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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1366**

In re the Marriage of: Brenda J. Gergen, petitioner,  
Respondent,

vs.

Stanley J. Gergen,  
Appellant.

**Filed November 9, 2010  
Reversed and remanded  
Larkin, Judge**

Dakota County District Court  
File No. 19AV-FA-08-1715

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

**UNPUBLISHED OPINION**

**LARKIN**, Judge

Appellant claims that the district court abused its discretion by granting default  
judgment against him after he failed to personally appear at a hearing. Because appellant

did not receive notice that the district court would treat the hearing as a prehearing conference, or that respondent would move for default judgment as a sanction for appellant's failure to comply with the district court's temporary order, we reverse and remand.

## **FACTS**

Appellant Stanley J. Gergen and respondent Brenda J. Gergen were married in 1986. In January 2008, respondent filed for dissolution of the parties' marriage in Dakota County District Court. On August 22, respondent filed a motion for temporary relief asking the district court, among other things, to compel appellant to answer discovery requests that had been previously served. The district court issued an order for temporary relief requiring appellant to serve "full and complete responses" to respondent's discovery requests no later than October 1.

Later, the district court provided appellant's trial counsel with written notice of a hearing to be held on November 6. The notice identified the hearing as a "[p]re-trial." The notice was addressed to counsel and stated: "You are expected to appear fully prepared." The notice did not reference appellant or command appellant's appearance at the hearing. Both parties submitted prehearing statements before the hearing. *See* Minn. R. Gen. Pract. 305.01 (requiring each party to submit a prehearing conference statement). Respondent and her attorney appeared at the hearing. Appellant did not personally appear, but counsel appeared on his behalf.

At the hearing, respondent made an oral request for default judgment based on appellant's failure to personally appear, his failure to file a prehearing statement at least

ten days before the hearing, and his failure to comply with the temporary order, including discovery requests. *See* Minn. R. Gen. Pract. 305.01 (requiring each party to submit a prehearing conference statement at least ten days prior to the date of the hearing); Minn. R. Gen. Pract. 305.02 (requiring the personal appearance of all parties at a prehearing conference). The district court granted respondent's request for default judgment but stayed entry of judgment for 30 days conditioned on appellant's "complete compliance" with the temporary order, including respondent's discovery requests.

On January 13, 2009, the district court issued its default judgment and decree, which among other things, granted respondent spousal maintenance and a one-half interest in the parties' homestead. The district court's order for judgment indicates that the district court treated the November hearing as a prehearing conference. The order also states that appellant violated Minnesota Rule of General Practice 305.01 by failing to serve and file his prehearing conference statement until two hours before the hearing and Minnesota Rule of General Practice 305.02 by failing to appear at the hearing without being excused by the court. The order also notes appellant's repeated failures to provide complete responses to respondent's discovery requests and his failure to comply with the order for temporary relief.

Appellant moved for a new trial, mediation, amended findings of fact and conclusions of law, or to set aside the default judgment. The district court summarily denied his motions. This appeal follows.

## DECISION

Appellant argues that the district court abused its discretion by granting a default judgment and decree.<sup>1</sup> The decision to grant or deny a motion for default judgment lies within the discretion of the district court, and an appellate court will not reverse absent an abuse of that discretion. *Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005), *review dismissed* (Minn. Sept. 28, 2005).

Respondent sought a default judgment, in part, because appellant failed to personally appear at the November hearing. Rule 305.02 provides, in pertinent part, that “[u]nless excused by the court for good cause, the parties and lawyers who will try the proceedings shall attend the prehearing conference. . . . If a party fails to appear at a prehearing conference, the court may dispose of the proceedings without further notice to that party.” Minn. R. Gen. Pract. 305.02 (a), (b). Appellant argues that default judgment was improper because he was not notified that the hearing would be treated as a prehearing conference. We agree.

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<sup>1</sup> This appeal is taken from the district court’s denial of appellant’s post-judgment motions. However, the parties primarily frame the issue before us as whether the district court should have granted respondent’s request for default judgment. Both the decision to grant default judgment and the decision not to vacate the judgment are reviewed for an abuse of discretion. *See Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005) (“The decision to grant or deny a motion for a default judgment lies within the discretion of the district court, and this court will not reverse absent an abuse of that discretion.”), *review dismissed* (Minn. Sept. 28, 2005); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 108 (Minn. App. 1987) (“The decision whether to vacate a default judgment falls within the sound discretion of the trial court and will not be reversed unless there is an abuse of discretion.”), *review denied* (Minn. Feb. 17, 1988). Accordingly, we frame the issue as whether the district court abused its discretion by granting respondent’s request for default judgment. *See generally* Minn. R. Civ. App. P. 103.04 (noting the broad scope of appellate review).

The notice at issue in this case designated the hearing as a “[p]re-trial,” and our review of the district court file indicates that it was sent to appellant’s counsel but not to appellant. Respondent argues that because the Minnesota Rules of General Practice do not provide for a pretrial hearing in family-law cases, appellant should have interpreted the term “pre-trial” to mean a “prehearing conference” requiring his personal appearance. Respondent further argues that if appellant was confused regarding the purpose of the hearing, he should have called the court administrator. At which time, he would have been informed that under the local custom of the district court, a pretrial hearing is actually a prehearing conference.

Respondent’s argument rests on too many assumptions. Parties should not have to look beyond the plain language of a hearing notice to determine the purpose of the hearing. Here, the hearing notice unambiguously states that a “[p]re-trial” would be held on November 6, 2008 and that trial counsel was “expected to appear fully prepared.” There was no reason for appellant’s trial counsel to engage in speculation or to have been confused regarding the purpose of the hearing. The district court erred by treating the hearing as a prehearing conference—and thereby obligating the parties to comply with the requirements of rule 305 or risk a default judgment—when its notice unambiguously informed counsel that the hearing was a pretrial conference. *See Kohner v. Comm’r of Pub. Safety*, 483 N.W.2d 515, 518 (Minn. App. 1992) (“[A] fundamental requirement of due process is notice.”); Minn. R. Gen. Pract. 305.02 (c) (“Failure to comply with the rules relating to prehearing conferences may result in . . . the hearing of the matter as a default.”). Thus, any reliance on rule 305 as a basis for default judgment is misplaced.

And if we assume that the hearing was a pretrial conference under Minnesota Rule of Civil Procedure 16, default judgment was not a permissible sanction for appellant's failure to personally appear. *See* Minn. R. Civ. P. 16.06 (allowing default judgment if *no* appearance is made on behalf of a party); Minn. R. Gen. Pract. 301 ("Rules 301 through 313 and, where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes or the Expedited Child Support Process Rules, Minn. Gen. R. Pract. 351 through 379."). Therefore, the district court abused its discretion by entering default judgment based upon appellant's failure to personally appear at the November hearing.

Respondent asserted in district court, and now asserts on appeal, that default judgment was proper based on appellant's failure to comply with the temporary order and respondent's discovery requests. We note that the district court stayed entry of the default judgment for 30 days conditioned on appellant's compliance with the temporary order and respondent's discovery requests. This stay indicates that appellant's failure to comply with discovery requests was another basis for the default judgment.

Failure to obey a discovery order may result in a judgment by default. Minn. R. Civ. P. 37.02(b)(3); *see* Minn. R. Gen. Pract. 301 ("Rules 301 through 313 and, where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes or the Expedited Child Support Process Rules, Minn. Gen. R. Pract. 351 through 379."). But a motion must be made, and notice provided, before default judgment is entered for failing to comply with discovery requests. *See* Minn. R. Gen. Pract. 303.03(a)(1) (providing that no motion shall be heard

unless the moving party pays any required filing fee, serves a copy of certain documents concerning the motion on opposing counsel, and files the original with the district court at least 14 days prior to the hearing). Respondent did not comply with the requirements of rule 303.03. As a result, she failed to provide notice of her intent to move for default judgment based on appellant's failure to respond to discovery requests. Given the lack of notice, default judgment was improper. *See Kohner*, 483 N.W.2d at 518 (“[A] fundamental requirement of due process is notice.”). The lack of notice also precludes a default judgment based on appellant's failure to comply with other dictates of the temporary order.

Moreover, a default judgment is the most severe sanction available under the rules. *See Chicago Greatwestern Office Condominium Ass'n v. Brooks*, 427 N.W.2d 728, 731 (Minn. App. 1988) (stating that courts should “act cautiously when the sanction imposed is that of default judgment, which is the most severe in the spectrum of sanctions provided by statute or rule.” (quotation omitted)). To the extent that the district court ordered default judgment as a discovery sanction, it was not utilized as the district court's last option. Although the discovery dispute had been ongoing, the November hearing was only the second hearing in this matter. And the district court had other tools at its disposal with which to compel appellant to comply with discovery. *See Minn. R. Civ. P. 37.02(b)* (stating that if a party fails to comply with discovery the district court may, among other options, order attorneys' fees, hold the party in contempt, strike pleadings or parts thereof, or stay the proceedings until the party has complied). While we appreciate the district court's frustration with appellant's seeming failure to comply with

respondent's discovery requests, "the primary objective of the law is to dispose of cases on the merits." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990). We therefore conclude that the district court abused its discretion to the extent that it granted default judgment as a discovery sanction in this case. *See Sommers v. Thomas*, 251 Minn. 461, 468, 88 N.W.2d 191, 196 (1958) (motions to vacate default judgments should be liberally granted to further policy of resolving cases on their merits).

While appellant claims that the district court erred by granting default judgment, his complaints regarding the terms of the resulting judgment and decree are limited. Specifically, he asserts only that the district court abused its discretion by awarding respondent spousal maintenance, which was not requested in respondent's dissolution petition, and a one-half marital interest in the parties' homestead, which he argues was his non-marital property. Appellant does not claim that he was otherwise prejudiced by the district court's property distribution or any other terms of the judgment and decree. Because default judgment was improper, we reverse the spousal-maintenance award and the homestead distribution. But because we do not reverse for non-prejudicial error, we limit our relief to reversal of the spousal-maintenance award and the homestead distribution and remand for further proceedings solely on those issues. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error). But if, on remand, the spousal-maintenance and homestead determinations affect

other aspects of the property distribution, the district court has discretion to alter the distribution accordingly.

**Reversed and remanded.**

Dated:

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Judge Michelle A. Larkin