STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2068

In re the Matter of: Julie Lynn North,
Respondent,

vs.

Brian Douglas Larson,
Appellant.

Filed February 12, 2008
Reversed and remanded
Minge, Judge

Hennepin County District Court
File No. PA 49335

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

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

MINGE, Judge

Appellant requests review of the district court's denial of his request to vacate a default judgment that determined his obligations and rights as a father and awarded attorney fees to respondent mother. Appellant asserts that the district court abused its

discretion in finding that his failure to participate in the hearing was not excusable neglect as provided in Minnesota Rules of Civil Procedure 60.02(a). Because we conclude that the district court did not properly apply the rule and that appellant meets the excusable-neglect standard, we reverse and remand.

FACTS

Appellant Brian Larson and respondent Julie North are the biological parents of G.L.N., who was born February 9, 2002. They were never married. North brought a paternity action in February 2004, to determine child support and parenting time. On June 2, 2004, Larson was ordered to pay $750 per month in temporary child support and granted reasonable visitation. The parties were unable to reach a final agreement, and a hearing on custody and support was scheduled for November 8, 2005. Although Larson's attorney received an e-mail notice of the hearing, the attorney neither informed Larson of the hearing nor appeared.

A default judgment was entered November 30, 2005. The order for judgment awarded sole physical and legal custody of G.L.N. to North, increased Larson's child support responsibility to $890 per month, established his child care obligation at $166.53 per month, awarded North $4,212 in conduct-based attorney fees, and determined that Larson owed retroactive child support of $21,331. Pursuant to the default judgment, North obtained a writ of execution, levied on Larson's bank account, and collected the judgment debt.[1]

[1] Larson makes various claims regarding the propriety of the execution on this judgment. The procedure for contesting a levy are set forth in Minn. Stat. § 552.06, subd. 5(b)

Larson retained a different attorney and moved to vacate the default judgment. His motion was denied. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion by denying Larson's motion to reopen the November 30, 2005 judgment. Under Minn. R. Civ. P. 60.02, the court may relieve a party from a final judgment or order for "[m]istake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief from the operation of the judgment." To qualify for such relief the moving party must show: (1) a reasonable claim on the merits; (2) a reasonable excuse for his failure or neglect to act; (3) due diligence after notice of entry of judgment; and (4) absence of substantial prejudice to the opponent. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964); *Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 455-56 (1952). "The right to be relieved of a default judgment is not absolute." *Kosloski v. Jones*, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973). Whether a judgment should be reopened is a matter largely within the discretion of the district court and will not be reversed on appeal absent a clear abuse of discretion. *Id.*

Generally, courts favor a liberal application of the four-part *Finden* test to further the policy of resolving cases on their merits. *See Taylor v. Steinke*, 295 Minn. 244, 246, 203 N.W.2d 859, 860 (1973) (stating courts should liberally open default judgments).

(2006). Because Larson has not contested the levy under the statute and has only peripherally referred to the levy-related issues on appeal, we do not consider its validity.

"All four elements must be proven, but a weak showing on one factor may be offset by a strong showing on the others." *Reid v. Strodtman*, 631 N.W.2d 414, 419 (Minn. App. 2001). Where the district court fails to apply the four-part test described in *Finden*, this court applies the test de novo. *Id.*; *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996).

Here, the district court responded to Larson's motion to reopen the default judgment against him by listing among its findings of fact that there was a "strong possibility that [Larson's] attorney was negligent and that was taken into consideration." The district court then recites the four-part *Finden* test and concludes that "[d]efendant does not meet each of these four conditions." This is the entirety of the district court's analysis. This statement does not constitute an analysis or application of law to the case.[2] Because the district court did not apply the four-part *Finden* test, we conduct that inquiry de novo.

A. Reasonable Claim on the Merits

The first part of the *Finden* test is a reasonable claim on the merits. In order for relief to be available under Minn. R. Civ. P. 60.02(1), "the existence of a meritorious claim must ordinarily be demonstrated by more than conclusory allegations in moving papers." *Charsen v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). Although we review de novo, the improper application of the law to facts also constitutes an abuse of discretion. *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998). At the

[2] Findings are necessary to permit meaningful appellate review. *Nat. Union. Fire Ins. Co. v. Evenson*, 439 N.W.2d 394, 398 (Minn. App. 1989).

time of the default hearing, child custody, child support, and child care responsibilities were in dispute.

1. Child Support and Child Care Payments

(a) Calculation of Support

When this case was decided in district court, Minnesota law provided that an obligor with a net income of $1,001 to $5,000 per month and one child in the sole custody of the other parent should pay child support in the amount of 25% of his net income. Minn. Stat. § 518.551 (2004).[3] Because Larson has not submitted a paystub or any other evidence to show that his income as calculated by the district court for the purposes of the November 30 default judgment was incorrect, we use the gross income and payroll expense figures adopted by the district court. The district court's order states:

> [Larson] has the following deductions from his gross monthly income of $4,567:
>
Federal Tax	$581.00
Social Security/FICA	349.00
State Tax	450.00
Retirement	450.00
Health and Dental Ins.	142.00

> This gives [Larson a] net monthly income of $2,831.

[3] Generally, appellate courts apply the law in effect at the time they make their decision unless doing so will alter vested rights or result in manifest injustice. *Interstate Power Co. v. Nobles County Bd. Of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000); *McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986), *review denied* (Minn. Nov. 17, 1986). Here, after the district court made its decision, the legislature amended the child support law. *See* 2006 Minn. Laws ch. 280, § 44, at 1145 (reciting effective date of amended child support laws); *compare* Minn. Stat. §§ 518.551, .64 (2004) *with* Minn. Stat. §§ 518A.26-.78 (2006). Although we apply the prior law, we recognize that much of the statutory language affecting this case has been restated.

If the deductions as stated are subtracted from the gross monthly income employed by the district court, Larson's net monthly income is $2,595, rather than $2,831.

The district court then calculated Larson's child support responsibility as $890. Even using the district court's incorrect calculation of Larson's net income, the child support responsibility of the appellant is 25% of $2,831, or $707.75 per month. Using the correct figure, $2,595, Larson's child support responsibility is $648.75 per month. Although the district court does not explain how it determined any of the figures in its order, they appear to come from an affidavit submitted by North.[4] Larson demonstrates a strong claim on the merits of his challenge to his child support obligations.

(b) Determination of the Arrearage

When the monthly child support obligation is increased, any retroactive liability for that increase is governed by Minn. Stat. § 518.64, subd. 2(d) (2004). In general, a child support order may be modified as of the date of service of the notice of motion for modification. *Id.* But the district court may retroactively modify to an earlier date if the district court expressly finds that "the party seeking modification was a recipient of . . . public assistance based upon need during the period for which retroactive modification is sought." Minn. Stat. § 518.64, subd. 2(d)(2).

[4] Adoption of a party's proposed findings and conclusions of law is not reversible error; however, wholesale adoption of one party's findings and conclusions raises the question of whether the district court independently evaluated each party's testimony and evidence. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992). We acknowledge that this matter came before the district court in a default setting. We recognize that in this setting the adversary system is not functioning, that the district court role is more perfunctory, and that the district courts commonly request and utilize proposed language for their findings, conclusions, and order.

The district court ordered Larson to pay retroactive child support in the amount of $21,331. This represented child support of $890 per month from the child's date of birth, February 9, 2002. The record shows that the original motion for support was dated December 5, 2003, 22 months after the child's birth; that support was first set in June 2004 in the amount of $750 per month; that the proceeding for support was ongoing and subject to numerous delays; that North was not a recipient of public assistance; and that the erroneous calculation of monthly child support previously discussed was used to compute the arrearage. Because this retroactive order of child support did not comply with Minn. Stat. § 518.64, subd. 2(d), and used inaccurate figures, Larson makes a strong showing on the merits of his challenge to the amount of the child support arrearage that was awarded.

(c) Child Care Responsibility

Because child care payments are based on the relative income of the parties after deduction of child support and because, as previously discussed, Larson's net income and child support obligation is not properly calculated, Larson's child care payment is understated and in error.

2. Child Custody

"[A] proper custody determination may be made only after both parties have been afforded the opportunity to present evidence and to have the credibility of that evidence determined in a proceeding where witnesses appear in person." *Moir v. Moir*, 400 N.W.2d 394, 398 (Minn. App. 1987). In *Moir*, district court reliance on affidavits of

interested parties without any testimony or the benefit of a custody study was found to be an abuse of discretion. *Id.*

Here, Larson did not present evidence or testimony. Although a professional court-ordered custody evaluation had evidently been completed, it does not appear in the record on appeal, and there is no reference to that study in the district court's order. As in *Moir*, the district court's findings in regard to the child's best interests mirror those supplied in an affidavit by North. Although the district court findings that rely on documents provided by one party are not per se error, *Bliss*, 493 N.W.2d at 590, and although Larson has not established any probability of ultimate success on the merits, without testimony or any consideration of the custody study, the custody decision should be reconsidered.

B. Reasonable Excuse for Failure to Act

The second *Finden* factor is whether the moving party has a reasonable excuse for failing to act. Attorney neglect is a well-established excuse for a party's failure to act. *Charson*, 419 N.W.2d at 491; *Kurak v. Control Data Corp.*, 410 N.W.2d 34, 36 (Minn. App. 1987). "A litigant is not to be penalized for the neglect or mistakes of his lawyer. Courts will relieve parties from the consequences of the neglect or mistakes of their attorney, when it can be done without substantial prejudice to their adversaries." *Kurak*, 410 N.W.2d at 36 (quotation omitted). In a case of alleged attorney neglect, the district court generally inquires into whether the client's personal conduct is excusable. *See Charson*, 419 N.W.2d at 491; *Finden*, 268 Minn. at 271-78, 128 N.W.2d at 751.

North acknowledges that Larson's attorney was negligent.[5] The record shows that Larson was never notified of the November 8, 2005 hearing. Because of his attorney's neglect, Larson was reasonably excused for his failure to act and satisfies the second *Finden* factor.

C. Due Diligence

The third *Finden* factor is whether the moving party exercised due diligence in pursuing his claims. The parties dispute whether the appellant acted with due diligence in making his motion to reopen the default judgment against him. Whether the appellant acted within a reasonable time after notice of entry of judgment is determined on a case-by-case basis. *Compare Kemmerer v. State Farm Ins. Co.*, 513 N.W.2d 838, 841 (Minn. App. 1994) (finding vacating judgment not an abuse of discretion even though movant waited three months before making motion to vacate judgment); *with Hovelson v. U.S. Swim and Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990) (finding that the district court did not abuse its discretion in finding that a company did not act diligently, despite its response nine days after the entry of judgment, because of its "seemingly purposeful failure to respond to notices of the suit."); *and with Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 185 (Minn. App. 1987) (finding that a district court abused its discretion in

[5] In 1990, the Director of the Lawyers Professional Responsibility Board filed a petition alleging that Larson's former attorney had committed professional misconduct. *In re Disciplinary Action Against James*, 458 N.W.2d 99 (Minn. 1990). The public report of this proceeding states that neglect of client matters, failure to communicate with clients regarding matters entrusted to him, and a failure to attend scheduled hearings were among the reasons that the petition was filed against that attorney. *Id.* Pursuant to stipulation, the supreme court placed that attorney on disability inactive status. *Id.* The attorney was reinstated to the practice of law in 1994. *In re Disciplinary Action Against James*, 521 N.W.2d 855, 856 (Minn. 1994).

denying a motion to vacate a default judgment where the movant made its motion six days after receiving notice of judgment).

North relies on *Reid*, 631 N.W.2d at 419, for the proposition that Larson was not diligent in bringing a motion to vacate. In *Reid*, the movant was aware of the hearing date and failed to appear because he had to "get away." *Id.* at 416. He then waited seven months after the notice of entry of judgment to bring a motion to vacate it. *Id.* at 419. There was no reason given for his delay in making a motion to vacate, nor any allegations of attorney neglect. *Id.*

Here, the default hearing occurred on November 8, 2005 and the default judgment is dated November 30, 2005. As already noted, Larson's counsel did not inform him that a hearing had been scheduled or held. The record indicates that Larson was first aware something was amiss when his child support payments unexpectedly increased in January of 2006. At that point, Larson began trying to contact his attorney to learn what had happened. After repeated, unsuccessful attempts to contact his attorney, Larson eventually contacted the organization that had referred him to that attorney. The organization assured him that his file was being taken care of. Finally, Larson concluded that he was being misled, and he obtained new counsel at the end of April 2006.

In early May 2006, Larson's new attorney began his efforts to vacate the district court judgment. Initially, the new attorney obtained a hearing date of June 5, 2006. It was reset for August 10, 2006, to enable the new attorney to prepare material in support of a motion to vacate. The new attorney did not actually serve and file the motion to

vacate the judgment until July 2006, more than seven months after the default judgment had been entered.

Larson's situation differs from the *Reid* case cited by North. There is no indication that Larson was personally negligent or capricious in disregarding the district court's judgment. By contrast, in *Reid*, no attorney negligence was alleged, the movant had actual notice of the hearing, and the movant gave no reason for his delay in filing a motion to vacate the default judgment. Yet we recognize that the seven-month delay here was substantial. Although Larson acted with persistence, he could have retained a new attorney and a motion to vacate could have been filed sooner. Larson makes a marginal case for relief under the third *Finden* factor.

D. Substantial Prejudice

The final *Finden* factor is prejudice. Prejudice is always inherent when the trial of a case is delayed, as it is when "an adversary changes his position from an attitude of conciliation and negotiation to an attitude of resistance." *Finden*, 268 Minn. at 272, 128 N.W.2d at 751. But prejudice inherently incidental to the reopening of a case is not enough to constitute the substantial prejudice to deny a motion to vacate. *Id.*; *see also Kemmerer*, 513 N.W.2d at 841 (stating that the inconvenience of opening and closing a file cannot be considered substantial prejudice). It is an appellant's burden to show that the opposing party will not be substantially prejudiced by a new trial. *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 584 (Minn. App. 1988).

Here, it does not appear that North is substantially prejudiced by the delay. North has collected support and the arrearage and has custody. The financial evidence is still

available. The parties still have access to witnesses and the custody evaluation. We conclude Larson has carried his burden in showing that substantial prejudice would not result from the reopening of his case.

We conclude Larson has made a strong showing for relief with respect to his child support obligation and the arrearages on three factors of the four-factor *Finden* test. Because the weaker showing of diligence is explained and because a marginal showing on one factor can be balanced with a strong showing on others, we reverse the district court's decision not to reopen the child support/arrearage questions in his case under Minn. R. Civ. P. 60.02 and remand.

The other issue Larson seeks to reopen is custody. Because Larson has not addressed the merits of custody and has only argued that the district court failed to properly consider that issue, Larson has only made an indirect showing of success on the merits and again a problematic showing of diligence. Although we would not reverse if custody were the sole basis on appeal, because of the lack of an appropriate record, we reverse the refusal to vacate on that issue and remand for further consideration.

II.

The second issue is whether the district court abused its discretion in its award of attorney fees. "Recovery of attorney's fees must be based on either a statute or a contract." *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). "The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the [district] court." *Patton v. Newmar Corp.*, 538 N.W.2d

116, 119 (Minn. 1995). This court reviews a district court's award of attorney fees for abuse of discretion. *In re Rollins*, 738 N.W.2d 798, 803 (Minn. App. 2007).

The district court did not specify a rule or statute under which it awarded attorney fees, nor did it provide an indication of how the amount awarded was calculated. We presume that they were awarded under Minn. Stat. § 518.14, subd. 1 (2004) which states:

> . . . [T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:
> (1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.
> *Nothing in this section . . . precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding*.

(emphasis added).

The district court found that "[North] has incurred attorney fees in the amount of $4,212. Her attorney, Jane Van Valkenburg, charges $260 per hour which is reasonable in Hennepin County with her experience." The district court did not state whether the attorney fees awarded were conduct-based or need-based attorney fees. Although nothing on the record indicates that the fees were awarded under Minn. Stat. § 518.14 (1), (2), or (3), an affidavit of Julie North dated October 31, 2005 states that she requested attorney fees because Larson twice refused to sign a stipulation as drafted by North's attorney. Thus, it appears that the fees were awarded against Larson because he

was found to have "contribut[ed] unnecessarily to the length or expense of the proceeding."

It appears on the record before us that the delay was partly due to Larson's refusal to sign the proposed agreements. Larson was unsatisfied with the terms of those agreements. A party should not be presented with the choice of either signing an agreement regarding custody and child support that is the subject of a bona fide dispute or paying attorney fees for declining to do so. The child support calculations in the proposed agreement may well have been the erroneous figures ultimately used by the district court. That would be good reason for not signing the proposed agreements. Thus, deciding to have these issues determined by a district court rather than through mediation was not an unreasonable contribution to the length or expense of the proceeding. Additionally, it appears that North's attorney, like Larson, was experiencing difficulty getting a response from Larson's former counsel and that this problem with representation contributed to the delay. Such attorney neglect should not automatically be imputed to Larson. *Kurak*, 410 N.W.2d at 36. On this record, we conclude that the district court abused its discretion when it awarded attorney fees and reverse that award.

Reversed and remanded.

Dated: