STATE OF MINNESOTA
IN COURT OF APPEALS
A07-664

In re the Marriage of:
David R.B. Knighton, petitioner,
Appellant,

vs.

Ellen L.B. Knighton,
Respondent.

Filed May 20, 2008
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-FA-000293968

Michael Ormond, Ormond & Zewiske, 303 Butler North Building, 510 First Avenue North, Minneapolis, MN 55403 (for appellant)

Dennis J. Dietzler, 6625 Lyndale Avenue South, Suite 426, Richfield, MN 55423 (for respondent)

Considered and decided by Worke, Presiding Judge; Hudson, 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

WORKE, Judge

In this dissolution matter, appellant challenges the district court's award of conduct-based attorney fees, arguing that the award is excessive and not supported by the district court's findings. By notice of review, respondent argues that the district court abused its discretion by (1) modifying the judgment based on a mistake because the modification does not afford her the same protections as the original judgment, and (2) not holding appellant in contempt for disobeying the judgment. We affirm.

FACTS

Appellant David R.B. Knighton is the 80% majority shareholder of Embro Corporation (Embro); Vance Fiegel is the 20% minority shareholder. Embro owns 85% of Embro Vascular LLC (Embro Vascular); Len Brandt owns the remaining 15%. Embro Vascular owned the Saphenous Vein Harvest device (device) that appellant invented during his marriage. The patent rights to the device were sold and provide Embro Vascular with royalty income. After Brandt receives 15% of the royalties, the remaining royalties are transferred to Embro for research and development or are paid out to appellant and Fiegel.

In August 2005, appellant and respondent Ellen L.B. Knighton entered into a marital-termination agreement (MTA) that was incorporated into the judgment dissolving the parties' marriage. Part H of the MTA and final judgment provides in relevant part:

> Embro Vascular is ordered to grant respondent a third party, first perfected security interest in (a) the [device] Royalties and related intellectual property . . . , (b) all patents,

> general intangibles, license agreements, contract rights, accounts receivable or other payment or royalty rights related to such collateral, including without limitation, the license agreement with Guidant or its affiliate, and (c) all proceeds of whatever form related to any of the foregoing (collectively, the "Collateral"). If any license or material agreement related to the collateral restricts its assignability, Embro Vascular would obtain the necessary consents to permit such security interest.

Appellant contacted Richard Leighton, the attorney representing Embro, Embro Vascular, Fiegel, and Brandt, and requested that he draft documentation to comply with the judgment. In September 2005, Leighton requested copies of company records in order to draft documentation contemplated by Part H. Appellant and Fiegel had only basic corporate records; thus, Leighton requested records from the law firm that represented Brandt when the company was created in 1995. In late 2005, Leighton obtained copies of Embro Vascular's company records, which included a 1995 Member Control Agreement (MCA). The MCA includes:

> Section 4.01 Prohibition on Transfer Generally. Except as provided to the contrary in this Agreement, no Member shall sell, transfer, assign, give or otherwise dispose of or encumber the Membership Interest of such Member or any part thereof whether voluntarily, by operation of law or otherwise (a "Transfer") without the consent of the Company and the holders of at least 90% of the Membership Units then held by all Members other than the Member seeking to Transfer all or any part of such Member's Membership Interest.
>
> . . . .
>
> Section 7.01 Member Approval of Extraordinary Action. Notwithstanding all other provisions of this Agreement, the Company's Articles of Organization or the Company's Operating Agreement (collectively, the "L.L.C. Documents") to the contrary, no Extraordinary Action by or

> on behalf of the Company shall be taken without the consent of the holders of at least 90% of the Membership Units then held by all Members.
>
> Section 7.02 Extraordinary Actions. The following acts shall be deemed to be "Extraordinary Actions" for purposes of Section 7.01:
>
> (a) any proposed remuneration to be paid to any of the managers of the Company, and any proposed contracts or arrangements between the Company and any of the managers of the Company;
>
> (b) any proposed amendment to any of the L.L.C. Documents, except for amendments to Schedule 1 to this Agreement to reflect the issuance of additional Membership Units or the transfer of Membership Units in accordance with the requirements of this Agreement; and
>
> (c) valuation of the consideration to be received by the Company for the issuance of additional Membership Units.

Leighton understood that the security interest to be granted under Part H constituted an extraordinary action requiring Brandt's consent. Brandt informed Leighton that he would not consent.

In January 2006, Leighton informed respondent that Embro Vascular, therefore appellant, was not able to provide the security interest required by Part H. By early February, Leighton provided respondent with a copy of the MCA and informed her that the companies objected to the obligation under Part H. In March, Leighton provided respondent with a proposed accommodation, which respondent rejected. Following further correspondence, the parties were unable to reach an agreement.

In late October 2006, appellant moved to modify the judgment, arguing that Part H should be modified because implementation was legally impossible. Respondent moved

for appellant to be held in contempt because he failed to provide her the security interest provided in the judgment. Both parties moved for attorney fees. The district court granted appellant's motion for alternative security provisions and denied his motion for attorney fees. The district court denied respondent's motion for contempt and granted her motion for conduct-based attorney fees. Although finding that appellant failed to comply with the security provisions, the court found that appellant does not have authority to provide the security called for in the judgment and that the provisions were stipulated to with the mistaken understanding that appellant had authority to encumber the corporation. The court also found that Brandt will not consent. Further, the court found that it was reasonable for respondent to expect that appellant knew what he was obligating himself to and that he should have been mindful of the MCA and/or conferred with corporate counsel prior to representing that he would be able to deliver the security. The court did not hold appellant in contempt because it was impossible for him to perform. The court found that appellant's conduct unreasonably contributed to the length and expense of the proceedings and awarded respondent $63,467.75 in attorney fees. The court modified the judgment and accepted the alternative security provisions proposed by Leighton, including appellant's personal guarantee and security. This appeal follows.

D E C I S I O N

Attorney Fees

A district court may award "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2006). The moving party has the burden of showing that the

nonmoving party unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). To award conduct-based fees, the court must identify the offending conduct and the conduct must have occurred during litigation. *Id.* at 819. An award of conduct-based attorney fees "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). But the court must set forth findings that "permit meaningful appellate review on the question whether attorney fees are appropriate because of a party's conduct." *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992).

Appellant argues that the district court abused its discretion in awarding conduct-based attorney fees because a good-faith mutual mistake prolonged the litigation and the district court's findings contradict the award. The district court found that appellant's conduct "in purporting to bind himself to security provisions which he could not deliver" unreasonably contributed to the length and expense of the proceeding. The district court identified the offending conduct, which occurred during litigation; specifically, that it was reasonable for respondent to expect that appellant knew what he was obligating himself to, should have been mindful of the MCA, and should have conferred with corporate counsel prior to agreeing to the obligation.

Appellant contends that because the court found that the security provision was based on a mutual mistake, he should not be responsible for respondent's attorney fees. But the court's findings show that appellant unreasonably contributed to the length and

expense of the proceeding. Even if appellant forgot about the MCA, he signed it and he should have been aware of its existence. And if appellant was not aware of the MCA, he should have met with corporate counsel before obligating himself. The district court did not abuse its discretion in awarding respondent conduct-based attorney fees.

Appellant also argues that it was an abuse of discretion for the district court to summarily affirm all post-judgment fees and costs. The court reviewed detailed billing statements and found costs and fees to be reasonable and necessary, and awarded respondent $63,467.75 in attorney fees. The billing record begins on September 22, 2005, and most, if not all, of the entries of the work description include the security interest. The district court did not abuse its discretion in the amount of the conduct-based attorney-fees award.

Modification

The district court may reopen a judgment when "it is no longer equitable that the judgment . . . or order should have prospective application." Minn. Stat. § 518.145, subd. 2(5) (2006). Additionally, district courts have inherent authority to clarify and construe a judgment as long as it does not change the parties' substantive rights. *Hanson v. Hanson*, 379 N.W.2d 230, 233 (Minn. App. 1985). Whether to reopen a dissolution judgment under Minn. Stat. § 518.145, subd. 2, rests in the discretion of the district court. *See Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996) (reviewing refusal to reopen for abuse of discretion); *Haefele v. Haefele*, 621 N.W.2d 758, 761 (Minn. App. 2001) (reviewing decision to reopen judgment for abuse of discretion), *review denied* (Minn.

Feb. 21, 2001); *see also Clark v. Clark*, 642 N.W.2d 459, 465 (Minn. App. 2002) (reciting general rule).

The district court reopened the judgment and found that the alternative security provisions were reasonable and sufficient. Respondent argues that the district court should not have modified the judgment because appellant had knowledge of the MCA and his conduct created the situation. But the district court found that appellant made a mistake in believing that he had authority to deliver the security interest. This finding is supported by the record, and respondent does not show that appellant remembered that the MCA existed. This is further supported by the record because neither appellant nor Fiegel had company records and Leighton had to contact the law firm that represented Brandt when the company was created to obtain the records, which were located in off-site storage. Respondent does not challenge this evidence and fails to show that appellant did not simply make a mistake.

Respondent also argues that there is no evidence that appellant sought Brandt's approval. The district court's finding that the minority shareholders would not consent is supported by the record by Leighton's assertion that he "was clearly informed and instructed by Mr. Brandt that he would not give his consent." Respondent also argues that her substantive rights are affected by the modification. Respondent contends that the parties agreed that appellant would pay her quarterly payments measured by 30% of the royalties and that the security interest was designed to protect her in two situations that could "endanger her" financially. First, if Embro borrowed money and could not pay its creditors, the creditors could attempt to seize the royalties, but respondent's security

interest would give her priority over creditors. Second, following appellant's death respondent would be forced to compete with other creditors, making the security interest her only assurance that she would be paid what she is due. But respondent does not show how she will not be protected with appellant's personal guarantee and security and the restrictions on his stock that make it subject to his payment obligations to respondent and to appellant's security agreement in favor of respondent. Because appellant cannot obtain consent, the district court did not abuse its discretion in modifying the judgment in order to provide reasonable and sufficient alternative security provisions.

Contempt

Under Minnesota law, a court may hold a person in contempt for "disobedience of any lawful judgment, order, or process of the court[.]" Minn. Stat. § 588.01, subd. 3(3) (2006). Contempt is constructive when the contemnor's acts occur outside a court's immediate presence. *Id.*, subd. 3. The district court has broad discretion to exercise its contempt powers, but contempt is "appropriate only where the alleged contemnor has acted contumaciously, in bad faith, and out of disrespect for the judicial process." *Minn. State Bar Ass'n v. Divorce Assistance Ass'n*, 311 Minn. 276, 284, 248 N.W.2d 733, 740 (1976). This court reviews a district court's contempt decision for an abuse of discretion. *Mower County Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). A contempt order will be overturned if the findings of fact supporting the order are clearly erroneous. *Id.* (citing Minn. R. Civ. P. 52.01).

Respondent argues that the district court abused its discretion by not holding appellant in contempt for failing to abide by the security-interest provision in the

judgment. Respondent contends that appellant failed to meet his burden of showing why he failed to obey the district court's judgment because he did not establish that he merely made a mistake. The district court found that "[t]he security provisions were stipulated to with the *mistaken* understanding by [appellant], in his status a majority stockholder, that he had the authority to encumber the corporation for personal purposes." (Emphasis added.) Respondent provides no evidence to show otherwise. Respondent contends that appellant did not even try to procure Brandt's consent. But the district court found that the minority shareholders made their objections clear. And the record shows that Leighton "was clearly informed and instructed by Mr. Brandt that he would not give his consent."

Finally, respondent argues that the inability to obtain consent does not excuse appellant's nonperformance of a legal responsibility. The district court found that "[c]ontempt cannot lie where there is an impossibility of performance." *See Hopp v. Hopp*, 279 Minn. 170, 175, 156 N.W.2d 212, 217 (1968). Additionally, "contempt proceedings are designed to induce future performance of a valid court order, not to punish for past failure to perform." *Engelby v. Engelby*, 479 N.W.2d 424, 426 (Minn. App. 1992). The court found that appellant cannot deliver the security interest. Because contempt is not intended to punish for failure to perform, appellant cannot be held in contempt for failing to deliver the security interest. And because it is impossible for appellant to perform what was envisioned in the judgment, he cannot be held in contempt in order to induce his performance of something impossible for him to perform. Respondent has not shown that it is possible for appellant to deliver the security interest.

The district court's findings are not clearly erroneous, and the district court did not abuse its discretion in denying respondent's motion to hold appellant in contempt.

Affirmed.