

COURT FILE NOS. A06-1432 & A06-1444

***STATE OF MINNESOTA
IN COURT OF APPEALS***

Kenneth King McIntosh, *Appellant*,

v.

Marjorie Mary McIntosh, *Respondent*

APPELLANT KENNETH KING McINTOSH'S REPLY BRIEF AND APPENDIX

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REPLY ARGUMENTS

1. THE TRIAL COURT ERRED BY EXTENDING THE ORDER FOR

PROTECTION. *a. Prior Violations.* Respondent Marjorie Marie McIntosh (hereinafter “Marjorie”) points to various allegations that she made in her initial order for protection affidavit and petition, filed on December 27, 2002, in opposition to Appellant Kenneth McIntosh’s (hereinafter “Kenneth”) appeal of the determination that a continuation was appropriate. It is unclear why they are reiterated since the key point is that there has *never* been a finding that Ken abused Marjorie, as contemplated by the definition of abuse as set forth in Minn.Stat. §518B.01, Subd. 2a.¹ The allegations are merely allegations, and nothing more. In fact, subsequent to the filing of the petition Washington County Community Services investigated the allegations in the context of a child protection proceeding and found them without merit. [A 1]

The clear statutory intention of allowing a party to consent to issuance of an order, *without findings*, is to give the applicant the relief that she believes that she is in need of while at the same time allowing a responding party to avoid a hearing that may have to involve the children, *and*, avoid the stigma and consequences of potentially losing a hearing.²

¹ The statutory definition of “domestic abuse” is, ““(1) *physical harm, bodily injury, or assault;* (2) *the infliction of fear of imminent physical harm, bodily injury, or assault;* or (3) *terroristic threats, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.*”

² Without a finding of abuse the negative inference under Minn.Stat. §518.17, Subd. 1(12) and 2(d). Furthermore, there are federal implications as well such as those

Ken consented to the order, he did not admit the allegations.

Marjorie cites ¶4b of the initial order for protection wherein it is stated, “[Ken] does not object to an Order for Protection and understands that the Order **will be enforced** as if there were an admission or finding of domestic abuse,” (emp. added) purportedly for the proposition that since it will be enforced the same as a finding of abuse, it is equated to a finding of abuse. That argument is entirely misplaced. The language contemplated *enforcement* of the order, while it was in effect, not the subsequent consequences of the mere issuance of the order. Once such an order is ultimately dismissed, there is no longer any consequence such as that identified in Minn.Stat. §518.17, since there has not been a finding of abuse.

Marjorie alleges (for the first time on appeal)³ that since Ken entered a “*plea of guilty*” to having violated the initial order for protection, that is sufficient to extend the current order. Once again, that logic is flawed. For one, there was no *finding* of a violation as required under Minn.Stat. §518B.01, 6a, which provides in relevant part as follows:

“Upon application, notice to all parties, and hearing, the court may extend the relief granted in an existing order for protection or, if a petitioner's order for protection is no longer in effect when an application for subsequent relief is made, grant a new order. The court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order upon a showing that:

(1) the respondent has violated a prior or existing order for protection;

(2) the petitioner is reasonably in fear of physical harm from the respondent;

involving the right to possess a firearm.

³ This argument was not made at the March 2006 hearing, as will be argued below.

(3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or

(4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.”

While Ken entered a “plea,” the “plea” was part of an arrangement to have the charges dismissed, which they ultimately were. The court never *accepted* the “plea.” Minn.Stat. §518B.01, Subd. 14 describes a “conviction” for purposes of the statute. While a conviction clearly constitutes a violation, there was no conviction.⁴ The subdivision states as follows:

“(a) A person who violates an order for protection issued by a judge or referee is subject to the penalties provided in paragraphs (b) to (d).

(b) Except as otherwise provided in paragraphs (c) and (d), whenever an order for protection is granted by a judge or referee or pursuant to a similar law of another state, the United States, the District of Columbia, tribal lands, or United States territories, and the respondent or person to be restrained knows of the existence of the order, violation of the order for protection is a misdemeanor. Upon a misdemeanor conviction under this paragraph, the defendant must be sentenced to a minimum of three days imprisonment and must be ordered to participate in counseling or other appropriate programs selected by the court. If the court stays imposition or execution of the jail sentence and the defendant refuses or fails to comply with the court's treatment order, the court must impose and execute the stayed jail sentence. A violation of an order for protection shall also constitute contempt of court and be subject to the penalties provided in chapter 588.

(c) A person is guilty of a gross misdemeanor who knowingly violates this subdivision during the time period between a previous qualified domestic violence-related offense conviction and the end of the five years following discharge from sentence for that offense. Upon a gross misdemeanor conviction under this paragraph, the defendant must be sentenced to a minimum of ten days imprisonment and must be ordered to participate in counseling or other appropriate programs selected by the court.

⁴ Ken concedes that Judge Muehlberg issued an extension of the original order for protection *solely* on the basis that of his “guilty plea.” Ken also concedes that the extension order was not appealed; however, the true lack of a “violation” plays into Ken’s following arguments. The fact is Ken testified that the “plea” was part of a deal suggested by Judge Cass and that there was never a conviction. [T 36]

Notwithstanding section 609.135, the court must impose and execute the minimum sentence provided in this paragraph for gross misdemeanor convictions.

(d) A person is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both, if the person knowingly violates this subdivision."

The statute clearly equates a conviction to a violation⁵. In fact, the terms are used interchangeably in criminal prosecutions. *See*, i.e., *State v. Colvin*, 645N.W.2d 449 (Minn. 2002); *State v. Bell*, 703 N.W.2d 858 (Minn.App. 2005).

The history of the "plea" and the court's prior finding of a "violation" is important since Marjorie did not base her request for the most recent extension (which is under appeal) on Judge Muehlberg's prior finding that the "plea" constituted a conviction. When asked to explain the reasons why she was seeking the most recent extension, Marjorie's counsel identified, "*violations for (sic) the order for protection.*" [T 525] Marjorie then expounded on the "violations" that she was referring to, and identified them as Ken being "ticketed" twice by the Forest Lake Police Department *since the issuance of the last order for protection extension.* [T 525] She and the trial court differentiated between the prior alleged violations cited in Judge Muehlberg's 2004 extension order. [T 526] Marjorie's counsel went on to add that the last such "ticketing" had occurred more than six months prior, and that, "*both had been dismissed.*" [T 526] Marjorie's counsel identified the second basis of the petition for an extension as the alleged incident on December 28, 2005, when she called to speak to the children in Michigan and Ken had answered the phone, and allegedly told her to "repent" and

⁵ One of the elements of a conviction for violation of an order for protection is that there was a "violation" of it. *State v. Hinton*, 702 N.W.2d 278, 281 (Minn.App. 2005).

he allegedly “harassed” her.

Prior to the hearing, Ken’s counsel moved to restrict the hearing to the specific allegations set forth in Marjorie’s affidavit. The trial court agreed, with the caveat that it would allow testimony as to why she was in *reasonable fear*. The trial court went on to note that it would restrict the case to the December 28th occurrence and a February 6, 2006, occurrence when Ken refused to accept a mailing from Marjorie. [T 527]

As noted above, Minn.Stat. §518B.01, Subd. 6a, allows an extension where there has been a “prior violation;” however, that does not mean that *any* prior violation at *any* time is sufficient to grant an extension. If that were the case, a violation would result in a permanent order. In fact, the “violations” spoken of in this extension had nothing to do with those referenced in Judge Muehlberg’s 2004 order. In fact, Judge Eckstrom did not extend the order for protection under §518B.01, Subd. 6a(1). In his finding of fact number 6, he specifically noted that the *prior* “violations” were not the basis for the extension. [A 145]

Therefore, Marjorie’s argument that the prior convictions formed the basis for the extension are without merit.

b. Reasonable fear. While the trial court did not use the alleged “violations” as the basis for an extension, it did use them as part of its finding that Marjorie is in “reasonable fear” of Ken. [A 145] The problem with the blind use of the three year old “violations” is that the court did not examine the context. In neither case was Ken alleged to have made a threats to Marjorie or even engage her. On the one occasion he simply looked for life jackets in an out-building to comply with the law and to ensure the children’s safety. There was no

contact with Marjorie. On the other occasion Ken allegedly called the “wrong” telephone line to speak to the children. There was no contact with Marjorie.⁶ Neither of those distant occurrences could reasonably lead to a conclusion that they would cause Marjorie any sort of present fear as required by the statute.

In Marjorie’s argument she points to the trial court’s determination in ¶6 of its order as supporting the statutory criteria for an extension; however, since the trial court specifically did not use the prior alleged violations as the basis for the extension, it is only necessary to examine whether the other statutory criteria was met. Minn.Stat. §518B.01, Subd. 6a(2) allows for an extension when,

“The petitioner is reasonably in fear of physical harm from the respondent.”

The key word is “reasonable.” While Marjorie centered her argument on the court’s finding that there was a demonstration of “reasonable fear,” she failed to address whether the court’s finding was supported by the evidence. The *only* statements that Marjorie made at the hearing pertaining to her “fear” were set forth in the following questions and answers:

SICHENEDER: How did you feel when speaking to [Ken]?

MARJORIE: I felt afraid that I couldn’t even talk to my own kids. [T 143]

That exchange clearly did not express a fear of “physical harm” from Ken.

The *only* other exchange pertaining to the “fear factor” was as follows:

SICHENEDER: Do you have fear of physical harm from [Ken]?

⁶ Marjorie testified at the March 31, 2006, hearing that she had not spoken to Ken in “many years.” [T 143]

MARJORIE: I do.

SICHENEDER: Why is that?

MARJORIE: Because I did my best to give to him and do everything right by him, and he turned it all against me. So I don't have a clue as to what he is going to do next. The things he said on the phone to the kids, tell your mother this, tell your mother that, she doesn't love you. * * * Also in dealing with the police department and neighbors, they encouraged me to get the Order for Protection to begin with. When he won't stop calling me and he won't stay away, should I not be afraid of him? [T 149, 150]

There was no other discussion of fear. That second exchange did not support that court's finding of *reasonable fear of physical harm* either. Ken made no threats, and the balance of the testimony pertained to the original order issued four years before. Findings of fact, whether based upon oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. This court will not reverse the district court's judgment merely because it views the evidence differently.

Findings not reasonably supported by the evidence as a whole warrant reversal. . *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn.1999). Findings of fact are clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn.1999) (quotation omitted). In this case, the evidence simply does not support the finding that Marjorie demonstrated *reasonable fear of physical harm*. In order to find that there is reasonable fear of physical harm, there has to be an overt act manifesting an intent to inflict the harm. *Baker v. Baker*, 492 N.W.2d 282, 287 (Minn. 1992). Here, there is no such evidence.

Finally, Marjorie argues that there is nothing in the statute which provides for a different standard to apply to extend an order for protection where there has been no finding of abuse. Marjorie has chosen to ignore the holding in *Hill v. Brockamp*, WL 32929 (Minn.App. 1999), wherein the Court of Appeals noted that,

“the act does not require a finding that domestic abuse occurred for subsequent orders for protection because such a finding is made as part of the initial order.”
[A 148]

While Marjorie calls such an interpretation an “absurd result,” that clearly is not the holding of the Court of Appeals in the *Hill* decision.⁷

2. THE TRIAL COURT ERRED IN TREATING ALL OF THE FUNDS REMAINING IN THE UNIDALE INSURANCE ACCOUNT ON

DECEMBER 31, 2003 AS A MARITAL ASSET. Marjorie cites *Ronnkvist v.*

Ronnkvist, 331 N.W.2d 764 (Minn. 1983) for the proposition that the trial court has broad discretion in the valuation of assets. Marjorie misses the point. The argument is not that the trial court improperly *valued* the asset. The essence of the argument is that the trial court *mis-identified* the funds in the account as an *asset*. While Marjorie is correct that the parties stipulated to using December 31, 2003, as the valuation date for *assets*, there was no agreement that the contents of the subject account were an asset. As noted, Ken’s argument is that the contents of that account cannot be both income and an asset.

Marjorie cited her expert Stephen Dennis’ testimony (at transcript pages 223-224) for

⁷ *See*, page 11, ¶3 of Respondent’s brief.

the alleged proposition that pitfalls may occur when there are subtractions from corporate accounts for money *owed* to one of the parties; however, he conceded that the court could properly make such a determination. [T 223-24] It should be noted that Mr. Stephens' testimony was discounted and held unreliable by the Court. [A 6] Furthermore, the questioning was in the context of a "balance sheet," not in the context of whether the monies were more appropriately characterized as an *asset* or *income*. In fact, under cross-examination, Mr. Dennis conceded that if the money was owed to Ken, it was an appropriate deduction from the account at the end of the year. [T 225] While Mr. Stephens viewed further inquiry as being a "legal question," he nonetheless conceded that in his view, Ken's *income* for 2003 was more than just his salary - it was, "*whatever [Ken], in his discretion as a corporate owner and officer and shareholder, wishes to distribute from whatever resources he has.*" [T 227] The confusion the trial court had was with further explanation by Mr. Stephens, which was if it was withdrawn prior to the end of the year by Ken it was *income*. If it was withdrawn after the end of the year it was "retained earnings." [T 228] The global problem is that by using the monies as *income* to determine Ken's support and maintenance obligations, the trial court cannot then re-characterize it as an *asset* for distribution purposes.⁸

⁸ Mr. Stephens also conceded that if the corporation were a c-corporation, the monies would clearly be characterized only as *income*. [T 228] The nature of the organization should not have a bearing on whether the court treated it as *income*, an *asset*, or both. In fact, Mr. Stephens related that he was aware of a case where a party left \$75,000 in a corporate account at the end of a tax year and claimed that his *income* was only the \$30,000 that he had pulled out. He conceded that it was proper to define the \$75,000 as *income*. [T 230]

Finally, Marjorie misses the point by arguing that Ken has cited no statutes or cases which define rents or undistributed Sub S earnings as nonmarital property. As noted, Ken's argument is that the monies cannot be both *income* and *property*.

3. THE TRIAL COURT PROPERLY DETERMINED THAT THE ENTIRE PROCEEDS FROM THE SALE OF KEN'S MOTHER'S HOME WAS HIS NON-MARITAL PROPERTY. Marjorie has raised on appeal a challenge to the trial court's characterization of the proceeds from the sale of Ken's mother's home as Ken's non-marital asset. This challenge is raised for the first time on appeal and was not raised in Marjorie's motion for amended finding and/or new trial. [A 82-84] Generally, issues raised for the first time on appeal are not properly before the appellate courts. *See*, i.e., *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988). However, Ken will nonetheless address those claims.

Marjorie cites *Van de Loo v. Van de Loo*, 346 N.W.2d 173, 175 (Minn.Ct.App. 1984), purportedly for the proposition that any "characterization" of an asset as marital or non-marital is a legal issue. That is not the holding in the *Van de Loo* case. That case involved whether or not the specific *characterization* of personal injury proceeds was a legal determination. The determination in this case was not whether the court properly characterized the proceeds from the sale of Ken's mother's home as a non-marital asset. It was whether Ken properly traced the asset.

Marjorie argues that in this case there was, "*significant co-mingling.*"⁹ Ken disputes

⁹ *See*, page 23 of Marjorie's brief.

that allegation. Furthermore, the trial court rejected such a finding. While Marjorie cites *Crosby v. Crosby*, 587 N.W.2d 292 (Minn.Ct.App. 1998) for the proposition that co-mingled assets *may* lose their non-marital character, Marjorie ignores the fact that the Court of Appeals upheld, on an abuse of discretion standard, the decision in *that* case that the asset had lost its non-marital character. Since there was evidence in the record supporting the court's determination in *Crosby*, the Court of Appeals declined to reverse the decision of the trial court. The same can be said here. There is more than ample evidence supporting the court's decision to treat the asset as Ken's non-marital asset. It is undisputed that Ken received nearly \$50,000 from his mother's estate. It was not an abuse of discretion to determine, by a preponderance of the evidence (which is the standard), that Ken properly traced the funds awarded by the trial court.

4. THE TRIAL COURT PROPERLY CREDITED KEN WITH THE PAYMENT OF FEDERAL AND STATE INCOME TAXES FOR 2002. The gist of Marjorie's argument is that she only agreed to file joint tax returns for the tax year 2002 in exchange for Ken holding her harmless from any liability. Marjorie's argument fails, primarily since that argument is not supported by the record.

Marjorie cites an August 2, 2004, letter from Ken's counsel to Marjorie's counsel in support of that contention; however, the letter is not complete and contains redacted language. [A 92] Marjorie further cites pages 363-64 of the transcript. The problem is Marjorie takes the letter and transcript entries out of context. Ken's counsel advised Marjorie as follows:

“That means that if the IRS said there is something wrong, he would be responsible and he would make sure you would have to pay nothing.” [T 364]

The intention was clear, and it was adopted by the trial court. If the IRS *later* determined that there was a problem with *Ken's* income and/or deductions, he would hold Marjorie harmless from such *future* contingency. That is a far cry from sharing the debt.

In dissolution actions debts are to be treated in the same fashion as the division of assets. *Korf v. Korf*, 553 N.W.2d 706, 711(Minn.App. 1996). A reviewing court will affirm the division of property if it has an acceptable basis in fact and principal, even though the reviewing court may have taken a different approach. *Korf* at 712, *citing, Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984).

In the trial court's finding of fact number 4, in its order amending the judgment and decree dated May 26, 2006, [A 45], it specifically held that the tax liabilities for 2002 were a marital obligation. The trial court went on to recognize that finding of fact number 21 in the judgment and decree merely indicated that Ken would hold Marjorie harmless from *“errors or mistakes”* in the return, not the tax liability. The trial court went on to recognize that the obligation was paid from an asset awarded to Ken and that he should properly be credited with the payment.

The decision of the trial court certainly had a basis in fact and principle and cannot be said to be in error.¹⁰

¹⁰ Marjorie asserts with proper citation to the record that Ken allegedly attempted to hide funds. There was no such determination by the trial court.

CONCLUSION

The trial court's determination that Marjorie had demonstrated that she was in reasonable fear of domestic abuse by Ken was not sustained by the evidence.

The trial court improperly characterized the Sub-S distribution as both *income* and an *asset*. That determination should be reversed.

Marjorie's request to disallow Ken's non-marital claim, and her request to disallow the requirement that she pay one-half of the 2002 tax liability should be denied.

Dated: January 11, 2006

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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).