STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1032

In re the Marriage of: Laura Daigle, petitioner,
Respondent,

vs.

Brian H. Daigle,
Appellant.

Filed April 12, 2011
Affirmed
Peterson, Judge

Itasca County District Court
File No. 31-FA-08-3983

James Perunovich, Law Offices of James Perunovich, Hibbing, Minnesota (for respondent)

Ellen Elizabeth Tholen, Bovey, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from the district court's denial of appellant-husband's motion to reopen the parties' dissolution judgment, husband argues that, because respondent failed to honor the parties' agreement underlying their stipulated dissolution judgment and

because he has lived beyond the life expectancy that was predicted when the parties entered the stipulation, the district court abused its discretion by refusing to reopen the parties' dissolution judgment. We affirm.

FACTS

The parties were married in 2003. In June 2008, respondent-wife Laura Daigle hired attorney Sara Swanson to represent her in a divorce proceeding against appellant-husband Brian Daigle. About one month later, husband was diagnosed with cancer and given a prognosis of six months to one year left to live. Husband acted pro se in the divorce proceeding. On November 12, 2008, one day after husband received a chemotherapy treatment, the parties met in wife's attorney's office to finalize and sign a marital termination agreement (MTA). The MTA's terms were incorporated into the dissolution judgment and decree.

The parties owned a homestead with a fair market value of about $325,000. The property was encumbered by two mortgages totaling $176,000. The dissolution judgment states:

> Because Husband has been recently diagnosed with colon cancer, the terms of the parties' property settlement may change depending on Husband's health. Specifically as it relates to the homestead, the parties agree that if Husband predeceases Wife, Wife shall be awarded all right, title, and interest to the homestead (the fairness of this is also valid in that Husband will be keeping all of the other real estate as well as his interest in and to his businesses).

The judgment awarded the homestead to wife

> subject to all encumbrances of record but free and clear of any claim on the part of [husband] (unless as described above,

> the parties decide to sell the homestead while Husband is still alive). If the homestead is sold while Husband is still alive, Wife would pay Husband fifty percent (50%) of the equity in the homestead after payment of realtor's fees, closing costs and the mortgages.

The judgment provided that husband could continue residing in the homestead as long as mutually agreeable to both parties, that the parties would share equally the mortgage obligations and other expenses as long as husband continued residing in the homestead, and that husband would execute a quit-claim deed relinquishing his interest in the homestead property. The judgment awarded husband two business properties; two timeshares in Florida; a one-fifth interest in a 30-acre parcel of hunting property; and two businesses, Itasca Electric and Mr. Electric. Husband owned Itasca Electric before the marriage and bought Mr. Electric during the marriage.

Husband moved out of the homestead in March 2009 and was barred from it by a May 2009 harassment restraining order. Husband's business properties have been foreclosed on, and the timeshares are in default. Itasca Electric was $500,000 in debt at the time of dissolution and went into bankruptcy. Husband sold his interest in Mr. Electric, and the $30,000 in sale proceeds were applied to bank and tax debts. At the time of dissolution, husband owed $80,000 in tax debts. In July 2009, husband moved the district court for an order (1) determining that the dissolution judgment was no longer equitable because husband was excluded from the homestead and (2) either directing that the homestead be sold or awarding husband one-half of the equity in the house at the time of dissolution.

At the evidentiary hearing on husband's motion, Swanson testified that she advised wife against her and husband coming into Swanson's office together and that she drafted the MTA based on wife's instructions and sent it to husband to review on October 28, 2008. A letter that Swanson sent to husband with the MTA encouraged husband to review the MTA with an attorney because property settlements are final and stated that Swanson represented only wife and could not give husband legal advice. Swanson made changes to the MTA based on an e-mail from wife, which indicated that some of the changes had been requested by husband. On November 12, 2008, the parties came to Swanson's office together, and Swanson made additional changes to the MTA at their request. Swanson gave the MTA to the parties to review and told them that they did not need to sign it that day if they were not satisfied with it. Swanson testified that, at the meeting on November 12, she had no concerns about husband's physical or mental condition and that he did not indicate that he was not feeling well or that he was having difficulty understanding anything.

Wife, who is a registered nurse, testified that husband appeared "competent and fully lucid" during the entire time they were negotiating the MTA until they signed it. Husband never told wife that he did not feel mentally or physically capable of discussing or making decisions about the property settlement and other issues involved in the divorce. Wife had no concerns about husband's physical or mental health affecting his ability to participate in the divorce negotiations. Husband continued working following his cancer diagnosis.

Husband testified that the prognosis that he had only six months to one year left to live was a consideration in the parties' agreement about the homestead and that the parties had agreed to sell the house and split the equity if he lived longer than predicted or if the parties stopped living together in the homestead.

The district court denied husband's motion based on its determinations that husband failed to show that (1) his physical or mental health caused excusable neglect in his review and approval of the MTA or (2) his current health substantially alters information known when the dissolution judgment was entered. This appeal followed.

D E C I S I O N

The district court's decision about whether to reopen a judgment will be upheld absent an abuse of discretion, and the underlying findings will not be set aside unless they are clearly erroneous. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998). Subject to the right of appeal, a dissolution judgment and decree is final when entered unless a statutory basis for reopening exists. Minn. Stat. § 518.145, subds. 1-2 (2010). A dissolution judgment may be reopened based on "mistake, inadvertence, surprise, or excusable neglect" or if "it is no longer equitable that the judgment and decree or order should have prospective application." *Id.*, subd. 2(1), (5). The moving party bears the burden of establishing a basis to reopen the judgment and decree. *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001).

Mistake, Inadvertence, Surprise, or Excusable Neglect

Husband asserts that he only had nine days to review the MTA before the November 12, 2008 meeting and that, during that time, he was preparing for his first

chemotherapy treatment, which occurred on November 11, 2008. But both wife and Swanson testified that husband appeared competent. Also, Swanson encouraged husband to review the MTA with another attorney and told the parties that they did not need to sign the MTA on November 12 if they were not satisfied with it.

To the extent that husband is arguing that his physical and mental health caused excusable neglect, the district court found:

> [Husband] offered no specific proof of impairment at the November 12, 2008, meeting. By contrast, [wife] and her counsel testified [husband] appeared to be lucid. Although [husband] testified about general symptoms, such as fatigue, that are associated with chemotherapy, there was no specific testimony or evidence offered that would lead the Court to conclude [husband's] capacity was diminished at any relevant time.

Husband argues that he understood that if the parties did not continue residing together in the homestead, they would sell the house. At husband's request, the MTA was modified from allowing wife to make the decision whether to sell the house to allowing the parties to make the decision to sell. It appears that the modification that husband desired was to allow either party to make a decision to sell. But husband's claimed misunderstanding does not justify reopening the judgment. *See Kubiszewski v. St. John*, 518 N.W.2d 4, 7 (Minn. 1994) (in interpreting mistake provision in Minn. R. Civ. P. 60.02, supreme court held that unilateral mistake does not justify reopening judgment); *see also Shirk v. Shirk*, 561 N.W.2d 519, 522 n.3 (Minn. 1997) (noting that language of Minn. Stat. § 518.145 closely parallels that of rule 60.02).

The district court did not abuse its discretion in declining to reopen the judgment based on mistake, inadvertence, surprise, or excusable neglect.

Prospective Application Inequitable

> [T]o reopen a judgment and decree because prospective application is no longer equitable, the inequity must result from the development of circumstances substantially altering the information known when the dissolution judgment and decree was entered. The moving party must present more than merely a new set of circumstances or an unforeseen change of a known circumstance to reopen a judgment and decree.

Thompson v. Thompson, 739 N.W.2d 424, 430-31 (Minn. App. 2007) (quotation omitted).

Husband argues that his life expectancy of six months to one year was taken into consideration by the parties when they entered into the MTA and, therefore, the dissolution judgment should be reopened because he has lived beyond that time. At the time of the hearing on husband's motion to reopen, appellant had lived about six months longer than the one year that had been predicted. Husband's claim that his life expectancy was taken into consideration is contradicted by wife's testimony that husband did not tell her about his life expectancy. Husband argues that the credibility of wife's testimony is undercut by the fact that she engaged in estate-planning activities before signing the MTA. But, although wife testified that she spoke with an attorney and with husband about estate planning, she also testified that "[t]he conversation revolved around the exchange of life insurance policies." The dissolution judgment awarded each party all right, title, interest, and equity in the other party's life-insurance policy and directed

how each party is to divide insurance proceeds if that party survives the other party. Thus, wife's testimony does not indicate that wife knew about husband's life expectancy.

Husband also cites paragraph 18 of the dissolution judgment as referring to his life expectancy. That paragraph states:

> Because Husband has been recently diagnosed with colon cancer, the terms of the parties' property settlement may change depending on Husband's health. Specifically as it relates to the homestead, the parties agree that if Husband predeceases Wife, Wife shall be awarded all right, title, and interest to the homestead (the fairness of this is also valid in that Husband will be keeping all of the other real estate as well as his interest in and to his businesses).

Although this paragraph refers to husband's colon cancer, it does not indicate how serious his condition is or what his life expectancy is. Thus, it does not support husband's argument that his life expectancy was taken into consideration by the parties when they entered into the MTA.

The district court found:

> [Husband's] current health appears to be substantially unchanged from his health at the time the Decree was entered. [Husband's] diagnosis is the same, Stage Four colon cancer. The Court is not aware of any change in the six-month to one-year life expectancy, except that [husband] has lived beyond his physician's expectations. Absent any other evidence, the Court must assume that [husband's] life expectancy is six months to one year. Thus, in purely formalistic terms, [husband's] current health does not substantially alter information that was known at the time the judgment and decree was entered.

The district court's determination is consistent with *Thompson*. Husband continues to suffer from colon cancer, and although he has lived beyond his physician's initial

expectations, there is no evidence that the nature or severity of his illness has changed. Furthermore, when considering whether husband's current health makes prospective application of the judgment inequitable, the district court assumed that husband's current health has substantially altered the information known when the judgment was entered.

Husband argues that prospective application is inequitable because the lien against the homestead granted to him in the MTA was omitted from the dissolution judgment. But the dissolution judgment states, "If the homestead is sold while Husband is still alive, Wife would pay Husband fifty percent (50%) of the equity in the homestead after payment of realtor's fees, closing costs and the mortgages." The district court found that this provision is "the functional equivalent of an inchoate lien on half the equity of the homestead." The district court also found that the homestead disposition was "not disturbed by [husband's] exclusion from the homestead because his conditional obligation to pay half the homestead expenses is extinguished."

Husband argues that the property distribution was unfair because the businesses, business properties, and timeshares awarded to him had no value and the hunting property was nonmarital. The district court found:

> [Husband] signed the MTA and by signing, stipulated to the property distribution therein. [Wife] had no reason to know the extent of [husband's] financial liabilities because she had little or no involvement in his businesses, and [husband] did not fully disclose his liabilities. . . . [H]e has failed his burden of proving how the award of the timeshares contributes to any unfairness.

These findings are supported by wife's testimony and the absence of evidence to the contrary.

Husband notes the lack of "valuations for the businesses real estate assets, time shares, or debts awarded to [him]." He also notes that there is no evidence of his nonmarital interest in the homestead. "A party cannot complain about a district court's failure to rule in the party's favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question." *Thompson*, 739 N.W.2d at 431 (quotation omitted).

The district court did not abuse its discretion in determining that husband failed to show that prospective application of the dissolution judgment is inequitable.

Affirmed.