STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1068

Jodi D. Campbell,
Respondent,

vs.

John J. Larson,
Appellant.

Filed May 3, 2021
Affirmed
Gaïtas, Judge

Ramsey County District Court
File No. 62-CV-19-1188

Rodd Tschida, Minneapolis, Minnesota (for respondent)

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Larkin, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

This appeal arises from an award of attorney fees in a partition action between siblings. Appellant John Larson asserts that Minnesota Statutes section 558.10 (2020), the statute governing costs in partition proceedings, is unconstitutional as applied by the district court. Larson also argues that the district court erred in awarding partial attorney fees to respondent Jodi Campbell. Because the statute was not unconstitutional as applied

to Larson and because the district court did not abuse its discretion in awarding attorney fees, we affirm.

FACTS

Larson and Campbell are brother and sister. In May 2018, they received title to their childhood home, a property in St. Paul, as tenants in common pursuant to a decree of summary assignment in their father's probate proceeding. The siblings' tenancy in common was contentious, and Larson actively denied Campbell access to the property for about two years.[1]

In February 2019, Campbell filed a complaint against Larson seeking partition by sale of the property. After process servers were unable to serve Larson with the summons and complaint and Larson subsequently failed to answer a published summons, Campbell filed a motion for default judgment. The district court scheduled a default hearing for July 2019. At the scheduled hearing, Larson appeared without counsel, and he indicated that he may want to purchase the property.

The district court ultimately determined that Campbell was entitled to partition by sale of the property, and it issued a written order requiring the property to be sold and the net proceeds of the sale to be deposited with the court, with distribution of the proceeds to be determined at trial. Additionally, the district court ordered that Larson provide Campbell a key and unlimited access to the property, that the parties obtain and exchange

[1] The district court found that Larson denied Campbell access to the property from November 2017 to November 2019 by changing locks, barricading doors, blocking the driveway, and placing metal spikes in the yard.

competitive market analyses of the property's fair market value, and that the parties complete mediation by September 11, 2019. The district court's order further noted that Campbell would be entitled to petition the court for all costs of partition in the action, including reasonable attorney fees expended for the common benefit of the parties.

On September 11, 2019—the deadline for completing mediation—Larson, now represented by counsel, filed an answer and counterclaim in the district court, alleging that Campbell had stolen money from their deceased father's estate. The parties appeared for a hearing several days later. Larson had not provided Campbell a key to the property, obtained a market analysis of the property's value, or participated in mediation. His counsel represented, though, that Larson would cooperate with the court's instructions moving forward. Following the hearing, the district court issued another order, and corresponding judgment, instructing the parties to sign a listing agreement for the property and to forward any purchase agreement at or above 95% of the listing price to the district court for approval.

Shortly thereafter, Larson moved to vacate the district court's July and September orders and judgment for a lack of personal jurisdiction. The district court denied Larson's motion to vacate, finding that Larson had waived any defenses relating to insufficient service of process or lack of personal jurisdiction, and that the purpose of his motion was to delay the proceedings.[2]

[2] The district court found the motion particularly disingenuous given that Larson's counsel seemed to accept the summons and complaint on the record at the September 16 hearing.

On February 5, 2020, the parties appeared for a court trial regarding how proceeds should be distributed once the property sold. Campbell notified the district court that a prospective buyer had offered to buy the property for $220,000. Larson stated that he wished to buy the property and that he was prepared to offer more than the third-party prospective buyer. The district court ordered Larson to provide the court with a bank letter the next day showing that Larson was approved for a loan for the amount of his offer. When the parties reconvened the following day to continue the trial, Larson offered a letter from a credit union, which the district court admitted as evidence of Larson's intent to move forward with the purchase of the property.

After the trial, the district court issued an order on February 10 that allowed Larson to submit his own purchase agreement, which would compete with that of the third-party prospective buyer. On February 12, after the district court received purchase agreements from the third-party prospective buyer and from Larson, the district court issued another order that provided Larson the opportunity to buy the property, contingent on his deposit of half the purchase price plus earnest money with the court within 24 hours. Larson failed to deposit the money. Instead, on the day the money was due, Larson petitioned this court for a writ of prohibition preventing the district court from enforcing the February 10 and February 12 orders based on jurisdictional and statutory defects. We denied Larson's petition for a writ of prohibition.

On February 14, after Larson did not deposit the money by the deadline, the district court determined that it was in the best interest of the parties to sell the property to the next

available buyer. The district court authorized Campbell to sign any document relating to the sale of the property on behalf of Larson.

The property was sold the next month to a third party, and the net sale proceeds were deposited with the district court. On April 10, Campbell moved for attorney fees and costs under Minnesota Statutes section 558.10, requesting that her attorney fees be paid by the parties in equal shares from the sale proceeds. Also on April 10, the district court issued a distribution order, directing that $100,934.82 of the net proceeds from the sale be distributed to Campbell and that $40,000 be distributed to Larson. The distribution order directed that the rest of Larson's distribution, $55,761.31, remain on deposit with the court until determination of Campbell's motion for attorney fees and costs. The district court ordered Larson to file a responsive memorandum regarding the attorney-fees request by April 27, 2020.

Larson filed a responsive memorandum on the day of the April 27 deadline. In it, he challenged, for the first time, the constitutionality of section 558.10 as applied to his case. On April 28, he filed a notice of constitutional challenge addressed to the Minnesota Attorney General's Office, along with an affidavit of service by mail, both dated April 27, 2020.

In June 2020, the district court granted Campbell's motion for attorney fees and costs. The district court concluded that Campbell's attorney fees, costs, and disbursements should be paid by the parties in equal shares out of the sale proceeds. It determined that the outstanding amount owed to Campbell's counsel, $43,245.50, was reasonable compensation for the services rendered. The district court also amended its earlier

distribution order to clarify that the actual amount of net sale proceeds was $196,286.44 and to direct that $79,857.23 of the proceeds be distributed to Campbell, $43,245.50 be distributed to Campbell's counsel, and $73,183.71 be distributed to Larson. The district court declined to consider Larson's constitutional challenge to the attorney-fees award, as it determined Larson had waived this issue by filing the attorney-general notice after the briefing deadline and without seeking leave from the court.

This appeal follows.

DECISION

I. The district court did not apply Minnesota Statutes section 558.10 in violation of Larson's constitutional rights.

We first consider Larson's claim that the district court's application of section 558.10 to allow attorney fees in this partition action violated Larson's constitutional rights. The district court declined to consider Larson's constitutional challenge, as it found Larson's notice of constitutional challenge was filed late. While we disagree with the district court's rationale for declining to address Larson's constitutional challenge to section 558.10, we nonetheless hold that the constitutional challenge fails.

If a party files a pleading, motion, or other document that "draw[s] into question the constitutionality" of a state statute, and neither the state nor any of its agencies, officers, or employees are party to the underlying lawsuit, Minnesota law requires the party to "file a notice of constitutional question stating the question and identifying the document that raises it." Minn. R. Civ. P. 5A. The party must serve the notice and document on the Minnesota Attorney General "by U.S. mail to afford the Attorney General an opportunity

to intervene." *Id.* "Generally, appellate courts have required strict compliance with these notice requirements." *State v. Jorgenson*, 934 N.W.2d 362, 367 n.2 (Minn. App. 2019) (citing *Charboneau v. Am. Family Ins. Co.*, 481 N.W.2d 19 (Minn. 1992)). But we have interpreted the attorney-general notice requirement to apply to challenges to the facial validity of a statute, and not to challenges to the constitutionality of a statute as applied. *See Clay v. Clay*, 397 N.W.2d 571, 576 (Minn. App. 1986), *review denied* (Minn. Feb. 17, 1987) (interpreting Minn. R. Civ. App. P. 144, the appellate counterpart of rule 5A); *Markert v. Behm*, 394 N.W.2d 239, 243 (Minn. App. 1986) (reasoning that "because there was no such notice [to the attorney general's office] in this case, only the constitutionality of the statute as applied need be addressed").

In his April 27 responsive briefing on the request for attorney fees, Larson raised a separation-of-powers argument. Specifically, he argued that if the district court were to interpret section 558.10 as allowing attorney fees in partition actions, the court would "read[] into § 558.10 a right that is not there," and thereby afford a remedy the legislature had not authorized. Providing this remedy, he reasoned, "would be an as-applied violation" of the Minnesota Constitution's separation-of-powers doctrine. As noted, Larson did not file a notice of constitutional challenge until April 28, which was one day after the deadline that the district court imposed for his responsive memorandum on the request for attorney fees.

Larson's constitutional challenge is, as he asserts, an as-applied challenge. A facial challenge to the constitutionality of a statute is one in which "the challenger bears the heavy burden of proving that the legislation is unconstitutional in all applications." *McCaughtry*

v. City of Red Wing, 831 N.W.2d 518, 522 (Minn. 2013). Larson does not argue that section 558.10 is unconstitutional in all applications; instead, he asserts that it is unconstitutional when applied to award attorney fees in a partition action. Larson contends that, although section 558.10 provides that "costs, charges, and disbursements of partition shall be paid by the parties respectively entitled to share in the land" in amounts determined by the district court, this language should not be read to allow attorney fees.[3] He does not seek to invalidate the statute, but instead contends that an erroneous judicial interpretation of "costs" infringes on the legislature's authority.

Accordingly, Larson was not required under rule 5A to notify the Minnesota Attorney General's Office of his as-applied challenge in order to have it considered by the district court. We turn next to whether we should consider his challenge in the absence of a district court decision.

This court does not normally address constitutional issues for the first time on appeal, as matters not considered by the district court are generally not amenable to appellate review. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981); *Elwell v. Hennepin County*, 221 N.W.2d 538, 542 (Minn. 1974). Exceptions apply, though, and we have considered constitutional issues when required in the interest of justice, when parties have had adequate briefing time, and when issues were implied in the district court. *See Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982). Appellate courts have also considered questions not properly presented in the interest of judicial efficiency. *See,*

[3] As explained in detail below, though, Minnesota courts have interpreted section 558.10 as permitting attorney fees in partition actions.

e.g., *Bode v. Minn. Dep't of Nat. Res.*, 612 N.W.2d 862, 869 (Minn. 2000) (addressing the propriety of a direct attack on a prior judgment to avoid the "exercise in judicial inefficiency" that would result if the supreme court remanded the case to allow the parties to present the same question in the proper procedural posture).

On appeal, Larson raises both a due-process and a separation-of-powers challenge to the district court's order providing for attorney fees. Larson never raised his due-process challenge in the district court. Accordingly, he forfeited consideration of that issue, and we decline to consider it. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (explaining that forfeiture is the failure to make a timely assertion of a right). However, because Larson did provide some briefing on his separation-of-powers challenge in the district court, we will consider the merits of this challenge in the interest of judicial efficiency.

The constitutionality of a statute is a question of law that is reviewed de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014) (citing *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 653 (Minn. 2012)). We presume that Minnesota statutes are constitutional. *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 298-99 (Minn. 2000). Further, "[t]he party challenging a statute has the burden of demonstrating beyond a reasonable doubt a violation of some provision of the Minnesota Constitution." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

The concept of separation of powers comes from article III, section 1, of the Minnesota Constitution, which divides the powers of the government into legislative, executive, and judicial departments, and provides that no person from one department

"shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Separation-of-powers violations can result if the judiciary improperly exercises a "legislative function" or the legislature improperly exercises a "judicial function." *See Sanchez v. State*, 816 N.W.2d 550, 563 (Minn. 2012) (holding that the legislature did not unconstitutionally usurp a judicial function when it added time limits to postconviction relief statute); *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) (explaining that the legislature "cannot delegate purely legislative power to any other body, person, board, or commission"). Courts "have the power to determine what is judicial and what is legislative." *Sanchez*, 816 N.W.2d at 563.

In his separation-of-powers challenge, Larson argues that by interpreting section 558.10 as allowing attorney fees, the district court provided a remedy that was not in the statute and thus usurped the legislature's power to decide when attorney fees are permissible. We disagree.

Statutory interpretation is undoubtedly a judicial function, and Larson cites no case in which a court's erroneous interpretation of a statute resulted in a separation-of-powers violation. Moreover, the district court's interpretation was based on controlling Minnesota Supreme Court precedent. Larson bears the burden of showing error on appeal, and ultimately, he has not done so here. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944); *see also Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999). We accordingly conclude that the district court's application of section 588.10 to award partial attorney fees to Campbell was not unconstitutional.

II. The district court did not err in awarding partial attorney fees to Campbell.

Larson next argues that the district court erred in awarding attorney fees to Campbell because the court did not have authority to do so in this partition action and because the fees were not necessary and reasonable. We disagree.

A. Minnesota Statutes section 558.10 authorizes attorney fees in partition actions.

Attorney fees generally "are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008). In partition actions, section 558.10 provides that "[t]he costs, charges, and disbursements of partition shall be paid by the parties respectively entitled to share in the land, and the amounts to be paid by each shall be determined by the court, and specified in the final judgment." Interpreting this statute in *Kuller v. Kuller*, the Minnesota Supreme Court held that attorney fees are allowed under the statute in some circumstances. 109 N.W.2d 561, 563 (Minn. 1961). Specifically, the court stated:

> [W]here the final result is of benefit to all parties a trial court in its discretion may award attorney's fees to plaintiffs, but that, where the action is adversary and where it can be fairly established that the results thereof were of no substantial benefit to defendants therein, such attorney's fees should be denied.

Id.; *accord Hanson v. Ingwaldson*, 87 N.W. 915, 915 (Minn. 1901) (explaining that "where a partition of real property is the principal object of the action, and the final judgment

results in benefit to all the parties concerned, the court may, in its discretion, make a reasonable allowance to plaintiffs for necessary attorney's fees").[4]

Larson suggests but fails to show that *Kuller* and *Hanson* have been overruled. In support of his assertion, Larson cites two later Minnesota Supreme Court cases holding that attorney fees are not recoverable unless a statute explicitly authorizes such recovery. *See Anderson v. Medtronic, Inc.*, 382 N.W.2d 512, 516 (Minn. 1985); *Bar/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). He emphasizes that section 558.10 does not explicitly provide for attorney fees. However, other than citing cases that stand for the proposition that attorney fees generally must be statutorily authorized, Larson does not provide a persuasive rationale for departing from *Kuller*, where the Minnesota Supreme Court interpreted section 558.10 to allow attorney fees in partition actions. Accordingly, we follow *Kuller* and recognize that attorney fees are authorized under section 558.10.[5]

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[4] We note that the Minnesota Supreme Court's interpretation of section 558.10 as allowing attorney fees under prescribed circumstances is pertinent despite the fact that, as Larson notes, neither partition action at issue in *Kuller* and *Hanson* resulted in an award of attorney fees. *See Kuller*, 109 N.W.2d at 564; *Hanson*, 87 N.W. at 915.

[5] Larson also argues that the district court erred by equating "costs" with "attorney fees" in its July 2019 order following the first hearing. In this order, the district court stated Campbell could petition the court for costs of partition, including attorney fees. Larson contends that because the word "costs" in section 558.10 refers to "costs of partition," the district court erroneously allowed Campbell to recover attorney fees by equating "attorney fees" to "costs of partition." However, as discussed, the Minnesota Supreme Court has construed Minnesota Statutes section 558.10—governing the "costs" of partition actions—as allowing recovery of attorney fees under prescribed circumstances. *Kuller*, 109 N.W.2d at 563. And as detailed below, the partition action here falls within those prescribed circumstances, meaning the district court was within its discretion to award costs and attorney fees to Campbell. Thus, the district court did not erroneously equate "costs" with "attorney fees."

B. The district court was within its discretion to award attorney fees.

Larson next contends that the district court misapplied the *Kuller* holding to this partition action and thus did not have discretion to award attorney fees. We disagree.

Appellate courts review a district court's assessment of fees and costs in a partition action for an abuse of discretion. *Kuller*, 109 N.W.2d at 564. A district court abuses its discretion when its "ruling is based on an erroneous view of the law" or when "its decision is against the facts in the record." *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

As stated, the *Kuller* court held that a district court may, in its discretion, award attorney fees to the plaintiff when the final partition of the property benefits all parties. *Kuller*, 109 N.W.2d at 563. Conversely, a district court should deny attorney fees in a good-faith adversarial partition action when the defendant derives no substantial benefit from the sale. *Id.* The *Hanson* decision, cited by the *Kuller* court, identified adversarial partitions as those where "the real contest is as to the title to the property." *Hanson*, 87 N.W. at 915.

In awarding attorney fees to Campbell, the district court found that both Larson and Campbell benefitted from the partition sale because it resolved their "contentious, untenable joint ownership" of the property and because both siblings received their share of the fair-market sale proceeds. The district court further noted that the partition sale benefitted them by providing full payment of delinquent real estate taxes for the property. And the district court found that the partition action was not adversarial because there was

no contest to title[6] and because Larson adopted a litigation strategy intended to delay the sale so that he could maintain control of the property without buying it or paying the delinquent real estate taxes.

Larson argues that he did not, in fact, benefit from the final partition because he wished to purchase the property—to which he had a sentimental attachment—but was unable to do so. While Larson may not have gotten the result he was seeking in the partition action, he cites no authority suggesting that a defendant does not receive a substantial benefit from a partition sale when the defendant wishes to buy the property, but instead collects a share of the sale proceeds. Nor does he refute the district court's findings that ending an untenable joint ownership, receiving a share of the sale proceeds, and paying delinquent real estate taxes were benefits that both he and Campbell received as a result of the sale. Accordingly, we determine that Larson has not shown that the district court abused its discretion in finding that this partition benefited both parties.

Larson also challenges the district court's determination that this partition action was not adversarial. He points to the fact that this was a contentious case in which he and

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[6] Larson argues that the district court erroneously conflated *Kuller* and *Hanson* when it stated that the proceeding in *Kuller* was adversarial because the parties in that case contested title. It appears that the district court did erroneously state that there was a title contest in *Kuller*. The *Kuller* court did not discuss whether the parties were contesting title to the property at issue. Rather, the 1901 *Hanson* case stated that the partition at issue in that case was an "adversary one, and the real contest [was] as to the title of the property," meaning attorney fees were properly denied. *Hanson*, 87 N.W. at 915. However, the district court's error here did not affect the court's ultimate conclusion because, as discussed above, the record supports a determination that the partition action here was not adversarial. *See In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015) (explaining that under the abuse of discretion standard, we accord discretion to the district court's ultimate conclusions).

Campbell were not friendly litigants. Larson also notes that like the defendants in *Kuller*, which involved an adversarial partition, he was a one-half owner in a joint tenancy who wanted to buy the property. *See Kuller*, 109 N.W.2d at 562.

As noted by the district court, the defendants in *Kuller* were obligated to fight vigorously to bring up the property's sale price at the partition sale, which required them to repeatedly seek corrections in the proceeding, have numerous conferences and consultations about values and procedures, and obtain funds to bid up the property to a price reasonably close to its fair market value. *Id.* at 564. The district court found that here, in contrast, Larson was not contesting the partition action in good faith or to increase the value of the property.

The district court determined that, whereas Campbell brought the partition action in good faith after being denied access to use and enjoyment of the property for about two years, Larson engaged in conduct intended to delay the sale so that he could maintain his unreasonable control over the property. The record supports the district court's finding that Larson engaged in a series of unreasonable delay tactics: Larson brought a counterclaim to recover estate-related claims from a completed probate action, pursued a motion to vacate the district court's order to sell the property based on lack of personal jurisdiction after having waived this defense, failed to comply with court orders, failed to cooperate with Campbell's efforts to sell the property, and misrepresented his own financing when he attempted to purchase the property.

While the partition proceeding indeed may have been contentious, we agree with the district court that Larson's bad-faith delay tactics as an unfriendly litigant did not

convert this proceeding into an adversarial partition action. Because the partition action resulted in benefits to both Campbell and Larson, we hold that the district court was within its discretion to award Campbell attorney fees.

C. The district court did not clearly err in determining that the fees paid to Campbell's attorney were reasonable, necessary, and furthered the partition to the benefit of both parties.

Finally, Larson challenges the necessity and reasonableness of Campbell's attorney fees, arguing that his conduct did not unreasonably delay the proceedings and that Campbell's fees were not incurred for his benefit. As discussed, the assessment of fees and costs in an action for partition lies within the discretion of the district court. *Kuller*, 109 N.W.2d at 563. The district court's determination of reasonable fees and costs is a finding of fact that will not be reversed unless clearly erroneous. *Amerman v. Lakeland Dev. Corp.*, 203 N.W.2d 400, 400-01 (Minn. 1973).

The district court determined that Campbell's requested $43,732.50 in attorney fees and $1,013 in costs and disbursements were necessary because Larson prolonged the litigation by engaging in delay tactics that increased the time, cost, and resources Campbell was required to expend to resolve the partition. As noted, the record supports the district court's findings that Larson engaged in unreasonable delay tactics, and, based on that record, we conclude that the district court did not clearly err in finding that Campbell's attorney fees were necessary.

The district court also determined that Campbell's fees were reasonable and furthered the partition to the benefit of both parties. Larson challenges this finding on the

ground that the district court did not identify which of Campbell's fees furthered the partition to his benefit and suggests that the awarded fees were therefore unreasonable.

The district court did not provide detail in its order about the specific charges in Campbell's award of attorney fees. But the district court noted that it had reviewed an affidavit and exhibits submitted by Campbell's attorney, which documented the hours that the attorney expended in the litigation and the billing rate for the services. The attorney's affidavit stated that the work was performed for Campbell's benefit, and the exhibits included itemized billing statements summarizing the fees and costs Campbell was billed throughout the partition proceeding.

The district court had opportunity to review these itemized invoices, stated that it did indeed review them, and then determined that Campbell and Larson should pay Campbell's attorney fees in equal shares. We conclude that Larson has not demonstrated that the district court clearly erred in apportioning the attorney fees.

Accordingly, because Larson has not shown that the district court clearly erred in finding the fees necessary, reasonable, and of benefit to both parties, we conclude that the district court did not err in ordering that Campbell's attorney fees be paid by the parties in equal shares out of the sale proceeds.

In sum, we hold that the district court correctly determined that it had discretion to award attorney fees under section 588.10 in this partition action and that the district court did not abuse its discretion in ordering Larson to pay half of Campbell's attorney fees.

Affirmed.