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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-653**

In re the Marriage of:
Vicki Lynn Henderson, n/k/a Vicki Lynn Mandeville,
Petitioner Below,

Mille Lacs County,
Respondent,

vs.

Michael P. Henderson,
Appellant.

**Filed February 2, 2010
Affirmed
Halbrooks, Judge**

Mille Lacs County District Court
File No. 48-F3-98-000111

Janice S. Kolb, Mille Lacs County Attorney, Timothy S. Kilgriff, Assistant County Attorney, Courthouse Square, Milaca, Minnesota (for respondent)

Michael P. Henderson, Bloomington, Minnesota (pro se appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion to forgive his outstanding child-support arrearages. Appellant also argues that the judgments by

operation of law that resulted from his unpaid child-support payments violated his constitutional rights. Because we conclude that the district court did not err by denying appellant's motion and because appellant's constitutional arguments are without merit, we affirm.

FACTS

Appellant Michael P. Henderson's marriage was dissolved on June 9, 1998, and his ex-wife was awarded sole physical custody of their two children. The district court ordered appellant to pay his ex-wife \$465 per month for the support of their children. In May 2002, appellant was incarcerated for an offense unrelated to his child-support obligation. In July 2003, appellant moved to modify his child-support payment on the ground that his incarceration created a substantial change in circumstances that made it unreasonable for him to pay child support. In response to appellant's motion, respondent Mille Lacs County moved the district court to enter a judgment against appellant for his outstanding arrearages. The child-support magistrate (CSM) granted appellant's motion, reducing his child-support payments to zero dollars per month. The CSM also granted the county's motion, which appellant did not oppose or respond to. The CSM entered and docketed a \$7,134.05 judgment against appellant, which represented the total amount of appellant's outstanding arrearages at that time.

In June 2007, appellant again moved to modify his child-support obligation. Appellant requested that the CSM suspend his support obligations effective on the date of his incarceration as opposed to the date of the 2003 order. Essentially, appellant requested that his arrearages be entirely forgiven. In his supporting affidavit, appellant

argued that his arrearages should not have increased beginning in 2002 because he was incarcerated at that time. The CSM denied appellant's motion for modification, finding that appellant should have moved for reconsideration or appealed from the 2003 order if he did not agree with the amount of the judgment. Because appellant did not seek review at that time, the CSM found that "based on the new child support law that went into effect on January 1, 2007, this court is without the ability to retroactively modify child support based on the facts and testimony brought forth by [appellant]."

In May 2008, appellant again moved for "appropriate relief," essentially asking the CSM to set aside the judgment entered for his arrearages.¹ Appellant argued that his child-support arrearages should be forgiven because he was incarcerated during the time of their accrual. The CSM found that appellant's appropriate remedy was a request for review or an appeal of the 2003 order. Lacking a statutory basis to retroactively forgive appellant's arrearages, the CSM denied the motion. Appellant moved for review at the district court, arguing that the county should have known about appellant's incarceration and suspended his obligations accordingly.

The district court denied appellant's motion to modify his child-support obligation, adopting the reasoning of the CSM. "If [appellant] objected to the August 25, 2003 order, he should have filed an appeal within the time frame allowed—not five years

¹ Appellant's motion is for a "more definite statement" as to the amount of his outstanding arrearages. But appellant's memorandum makes clear that he was disputing the amount owed because he disagreed that he had to pay the amounts that accumulated while he was incarcerated. The CSM framed the issue as "whether all, or a portion, of the arrears owed by [appellant] should be forgiven and whether a lien/levy should be removed from [appellant]'s account."

after the fact.” The district court further noted that appellant cited no authority that placed a burden on the county to “unilaterally determine when a child-support obligor has been incarcerated and then to suspend that obligor’s obligation.”

Appellant moved to quash a levy placed on his bank account on the ground that his arrearages should not have accrued during his incarceration. Appellant also raised various constitutional issues in support of amending his child-support obligation, including a due-process violation, a double-jeopardy violation, and a violation of his right to a jury under the federal constitution. The district court denied appellant’s motion, finding that “because [appellant] failed to make a timely appeal in 2003, [appellant] cannot now appeal that decision. This Court is powerless to entertain respondent’s untimely motion.” The district court also concluded that appellant’s constitutional arguments were without merit. This appeal follows.

DECISION

I.

Appellant contends that the district court abused its discretion by failing to forgive his outstanding arrearages. The district court “enjoys broad discretion in ordering modifications to child support orders.” *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Its discretion must be exercised within the limits set by the legislature. *Id.* “Misapplying the law is an abuse of discretion.” *Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009); *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009) (stating, in the context of a child-support dispute, that “[t]he [district] court abuses its discretion if it erroneously applies the law to the case”).

On August 27, 2003, a judgment in the amount of \$7,134.05 was entered and docketed against appellant for his child-support arrearages that accrued between the time of his dissolution and his 2003 motion to modify child support. As noted by the district court, appellant could have sought review of this determination and argued for modification of his arrearages²; he also had the right to appeal this determination. Appellant failed to exercise either option available to him, and he cannot now seek any review of the 2003 order.

Appellant has since filed several motions seeking modification of his arrearages. A modification of child support may not be made retroactive beyond the date that the party seeking modification served notice of the motion on the responding party. Minn. Stat. § 518A.39, subd. 2(e) (2008). “Because forgiveness of arrearages is a retroactive modification of support, arrearages accruing prior to service of the modification motion may not be forgiven.” *Allan v. Allan*, 509 N.W.2d 593, 597 (Minn. App. 1993). Before January 1, 2007, a district court had the discretion to modify child support for a period of time that preceded service of the notice if the district court made an express finding that “the party seeking modification was . . . incarcerated for an offense other than nonsupport of a child during the period for which retroactive modification is sought and lacked the financial ability to pay the support ordered during that time period.” Minn. Stat. § 518.64, subd. 2(d)(4) (2004); 2005 Minn. Laws ch. 164, § 10, at 1895 (striking the above passage from the statute); 2006 Minn. Laws ch. 280, § 32, at 1145 (stating that the

² Pursuant to Minn. Stat. § 548.091, subd. 4 (2002), appellant could have moved for an order to vacate or modify the judgment entered following the 2003 hearing.

statutory changes became effective January 1, 2007, and applied to “all support orders in effect prior to January 1, 2007”). The current statute does not permit retroactive forgiveness of child-support arrearages for a time preceding service of a modification motion, regardless of a person’s incarceration. Minn. Stat. § 518A.39, subd. 2(e). Because appellant’s modification motions were all filed after January 1, 2007, the district court did not have the authority to retroactively forgive appellant’s child-support arrearages. We therefore conclude that the district court did not abuse its discretion by denying appellant’s motion for retroactive forgiveness of his arrearages.

II.

Appellant argues that he was denied his right to procedural due process when, by operation of law, judgments were entered against him each month that he failed to pay his child support.

Under Minn. Stat. § 548.091, subd. 1a(a) (2002),

[a]ny payment or installment of support required by a judgment or decree of dissolution . . . that is not paid or withheld from the obligor’s income . . . or which is ordered as child support by judgment, decree, or order by a court in any other state, is a judgment by operation of law on and after the date it is due . . . and shall be entered and docketed by the court administrator on the filing of affidavits as provided in subdivision 2a.

After the unpaid payment becomes a judgment by operation of law, either the obligee or the public authority must submit documents before the judgment is entered and docketed. Minn. Stat. § 548.091, subs. 2a–3a (2002). The obligor may request a hearing “on the issue of whether the judgment amount or amounts have been paid and may move the

court for an order directing the court administrator to vacate or modify the judgment or judgments entered pursuant to this action.” *Id.*, subd. 4 (2002).

Both the United States Constitution and the Minnesota Constitution provide that no person shall be deprived of “life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. The Due Process Clause requires that deprivations of life, liberty, or property by adjudication be preceded by adequate notice and meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 1020 (1970). But the concept of due process is “flexible and calls for such procedural protections as the particular situation demands.” *Am. Dog Owners Ass’n v. City of Minneapolis*, 453 N.W.2d 69, 71 (Minn. App. 1990) (quotation omitted). Claims of denial of procedural due process are reviewed de novo. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Although appellant was not afforded an opportunity to be heard each month when his outstanding payment became a judgment by operation of law, the statutory scheme provides an individual with notice and an opportunity to be heard before the judgments are entered and docketed by the district court. Here, the county served appellant with its motion to modify child support, requesting that appellant’s judgments be entered and docketed. The county’s motion also informed appellant of his right to a hearing on the issue. As previously noted, the statutes also provided appellant with the right to a hearing following the entry of judgment, and appellant had the right to appeal this determination.

We conclude that the procedures satisfy the due-process requirements of the state and federal constitutions.

Appellant also argues that the accrual of his child-support obligation during his incarceration violates the prohibition against double jeopardy. Both the United States and the Minnesota Constitutions guarantee that a criminal defendant may not be tried more than once for the same crime. *See* U.S. Const. amend. V (providing that “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy [of punishment] of life or limb”); Minn. Const. art. I, § 7 (providing that “no person shall be put twice in jeopardy of punishment for the same offense”). The federal provision is binding on the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969). This prohibition protects a criminal defendant from “three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.” *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998). Constitutional double-jeopardy claims are reviewed de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

Appellant’s judgments for his outstanding child-support payments are unrelated to his criminal conviction. The fact that appellant’s obligations accrued while he was incarcerated does not constitute a second punishment for his original, criminal offense. Because appellant is not being subjected to multiple punishments for the same offense, his judgment does not violate the prohibition on double jeopardy.

Affirmed.