acknowledged existence of bank and farm accounts of which Respondent did not have knowledge or access. (June 16, 2006 Trans. P.43). Based on the accounts she discovered, she made a motion to the trial court to receive what she was entitled. See Appendix A-38.

Appellant was clearly in default and failed to provide discovery responses, Respondent filed her proposed findings of fact, conclusions of law, order for judgment, and judgment and decree in accordance with Minnesota law, and the trial court properly entered the Judgment and Decree without a hearing in accordance with Minnesota Statute § 518.13, subd. 5.

The trial court did not abuse its discretion in awarding Respondent the judgment against Appellant in the amount of \$66,731.56, based on the circumstances described above and the evidence it was presented in this matter. See Appendix A-23.

**IV. TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO VACATE THE PROPERTY DIVISION AND PERMANENT SPOUSAL MAINTENANCE PROVISIONS OF THE DEFAULT JUDGMENT AND DECREE.**

For the purposes of re-opening a dissolution judgment, the moving party bears the burden of proof. Haefele v. Haefele, 621 N.W.2d 758, 762 (Minn.Ct.App. 2001) review denied (Feb.21, 2001). Whether to re-open a dissolution judgment under statute governing re-opening of dissolution judgments is discretionary with the district court. Clark v. Clark, 642 N.W.2d 459, 465 (Minn.Ct.App. 2002). The trial court's decision

refusing to re-open a divorce judgment will not be disturbed absent an abuse of discretion. Harding v. Harding, 620 N.W.2d 920, 922 (Minn.Ct.App. 2001) review denied (April 17, 2001).

Regarding the ability to re-open judgments, Minnesota Statutes § 518.145, subd. 2, (with emphasis added) states as follows:

**Subd. 2. Reopening.** On motion and upon terms as are just, the court may relieve a party from a judgment and decree, order, or proceeding under this chapter, except for provisions dissolving the bonds of marriage, annulling the marriage, or directing that the parties are legally separated, and may order a new trial or grant other relief as may be just the following:

- (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.

The motion must be made within a reasonable time, and for a reason under clause (1), (2), (3), not more than one year after the judgment and decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment and decree or order or suspend its operation. This subdivision does not limit the power of a court to entertain an independent action to relieve a party from a judgment and decree, order, or proceeding or to grant relief to a party not actually personally notified as provided in the Rules of Civil Procedure, or to set aside a judgment for fraud upon the Court.

Here, Appellant's motion to vacate and reopen the parties' judgment and decree was made over one (1) year after the Judgment and Decree was entered. See Appendix

A-1; A-61. In rare circumstances, a party may have a judgment set aside after this one-year limitation has passed if that party can prove that the party seeking judgment committed "fraud on the Court." Maranda v. Maranda, 449 N.W.2d 158, 165 (Minn. 1989). A finding of fraud on the Court and the administration of justice must be made upon the particular facts of each case. Id. At 164. Fraud on the Court must be "an intentional course of material representation or non-disclosure, having the result of misleading the Court and opposing counsel and making the property settlement grossly unfair." Id. at 165. Reopening a judgment for fraud on the Court requires satisfaction of a more strenuous standard than that for reopening a judgment for ordinary fraud. See Doering v. Doering, 629 N.W.2d 124, 128-29 (Minn.Ct.App. 2001).

The trial court properly stated in its Memorandum, "Respondent (Appellant here) has failed to bring forth any substantial evidence of fraud on the Court in this case. There is simply no substantial evidence that the Petitioner (Respondent here) engaged in an intentional course of conduct involving any material misrepresentation or non-disclosure to the Court. Based on the evidence presented, the Respondent (Appellant here) has failed to meet the high standard required to show that the Petitioner (Respondent here) committed fraud on the Court." See Appendix A-33.

Based on the facts presented, the trial court clearly did not abuse its discretion. Appellant acknowledged being served with the Summons and Petition on September 8, 2004 and discovery requests on the same date. (June 16, 2006 Trans. P.5.L.18-25; P.40).

Appellant never answered the Summons and Petition. Appellant acknowledged not responding to discovery requests. (June 16, 2006 Trans. P.41.L.1-8).

Respondent did not mislead Appellant in any way. After serving Appellant with Summons and Petition, Respondent gave Appellant an ultimatum in regards to reconciliation. (June 16, 2006, Trans. P.81.L.11-25). Appellant did not follow through, behaved inappropriately, and Respondent clearly communicated to him her intent to follow through with the dissolution. (June 16, 2006, Trans. P.83.L.1-19; P.84.L.9-25; P.85; P.86; P. 87; P.88.L.1).

Appellant acknowledged he knew the Judgment and Decree had been entered on January 3, 2004. (June 16, 2006 Trans. P.33.L.4-13). Appellant stated he did nothing to respond to Respondent's motion to amend the Judgment and Decree which was served upon him. (June 16, 2006 Trans. P.32.L.2-24). Appellant acknowledged he was surprised that he received the Judgment and Decree in February of 2005, that he understood it, *but that he did nothing*. (June 16, 2006, Trans. P.50.L.9-25)(emphasis added). Appellant's reason for doing nothing after receiving the Amended Judgment and Decree was *because he was incarcerated in jail, he was depressed, and he really did not care*. (June 16, 2006, Trans. P.56.L.8-21)(emphasis added).

After getting served with the Judgment and Decree, Appellant never contacted Respondent stating he was not happy with the property division. (June 16, 2006, Trans. P.93.L.20-25; P.94.L.1). Appellant stated to Respondent, "*you are not getting any of my*

money, that he was not going to say a word, he was going to be complicated, and that you (Respondent) can pay your lawyer's fees." (June 16, 2006, Trans. P.94.L.23-25; P.95.L.1-6)(emphasis added).

Respondent did not mislead the trial court or misrepresent any thing to the trial court. Respondent was not trying to hide anything from the trial court and did request a hearing to prove up the Judgment and Decree. (June 16, 2006, Trans. P.92.L.19-24). In an effort to further not mislead the trial court, Respondent actually requested a default hearing even though Minnesota law states this matter could be entered without a hearing. See Appendix A-85.

Respondent did not have knowledge in regards to Appellant's bank and farm accounts. Because of Appellant's default and failure to respond to discovery requests and based on Minnesota law, Respondent was forced to submit her proposed findings of fact, conclusions of law, order for judgment, and judgment and decree without all the parties' information. See Appendix A-1. She was extremely fair. Respondent had to decide how to divide the parties' real estate, and chose to let Appellant keep all his farmland and the parties home in Barnesville, Minnesota free and clear of any claim of her own. (June 16, 2006, Trans. P.88.L.6-22); See Appendix A-8. Because Respondent did not have knowledge regarding the bank and farm accounts, the Judgment and Decree simply awarded her half of those accounts. (June 16, 2006, Trans. P.89.L.14-25). In no could it be construed that Respondent mislead the trial court in regard to property

division.

In regards to spousal maintenance, the trial court awarded her permanent spousal maintenance in the form of health insurance from the Appellant. Respondent did not mislead the court in proposing this spousal maintenance, because she had a true need for it. Although the parties were married for two years, the parties were together for a total of eight (8) to 10 years including the years of marriage. (June 16, 2006 Trans. P.10.L.3-11; P.53.L.10-25).

Appellant acknowledged he knew Respondent's back surgery was for a tumor on her back. (June 16, 2006, Trans. P.51.L.1-15; P.78.L.1-25; P.79.L.1-14). Respondent was out of work for approximately six (6) weeks. (June 16, 2006, Trans. P.79.L.16-20). The surgery cost about \$50,000.00. (June 16, 2006, Trans. P.53.L.1-10; P.80.L.14-24).

The insurance that paid for Respondent's surgery was provided by Appellant. (June 16, 2006, Trans. P.52.L.13-25; P.80.L.4-24). Respondent was not in good physical health during the marriage. (June 16, 2006, Trans. P.62.L.4-6). Respondent was in need of spousal maintenance.

The trial court did not abuse its discretion in denying Appellant's motion to vacate and reopen the parties' judgment and decree. Appellant clearly failed to meet his burden, in light of the facts presented above. Respondent made no intentional course of conduct involving any material misrepresentation or non-disclosure to the trial court whatsoever.

**V. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING APPELLANT TO DELIVER SNOWMOBILE AWARDED TO RESPONDENT IN THE DEFAULT JUDGMENT AND DECREE.**

Again, there must be clearly erroneous conclusion that is against logic and the facts in the record before the Appellate Court will find that the trial court abused its discretion. Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). Even though the Appellate Court might have taken a different approach, it will not reverse the trial court's determination absent a clear abuse of its discretion. Miller v. Miller, 352 N.W.2d 738, 741-42 (Minn. 1984).

Respondent was awarded the Polaris snowmobile, which was bought together and paid for by the parties together prior to marriage. (June 16, 2006, Trans. P.64.L.5-15). The parties Judgment and Decree awarded this snowmobile to Respondent. See (Judgment and Decree, January 3, 2004). The trial court simply ordered the following:

“The Respondent (Appellant here) is ORDERED to deliver the 2004 Polaris Snowmobile to the Petitioner (Respondent here) within 10 days of the date of this Order. If the Respondent (Appellant here) fails to do this, law enforcement is authorized to take possession of the snowmobile and deliver it to the Petitioner (Respondent here).”

See (Findings of Fact, Conclusions of Law, Order & Memorandum, July 19, 2006).

Again, Appellant was in default in this matter, and a default Judgment and Decree was entered. Respondent filed her proposed findings of fact, conclusions of law, order for judgment, and judgment and decree in accordance with Minnesota law. The trial court properly entered the Judgment and Decree. Respondent was awarded this

snowmobile. Appellant failed to abide by the trial court's Order and deliver the snowmobile to Respondent. Respondent was forced to motion the trial court for relief. Because she was awarded the snowmobile in a properly entered Judgment and Decree, the trial court did not abuse its discretion in ordering Appellant to deliver this personal property to Respondent.

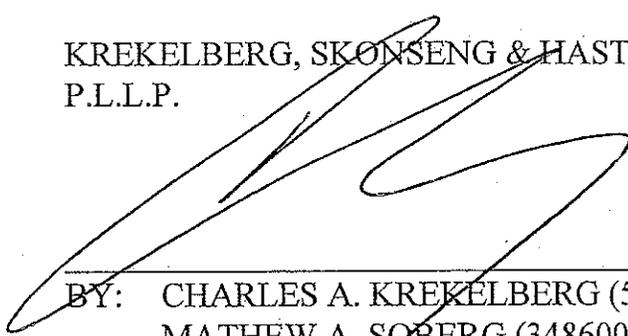
**CONCLUSION**

Based upon the foregoing, the Respondent, Leah Marie Thompson, respectfully requests that this Court affirm the trial court's determination in all respects.

Respectfully submitted this 18 day of July 2006.

DATED: 12/18/06

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CERTIFICATE OF LENGTH COMPLIANCE

I, Charles A. Krekelberg, attorney for Respondent Leah Marie Thompson, hereby state that Respondent's Brief complies with both the typeface requirements and word count limitations as set forth in Minnesota Rule of Civil Procedure 132 Sub. 3(a). Corel WordPerfect version 11 was used in the preparation of Respondent's Brief.

There are 7228 words in the brief.

DATED: 12/18/06

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Respondent  
Court File A06-1453

Enclosed please find copies of the following documents in the above  
matter, per your request this date:

1. Respondent's Brief
2. Appendix to Respondent's Brief
3. Affidavit of Service by Mail

If you have any questions, please contact me. Thank you.

Sincerely,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).