STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2181

In re the Marriage of:
Nicola Alexander-Knight, petitioner,
Respondent,

vs.

Peter St. John Knight,
Appellant.

Filed November 25, 2008
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Dakota County District Court
File No. F1-05-9791

Nicola Alexander-Knight, 3646 2-1/2 Street NE, Minneapolis, MN 55418 (pro se respondent)

Peter St. John Knight, 14796 Haven Drive, Apple Valley, MN 55124 (pro se appellant)

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

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

LARKIN, Judge

The parties' marital dissolution decree awarded appellant title to the marital homestead, subject to a lien in respondent's favor. The decree required appellant to

satisfy the lien within a specified period of time or place the homestead on the market for sale. After the period ended without satisfaction of the lien or sale, the district court found appellant in contempt of court and transferred title to the homestead from appellant to respondent for the purpose of sale.

Appellant argues that the district court (1) lacked personal jurisdiction over him because he was not properly served with the contempt motion papers, (2) denied appellant due process of law by denying him a bifurcated hearing and the opportunity to call witnesses, (3) abused its discretion by failing to make findings as mandated by *Hopp v. Hopp*, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (1968), and (4) abused its discretion by effectively altering the dissolution decree's property allocution when the district court transferred title of the marital homestead to respondent. We conclude that appellant waived his challenge to the alleged jurisdictional defect and was afforded due process of law. But we reverse and remand because the district court abused its discretion by finding appellant in contempt without making sufficient findings and by altering the property division determined in the judgment and decree.

FACTS

Appellant Peter St. John Knight and respondent Nicola Alexander-Knight jointly owned a homestead in Apple Valley. The parties' marriage dissolved by stipulated judgment and decree on March 22, 2007. The decree granted appellant title to the homestead subject to a lien in the amount of $11,325 in favor of respondent. The lien was to be paid within 75 days of entry of the judgment. If appellant failed to satisfy the lien within 75 days, interest would accrue. The decree also required appellant to

refinance or obtain a release of respondent's name from the mortgage within eight months of entry of the judgment and decree. If appellant failed to perform, the homestead was to be "immediately" placed on the market and sold.

On July 31, 2007, respondent moved the district court to find appellant in contempt for failing to comply with the judgment and decree. Respondent's supporting affidavit alleged that more than 75 days had elapsed and appellant had not satisfied the lien or listed the homestead for sale. It also alleged that the homestead was in danger of foreclosure. Respondent requested relief from the district court, including (1) an order that the homestead be placed on the market for sale, (2) an order granting respondent sole authority to make all decisions regarding the sale of the homestead, and (3) judgment against appellant in the amount of $11,325 plus interest. Respondent did not personally serve the notice of motion and motion on appellant. Rather, respondent served appellant's counsel of record in the dissolution proceeding.

On August 10, 2007, the district court heard argument on respondent's motion. Appellant appeared pro se. Before making any argument on the motion, appellant stated, "I've never been personally served, and I'm representing myself." The district court responded, "All right. Have a seat, please, and we'll see what she has to say." In response, respondent stated that appellant had proper notice because appellant's attorney was served. Respondent also argued that there is no requirement of personal service of a post-decree motion. Respondent then argued the merits of her motion and requested that the district court transfer title of the homestead to respondent for the purpose of sale.

After respondent's argument, the district court permitted appellant to respond. Appellant stated:

> I would like to put on the record that regardless of Ms. Freeman's desire to have me muted in this court this morning, I respectfully ask the court to hear what I have to say, because contrary to the allegations that are being made, they are unfounded, and I have the facts to prove that. The basis of their argument is that I'm not making a good-faith effort to meet my obligations, and that's not true.
>
> And so where I would like to begin again is to say I got a letter this week, very late this week, stating from my lawyer that she—and I'm in agreement with it—that she would no longer represent me, and especially in something as frivolous as I think this is, being hauled back into court for something we have demonstrated to her. And they know, based on the information that was sent to them, that there are things being done that are outside of my control to satisfy my obligation.
>
> So again, reiterating, I have not been personally served with anything. I got an e-mail from my lawyer and a letter, and so I've decided I would be here to represent my good name because it has been consistently slandered and tarnished over this past year.

Appellant then argued against respondent's motion and offered documents to the district court, including evidence of a purported listing agreement for the marital homestead.

The district court issued its order on September 21, 2007. Within the order, the district court found that (1) the 75-day deadline was June 5, 2007; (2) appellant failed to satisfy respondent's lien; (3) appellant "has not provided [respondent] with any reliable information to confirm that the homestead has been listed for sale;" (4) appellant "failed, without good cause shown, to comply with the terms set forth in the Judgment and Decree;" and (5) appellant "is in constructive contempt of Court."

The district court transferred title of the homestead to respondent "for the purpose of allowing [respondent] to sell the property." The district court gave respondent "sole decision making authority related to all aspects of selling" the property. In addition, the court entered judgment in the amount of $11,427.30 against appellant. The court ordered appellant to make all payments associated with the property and to fully cooperate with preparation of the property for sale. The district court ordered appellant to satisfy respondent's lien. The district court also sentenced appellant to 30 days in jail with execution stayed "on the condition that [appellant] abide[] by all of the terms of this Order as set forth herein, as well as all of the terms set forth in the . . . Judgment and decree entered March 22, 2007." The order concluded by stating that "[A]ll provisions of the Stipulated Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree not specifically addressed herein remain in full force and effect."

Appellant moved the district court to vacate the contempt order, which the district court denied. This appeal follows, challenging the district court's September 21, 2007 order.

D E C I S I O N

I. Appellant waived the defense of lack of personal jurisdiction.

Appellant argues that the district court lacked personal jurisdiction over him because the district court did not first issue an order to show cause as required by Minn. R. Gen. Prac. 309.01(a), and because respondent did not personally serve the motion papers on appellant. Respondent contends that Minn. Stat. § 588.04 (2006) controls and

does not require an order to show cause. Respondent also argues that service on appellant's attorney was sufficient.

The parties disagree regarding whether Minn. Stat. § 588.04 or Minn. R. Gen. Prac. 309.01(a) is controlling in this contempt proceeding. *Compare* Minn. Stat. § 588.04 (stating that an alleged contemnor can be summoned to a hearing "upon notice, or upon an order to show cause, which may be served by a sheriff or other officer in the same manner as a summons in an action"), *with* Minn. R. Gen. Prac. 309.01(a) (stating that "[c]ontempt proceedings shall be initiated by an order to show cause served upon the person of the alleged contemnor"). Because we conclude that appellant waived his jurisdictional defense when he participated in the contempt hearing after urging the district court to address the merits, we do not address the purported conflict between Minn. Stat. § 588.04 and Minn. R. Gen. Prac. 309.01(a).

"[I]t is a rule of universal application that a party may, by consent, give jurisdiction over his person, and it follows as a consequence that, where there is any defect of jurisdiction, or it has ceased, [the person] may waive the objection, and does so when [the person] takes or consents to any step in the cause which assumes that jurisdiction exists or continues." *Quaker Creamery Co. v. Carlson*, 124 Minn. 149, 150, 144 N.W. 449, 449 (1913).

In *Patterson v. Wu Family Corp*, our supreme court held that "by failing to move the district court to dismiss [petitioner's] claims before, or contemporaneously with, moving for partial summary judgment, [the defendant] affirmatively invoked the jurisdiction of the district court and waived by implication the defense of insufficient

service of process." 608 N.W.2d 863, 869 (Minn. 2000). In *Patterson*, the defendant raised the defense of insufficient service of process but did not move to dismiss the complaint on that ground until after he requested and obtained partial summary judgment in his favor. *Id.* at 865. The supreme court rejected the argument that as long as the defense of insufficient service of process has been raised by answer and asserted during the litigation, the defense is not waived by participating in the litigation. *Id.* at 867. The supreme court acknowledged that defendant provided notice of the objection to personal jurisdiction. *Id.* But mere notice was insufficient to preserve the defense once the defendant affirmatively invoked the jurisdiction of the court by requesting summary judgment. *Id.*

The supreme court agreed that simple participation, standing alone, does not amount to a waiver of a jurisdictional defense. *Id.* at 868.

> Rather it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court's jurisdiction on the merits of the claim that is determinative. Indeed, even proceeding with trial on the merits does not waive the defense where the defendants brought a motion to dismiss for lack of jurisdiction that the trial court denied.

Id.; *see also Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008).

Thus, jurisdictional defenses are preserved by requesting a determination of the jurisdictional issue *before* proceeding on the merits. "Our case law demonstrates that a defendant is free to proceed on the merits of a case without fear of waiving the defense so long as the court has been provided an opportunity to determine the validity of the defense." *Patterson*, 608 N.W.2d at 869.

In the present case, appellant appeared at the hearing despite lack of personal service and promptly stated, "I've never been personally served, and I'm representing myself." When appellant was given his opportunity to speak, he again mentioned the lack of personal service, but he also addressed the merits of the case and offered documents for the district court's consideration. At no point did appellant ask the district court to rule on the jurisdictional issue. Nor did appellant argue that a contested hearing on the merits was improper. These omissions alone may not have waived his challenge to personal jurisdiction, but appellant affirmatively sought the district court's ruling on the merits of respondent's contempt motion. After he raised the jurisdictional issue, he demanded a hearing on the merits.

We conclude that appellant did not provide the district court an opportunity to determine the personal jurisdiction issue before proceeding on the merits of the case. Appellant's brief statements that he had not been served did no more than provide notice of the alleged jurisdictional defense. Notice alone was insufficient to preserve the defense once appellant affirmatively invoked the jurisdiction of the court by requesting a hearing on the merits. *See id.* at 867 (holding mere notice is insufficient). Appellant's statements regarding lack of service must be considered in the context of appellant urging the district court to conduct a hearing on the merits. By asking the district court to resolve the merits, without first deciding the alleged jurisdictional issue, appellant waived his jurisdictional defense and submitted to the district court's jurisdiction. Therefore, we hold that the district court properly exercised jurisdiction over appellant.

II. Appellant was not denied due process of law at the contempt hearing.

Appellant argues that he was denied due process because the district court (1) failed to bifurcate his contempt hearing into an admit-or-deny hearing and an evidentiary hearing, and (2) denied appellant the opportunity to offer sworn testimony. "This court reviews de novo the procedural due process afforded a party." *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758,* 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Denial of a Bifurcated Hearing

While some district courts may use a bifurcated hearing in contempt proceedings, appellant cites no legal authority mandating a bifurcated hearing. Furthermore, appellant fails to advance a legal argument explaining how failure to use a bifurcated-hearing process violates due process. Finally, appellant does not make any claim that the lack of a bifurcated hearing prejudiced him. Appellant did not request a bifurcated hearing or ask the district court to continue any portion of the hearing. Appellant did not ask to call any witnesses. While respondent objected to the district court's consideration of appellant's statements and documents, the district court heard appellant's arguments and apparently accepted appellant's documents. The district court did not refuse to receive or consider any evidence offered by appellant. We reject appellant's unsupported claim that the district court's failure to hold a bifurcated hearing denied appellant due process of law.

Denial of Sworn Testimony

Appellant argues that the district court denied him due process of law by denying him the opportunity to offer sworn testimony. It appears that the district court failed to place appellant under oath prior to appellant's statements in opposition to a contempt finding. Appellant argues that the lack of an oath violates Minn. R. Gen. Prac. 309.02 and precedent.

Minn. R. Gen. Prac. 309.02 states, "[t]he alleged contemnor must appear in person before the court to be afforded the opportunity to resist the motion for contempt by sworn testimony. The court shall not act upon affidavit alone, absent express waiver by the alleged contemnor of the right to offer sworn testimony." The supreme court has held "the district court is without the power to adjudge a person guilty of contempt unless he has first been brought before the court and examined." *Clausen v. Clausen*, 250 Minn. 293, 298, 84 N.W.2d 675, 679 (1957) (applying identical prior versions of Minn. Stat. §§ 588.09-.10). The rule and caselaw do not support a conclusion that the district court denied appellant due process of law by failing to administer an oath to appellant. The law simply prohibits a contempt finding without an appearance by the alleged contemnor and an opportunity for the alleged contemnor to be heard. Appellant appeared and was heard.

Appellant's argument regarding the lack of an oath would be more compelling if any witness other than appellant himself had testified. The oath ensures the veracity of a witness's testimony. *See State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989) (noting that sworn testimony protects the integrity of the fact-finding process). Presumably,

appellant does not mean to suggest that his statements were not trustworthy because he was not administered an oath.

"The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1998). "These protections include reasonable notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decisionmaker, and the right to a reasonable decision based solely on the record." *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970)), *review denied* (Minn. Feb. 14, 1995). Appellant appeared before the district court in response to notice served on his previous attorney of record. Appellant obviously received the notice. Appellant indicated that he would represent himself. Appellant was given an opportunity to be heard and was not denied the opportunity to present witness testimony or other evidence. On this record we conclude that appellant was afforded appropriate procedural due process.

III. The district court abused its discretion by failing to make findings mandated by *Hopp*.

Appellant argues that the district court's contempt order should be reversed because the district court abused its discretion by failing to determine that appellant had the ability to pay the respondent's lien, citing *Hopp*, 279 Minn. at 173, 156 N.W.2d at 215 (holding that remand is appropriate where the district court failed to make "essential

findings"). Appellant's failure to satisfy the lien after 75 days had elapsed was neither the basis for the contempt proceedings nor the district court's contempt finding. The basis for the contempt proceeding and order was appellant's failure to immediately list the homestead for sale after failing to satisfy the lien obligation, in violation of the terms of the judgment and decree.[1]

While appellant's ability to satisfy the marital lien was not at issue, there is merit to appellant's argument that the contempt order in this case fails to follow the established procedure for a conditional contempt order and should be reversed. A proper exercise of contempt powers requires:

> (a) That the ordering court had jurisdiction of the subject matter and the person.
>
> (b) That the decree of the court clearly defined the acts to be performed by a party to the proceedings.
>
> (c) That the party directed to perform had notice of the court's decree and a reasonable time within which to comply.
>
> (d) That the party adversely affected by the alleged failure of the directed party to comply has applied to the court for aid in compelling performance, giving specific grounds for complaint.
>
> (e) That upon due notice a hearing be conducted and at such hearing the party charged with nonperformance be given an opportunity to show compliance or his reasons for failure.
>
> (f) That the court after such a hearing should determine *formally* whether there was a failure to comply with the order

[1] Both the contempt motion and the resulting order lack specificity regarding the exact terms with which appellant failed to comply. We interpret the district's court order to be based on appellant's failure to immediately list the home for sale.

> and, if so, whether conditional confinement is reasonably likely to produce compliance fully or in part.
>
> (g) That confinement should not be directed to compel a party to do something which he is wholly unable to do. But the burden of proving inability should be on the defendant, who should not be held to have sustained it when he has failed to make a good-faith effort to conform.
>
> (h) That when confinement is directed, the party confined should be able to effect his release by compliance or, in some cases, by his agreement to comply as directed to the best of his ability.

Hopp, 279 Minn. at 174-75, 156 N.W.2d at 216-17 (citations omitted).

The district court has broad discretion to exercise its contempt powers, but contempt is appropriate only when a party has acted "contumaciously, in bad faith, and out of disrespect for the judicial process." *Minn. State Bar Ass'n v. Divorce Assistance Ass'n, Inc*., 311 Minn. 276, 284, 248 N.W.2d 733, 740 (1976). This court will not disturb the district court's ruling on a contempt motion absent an abuse of discretion. *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986).

At issue here is the sufficiency of the district court's findings that appellant failed to comply with a court order and that conditional confinement is reasonably likely to produce compliance. The district court was required to formally determine whether appellant failed to comply with an order and if so, whether conditional confinement was reasonably likely to produce compliance. *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217. A finding regarding a person's ability to comply with the court's order is "essential." *Id.* at 173, 156 N.W.2d at 21.

The district court's findings regarding appellant's failure to comply with the requirement that he immediately list the house for sale were as follows: (1) the 75-day deadline elapsed; (2) appellant failed to satisfy respondent's lien within the 75 days; (3) appellant "has not provided [respondent] with any reliable information to confirm that the homestead has been listed for sale"; (4) appellant "failed, without good cause shown, to comply with the terms set forth in the Judgment and Decree"; and (5) appellant "is in constructive contempt of Court."

The district court's findings are deficient. At the hearing, appellant twice stated that the marital homestead was listed for sale. The hearing transcript indicates that appellant provided the district court a copy of appellant's purported listing agreement. Appellant offered an explanation for the delay in listing that related to his children's school enrollment. Yet, the district court made no findings regarding (1) whether appellant had listed the homestead for sale; (2) if the homestead had been listed, the date of listing; (3) if the homestead had been listed, whether the listing was "immediate"; and (4) if appellant failed to list immediately, whether appellant was able to comply with an order for immediate listing. These findings were necessary to sustain a contempt finding under *Hopp*.

Appellant's failure to provide respondent with information about the listing prior to the hearing may be relevant to the determination of whether respondent is entitled to attorney fees resulting from respondent's action to enforce the terms of the judgment and

decree,[2] but these findings do not establish that appellant failed to immediately list the homestead for sale. Without specific findings regarding appellant's noncompliance, we do not know whether the district court disbelieved appellant's claim that the homestead was listed for sale, or found the claim credible but that the listing was not immediate. If the district court believed that appellant listed the homestead, but not immediately, it was necessary to make a finding regarding the date of the listing and the district court's interpretation of the term "immediate."

Because the district court did not formally determine that appellant failed to comply with a court order and did not make the essential finding that appellant was able to comply with the underlying order, we reverse the district court's contempt finding and order. We remand to provide the district court an opportunity to issue a contempt finding and conditional confinement order that is supported by specific findings consistent with the requirements of *Hopp*.

On remand we caution the district court to consider whether its conditional confinement order may require, as a condition of stayed confinement, compliance with orders that previously did not exist. In this case, the district court stayed appellant's 30-day jail sanction on the condition that appellant abide by all terms of the judgment and decree, which is the order underlying the contempt proceeding. The district court also conditioned the stay on appellant's compliance with all terms of the September 21, 2007

[2] The judgment and decree provided that if appellant failed to satisfy respondent's lien or refinance or obtain a release from the lender, the appellant would be responsible for all reasonable attorney fees incurred by respondent if it was necessary for respondent to seek enforcement of the provisions.

order, which is the order that resulted from the contempt proceedings. The September 21, 2007 order includes terms that were not included in the judgment and decree and which appear to impose obligations broader than those imposed by the judgment and decree (e.g., that respondent shall undertake to make all repairs and improvements suggested by the real estate agent as necessary to place the property on the market for sale). Thus, the conditional confinement order attempts to compel compliance, via a stayed jail sentence, with terms that previously did not exist and were never violated.

A conditional confinement order is a means of producing future compliance with a prior court order. *Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 309 Minn. 408, 411, 245 N.W.2d 837, 838 (1976) (noting "one essential prerequisite is that the prior decree or order of a court sought to be enforced by contempt must clearly define the acts to be performed by the alleged contemnor"). The stay conditions of a conditional confinement order should be based on the terms of the prior order, which is intended to be enforced. While the district court has discretion to fashion stay conditions that will ensure compliance with the prior order, every exercise of the district court's civil contempt power must adhere to the eight *Hopp* requirements.

IV. The district court abused its discretion when it ordered transfer of the title to the parties' homestead from appellant to respondent.

Appellant argues that the district court abused its discretion by ordering title to the homestead transferred from appellant to respondent because the order changed appellant's substantive property rights under the judgment and decree. Respondent

argues that appellant's substantive rights were not altered because the parties retained their respective equity in the homestead, and the title transfer merely served to effectuate the sale of the homestead as mandated by the judgment and decree.

A lien on a homestead is a division of property. *Kerr v. Kerr*, 309 Minn. 124, 126, 243 N.W.2d 313, 314 (1976). A district court may not modify a division of property. Minn. Stat. § 518A.39, subd. 2(f) (2006); *Erickson v. Erickson*, 452 N.W.2d 253, 255 (Minn. App. 1990). However, a district court may issue appropriate orders implementing or enforcing the provisions of a dissolution decree. *Id*. A district court has the power to clarify and construe a divorce judgment so long as it does not change the parties' substantive rights. *Ulrich v. Ulrich*, 400 N.W.2d 213, 218 (Minn. App. 1987). Furthermore, the district court may issue appropriate orders implementing or enforcing specific provisions of the dissolution decree. *Linder v. Linder*, 391 N.W.2d 5, 8 (Minn. App. 1986).

Appellant relies on *Potter v. Potter* for support. 471 N.W.2d 113, 113 (Minn. App. 1991). That case involved facts similar in that the dissolution decree awarded one party title to the marital property and the other party a lien. *Id.* But the dissolution decree was silent as to how the lien was to be satisfied. In an effort to satisfy the lien, the district court ordered that the property be listed for sale at fair-market value and sold by a realtor agreeable to both parties. *Id.* The order specified that the lienholder's interest would be satisfied with sale proceeds. *Id*. But the district court did not transfer title to effectuate the sale. This court held that a public sale protected the parties' interests from

an unfair sale price, and therefore, there was no change in the parties' substantive property rights. *Id*. at 114.

The district court's order here compromises appellant's property award under the judgment and decree in several respects. An unidentified realtor, rather than the parties, is ordered to set the sale price. The order does not state how the sale proceeds will be distributed. There is no provision for the return of proceeds in excess of respondent's lien amount to appellant. Under the district court's order, appellant loses title to the homestead and any equity he is entitled to under the judgment and decree. Furthermore, the district court's order transferred title to respondent and simultaneously reduced respondent's lien to a judgment in respondent's favor. Under the terms of the order, respondent may enforce the judgment to satisfy the lien despite the fact that respondent also received title to the homestead as a means of enforcing the lien. The catch-all provision that "all provisions of the . . . [judgment and decree] not specifically addressed herein remain in full force and effect" fails to adequately preserve appellant's property interest under the judgment and decree. The judgment and decree granted appellant title to the homestead and respondent a lien. The district court's order divested appellant of title without preserving appellant's interest in the equity associated with title.

An order for title transfer and sale may be an appropriate means of implementing or enforcing the provisions of the parties' dissolution decree. But the district court's order failed to preserve appellant's equity interest in the homestead. The order therefore modifies the property division in the judgment and decree contrary to Minn. Stat. § 518A.39, subd. 2(f) and constitutes an abuse of the district court's discretion.

Affirmed in part, reversed in part, and remanded.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals