STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1059

In re the Marriage of:
Anne Elizabeth Thommes, petitioner,
Appellant,

vs.

Michael Anthony Thommes,
Respondent.

Filed April 19, 2011
Affirmed in part, reversed in part, and remanded
Harten, Judge[*]

Wright County District Court
File No. 86-F3-05-004534

Anne E. Thommes, Delano, Minnesota (pro se appellant)

Kathryn A. Graves, Katz, Manka, Teplinsky, Graves & Sobol, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Harten, Judge.

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

HARTEN, Judge

In this post-dissolution dispute, appellant challenges the denials of her motions for (1) some amended findings; (2) a default judgment for half the value of four of the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

parties' vehicles; and (3) need-based and conduct-based attorney fees. Respondent challenges the denials of his motions for (1) some amended findings; (2) an order compelling discovery of the records of appellant's family's business; and (3) retroactive modification of spousal maintenance as a sanction for appellant's alleged fraud. Because we see no error in them, we affirm the findings that (1) appellant's income includes both her imputed income and her employer's payments of some of her expenses; (2) appellant's income includes her tax refunds; and (3) some of appellant's employer's payments of her credit card expenses are not part of her income. We also affirm the denial of respondent's motion for retroactive modification of spousal maintenance and appellant's motion for conduct-based attorney fees. Because we find error or an abuse of discretion, we reverse and remand the findings as to (1) the amount respondent pays his parents as rent for his business premises; (2) the attorney fees paid by respondent's business; (3) the depreciation of the business's vehicles; and (4) appellant's employer's payment of her gas expenses. We also reverse and remand the denials of (1) respondent's motion for an order to compel discovery of the records of appellant's family's business; (2) appellant's motion for a default judgment for half the value of four of the parties' vehicles; and (3) appellant's motion for need-based attorney fees.

FACTS

In 1988, appellant Anne Thommes and respondent Michael Thommes were married. Their three children are now 20, 18, and 16. During the marriage, the family enjoyed a very comfortable lifestyle. The district court found that "[t]he parties were

able to collect a number of automobiles and recreational vehicles, and [appellant] and the children pursued their various hobbies, including horseback riding and showing horses."

This lifestyle was financed through MT Specialties Inc., (MT), a computer numeric control repair and maintenance company, which was owned partly by the parties and partly by Hammerlund Manufacturing Co., Inc. (HMI), a business owned by appellant (a 24% shareholder), her parents, and her brother. Both parties worked for MT during the marriage; appellant also worked for HMI. When the parties separated, respondent left MT and started his own company (Pro CNC), of which he is the sole proprietor. Appellant, her parents, and HMI brought an action against respondent, his parents, and Pro CNC; that action settled in 2009.

Respondent's income is derived from Pro CNC, which experienced significant losses during the 2009 recession. To store his equipment and to conduct the business of Pro CNC, respondent rents a building from his parents. Appellant's income is derived from her part-time employment at HMI and from HMI's payment of some of her personal expenses.

The parties' marriage was dissolved in 2007. The district court found that the parties had been able to maintain their lifestyle in part because of their "extremely low income tax payments based on highly questionable business tax deductions" and that their lifestyle "could not have been maintained had the parties paid a reasonable percentage of their income toward income taxes."

The parties filed numerous post-dissolution motions that generated the three documents challenged on this appeal.[1] The September 2009 second amended judgment (1) denied respondent's motion to compel discovery of HMI's business records[2]; (2) set monthly child support at $1,343 and required respondent to provide medical insurance for appellant and the children; (3) reduced monthly spousal maintenance from $3,000 to $1,750; and (4) denied both parties' motions for attorney fees. The January 2010 order denied most of the parties' motions to amend the findings in the second amended judgment. The April 2010 order denied appellant's motions to amend findings, to modify child support, and for attorney fees; it also denied respondent's motion to modify the children's medical support and for attorney fees.

Both parties challenge the denials of motions to amend the findings supporting the modification of spousal maintenance. Respondent challenges the denial of his motion to compel discovery. Appellant challenges the denials of her motions for a default judgment and for attorney fees.

D E C I S I O N

1. Spousal Maintenance

We review for an abuse of discretion a district court's decision on whether to modify an existing maintenance award, *Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn.

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[1] *See Thommes v. Thommes*, A10-1059 (Minn. App. 5 Aug. 2010) (order) (construing appellant's appeal from the April 2010 order to be from the second amended judgment and the January 2010 order as well).

[2] In so doing, the judgment implicitly granted appellant's motion for an order "that pursuant to [Minn. R. Civ. P. 26.03], additional discovery shall not be had regarding [HMI]."

1997), but we review de novo "questions of law related to spousal maintenance." *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009).

The district court found that respondent's circumstances had changed since the original judgment in 2007: his gross monthly income in 2007 was $12,333, and his gross monthly income in 2009 was $9,100 or $9,087.[3] Therefore, a modification of maintenance was appropriate. *See* Minn. Stat. § 518A.39, subd. 2(a)(1) (2008) (substantially decreased income of obligor may be basis for modification). The district court reduced monthly spousal maintenance to $1,750.

Appellant now argues that spousal maintenance should be restored to the original $3,000 per month; respondent argues that it should be terminated. Both parties challenge some of the district court's findings as to their incomes. "A district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004).

a. Findings on Respondent's Income

Respondent's income is earned entirely from Pro CNC, either as his monthly draw or as profit. He challenges the district court's determination of the appropriate rent for him to pay his parents for Pro CNC's business premises; appellant challenges the findings on Pro CNC's annual legal expenses and on the depreciation of its vehicles.

Regarding the rent, respondent's parents hired an appraiser to calculate an appropriate amount for the building they rent to Pro CNC. Respondent testified that the

[3] The district court at different parts of the second amended judgment used both figures; this discrepancy is de minimis.

$1,200 rent his parents set was lower than the appraiser's value. Appellant's financial expert opined, without giving any reason, that this rent "appear[ed] high" and that $500 would be a reasonable rent. The district court did not explain why it rejected rent based on the appraiser's qualified opinion and adopted rent based on a financial expert's unsupported opinion.

Regarding attorney fees, the district court found that the approximately $20,000 Pro CNC paid in both 2007 and 2008 resulted from a lawsuit that had settled and that the 2009 fees would be about $5,141, but nevertheless allowed an attorney fee deduction of about $20,000 from Pro CNC's anticipated 2009 profit.

Regarding vehicle depreciation, appellant's expert argued that annual depreciation of about $22,000 should be added to Pro CNC's cash flow while respondent's expert argued that the depreciation should not be added because Pro CNC was making loan payments on the depreciating equipment, which would be paid off in July 2009. The district court "conclude[d] that the expert testimony of [appellant's expert] is applicable here, while that of [respondent's expert] is not[,]" but adopted the figures of respondent's expert, which did not restore the 2008 depreciation of $23,339.

Because of the unexplained inconsistencies in these three findings, we reverse and remand them.

b. Findings on Appellant's Income

Appellant challenges two of the district court's findings as to her income. First, she argues that the district court erred by both imputing to her the income she could earn from a full-time job with another employer and by adding to her income the personal

expenses paid by HMI, her current part-time employer. But this argument is speculative: HMI might pay appellant's expenses even if she were not an employee; appellant does not consider that full-time employment with another employer might provide other benefits, such as health insurance; and appellant has made no effort to find full-time employment. A district court may not rely on speculation in determining a party's income. *See, e.g. Hafner v. Hafner*, 406 N.W.2d 590, 593 (Minn. App. 1987).

Second, appellant challenges the inclusion of her tax refund in her income, arguing that she is entitled to the earned-income tax credit because of respondent's failure to make timely child support and spousal maintenance payments. But child support and spousal maintenance payments are not earned income. *See* 26 U.S.C. § 32(c)(2)(A) (2010) ("earned income" defined as "wages salaries, tips, and other employee compensation" and "the amount of the taxpayer's net earnings from self-employment"). Moreover, the district court has discretion to include tax refunds as income. *Johnson v. Johnson,* 533 N.W.2d 859, 864 (Minn. App. 1995). Neither of appellant's challenges has merit.

Respondent challenges the district court's exclusion from appellant's income of HMI's payments of all appellant's credit card bills and, specifically, of her gas bills. HMI reports show average monthly payments of $868.61 on appellant's credit card bills; she testified that an unspecified amount is for business rather than personal expenses. Respondent asserts that this testimony "was inconsistent and not credible." But credibility determinations are for the district court. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000) (holding that appellate court defers to a district

court's credibility determinations). The district court's finding that HMI's payment of some of appellant's credit card bills was not income was not clearly erroneous. *See Peterka*, 675 N.W.2d at 357.

The district court also found that HMI makes monthly payments of $45 for appellant's cell phone, $386 for her car payment, $111 for her car insurance, and between $300 and $400 for her gas, but included only the first three, not the gas payment, in her income. The exclusion of the gas payment from her income conflicts with the finding and is unexplained.

We affirm the inclusions in appellant's income of imputed earnings, HMI's payments of her personal expenses, and her tax refund, and the exclusion from her income of HMI's payments of her credit card bills. We reverse and remand the exclusion of HMI's payment of appellant's gas bills.

c. Discovery of HMI's Records

Because HMI contributes to appellant's income by paying some of her expenses, respondent challenges the denial of his motion to compel discovery of HMI's business records. "[A district court] has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

Respondent argues that the district court erred by concluding that it lacked authority to require appellant to produce HMI's business records because HMI is not a party to this lawsuit and denying respondent's motion to compel discovery.[4]

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires . . . including . . . that commercial information not be disclosed or be disclosed only in a designated way . . . . If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Minn. R. Civ. P. 26.03. Therefore, the district court did have authority both to compel discovery of HMI's records and to issue an order protecting the records.

Respondent relies on *Ciriacy v. Ciriacy*, 431 N.W.2d 596 (Minn. App. 1988). *Ciriacy* concerned a husband who, after dissolution, established a medical practice and became a shareholder and employee of a medical clinic. *Id.* at 597. His wife sought records from the clinic to establish the amounts of his interest in the clinic and of his compensation. *Id.* at 598. The clinic moved to partially quash or modify the subpoenas, and the district court issued an order modifying them. *Id.* The wife moved to vacate the order, and the district court denied her motion. *Id.* This court reversed, concluding that the district court denied the wife access to information she needed to review in order to establish the value of her husband's interests. *Id*. at 599-600. The wife's examination of the documents was subject to a protective order, and the clinic had the right to substitute

[4] Appellant argues that this issue is precluded by res judicata, because respondent's motion in the June 2008 order was denied. But respondent subpoenaed, and appellant partially provided, additional HMI records in 2009.

numbers for the names of the other physicians to protect their private financial data. *Id*. at 600.

The same situation exists here. Given the extent of HMI's known contribution to appellant's lifestyle, respondent needs HMI's records to establish the full extent of that contribution, and his examination of HMI's records shall be subject to a district court protective order of HMI's interests. We reverse and remand the denial of respondent's motion to compel discovery of HMI's records.[5]

2. Marital Property Division

A district court's division of marital property will be reversed only for an abuse of its broad discretion. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). The property at issue is four recreational vehicles that respondent claimed were sold during the marriage, but that appellant claimed were still in respondent's possession.[6]

These vehicles have been the subject of ongoing controversy. The September 2007 amended judgment provided that they be sold and the proceeds divided equally between the parties, or, if they already had been sold, respondent was to verify the sales and pay appellant half of their value. In 2008, two district court orders denied appellant's motions to have respondent held in contempt for noncompliance with the amended judgment and for nonpayment of his "support obligations." She challenged the denials in

[5] Respondent also challenges the denial of his motion to have spousal maintenance retroactively reduced or terminated as a sanction for appellant's alleged fraud in not disclosing HMI's records. While we reverse the denial of respondent's motion to compel discovery, we do not find that appellant's objection to the discovery was fraudulent, and we affirm the denial of respondent's motion to sanction appellant for fraud.

[6] A trailer was also included with the four vehicles, but is not mentioned in this appeal.

this court, where her appeal was resolved by appellate mediation based on the parties' stipulation that the district court's findings in the 2008 orders would not be binding in any subsequent court proceeding.

In February 2010, appellant moved to require respondent to comply with the amended judgment immediately by either producing the vehicles or verifying their sales and paying appellant half their value plus depreciation, or, in the alternative, by giving appellant the right to file an affidavit of default for entry and docketing of a property judgment in the amount of half the value of the vehicles at the time of the original judgment ($8,937), plus interest. In its April 2010 order, the district court denied the motion because the issue was "never preserved when the appeal was dismissed b[y] settlement" and observed that the motion was "merely a request to reconsider the . . . order [of June 2008]."

Appellant asserts that this motion did not duplicate an earlier motion. She previously moved to have respondent found in contempt for noncompliance; she now moves for a default judgment in the amount she would have received if he had complied. Contempt in a dissolution case focuses on confinement of the non-complying individual. *Hopp v. Hopp*, 279 Minn. 170, 174-75, 156 N.W.2d 212, 216-17 (Minn. 1968). Default judgment focuses on the individual's failure to respond. *Doe v. Legacy Broadcasting*, 504 N.W.2d 527, 528 (Minn. App. 1993). The district court's 2008 determination that appellant was not entitled to have respondent held in contempt for noncompliance did not preclude her from challenging his noncompliance by seeking a default judgment in 2010.

We reverse the denial of appellant's motion on the ground that it was duplicative and remand for a decision on its merits.[7]

3. Attorney Fees

In marriage dissolution cases, an award of attorney fees may be either needs-based fees (when the fees are necessary for a good faith assertion of the rights of a party that cannot pay them and the other party has the ability to pay them) or conduct-based fees (when a party "unreasonably contributes to the length or expense of the proceeding"). Minn. Stat. § 518.14, subd. 1 (2010); *see also Geske v. Marcolina*, 624 N.W.2d 813, 816-19 (Minn. App. 2001) (attorney fees in dissolution cases are generally governed by Minn. Stat. § 518.14, subd. 1). Both types of fees are reviewed for an abuse of discretion. *See Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (needs-based); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) (conduct-based). The district court did not abuse its discretion by denying appellant needs-based attorney fees because respondent lacks the ability to pay them.[8] However, because our reversal and

[7] Respondent argues that appellant's motion was precluded by res judicata. Res judicata requires proof that the earlier claim (1) involved the same set of factual circumstances; (2) involved the same parties; and (3) was resolved by a final judgment on the merits; and that (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). It is unclear whether respondent made this argument to the district court, and, in any event, review of the application of res judicata is de novo. *Id.* While the first and second elements are met, the third is not: adjudication on the merits of a claim for a contempt holding is not an adjudication on the merits of a claim for a default judgment. Res judicata does not preclude appellant's motion. Appellant's argument that the fourth element is not met because she did not have a full and fair opportunity to litigate the claim is therefore moot.

[8] Appellant claims that respondent is in better circumstances than she is and that she is now obliged to proceed pro se. But she does not dispute the district court's findings that

remanding of some of the findings as to the parties' incomes may affect the calculation of either appellant's needs or respondent's ability to pay, or both, we reverse and remand the denial of needs-based attorney fees.[9]

The district court denied appellant conduct-based attorney fees on the ground that there was no evidence that respondent failed to respond to discovery requests or that he brought bad-faith motions. Appellant argues that respondent has failed to make timely payments of child support and spousal maintenance, but that is irrelevant to an award of attorney fees. She raises the same arguments in connection with the denial of her motion for attorney fees in the April 2010 order, which denied them on the ground that appellant was then acting pro se. We affirm the denial of appellant's motion for conduct-based attorney fees.[10]

In summary, we affirm: (1) the inclusion in appellant's income of both her imputed income and HMI's payments of some of her expenses; (2) the inclusion in appellant's income of her tax refunds; (3) the exclusion from appellant's income of some of HMI's payments of her credit card expenses; (4) the denial of respondent's motion for

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her present lifestyle is considerably more lavish than that of respondent, who owns neither a home nor a vehicle.

[9] The parties agree that the amount of child support may also need to be recalculated in light of possible changes in the findings on their incomes after remand.

[10] Appellant challenges the denial of her motion for fees incurred earlier in these proceedings. The district court noted that this motion "was not appropriate since [it] was specifically denied by the Court in the Order of September 16, 2008." She also challenges the district court's refusal to enforce her award of $1,000 in attorney fees in its June 2008 order. In the second amended judgment, the district court noted that respondent had made two payments of $5 each on this award.

retroactive termination or modification of spousal maintenance; and (5) the denial of appellant's motion for conduct-based attorney fees.

We reverse and remand: (1) the inclusion in respondent's expenses of $500 as the amount paid to his parents as rent for Pro CNC's premises; (2) the inclusion in Pro CNC's 2009 expenses of $20,000 in attorney fees; (3) the inclusion in Pro CNC's 2009 expenses of depreciation of its vehicles; (4) the exclusion from appellant's income of HMI's payment of her gas expenses; (5) the denial of respondent's motion for an order to compel discovery of HMI's records; (6) the denial of appellant's motion for a default judgment for half the value of four of the parties' vehicles; and (7) the denial of appellant's motion for need-based attorney fees.

Affirmed in part, reversed in part, and remanded.