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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1383**

In re the Marriage of:
Denise Marie Kienholz, petitioner,
Respondent,

vs.

Douglas Floyd Kienholz,
Appellant.

**Filed May 20, 2019
Affirmed
Slieter, Judge**

Morrison County District Court
File No. 49-FA-16-1726

Cynthia J. Vermeulen, Vermeulen Law Office, PA, St. Cloud, Minnesota (for respondent)

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PLLP, Willmar, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

SLIETER, Judge

The matter comes before this court following a denial to reopen and vacate a default judgment and decree (J&D) pursuant to Minn. Stat. § 518.145, subd. 2 (2018). The district court denied a motion to reopen and vacate for fraud and misrepresentation, and excusable

neglect. Because the district court properly addressed the legal standard to reopen and vacate the J&D, we affirm.¹

FACTS

Respondent Denise Marie Kienholz and appellant Douglas Floyd Kienholz dissolved their 47-year marriage in 2017. At the time of dissolution, respondent was 66 years old and appellant was 67 years old.

On December 2, 2016, respondent filed the petition for dissolution of marriage, which requested the district court award her the parties' Morrison County property and award appellant their Renville County property. The Morrison County Sheriff's Office personally served appellant the petition at the Morrison County property. The district court issued a scheduling order in the matter that was served on appellant. On February 6, 2017, respondent requested default relief under Minn. Stat. § 518.13, subd. 5 (2018), and she served the request on appellant. A default hearing was set on the same day as the trial date identified in the scheduling order.

On April 28, 2017, respondent appeared with counsel for the default hearing and appellant did not appear. The judge acknowledged that appellant had made an earlier request in his criminal proceeding to appear for the default hearing, but that request was denied and he was transported to the Minnesota Correctional Facility in St. Cloud.

¹ Appellant also asserts that the property division in the J&D runs afoul of Minn. Stat. § 518.58, subd. 2 (2018), which allows a district court, to prevent an unfair hardship on a spouse in a dissolution proceeding, to apportion up to one-half of nonmarital property. Because appellant failed to present a claim to reopen and vacate the J&D, we do not examine this issue.

Respondent's counsel requested to proceed by default without appellant's presence because he failed to make a request after being served with the default request. The judge proceeded with the hearing. Respondent testified at the default hearing in support of her petition. The district court adopted respondent's proposed order and entered the J&D following the hearing.

The district court awarded respondent the parties' Morrison County property with an estimated fair market value of \$315,000, subject to a reverse mortgage in the amount of \$149,000.² Appellant was awarded the parties' Renville County property with an estimated fair market value between \$70,000 and \$80,000. Respondent waived her right to seek spousal maintenance on a recognition appellant did not have income to pay a maintenance award. The parties' remaining property and debts were divided as set out in the proposed J&D. The J&D included a finding that the property division was "fair and equitable" considering these factors:

(1) [respondent's] loss of her one-half marital interest in [appellant's] retirement income;

(2) [respondent's] loss of her one-half marital interest in [appellant's] retirement accounts, which he cashed out and spent;

(3) [respondent's] right to spousal maintenance, including loss of earning, seniority, benefits, and retirement funds due to being a stay-at-home mother, and supporting [appellant's] career;

(4) reimbursement to [respondent] for use of her non-marital inheritance funds in the amount of \$138,000.00 which were applied towards marital obligations, including paying off

² The district court also ordered that "[respondent] shall be solely responsible for payment of the reverse mortgage on the homestead, together with insurance, taxes, and utilities and shall hold [appellant] harmless therefrom."

the homestead mortgage, payment of marital debt and living expenses;

(5) [respondent's] obligation for marital debt in this [d]ecree; and

(6) [appellant's] obligation for [respondent's] attorney fees and costs incurred in this proceeding.

On September 11, 2017—136 days after entry of the J&D and 67 days after entry of the amended J&D³—appellant filed a notice of appeal. Appellant acknowledged his appeal was untimely though explained he had limited resources and lacked necessary information to proceed *pro se*. This court questioned whether the appeal was timely, appellant did not respond to this court's order questioning jurisdiction, and this court then dismissed the appeal. *Kienholz v. Kienholz*, No. A17-1419 (Minn. App. Oct. 3, 2017) (order).

On April 25, 2018, appellant, through counsel, filed a motion to vacate and reopen the J&D. Appellant argued he used his inheritance funds from his father's estate to purchase the Morrison County property and, therefore, the district court should have awarded him that property.

On June 20, 2018, the district court held a motion hearing.⁴ The district court denied appellant's motion concluding no grounds existed to vacate and reopen pursuant to Minn. Stat. § 518.145, subd. 2(1) ("mistake, inadvertence, surprise, or excusable neglect") or

³ On July 6, 2017, the default hearing court entered an amended J&D modifying the legal description of the Morrison County property and the vehicle identification number for one of the vehicles.

⁴ The judge presiding over the motion hearing was neither the judge who entered the J&D nor the judge who entered the amended J&D.

Minn. Stat. § 518.145, subd. 2(3) (“fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party”).⁵ The district court determined respondent did not commit a fraud, and the J&D contained a sufficient explanation for the property division. The district court also found that appellant failed to respond to the filing documents, he failed to utilize the financial resources provided to him to pursue an appeal, and he possessed sufficient means to file a notice of appeal in August 2017, but failed to perfect the appeal.

This appeal follows.

D E C I S I O N

Did the district court abuse its discretion when it denied appellant’s motion to vacate and reopen the J&D?

A district court’s decision to reopen a J&D under Minn. Stat. § 518.145, subd. 2, “will not be disturbed absent an abuse of discretion.” *Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996). “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or rendering a decision that is against logic and the facts on record. A district [court’s] findings of fact are not set aside unless clearly erroneous.” *Knapp v. Knapp*, 883 N.W.2d 833, 835 (Minn. App. 2016) (quotations and citation omitted).

⁵ The district court’s order denying appellant’s request reflects a discrepancy between the file stamp and the signature date showing it was file stamped before it was signed. Both the register of actions and notice of filing of order, however, show the order was filed on June 26, 2018.

A party may seek to reopen a default judgment in a dissolution proceeding by filing a motion under Minn. Stat. § 518.145, subd. 2. *Mesembourg v. Mesembourg*, 538 N.W.2d 489, 493 (Minn. App. 1995). Pursuant to Minn. Stat. § 518.145, subd. 2, a district court may reopen a J&D for “mistake, inadvertence, surprise, or excusable neglect” or “fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party.”⁶ A motion seeking to reopen “must be made within a reasonable time,” for both these grounds, and “not more than one year after the judgment and decree, order, or proceeding was entered or taken.” Minn. Stat. § 518.145, subd. 2. “For the purposes of reopening a dissolution judgment, the moving party bears the burden of proof.” *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). “The moving party must prove at least one of the statutory grounds for vacating by a preponderance of the evidence.” *Knapp*, 883 N.W.2d at 835.

A. Fraud and Misrepresentation

Appellant requested the district court vacate and reopen the J&D because respondent failed to disclose to the court that appellant’s inheritance money was used to purchase the Morrison County property. Appellant provided to the district court his receipt of inheritance funds in the amount of \$379,413.64 on August 28, 2013, and the purported use of those funds in a check dated August 29, 2013 to purchase the Morrison County

⁶ As the Minnesota Supreme Court noted in *Shirk v. Shirk*, the language of Minn. Stat. § 518.145, subd. 2, was “carefully crafted by the legislature” to allow reopening and vacating judgments by paralleling the language of Minn. R. Civ. P. 60.02 except, significantly, eliminating relief under rule 60.02(f). 561 N.W.2d 519, 522 n.3 (Minn. 1997).

property in the amount of \$311,462.95. Respondent filed a responsive affidavit asserting the property division did not constitute misconduct by her or her counsel because, much like appellant, she used inheritance money during the parties' marriage for marital assets. The district court denied appellant's requested relief.

In *Doering v. Doering*, this court distinguished fraud from fraud on the court for purposes of seeking relief pursuant to Minn. Stat. § 518.145, subd. 2(3). 629 N.W.2d 124, 128-29 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). As relevant here, a party seeking relief within one year from entry of judgment must show "[o]rdinary fraud," which "does not require an affirmative misrepresentation or an intentional course of concealment because parties to a marriage dissolution have a duty to disclose all assets and liabilities completely and accurately." *Id.* at 130.

Because appellant filed his fraud claim within one year of entry of the J&D, it is subject to the "ordinary fraud" standard. Appellant argues the district court abused its discretion by not reopening and vacating the J&D because respondent violated her obligation to inform the district court about his purported nonmarital interest in the Morrison County property.⁷

⁷ Appellant also contends the district court factually erred in its order finding the J&D was silent on the parties' ownership interest in the Morrison County property. The J&D, however, uses language that the parties are "the owners of, or have an interest in, their homestead," in Morrison County. Respondent did not represent an ownership interest at the default hearing. The language in the J&D is the same language in the petition for dissolution personally served on appellant.

The Morrison County property is presumptively marital property because it was acquired during the marriage, which places a burden on appellant to prove by a preponderance of the evidence that the property is nonmarital. Minn. Stat. § 518.003, subd. 3b (2018) (“All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses”); *Crosby v. Crosby*, 587 N.W.2d 292, 296 (Minn. App. 1998) (recognizing presumption of marital property requires party challenging that status to “demonstrate by a preponderance of the evidence that the property is non-marital”), *review denied* (Minn. Feb. 18, 1999). Respondent obtained default relief based on appellant’s failure to respond to the dissolution proceeding, which permitted the district court to hear and determine the matter without appellant’s presence. Minn. Stat. § 518.13, subd. 1 (2018). Even though respondent personally served appellant with the petition, which identified the requested relief, appellant raised no concerns related to respondent’s property request.

This case is distinguishable from situations in which a party has no presumptive marital right to the property, such as a non-owner of the property or presumptively nonmarital property.⁸ The evidence before the district court showed the Morrison County property was purchased during the course of the marriage. The property is presumptively

⁸ Appellant relies on an unpublished case from this court, which is not binding precedent. In that unpublished opinion, a wife represented to the district court that the parties’ farmstead belonged to both parties—a statement the district court found to be a misrepresentation because husband owned the property before the parties’ marriage. As noted elsewhere in this opinion, the facts here are distinguishable.

marital property. Minn. Stat. § 518.003, subd. 3b. Because appellant failed to establish a legal obligation for respondent to present his anticipated defense of a nonmarital interest in the property, the district court properly denied appellant's motion to reopen and vacate the J&D pursuant to Minn. Stat. § 518.145, subd. 2(3).

B. Excusable Neglect

Appellant also sought to reopen and vacate the J&D pursuant to section 518.145, subdivision 2(1), for excusable neglect. The district court denied appellant's request because it concluded there was no basis to reopen the J&D under this subdivision. The district court noted appellant never filed a response to the petition for dissolution or made an appearance. Respondent served notices on appellant, but appellant neither participated nor responded to those notices. Even though appellant was incarcerated during part of the litigation, the district court noted "he was present in Morrison County throughout the pendency of the dissolution action and could have appeared."

A party may vacate and reopen a J&D on a showing of "mistake, inadvertence, surprise, or excusable neglect." Minn. Stat. § 518.145, subd. 2(1). The language in Minn. Stat. § 518.145, subd. 2(1), is identical to the language in Minn. R. Civ. P. 60.02(a), which for purposes of assessing whether reopening a judgment for excusable neglect is appropriate, uses a four-factor analysis. *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). For a party to obtain relief under rule 60.02(a), the party must satisfy all the factors. *Gams v. Houghton*, 884 N.W.2d 611, 619-20 (Minn. 2016).

This court held in *Knapp* that a district court acted within its discretion by not analyzing the four factors considered under rule 60.02(a) when addressing relief under section 518.145, subdivision 2(1). 883 N.W.2d at 837. The *Knapp* court held the record on review “amply support[ed] the district court’s finding and its conclusion that [the moving party] failed to meet his burden to prove excusable neglect under Minn. Stat. § 518.145, subd. 2(1).” *Id.* at 838. In particular, the *Knapp* court recognized the district court credited the affidavit of the nonmoving party over the moving party in addressing the claims before it. *Id.* at 837-38.

The district court made sufficient findings in denying appellant’s request for relief under the excusable-neglect standard—even without analyzing the rule 60.02 factors as permitted by *Knapp*. The district court’s order addressed facts related to appellant’s lack of a reasonable excuse for failing to respond to the dissolution action. Moreover, the district court found appellant did not have an adequate excuse due to his incarceration because he was initially served with the petition when he was at the parties’ homestead in November 2016 and was residing in Morrison County, whether in or out of custody, until transported to the Minnesota Correctional Facility in St. Cloud on or about April 27, 2017.

Appellant contends the district court erred in its determination of his ability to appear personally because his request to appear at the default hearing to the criminal sentencing judge was not granted and he was, thereafter, committed to the commissioner of corrections. The district court’s order denying appellant’s motion to reopen and vacate the J&D recognized that appellant had opportunities to answer the dissolution action between November 2016 and April 27, 2017, but never did so. Appellant also failed to

respond to respondent's default scheduling request. The district court did not err in its factual findings on appellant's failure to respond to the action between the initial service of the petition and the default hearing by identifying any objections to respondent's requests. Therefore, the district court properly denied appellant's motion to reopen and vacate the J&D under Minn. Stat. § 518.145, subd. 2(1).

Affirmed.