IN THE COURT OF APPEALS OF IOWA

No. 6-574 / 05-1635
Filed October 25, 2006

IN RE THE MARRIAGE OF ROBERT L. MANDERS AND CLEMENTINE C. MANDERS

Upon the Petition of
ROBERT L. MANDERS,
Petitioner-Appellant,

And Concerning
CLEMENTINE C. MANDERS,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Robert Manders appeals a temporary attorney fee award entered in connection with a petition to vacate a dissolution decree. **APPEAL DISMISSED.**

Robert L. Day, Jr. of Day, Hellmer & Straka, P.C., Dubuque, for appellant.

Daniel L. Bray and Lori L. Klockau of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Vogel, P.J., and Vaitheswaran, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VAITHESWARAN, J.

Robert Manders appeals a $5000 temporary attorney fee award entered in connection with a petition to vacate a dissolution decree. We dismiss the appeal for lack of jurisdiction.

I. Background Facts and Proceedings

Robert and Clementine Manders divorced after forty-five years of marriage. At the time of the divorce, Clementine released Robert, their daughter, and others from liability for "any actions financially or otherwise." In exchange for the release, Clementine received a property settlement of $53,000.

Approximately a year after the dissolution decree was entered, Clementine filed a petition to vacate the decree. She alleged that the decree was based on fraud, the decree was grounded on "an erroneous proceeding against a person of unsound mind," and there existed newly discovered evidence that could not have been produced at trial. *See* Iowa R. Civ. P. 1.1012(2), (3), and (6).

The parties' daughter was added to the lawsuit by amendment. She moved for summary judgment based upon the release. The district court, finding that Clementine received consideration for the release of liability, partially granted the motion, but reserved the issue of whether Clementine executed the release knowingly and voluntarily. The court stated:

> If the release is set aside then the judgment and decree should be vacated and the fraud alleged during the course of the marriage can be litigated. However, if the release was knowing and voluntary, any fraud that may have occurred has been settled.

Robert and his daughter moved for a separate trial on the question of whether Clementine voluntarily executed the release. Clementine resisted the motions. The resistance contained assertions that Clementine did "not have the financial ability to defend two separate trials" and "[f]or this reason, bifurcation would be prejudicial to Respondent."

The district court granted the motions, finding it to be "in all parties' best interest." On its own motion, the district court further ordered Robert to pay money toward Clementine's attorney fees. The court stated:

> [I]n light of the Respondent's limited finances, in order to ensure that this matter is properly attended to during this bifurcated trial, and in order to allow her a full opportunity for representation, IT IS HEREBY ORDERED that the Petitioner shall pay the sum of $5,000 to the Respondent's attorney to be held in trust. He shall then bill against this attorney fee award up to and including the time of trial on the bifurcated issue associated with determining the validity of the release signed by the Respondent.

Robert moved to reconsider this portion of the ruling, urging that the court acted without authority in awarding temporary fees. The court denied the motion. The court reasoned as follows:

> First of all, this matter is in equity as a result of the nature of the original filings and what can possibly result in the overturning of the original judgment entered by this court. Second, the respondent asserted in her response that she is under limited resources with which to go forward with one trial, let alone two. Third, the court has the inherent power to do equity in these types of proceedings where it is warranted.
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> Equity dictates that the issues presented be bifurcated and in doing so, the court determined that the respondent's fees should be paid for by the party making the request to go forward not only once, but twice on these matters.

Robert appealed this ruling.

II. Finality of Order

A preliminary question facing us is whether the district court's temporary attorney fee award was a final order. *In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999) ("[A] final judgment or decision is one that finally adjudicates the rights of the parties."). We must address this jurisdictional issue even though Clementine has not raised it. *Mid-Continent Refrigerator Co. v. Harris*, 248 N.W.2d 145, 146 (Iowa 1976) ("Although neither party hereto questions our jurisdiction in this case, we will sua sponte dismiss an appeal neither authorized nor permitted.").

As noted, the district court's ruling on attorney fees was part of a larger ruling granting the motions to bifurcate the proceedings. This was not a final adjudication of the rights of the parties, as the parties had yet to litigate the question of whether Clementine executed the release knowingly and voluntarily. Therefore, the order was not subject to appeal as a matter of right. *See* Iowa R. App. P. 6.1(1).

In reaching this conclusion, we have considered precedent holding that temporary attorney fee awards in dissolution cases are final orders. *See Denly*, 590 N.W.2d at 50; *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977). These cases are inapposite because the orders were issued in dissolution actions pursuant to express statutory authority. *See* Iowa Code § 598.11 (2005). Here, in contrast, the order was entered in connection with an order bifurcating the proceedings. As noted, the bifurcation order is not final because the order does not "conclusively adjudicate" all the rights of the parties. *See In re Marriage of Welp*, 596 N.W.2d 569, 572 (Iowa 1999). Moreover, the

attorney fee award was entered sua sponte and was not entered in a dissolution proceeding but in a proceeding on a petition to vacate the decree. *See In re Marriage of Cutler*, 588 N.W.2d 425, 429 (Iowa 1999); *In re Marriage of Butterfield*, 500 N.W.2d 95, 97 (Iowa Ct. App. 1993) (noting proceedings on petitions to vacate are law actions rather than actions in equity). As a result, neither party made a record on the question of Clementine's financial status at the time of the bifurcation motion, as would have been the case if an application for temporary fees had been filed pursuant to Iowa Code section 598.11.[1] Therefore, *Winegard* and *Denly* do not mandate a conclusion that the temporary attorney fee award was final.

III. Interlocutory Review

Our conclusion that the order was not final does not end the inquiry, because we have the authority to treat the appeal as an application for interlocutory review. *See* Iowa R. App. P. 6.1(4); *Denly*, 590 N.W.2d at 51. The standards for granting such an application are well established. We must find:

> (1) that the court's order involves substantial rights; (2) the order will materially affect the final decision; and (3) that a determination of the order's correctness before trial on the merits will better serve the interests of justice.

Denly, 590 N.W.2d at 51; *see also* Iowa R. App. P. 6.2(1).

[1] Clementine points to a statement concerning her financial impoverishment made by her attorney in a court filing. That statement was not supported by a financial affidavit and was made in connection with her resistance to a bifurcation motion. Clementine also points to a gift tax return signed in 2002 and attached to a statement of facts filed in connection with her daughter's summary judgment motion. This document was not used to justify an award of temporary attorney fees in the bifurcated trial and, for that reason, has little, if any, probative value.

We will assume without deciding that the loss of $5000 is a loss of a substantial right[2] and that resolution of the order's correctness will serve the interests of justice. This leaves prong two: whether the order will materially affect the final decision. To answer this question we must ask and answer another question: "Will the party aggrieved thereby be deprived of some right which cannot be protected by an appeal from the final judgment?" *Lerdall Constr. Co., Inc. v. City of Ossian*, 318 N.W.2d 172, 175 (Iowa 1982) (citation omitted); *Wolf v. Lutheran Mut. Life Ins. Co.*, 236 Iowa 334, 344-45, 18 N.W.2d 804, 810 (1945). We believe the answer to this question is no. Robert will have a right to appeal from a final judgment on Clementine's motion to vacate the decree, including orders that inhere in that final judgment. Iowa R. App. P. 6.1. Therefore, we conclude prong two is not satisfied and we further conclude there is no basis for interlocutory review of the order. Accordingly, the appeal is dismissed.

We grant Robert's motion to have a portion of the costs of reproducing the appendix taxed to Clementine. Finding 197 pages did not need to be designated, we assess the cost of reproducing those pages to Clementine's counsel.

APPEAL DISMISSED.

Vogel, P.J., concurs; Schechtman, S.J., dissents.

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[2] Clementine argues that the "amount in controversy" requirement is not satisfied. *See* Iowa R. App. P. 6.3. The Iowa Supreme Court denied her motion to dismiss on this ground. Therefore, we did not address this basis for dismissal.

SCHECHTMAN, S.J. (dissenting)

I respectfully dissent.

The attorney fee award, entered sua sponte, is a final judgment that adjudicates the absolute direction to Robert to pay $5000 to Clementine's attorney for use in the preparation and trial of the bifurcated issue of voluntariness of the release. It is not a temporary award in any sense. It is a judgment, without reservation. It is a judgment without terms for review, as to need, necessity, reasonableness, restitution, or refund of any unused portion. It is an independent order that can be enforced separate from the eventual final decree, by contempt or other means, without any review by the district court in its final disposition. *See In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999). No matter the outcome of the bifurcated issue (dismissal or allowance) the funded cache for attorney fees will have been consumed without recourse or contest. Temporary awards of alimony and attorney fees in dissolutions are treated as final orders for purposes of appeal. *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1997). The characteristics of finality of this permanent award measures more favorably than those temporary awards. That being true, the attorney fee award was a final order for the purpose of an appeal. Iowa R. App. P. 6.1.

Addressing the merits, an award of attorney fees rests in the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *See In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). The issue here, however, is whether the district court had authority to award attorney fees. The court's conclusion that it possessed such authority is

reviewed for corrections of errors at law. *See In re Marriage of Marconi*, 584 N.W.2d 331, 334 (Iowa 1998); *see also In re Marriage of Gallagher*, 539 N.W.2d 479, 480 (Iowa 1995) ("Our review of the trial court's legal conclusions is on error.").

Clementine argues a temporary attorney fee award is permissible under Iowa Code chapter 598. I disagree. Iowa Code section 598.11 authorizes temporary attorney fee awards to enable a party "to prosecute or defend the action." This appeal, however, is not from a ruling in a dissolution action but from an action to vacate a dissolution decree. The two are separate and distinct actions. *See Cutler*, 588 N.W.2d at 429-30 (stating actions seeking to vacate judgments are law rather than equity actions).

Even if the petition could be construed as a continuation of the dissolution action governed by chapter 598, that statute limits post-decree awards of attorney fees to certain specified circumstances. Iowa Code § 598.14. The statute also requires that a party file an application or request attorney fees in the petition. *Id*. at § 598.11. Clementine did not request attorney fees in her petition to vacate, did not file an application for attorney fees, and did not request fees as part of her resistance to Robert's motion to bifurcate. The only hint of her financial situation comes from her attorney's statement in the resistance that "Respondent does not have the financial ability to defend two separate trials." At the time, this allegation supported her contention that bifurcation of the trial would prove prejudicial. The statement cannot be transformed into a request for attorney fees.

Neither of the rules under which the petition to vacate was filed (Iowa R. Civ. P. 1.1012 and 1.1013) authorizes an award of attorney fees. *See also* Iowa Code ch. 624A (addressing the procedure to vacate or modify a judgment and containing no provision for the award of attorney fees).

What is left is a potential contractual right to attorney fees. Clementine has not argued in favor of such a right,[3] nor does such a contract exist.

Without statutory or contractual authority, Clementine was not entitled to an award of temporary attorney fees. I would reverse that portion of the district court's ruling and vacate the award of attorney fees.

[3] In limited circumstances, the court has also recognized a common law right to attorney fees. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply*, 510 N.W.2d 153, 158 (Iowa 1994). The standard for receipt of this type of award is high. It "requires a showing of culpability beyond the showing required for punitive damages." *Id*. at 159. Specifically, the "conduct must rise to the level of oppression or connivance to harass or injure another." *Id*. at 159-60. There is no evidence to suggest that this standard was satisfied.