STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0332

In re the Marriage of:
Joseph P. K. Tran, petitioner,
Appellant,

vs.

Bonavy Chou Tran,
Respondent.

Filed October 22, 2012
Reversed in part, dismissed in part, and remanded
Klaphake, Judge[*]

Clay County District Court
File No. 14-FA-08-2585

Stephen R. Dawson, Fargo, North Dakota (for appellant)

Craig M. Richie, Fargo, North Dakota (for respondent)

Considered and decided by Kirk, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.

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

KLAPHAKE, Judge

Appellant Joseph P. K. Tran challenges the district court's grant of respondent Bonavy Chou Tran's motion to restrict his parenting time with their minor daughter,

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

arguing that the district court abused its discretion by restricting his parenting time without a complete evidentiary hearing and without sufficient support in the record. Because the district court issued its order prior to concluding the evidentiary hearing and without clear evidence that appellant waived his right to continue the hearing, we conclude that the district court abused its discretion.

Appellant also challenges the district court's order holding him in civil contempt of court and directing his immediate confinement after a single civil-contempt hearing. Because appellant has complied with the district court's order compelling him to transfer his interest in the marital home to respondent and has been released from confinement, the issue is moot, and we need not address appellant's challenge of the district court's order.

Therefore, we reverse in part, dismiss in part, and remand.

D E C I S I O N

I. Restriction of Parenting Time

"The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). A district court abuses its discretion when its findings of fact are clearly erroneous or when it improperly applies the law. *Id.* In Minnesota, "[s]ubstantial modifications of visitation rights require an evidentiary hearing[.]" *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A substantial modification of parenting time "appears to include the placement or removal of restrictions on parenting time." *In re Welfare of B.K.P.*, 662 N.W.2d 913, 916 (Minn.

App. 2003). But a party may waive his or her right to an evidentiary hearing. *See Thompson v. Thompson*, 238 Minn. 41, 47, 55 N.W.2d 329, 332 (1952) ("[W]here there has been no waiver of the right, . . . an order amending a divorce decree so as to change the custody of children should be based upon a hearing in which witnesses may be cross-examined and in which a record is made which effectively may be reviewed on appeal.").

"Waiver requires the intentional, or voluntary, relinquishment of a known right." *Adam v. Adam*, 358 N.W.2d 487, 489 (Minn. App. 1984). Therefore, "[a]lthough waiver may be found by implication, . . . it will not be implied simply from participation in the deficient procedure." *Id.* The Minnesota Supreme Court has expressed the need for caution in reviewing a finding of waiver:

> Where rights as vital as the right to a hearing in which a record can be made that may be reviewed on appeal and the right to cross-examine witnesses, upon whose statements a finding of fitness to have custody of minor children is to be based, are to be waived, it should be done by written stipulation; or it should clearly be made to appear from the record.

Thompson, 238 Minn. at 47-48, 55 N.W.2d at 333. Without an express written or oral waiver, a reviewing court cannot assume that the waiving party fully understood the consequences of waiver and thus must conclude that the right has not been validly waived. *Id.* at 48, 55 N.W.2d at 333; *see also Hummel v. Hummel*, 304 N.W.2d 19, 20 (Minn. 1981) (concluding no clear waiver shown even though each party filed affidavits and both parties' counsel presented oral arguments on the custody issue); *Adam*, 358 N.W.2d at 489 ("Although neither party objected to submission of the issue on the basis of opposing affidavits and arguments of counsel, this did not constitute a waiver of the

right to an evidentiary hearing."). "The question of waiver may be decided as a matter of law where the facts are not in dispute." *In re Estate of Sangren*, 504 N.W.2d 786, 790 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993).

At the hearing on respondent's motion to restrict appellant's parenting time with J.T., the district court heard testimony from a number of appellant's character witnesses and appellant's expert Dr. Timm. Respondent presented only appellant's supervised visitation records during the first two days of the evidentiary hearing. At the conclusion of the second day of testimony, the district court ordered J.T. to meet with a mental-health professional recommended by Dr. Timm before continuation of the hearing. Later that month, in a telephone conference, the district court and counsel discussed the conflicting recommendations offered by Dr. Timm in his report and testimony and respondent's expert Dr. Gregory in his report. Then the district court stated:

> Well, I have not had an opportunity to see Dr. Gregory's report, so I will take a look at that and compare it with what Dr. Timm has recommended. And if . . . either of you feel we have to have an actual in person hearing here in the court regarding that, we'll do that, but I'm thinking that if I can just read Dr. Gregory's report and compare it with Dr. Timm's report and recommendations, then I would propose to come up with a solution and issue an order on how we're going to proceed.

Counsel for both parties responded by stating, "That's fine with us." The district court then concluded the telephone conference by stating, "Let's consider the Friday hearing canceled then. And I will review this and get out an order promptly or, again, if I feel I want to have more input from you two, we'll give you a call and set up a telephone conference and discuss it."

Based on this telephone conference, the district court determined that a final evidentiary hearing day was cancelled by agreement of the parties and that the parties agreed that the court could consider respondent's expert's written report and the guardian ad litem's (GAL) reports without live testimony and cross examination. In other words, although the parties, the GAL, and respondent's expert had not yet testified, the district court concluded that appellant waived his right to continue the evidentiary hearing and agreed to submit the matter to the district court for a decision. On December 23, 2011, the district court restricted appellant's parenting time with J.T. to two supervised hours each week.

Although the district court and counsel discussed the expert reports during the telephone conference, they did not discuss appellant's right to testify or his right to cross-examine the GAL and respondent. In addition, appellant's attorney sent a letter to the district court on the day after the GAL submitted an addendum to her report, in which he requested an opportunity to cross-examine the GAL. In light of this request and the lack of discussion of the testimony and cross-examination of the parties and GAL during the August 31 telephone conference, we cannot conclude that appellant clearly waived his right to a complete evidentiary hearing as required by the Minnesota Supreme Court in *Thompson*. *See* 238 Minn. at 47-48, 55 N.W.2d at 333. The district court abused its discretion when it restricted appellant's parenting time to two supervised hours each week without a complete evidentiary hearing.

II. Civil Contempt

On appeal, appellant also seeks review of the district court's civil-contempt order. We will not review a contempt order if the issue is moot. *See Clement v. Clement*, 295 Minn. 569, 569-70, 204 N.W.2d 819, 819 (1973) (stating that contempt order issue was moot after defendant made payment required to purge himself of contempt); *Walz v. Walz*, 409 N.W.2d 39, 41 (Minn. App. 1987) (noting that the matter was arguably moot because the contemnor served his sentence and the court could no longer affect the issue of his release). A case is moot if there is no justiciable controversy. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). Appellate courts "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). A justiciable controversy is one that involves definite and concrete assertions of right. *Kahn*, 701 N.W.2d at 821. A court should generally dismiss a case as moot if it is unable to grant effectual relief. *Id.*

Here, the district court held appellant in civil contempt on January 18, 2011, for failing to transfer his interest in the marital home to respondent as required by the parties' divorce decree and ordered that appellant be incarcerated until he signed the necessary papers. Appellant signed a quitclaim deed on January 21 and was released. Because appellant satisfied the purge requirement and was released from incarceration, appellant's challenge of the district court's order finding him in civil contempt and jailing him is moot. There is no actual controversy for this court to review, and we cannot grant other effectual relief.

We also conclude that none of the exceptions to the mootness doctrine, for issues that are capable of repetition, yet likely to evade review, or that may have collateral consequences, apply in this case to warrant review or remand. *See In re McCaskill*, 603 N.W.2d at 327. First, unlike the failure to pay child support at issue in *Walz*, appellant's conveyance of his interest in the marital home was a one-time obligation that cannot possibly recur. Second, there is no indication that appellant suffered collateral consequences as a result of the district court's civil-contempt order. Therefore, appellant's appeal of the district court's civil-contempt order must be dismissed as moot.

Reversed in part, dismissed in part, and remanded.