STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0901

In re the Marriage of: Jacqueline Ann Ahlers, petitioner,
Respondent,

vs.

Scott Steven Ahlers,
Appellant.

Filed January 27, 2009
Reversed and remanded
Minge, Judge

Dakota County District Court
File No. F2-07-13355

Deborah N. Dewalt, 2412 117th Street, Suite 100, Burnsville, MN 55337 (for respondent)

John T. Burns, Burns Law Office, 200 American Bank Building, 14300 Nicollet Court, Burnsville, MN 55306 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Johnson, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of a motion for amended findings and for attorney fees. We reverse and remand.

FACTS

Appellant Scott Ahlers (father) and respondent Jacqueline Ahlers (mother) were divorced in 2004. In accordance with a marital termination agreement, the district court's judgment and decree provided that they would have joint physical and legal custody of their minor child with equal parenting time. In April 2007, father brought a motion to modify custody. The district court issued a temporary order in May 2007, granting father sole physical custody of the child pending an evidentiary hearing.

On October 26 and November 1, 2007, evidentiary hearings were held. Over the lunch hour on November 1, 2007, the parties reached a settlement agreement. Father's attorney summarized the terms of a stipulated agreement on the record. Neither party was to submit a proposed order; rather they agreed that the district court was to craft an order based on the oral stipulated agreement and the submission of a supplemental agreement regarding the holiday schedule.

Following the November 1 hearing, mother's attorney directed her secretary to call the district court and ask when they should expect to receive the order. On November 26, 2007, the district court judge e-mailed mother's attorney and requested an electronic copy of the "proposed resolution" of the controversy. Mother's attorney provided the district court a proposed order. Father's attorney was not made aware of the contacts between the district court and mother's attorney or furnished a copy of the proposed resolution.

On November 29, 2007, the district court issued an order purportedly based on the oral settlement agreement contained in the court record. Father had learned about the contacts and order from mother. Father's attorney objected that the order did not

accurately reflect the settlement agreement and that the inaccuracies were due to improper ex parte communications between mother's attorney and the district court. Mother's attorney agreed that the order did not accurately reflect the settlement agreement. The district court held a telephone conference with counsel to address the disagreement. The district court judge indicated that he would recuse himself and that a new stipulated order could be presented by the parties to a signing judge. However, the parties were unable to agree on a new stipulated order. Instead, each submitted a proposed, amended order to the original district court judge. On January 15, 2008, the district court entered an order that adopted, verbatim, mother's proposed, amended order.

In response, father moved for fresh amended findings and a new amended order. Father's motion contained a request for an award of attorney fees based on the alleged improper communications between the district court and mother's attorney. A different district court judge considered the matter and, on April 2, 2008, entered an order denying father's motion and his request for attorney fees. The reviewing district court did not address the specific inaccuracies challenged by father but summarily concluded that there was no indication that the January 15, 2008 order was inconsistent with the settlement agreement reached by the parties. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion in finding that there were no inconsistencies between the January 15, 2008 amended order and the parties' original stipulated agreement and denying father's motion to revise that January

15, 2008 order. This court reviews a district court's refusal to reopen a dissolution judgment for an abuse of discretion. *Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996). Minnesota courts favor stipulations in dissolution cases to expedite litigation and resolve disputes. *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). This court accords stipulations "the sanctity of binding contracts." *Id*. Once a dissolution stipulation has been reached, the district court can refuse to accept the stipulation but "cannot, by judicial fiat, impose conditions on the parties to which they did not stipulate and thereby deprive the parties of their day in court." *Toughill v. Toughill*, 609 N.W.2d 634, 638 n.1 (Minn. App. 2000) (quotation omitted).

Father claims that the January 15 order erroneously favored mother in two respects: (1) representing an intention to restore to mother 50% parenting time; and (2) failing to continue father's pending motion. The district court, in upholding the order, made no findings regarding the two claimed departures from the agreement.

(1) Parenting Time

On November 1, 2006, father's attorney reviewed, on the record, the parties' stipulated agreement regarding parenting time. He specifically stated that mother's parenting time would be Tuesday overnights with every other weekend and that the parties understood that there would be a June 2008 review hearing before the court "only if needed." He also stated that the parties agreed that the order would provide that, if a review hearing was needed, the scope of that June hearing would be as follows:

> [First, issues of endangerment that could require restricting the parenting time schedule.] Second, if there are no concerns at that point, Mr. Ahlers is contemplating that he would

> withdraw his [sole custody] motion if we had set up this longer period of time to look at it.
>
> Third, we are understating [sic] that . . .
>
> . . . .
>
> . . . if the court makes these Findings [that mother maintained her mental health and if the child maintains or improves his overall well-being], that Ms. Ahlers' parenting time would be contemplating to increase to a second overnight per week. That's the scope of her request. And, as the court indicated, that would be your intention. The every other weekend would remain as her parenting time. Or, if [the child's] best interest would be served by such other schedule as the court may find.

In contrast, the district court order states:

> 11. If needed, the parties shall schedule a review hearing in June 2008. The scope of the hearing is as follows:
>
> a. To address any additional or new concerns regarding endangerment which may require restricting the schedule.
>
> b. To make the following findings, as applicable, and if made, to order an additional overnight of parenting time for Petitioner including such connecting times as are appropriate (for example modifying the return time on Sundays for a bridge over[)] so that Petitioner has the child every other weekend from Friday after school until Wednesday morning return to school. The intention is to restore the 50/50 schedule; if it works better for [the child] and the party, a different 50/50 schedule may be used.

(internal citations to the transcript omitted).[1]

[1] It should be noted that the internal transcript references in the district court order (as in the mother's proposed order) do not correspond to the text that they are citing and appear to be erroneously referencing the page numbers on the header printed by a fax machine.

The intent to restore the 50/50 schedule and the addition of "connecting times" is one-sided and, even then, limited. There is only one place in the transcript where the return of a 50/50 parenting-time schedule is mentioned. This occurs when mother's attorney questions mother regarding the stipulated agreement as follows:

> MOTHER'S ATTORNEY: Now the agreement that [father's attorney] and I jointly read into the record, is that what you understood you were agreeing to?
>
> MOTHER: Yes.
>
> ATTORNEY: And this agreement offers you the opportunity to possibly have a fifty-fifty schedule with your son, do you understand that?
>
> MOTHER: Yes.
>
> ATTORNEY: Do you also understand that in this agreement there is no guarantee of that?
>
> MOTHER: My understanding is that as long as my mental health is stabilized or improves, or better, and as long as [my son] is doing well psychologically and maintaining, or improving, that I will once again be given fifty-fifty parental time.
>
> ATTORNEY: And is it your intention to do your very best to at least do your part of the equation?
>
> MOTHER: I think that they're both my part – I mean, obviously my mental health is in my hands. But also working with Scott co-parenting, to help maintain and keep improving [my son's] condition and . . . .

Note that mother indicates that so long as different factors improve, she will be granted 50/50 parenting time, and she affirms her attorney's statement that this agreement only afforded "the *opportunity* to *possibly* have a 50/50 [parenting time] schedule." Taken

together, mother's statements indicate her expectation of what she could achieve. The concept of an extra overnight to bridge mother's weekend time with Tuesday/Wednesday time (connecting time) is never addressed in the stipulated agreement or mother's testimony. However, the district court order adopting the language drafted by mother's attorney recognizes a connecting time bridge as a basis for establishing a five-day block of parenting time for mother every other week and ultimately a 50/50 parenting time arrangement.

The oral summary of the stipulated agreement is that if, as of June 2008, the parties agree that the facts support increased parenting time for mother, they will make such a formal arrangement. If they cannot agree, any such determination and modification would be made by the district court. This potential future dispute is the nub of the current controversy over the language in the challenged January 15 order. Father had concluded that mother's mental health issues had been detrimental to the child and that the parenting time had to be substantially curtailed. At the time of the stipulated agreement, he was attempting to establish a record to limit mother's parenting time and position himself to deal with an attempt to increase mother's parenting time in the future. The January 15, 2008 order does not reflect what the parties apparently agreed to.

(2) Continuation of the Motion

Father also alleges that it was error for the district court to omit the continued pendency of his motion for modification of the custody order. When discussing the possibility of a June 2008 review hearing, father's attorney states: "if there are no concerns *at that point,* Mr. Ahlers is contemplating that he would withdraw his motion if

we had set up this longer period of time to look at it." Although not a model of clarity, this language indicates that father intended to continue his motion to modify custody until a later date. By not including this provision in the order, father's motion is no longer pending, and father would have to initiate a new proceeding to address his concerns with mother's situation.

We recognize that all of the matters being considered are ultimately subject to a district court determination of what is in the best interests of the child, that this in turn depends on the mother's mental health and the child's well-being, and that the points raised by father regarding parenting time and the pendency of his motion may be minor, nuanced, and contingent on a future hearing. However, in the highly charged setting where the parties were not sure what the future held, a narrowly drawn order was important. Unfortunately, a written summary of the stipulated agreement was not submitted to the district court. It was only provided with an oral statement that lacks precision. The district court was severely handicapped. Under the circumstances, we conclude that the deviations from the oral stipulation were potentially material. However, before concluding on a disposition we consider the ex parte communication issue and the verbatim-adoption argument.

II.

The second issue is whether the communications between the district court and mother's attorney constituted inappropriate ex parte communications resulting in an

improper order. The Minnesota Code of Judicial Conduct[2] prohibits ex parte communication:

> A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Minn. Code of Judicial Conduct, Canon 3A(7)(a) (2008).

To make a claim of reversible error on appeal, appellant must demonstrate that there was an ex parte communication, the communication constituted error, and the error was prejudicial. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 363 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). In the context of administrative tribunals, this court has found ex parte communications to be reversible error because the appearance of impropriety created by ex parte communications undermines public

[2] Importantly, father is not alleging any ethical violations on appeal, only that the district court and mother's attorney erroneously engaged in ex parte communications which resulted in an improper order. The Minnesota Code of Judicial Conduct is considered to define what is and what is not an appropriate ex parte communication. Our examination of the Judicial Code is to determine whether an inappropriate ex parte communication was engaged in for the purpose of the finding of reversible error, not for the purpose of finding an ethical violation.

confidence in the system. *Meinzer v. Buhl 66 C & B Warehouse Distrib., Inc.*, 584 N.W.2d 5, 6-7 (Minn. App. 1998) (overturning reemployment insurance judge's decision when a tape recording of the hearing demonstrated that the judge and opposing party "discussed some pieces of evidence and laughed" when Meinzer left the room).

The Minnesota Rules of General Practice set forth the procedure for an attorney to submit a draft final decree to the court:

> (b) Where a stipulation has been entered orally upon the record, the lawyer directed to prepare the decree shall submit it to the court with a copy to each party. Unless a written, fully executed stipulation is filed or unless the decree contains the written approval of the lawyer for each party, a transcript of the oral stipulation shall be filed by the lawyer directed to prepare the decree. Responsibility for the cost of the transcript shall be determined by the court. Entry of the decree shall be deferred for 14 days to allow for objections unless the decree contains the written approval of the lawyer for each party.

Minn. R. Gen. Pract. 307(b). This rule provides guidance as to proper conduct in submitting proposed orders. Minnesota rules consistently require attorneys to furnish opposing counsel a copy of material sent to the court. *See* Minn. R. Civ. P. 4.01–4.07, 5.01–5.05.

On appeal, mother's attorney argues that she engaged in permissible ex parte communications with the district court regarding procedural issues and the transmittal of forms to the district court. It is undisputed that mother's attorney sent documents to the district court in response to the district court's e-mail request for mother's attorney's "proposed resolution." Father's attorney was not copied or informed of this communication.

The documents sent by mother's attorney dealt with substantive, and not procedural matters, and therefore do not fall under the exception of Canon 3A(7)(a). Accepted practice is that, where an attorney is directed to prepare a proposed order, a copy should be provided to opposing counsel. The communication between mother's attorney and the district court was error under both accepted practice and the Code of Judicial Conduct.

The question for this court on review is whether such an error constitutes reversible error. Under *Meinzer*, the creation of an appearance of impropriety would require reversal. 584 N.W.2d at 6. However, *Meinzer* dealt with a reemployment insurance judge and not a district court. Under this court's reasoning in *Koes*, father would have to demonstrate prejudicial error in order to warrant reversal. 636 N.W.2d at 363.

In addition to the ex parte communications regarding the original order, appellant points to the district court's verbatim adoption of mother's proposed, amended order. When a district court adopts a party's proposed findings verbatim, a reviewing court must "heed how the findings were prepared when . . . conduct[ing] a careful and searching review of the record." *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001). Although a district court's verbatim adoption of a party's proposed findings and conclusions of law is not considered to be reversible error per se, a verbatim adoption may raise questions as to whether the district court independently evaluated the evidence and analyzed the issues. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993).

Based on a review of the record, the district court and mother's attorney engaged in an erroneous and impermissible ex parte communication that, at minimum, affected the litigation by augmenting the terms of the settlement of the custody dispute. By December 2007, mother's attorney and the district court were aware of the controversy that this had engendered. After the January 15, 2008 order, the motion for new amended findings presented the renewal of father's objection. The reviewing district court did not address the claimed discrepancies in the November 29 order or the January 15 order that superseded it. We conclude the January 15, 2008 order was prejudicial under the standard of *Koes*. Although the ex parte communications may have been unintentional and innocent, they raise the specter of partiality. We note that if father had been given an opportunity to comment on mother's proposed orders, the variances with the stipulation could have been identified, and useful analysis and argument could have been provided to the district court. This would have allowed the district court to address the complained of errors or enter an order expressly addressing shortcomings in the stipulated agreement and adopting the disputed provisions based on appropriate findings. The verbatim adoption of the proposal from mother's attorney requires that this court more carefully scrutinize the situation.

Based on the conclusion that the order is not consistent with the stipulated agreement and that the ex parte communications facilitated this variance, we conclude that the district court abused its discretion in affirming the January 15, 2008 verbatim adoption of mother's proposed order. We reverse the district court and vacate the

January 15, 2008 and November 29, 2007 orders, reinstate the May 2007 order and remand.

III.

The third issue is whether the district court abused its discretion in denying father's request for attorney fees. The district court may award conduct-based fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2006). Conduct-based fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).

The district court denied father's request for attorney fees concluding there was no adequate factual basis to support an award of fees. The district court did not make any additional findings. The record indicates that mother's attorney engaged in improper communications with the district court. This improper communication resulted in the original erroneous order and the protracted litigation in the district court. Because the record is sufficient to support an award of attorney fees and because mother's attorney's conduct unreasonably contributed to the length and expense of the litigation, we reverse the district court's denial and remand for a determination of appropriate award of attorney fees to father.

Reversed and remanded.

Dated: