STATE OF MINNESOTA
IN COURT OF APPEALS
A11-678

In re the Marriage of: Nancy Reeves Sitek, petitioner,
Appellant,

vs.

Michael Joseph Sitek,
Respondent.

Filed June 4, 2012
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Hennepin County District Court
File No. DW27FA225856

John E. Mack, Mack & Daby, New London, Minnesota (for appellant)

Jodi M. Terzich, Kerry Minnich, Terzich & Ort, L.L.P., Maple Grove, Minnesota; and

Peter Gray, Nilan, Johnson, Lewis, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Harten, Judge.*

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

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

RODENBERG, Judge

In this spousal-maintenance dispute, appellant argues that (1) the district court failed to properly apply the General Rules of Practice for the District Courts with respect to the hearing on the parties' motions; (2) the temporary suspension of maintenance fails to adequately consider both parties' financial status; and (3) the retroactive temporary suspension of her maintenance award was improper under Minn. Stat. § 518A.39, subd. 2(e) (2010), and the prior decision of this court, issued July 27, 2010. Because the district court acted within its discretion with respect to its procedural rulings and with respect to its decision to suspend respondent's maintenance due to his inability to pay, we affirm those aspects of the district court's ruling. We also reverse in part and remand because the district court was not statutorily authorized to modify maintenance retroactive to a date preceding the date of effective service of notice of the motion to modify.

FACTS

Appellant-wife Nancy Sitek and respondent-husband Michael Sitek were married in 1984 and separated in 1996. Their marriage was dissolved in December 1998. At the time of the entry of the dissolution judgment, husband earned $225,000 per year. Wife was not employed and had monthly living expenses of $3,953. Wife was awarded $4,000 per month in permanent spousal maintenance and ownership of the parties' homestead in Edina, Minnesota.

On June 28, 2001, the district court reduced husband's spousal maintenance obligation to $2,500 per month. Wife appealed, arguing only that final relief on husband's motion should not have been granted at the initial hearing. *Sitek v. Sitek*, 2002 WL 338121 at * 3 (Minn. App. 2002) (*Sitek I*). This court affirmed. *Id*.

On June 19, 2009, husband mailed a notice of motion and motion to suspend his maintenance obligation to wife at the homestead address; that correspondence was returned to husband's counsel. On June 29, 2009, a process server placed the documents in the door of the homestead. No service was made upon wife's counsel.

Wife did not appear at the post-decree motion hearing held on August 24, 2009. The district court proceeded by default. On August 27, 2009, the district court ordered that husband's spousal maintenance obligation was suspended retroactive to July 1, 2009.

Wife was served by mail with the order on September 14, 2009. On November 9, 2009, wife filed a motion to vacate the district court's order suspending husband's maintenance obligation.

The district court denied wife's motion to vacate, a decision that this court reversed and remanded on July 27, 2010, with instructions to reinstate maintenance because service of the notice of the motion to suspend maintenance on wife had not been effective, and because service had not been made or attempted on wife's counsel. *Sitek v. Sitek*, 2010 WL 2900344 at *2, *6 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010) (*Sitek II)*.

On July 29, 2010, wife served a notice of motion and motion on husband requesting, among other things, that judgment be entered against husband in an amount

equal to $2,500 for each month between the date that husband ceased paying maintenance and the date of the scheduled hearing.

Husband had filed a petition for review with the Minnesota Supreme Court after the release of the opinion of this court on July 27, 2010. The supreme court ultimately denied review on October 19, 2010. On October 21, 2010, wife re-served her notice of motion and motion previously served on July 29, 2010, upon which no action had been taken as a result of the then-pending petition for review.

Husband served a responsive motion on wife on December 23, 2010, requesting that the district court deny wife's motions and "[o]n remand from the Court of Appeals grant[] Respondent's motion dated June 19, 2009, . . . and suspend[] Respondent's spousal maintenance obligation as of July 1, 2009."

The district court heard arguments on the parties' respective motions on December 29, 2010. Wife requested but was denied permission to present live testimony at the motion hearing. Wife also moved that the district court strike husband's filings of December 23, 2010, arguing that they were untimely. The district court denied the motion, finding that it was responsive, raised no new issues, and was therefore timely.

The district court issued findings of fact and an order on March 16, 2011, which granted husband's motions and denied wife's motions.

The district court found that husband had become unemployed on May 29, 2009. Husband had used up all savings and investments that had accrued since the parties' divorce. While husband still had a home, the debt on the home exceeded its value, and it

"d[id] not provide Respondent with any liquidity to meet his spousal maintenance obligation."

The district court found that it could not require husband to use previously divided marital assets to satisfy his maintenance obligation. Husband's only remaining marital assets were a vacation home in northern Minnesota, and an IRA containing funds traceable to a previously-divided marital 401(k) account.

The funds remaining in the IRA account at the time of the hearing were negligible. Husband had withdrawn $200,000 from the IRA account in August 2009 to purchase a franchise called Handyman Matters. Husband used the remainder of the money to meet living expenses while trying to develop his business. At the time of the hearing, the Handyman Matters franchise account had a balance of $41,726.20, all of it traceable to the IRA account. The business had not generated a profit, and husband had not received a salary from it. Because husband was no longer actively seeking work and was engaged in this startup business, he was not entitled to unemployment benefits. He had neither any income nor any assets that were not traceable to assets awarded him from the parties' marital dissolution.

The district court concluded that husband had made good-faith efforts to find reemployment or otherwise generate income, but had not yet been successful and was unable to pay spousal maintenance. The district court also concluded that wife was unable to meet her needs independently and needed spousal maintenance. The district court suspended husband's obligation to make spousal maintenance payments

retroactively to June 1, 2009, but required husband to immediately notify wife upon securing employment and to provide a verification of income with such notice.

The district court reasoned that the retroactive suspension of maintenance to June 2009 was appropriate because it believed this court would have mentioned the possibility of significant arrearages in *Sitek II* if this court had intended that husband could be responsible for arrearages by virtue of the July 27, 2010 opinion. The district court interpreted this court's silence on the question of arrearages as evidence of this court's intent that any suspension of maintenance could be made retroactive to the original date of attempted service.

This appeal follows.

D E C I S I O N

Wife argues that the district court's procedural rulings at the motion hearing were an abuse of discretion, that the district court erred in suspending the husband's maintenance obligation based upon the finding that he was unable to pay, and that the district court erred in making the suspension of maintenance retroactive to June 1, 2009.

I.

Wife contends that, at the motion hearing held on December 29, 2010, the district court improperly denied her request to present testimony and improperly considered a late-filed motion as "responsive."

The district court's decision to enforce or relax a procedural rule is reviewed under the abuse-of-discretion standard. *Lee v. Lee*, 749 N.W.2d 51, 61–62 (Minn. App. 2008), *aff'd in part and rev'd in part on other grounds*, 775 N.W.2d 631 (Minn. 2009).

Wife here did not properly request leave to present oral testimony at the motion hearing. *See generally* Minn. Gen. R. Prac. 303.03(d) (laying out specific requirements for requesting the taking of oral testimony, or requesting a hearing that is expected to last more than 30 minutes). Her counsel did not "include names of witnesses, nature and length of testimony, including cross-examination, and the exhibits, if any." *Id.* Moreover, and even if the request had been properly presented, the district court had the discretion to deny wife's request to present live testimony. The district court did not abuse its discretion.

With respect to the contention that the district court erred in considering the motion served and filed on December 23, 2010, at the hearing held on December 29, 2010, wife's own motions addressed whether and how maintenance payments should be modified. Husband's motion was thus governed by Minn. Gen. R. Prac. 303(a)(3), which governs responsive motions that do not raise new issues. The district court did not abuse its discretion in hearing husband's motion.

II.

Wife claims that the district court did not adequately balance her need for maintenance against the husband's ability to pay.

This court reviews a decision to modify maintenance under the abuse-of-discretion standard. *Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn. 1997). The district court's findings of fact will not be reversed unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). We review de novo the district court's analysis of questions of law. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009).

The district court found that wife did not have the financial ability to meet her needs without maintenance. The district court also found that husband did not have available income and assets with which to pay maintenance. The district court based this finding on the fact that husband was unemployed, that his startup business had yet to turn a profit or provide him with a salary, that husband had spent any savings that he had accumulated following the parties' divorce, that husband had no equity in his home, and that any remaining assets held by husband were traceable to previously divided marital assets.

The district court's factual findings were not clearly erroneous. It was not an abuse of the district court's discretion to suspend the husband's maintenance obligation. *Cf. Beckstrom v. Beckstrom*, 385 N.W.2d 402, 403 (Minn. App. 1986) (reversing a maintenance award as an abuse of discretion where the obligor "had insufficient income to provide for his own needs while assisting [obligee] with her needs").

Wife argues that the district court erred as a matter of law by excluding from its analysis the money in the husband's retirement account and the value of his vacation home as assets in determining his ability to pay maintenance, even though these items were awarded to him as part of the divorce decree.[1]

Under *Lee*, 775 N.W.2d at 640, and *Kruschel v. Kruschel*, 419 N.W.2d 119, 122 (Minn. App. 1988), the district court could not properly include previously divided

[1] Wife also argues that the district court should have included the value of the respondent's home in its calculation. However, it is not disputed that respondent owes more on the home than it is worth. The home does not provide respondent with a means of paying maintenance.

marital assets in its determination of husband's income for maintenance purposes. This prevented the district court from considering the husband's handyman business as an asset for purposes of his ability to pay maintenance. The business had been acquired solely with assets from the IRA account, and it had not yet generated income.

The district court did not err in excluding previously divided marital assets from its calculation of the husband's income and his ability to pay maintenance. The district court's determination that husband lacked the capacity to pay maintenance was not clearly erroneous.

III.

Wife challenges the district court's decision to make the temporary suspension of maintenance retroactive to June 1, 2009.

The decision to set a retroactive effective date for the modification of maintenance is reviewed for an abuse of discretion so long as the statutory requirements for retroactivity are met. *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000). The district court's construction of maintenance statutes is a question of law and is reviewed de novo. *Lee*, 775 N.W.2d at 637.

"A modification of support or maintenance . . . may be made retroactive only with respect to any period during which the petitioning party has a pending motion for modification *but only from the date of service of notice of motion on the responding party* . . . ." Minn. Stat. § 518A.39, subd. 2(e) (2010) (emphasis added). The forgiveness of arrearages constitutes a retroactive modification of maintenance and must comply with section 518A.39, subd. 2(e). *See Christenson v. Christenson*, 490 N.W.2d 447, 449

(Minn. App. 1992) (construing a prior version of the maintenance statute), *review granted* (Minn. Jan. 15, 1993), *review dismissed* (Minn. Feb. 16, 1993).

Under a previous version of the statute, the modification of a support or maintenance obligation could be made retroactive to a date earlier than the date of service, but only if certain enumerated conditions were applicable and only if the district court expressly found that those conditions applied.[2] Minn. Stat. § 518.64, subd. 2(d) (2004). However, the legislature repealed all such exceptions in 2005. 2005 Minn. Laws ch. 164, § 10, at 1894–95.

This court has interpreted and applied the service requirement strictly. In *Buntje v. Buntje*, for example, father sought to modify child support, and the parties entered into mediation as mandated by the divorce decree. 511 N.W.2d 479, 480 (Minn. App. 1994). Only after the attempted mediation failed did father serve a motion to modify child support. *Id.* The district court granted the motion, and modified child support retroactive to the date when mediation began. *Id.* at 482.

Mother appealed, arguing that the modification could only be made retroactive to the date of service, and father argued on appeal "that requesting mandatory mediation was the functional equivalent of serving notice of a motion to modify." *Id.* at 482. He argued that strictly construing the statute would undermine strong public policy

[2] For example, under the prior law, the maintenance modification could be made retroactive to a date before the date of service if "the party seeking modification *was precluded from serving a motion* by reason of a significant physical or mental disability, a material misrepresentation of another party, or fraud upon the court and that the party seeking modification, *when no longer precluded, promptly served a motion.*" Minn. Stat. § 518.64, subd. 2(d)(1) (2004) (emphasis added).

preferences favoring mediation in family law matters by punishing him for having sought mediation before serving a motion to modify. *Id.*

This court, while sensitive to father's "compelling policy arguments," stated that the statute's explicit language prohibited retroactive modification for periods preceding the date of service of the notice of motion to modify. *Id.* This court based its decision on the legislature's instruction that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2010); *see also Buntje*, 511 N.W.2d at 482 (citing Minn. Stat. § 645.16). This court noted that "the father could have avoided the problem had he served the modification motion with a request that it be held in abeyance pending the parties' mediation efforts. Proceeding in that manner would have complied with the statutory requirement without undermining the state's policy promoting mediation." *Buntje*, 511 N.W.2d at 482.

As in *Buntje*, wife in this case received notice of husband's *intention* to modify maintenance on multiple occasions. However, under *Buntje*, the "functional equivalent" of a notice of motion does not satisfy the statutory requirement that the non-moving party be served with a notice of motion. Instead, *Buntje*'s literal interpretation of the phrase "date of service of notice of the motion" supports wife's position. *See* 511 N.W.2d at 482 (strictly construing the statutory requirement that the non-moving party be served with notice of motion). This court has previously held *in this very case* that wife had not been effectively served with the notice of motion during the period of time in question. *Sitek II*, 2010 WL 2900344 at *3. Like father in *Buntje*, husband in this case could have

avoided the problem and complied with the statutory requirement: husband could have re-served the notice of motion and motion as soon as he learned that service was being contested. He did not do so until December 23, 2010.

In *Christenson*, this court held that the maintenance obligor was not entitled to retroactive modification for the period between the denial of the obligor's first motion to modify and the date he served notice of a renewed motion to modify.[3] 490 N.W.2d at 449. Similarly, in this case, the order suspending husband's maintenance obligation may not be given retroactive effect for the period between husband's first ineffective attempt at service and the date on which husband effectively served wife with notice of the motion to suspend maintenance.

Husband argues that if this court had intended that the district court, on remand, could not treat the June 2009 attempted service as the date of service for purposes of section 518A.39, subd. 2(e), then *Sitek II* would have mentioned in its reasoning on the prejudice prong of its *Finden* analysis the fact that husband would have been subject to arrearages. *See generally Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (Minn. 1964) (laying out a four-pronged standard for relieving a party from a judgment or adverse ruling). Husband's position is that the district court properly interpreted this court's silence on the arrearage issue as indicative of the availability of retroactive relief

[3] *Christenson* focused on the "any period during which the petitioning party has a pending motion for modification" prong of what is now § 518A.39, subd. 2(e). *See* 490 N.W.2d at 449. The present matter is being decided under the "but only from the date of service of notice of motion on the responding party" prong. However, for present purposes, the effect of the first statutory prong is sufficiently analogous to that of the second prong that *Christenson*'s reasoning applies to this case.

upon remand. Because wife had not been effectively served with a notice of motion, *Sitek II* ordered that "we reverse the district court's denial of wife's motion to vacate the order suspending husband's maintenance obligation and remand to the district court for reinstatement of husband's maintenance obligation that existed at the time of his motion." *Sitek II*, 2010 WL 2900344 at *6. The remand instruction was that the district court reinstate the maintenance obligation, not that it re-examine or reconsider the *Finden* factors. *Id.; see also Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987) ("Issues determined in a first appeal will not be relitigated in the trial court nor re-examined in a second appeal.").

Section 518A.39, subd. 2(e), is unambiguous. There is case law directly on point as to its interpretation. The cases cited by wife addressing whether actual notice in lieu of service is sufficient to satisfy the Due Process Clause and confer personal jurisdiction are not applicable here.

This court expressly held in *Sitek II* that wife had not been effectively served with notice of the original motion. Husband did not reattempt service of notice of the motion to suspend maintenance until he served his responsive motions on December 23, 2010. Therefore, the earliest date to which the modification could be made retroactive was December 23, 2010, and the district court erred by making the modification retroactive to an earlier date.

Because the district court appropriately granted husband's motion to suspend his maintenance obligation, and because the earliest available date under the statute to which

that suspension could properly be made retroactive was December 23, 2010, husband's maintenance obligation is suspended retroactive to that date.

IV.

The district court properly acted within its broad discretion when it denied the wife's request to present oral testimony at the motion hearing. The district court was correct in considering that husband's responsive motions served and filed on December 23, 2010, were timely and did not abuse its discretion by considering the husband's motions on the merits. The district court properly acted within its broad discretion when it suspended husband's maintenance obligation based on husband's inability to pay maintenance. The district court did not err in finding that previously divided marital assets could not be considered when determining husband's maintenance obligation.

Because this court previously held that wife had not been effectively served with the notice of husband's original motion to suspend maintenance, and because husband did not serve wife with notice of his motion to modify maintenance until December 23, 2010, the district court was barred by section 518A.39, subd. 2(e), from making the suspension of maintenance retroactive to a date earlier than December 23, 2010.

In conclusion, we affirm the district court's decision to temporarily suspend husband's maintenance obligation as of December 23, 2010, the date on which husband effectively served his notice of motion to suspend maintenance. We reverse the district court's decision to give the temporary suspension of maintenance retroactive effect for the period between June 1, 2009, and December 23, 2010, and remand for further

proceedings on wife's request for entry of judgment and other matters pertaining to arrearages.

Affirmed in part, reversed in part, and remanded.