

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0951**

In re the Marriage of: Dia Eldin Jubara, petitioner,
Respondent,

vs.

Nihad Salah Awad Hamed,
Appellant.

**Filed March 8, 2021
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-FA-17-8036

Maury D. Beaulier, Beaulier Law Office, St. Louis Park, Minnesota (for respondent)

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Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and
Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this marital dissolution dispute, appellant wife argues that the district court erred
by denying her motion for contempt of court and conduct-based attorney fees and costs.
We affirm.

FACTS

The parties married in Sudan. After the parties had moved to Minnesota, respondent husband Dia Eldin Jubara petitioned the district court, Hennepin County, for a dissolution of marriage. Following a two-day trial, the district court issued its findings of fact, conclusions of law, order for judgment, and judgment and decree dissolving the parties' marriage.

In this judgment, the district court made a finding that appellant wife Nihad Salah Awad Hamed claimed a nonmarital interest in homemade perfume given to her by her mother as a wedding gift. The district court also made a finding that appellant claimed that the perfume was worth \$15,000. The district court did not make any findings as to the actual marital or nonmarital nature of the perfume or its actual value. The district court did, however, order respondent to deliver the perfume to appellant within two weeks of the date of the judgment and decree. Respondent admits that he has yet to comply with that directive. He has maintained throughout the proceedings that his failure to deliver the perfume is due to the fact that it has never been in his possession.

Following the original judgment and decree, both parties moved for amended findings. The district court issued an order denying the parties' motions. Appellant then appealed from the judgment and decree, arguing that the district court erred in dividing the marital estate, denying her request for spousal maintenance, and denying her request for both conduct- and need-based attorney fees. *See Jubara v. Hamed*, No. A19-1916, 2020 WL 6122805, at *1 (Minn. App. Oct. 19, 2020). We affirmed the district court's division of the marital estate; declined to reach appellant's attorney fees arguments, concluding that

she had forfeited those arguments by inadequately briefing them, failing to bring a motion for a new trial, and failing to present evidence relevant to the arguments at trial; and remanded the matter for further proceedings on the issue of spousal maintenance, after concluding that the district court had made insufficient findings of fact to permit review on that issue. *Id.* at *4–8.

While her first appeal was still pending, appellant filed a motion to hold respondent in contempt of court, arguing that he had failed to comply with the district court's order requiring him to deliver the perfume to her. Appellant's motion also requested that the district court require respondent to pay her \$15,000 plus pre-judgment interest at a four percent rate as a condition of purging his contempt. Finally, appellant's motion requested that the district court award her the attorney fees and costs she had incurred in bringing the contempt motion. Respondent filed a responsive motion asking the district court to deny appellant's motion in its entirety or, in the alternative, to hold an evidentiary hearing regarding the existence and value of the perfume.

The district court originally scheduled a motion hearing on appellant's contempt motion for April 14, 2020. On March 24, 2020, counsel for respondent requested a continuance or, in the alternative, to hold the hearing via telephone due to the COVID-19 pandemic. The district court eventually canceled the hearing and ordered the parties to present their arguments via written submissions. Both parties complied, submitting written arguments.

After considering the parties' written arguments, the district court issued an order denying appellant's contempt motion. The district court found no indication that appellant

had personally served respondent with her contempt motion and concluded that the motion must therefore be denied. Additionally, the district court concluded that even if there had been proper service of the motion, holding respondent in contempt was not an appropriate remedy for his failure to deliver the perfume. Finally, the district court appears to have declined to award attorney fees and costs to appellant. This appeals follows.

DECISION

Appellant raises two claims of error in her brief. First, appellant argues that the district court abused its discretion in denying her contempt motion. Second, appellant argues that the district court abused its discretion in denying her request for conduct-based attorney fees and costs. For the reasons that follow, both of appellant's arguments fail.

I. The district court did not abuse its discretion in denying appellant's contempt motion.

The purpose of a civil contempt proceeding is to secure compliance with a court order. *Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968). There are two types of civil contempt: direct and constructive. Minn. Stat. § 588.01, subd. 1 (2020). Contempt that occurs outside the immediate presence of the court is constructive contempt. Minn. Stat. § 588.01, subd. 3 (2020). Disobedience of any lawful order of the court may constitute constructive contempt. *Id.* The district court “may punish a contempt by fine or imprisonment, or both.” Minn. Stat. § 588.02 (2020). But the Minnesota Supreme Court has characterized contempt as an extreme remedy, *Hampton v. Hampton*, 229 N.W.2d 139, 140 (1975), and we have “instructed that civil contempt powers must be exercised with

caution.” *Newstrand v. Arend*, 869 N.W.2d 681, 692 (Minn. App. 2015) (quotations omitted), *review denied* (Minn. Dec. 15, 2015).

Here, respondent’s failure to deliver the perfume to appellant occurred outside the immediate presence of the court. It is thus constructive contempt if it is contempt at all. See Minn. Stat. § 588.01, subd. 3. The district court denied appellant’s motion to hold respondent in contempt for two reasons: first, because there was no evidence that appellant had personally served respondent with the contempt motion, and second, because holding respondent in contempt was not an appropriate remedy for his failure to deliver the perfume to appellant. “Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo.” *Cox v. Mid-Minnesota Mut. Ins. Co.*, 909 N.W.2d 540, 547 (Minn. 2018). We review the district court’s decision not to invoke its contempt powers for an abuse of discretion. See *In re Welfare of Children of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010).

First, the district court erred in denying appellant’s motion on the ground of lack of personal service. “Statutory provisions for service of notice must be strictly followed in order for a court to acquire jurisdiction.” *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 477 (Minn. 2013). In cases of constructive contempt, the alleged contemnor may be served in the same manner by which a summons is served in a civil action, that is, either personally or by leaving a copy of the notice at the individual’s usual place of abode with some person

of suitable age. Minn. Stat. § 588.04(a) (2020); Minn. R. Civ. P. 4.03.¹ But where a party has not previously moved to dismiss an action on the ground of insufficiency of service, “moving for a decision on the merits of part of a claim invites the court to exercise its authority on behalf of the moving party and implicitly acquiesces to the court’s exercise of jurisdiction over that party.” *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 869 (Minn. 2000).

Here, appellant admits that she did not serve respondent personally, and there is no indication in the record that service was made at respondent’s usual place of abode. Instead, appellant appears to have served respondent electronically. But respondent filed a motion responding to appellant’s contempt motion, in which he asked the district court to deny the motion or, in the alternative, to hold an evidentiary hearing. And importantly, respondent’s motion did not raise the defense of insufficiency of service. Respondent’s motion is therefore to be treated as an invitation to the district court to exercise jurisdiction over him. *See Patterson*, 608 N.W.2d at 869. Accordingly, the district court erred in denying appellant’s motion on the ground of lack of personal service.

Second, however, the district court did not abuse its discretion in concluding that contempt was an inappropriate remedy for respondent’s failure to deliver the perfume. “Contempt is an extraordinary remedy that must be exercised with caution.” *Burgardt v. Burgardt*, 474 N.W.2d 235, 236 (Minn. App. 1991). Where a party has access to an

¹ The court may also “issue a warrant of arrest to bring the person charged to answer.” Minn. Stat. § 588.04(a). There is no indication in the record that the district court issued a warrant for respondent’s arrest.

ordinary and adequate remedy, the Minnesota Supreme Court has held that the party should not resort to extraordinary remedies. *See, e.g., State v. Prob. Court of Goodhue Cty.*, 210 N.W. 40, 41 (Minn. 1926) (“In the presence of [an] ordinary and adequate remedy, there should be no resort to the extraordinary [remedy of a] writ of prohibition.”); *State ex rel. McCardy v. Nelson*, 42 N.W. 548, 549 (Minn. 1889) (“[T]he extraordinary [remedy of a] writ of mandamus should not be resorted to . . . unless[] the ordinary legal remedies [are] unavailable or inadequate . . .”).

“Where a judgment requires the payment of money, or the delivery of real or personal property, it may be enforced in those respects by execution,” Minn. Stat. § 550.02 (2020), that is, by a court order directing a sheriff to enforce the judgment by levying upon the property of the judgment debtor or collecting the property at issue. *See* Minn. Stat. §§ 550.03, .08 (2020). Property settlements in dissolution proceedings have historically been treated as ordinary debts, and this court has declined to permit the use of the extraordinary remedy of contempt to enforce dissolution property settlements that order the payment of money, holding that the ordinary remedy of execution should instead be used. *Burgardt*, 474 N.W.2d at 237. There is no meaningful distinction, at least regarding the availability of execution and contempt as remedies, between dissolution property settlements that require the payment of money and those that require the delivery of personal property subject to execution. As such, contempt is an inappropriate means of enforcing a dissolution property settlement that requires the delivery of personal property that is subject to execution.

Here, there is no indication that appellant attempted to avail herself of the ordinary remedy of execution before bringing a contempt motion. Whether that ordinary remedy is inadequate in this case is thus unclear, and the district court therefore did not abuse its discretion in denying appellant's contempt motion on the ground that holding respondent in contempt was not shown to be an appropriate remedy for his failure to deliver the perfume.

II. The district court did not abuse its discretion in declining to award appellant conduct-based attorney fees and costs.

Minn. Stat. § 518.14 (2020) governs awards of attorney fees in dissolution matters. Under section 518.14, subdivision 1, the district court is not precluded “from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” The party requesting such conduct-based attorney fees bears the burden of establishing that the other party's conduct unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001).

Here, the district court implicitly concluded that appellant was not entitled to conduct-based attorney fees. Although the district court's order does not specifically address appellant's request for conduct-based attorney fees and costs, the district court denied appellant's contempt motion—including its request for conduct-based attorney fees and costs—as a whole. We review the district court's decision not to award conduct-based attorney fees for an abuse of discretion. *See Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007).

Appellant argues that the district court abused its discretion in failing to award her conduct-based attorney fees and costs. Paragraph 17 of the district court's original dissolution order provides:

In the event either party renders it necessary for the other party to seek enforcement of any of the provisions herein, the party who failed to comply with the terms of the Judgment and Decree shall be responsible for all reasonable attorney's fees and costs the other party incurred in seeking enforcement of the terms of the Judgment and Decree.

Appellant argues that the use of *shall* in the above paragraph restricts the discretion that the district court would normally have under Minn. Stat. § 518.14, and mandates an award of fees and costs to her, because respondent failed to comply with the district court's order requiring him to deliver the perfume within two weeks of the entry of judgment.

The district court did not abuse its discretion in declining to award conduct-based attorney fees and costs to appellant. As is discussed above, seeking to hold respondent in contempt was an inappropriate remedy for his failure to comply with the property settlement in this case. It follows that the conduct-based attorney fees and costs that appellant seeks in order to recuperate the expense of pursuing her inappropriate contempt motion are not reasonable. Paragraph 17 of the district court's original order provides for the award of only reasonable attorney fees. Accordingly, appellant is not entitled to the attorney fees or costs expended in bringing her contempt motion, and the district court did not abuse its discretion in declining to award those fees and costs to appellant.

Affirmed.