IN THE COURT OF APPEALS OF IOWA

No. 2-443 / 11-1860
Filed July 25, 2012

IN RE THE MARRIAGE OF MATTHEW B. SIDDALL AND RACHENA M. JOHNSON

Upon the Petition of

MATTHEW B. SIDDALL,
Petitioner-Appellee,

And Concerning

RACHENA M. JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

Rachena Johnson appeals from the denial of her petition to vacate her dissolution decree. **AFFIRMED.**

Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Jane Odland of Walker, Billingsley & Bair, Newton, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Rachena Johnson appeals from the denial of her petition to vacate her dissolution decree. Upon our review, we affirm the district court's entry of a default decree.

I. Background Facts and Proceedings.

Rachena Johnson and Matthew Siddall agree they entered into a common law marriage in July 2007. They have two children, born in October 2005 and November 2006. Matthew owns a home in Newton, Iowa, where the family resided. In January 2010, Rachena moved out of the home and into an apartment in Newton. The children lived with Matthew and stayed with Matthew's parents, who also lived in Newton, when Matthew worked at night. In May 2010, Rachena moved to Columbia, Missouri, to assist her mother who had been diagnosed with cancer.

Matthew filed a petition for dissolution on June 9, 2010. The parties had agreed to divorce. Michael sent Rachena an original notice and a copy of the petition to her mother's home in Missouri. The notice required Rachena to appear before the court within twenty days after service. It further directed that unless she so appeared, default would be entered and judgment or decree rendered against her for the relief demanded in the petition. The petition set forth Rachena's address as the apartment in Newton. Rachena signed the acceptance of service on July 26, 2010, and mailed it back to Matthew. It was filed the following day.

Rachena had given Matthew the keys to her apartment in Newton before she moved to Missouri. Matthew checked her mail and brought it to her in Missouri on a few occasions when he visited. In July 2010, at Rachena's request, Matthew removed her belongings from the apartment and turned in the keys. The children continued to reside with Matthew in Newton. Rachena saw the children and Matthew a few times. For example, Matthew attended a family reunion in Missouri in July 2010, and the children spent some time with her in Missouri in September 2010. The parties kept in contact, but contact was sporadic. There were no attempts to reconcile, but the parties were not on bad terms.

On September 10, 2010, the clerk of court mailed a scheduling conference notice to the parties. As set forth in the notice, the scheduling conference was held on September 21, 2010. Trial was set for May 5, 2011. The notice of the scheduling conference and the scheduling order were sent to Rachena's apartment address in Newton. They were returned undelivered.

Trial was held on May 5, 2011. Rachena did not attend the trial. She was found to be in default and a decree was entered. Pursuant to the decree, physical care of the children was placed with Matthew, with liberal visitation to Rachena. The decree was sent to Rachena's mother's address in Missouri, where Rachena was still living.[1]

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[1] Upon receiving the decree, Rachena contacted the clerk of court, who directed her to complete a Children in the Middle course. Rachena completed a similar course in Missouri, and filed her certificate of completion on July 27, 2011.

Rachena, through an attorney, filed a petition to vacate or modify the decree on June 10, 2011. In the petition, Rachena alleged she "was not properly provided notice of the hearing" because Matthew "fraudulently misrepresented to the Court [her] correct and current address so as to obtain a default judgment." Rachena requested the court "vacate the judgment, pursuant to Iowa Rules of Civil Procedure 1.1012 and 1.1013, or alternatively set the matter for trial so the decree can be modified accordingly."

Matthew filed a motion to dismiss the petition to vacate. A hearing was held on September 27, 2011, during which the district court allowed Rachena to present evidence on her petition to vacate. Rachena and Matthew testified. On October 14, 2011, the court issued its ruling denying Rachena's petition to vacate. Rachena now appeals, arguing the court abused its discretion in finding her in default.

II. Scope and Standard of Review.

Actions under Iowa Rule of Civil Procedure 1.1012(2) to vacate orders are law actions, not equity actions. *In re Marriage of Cutler*, 588 N.W.2d 425, 429 (Iowa 1999). Our review, therefore, is for the correction of errors of law. Iowa R. App. P. 6.907. The district court's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a).

The district court enjoys wide discretion in deciding whether to vacate an order under Iowa Rule of Civil Procedure 1.1012(2). *In re Adoption of B.J.H.*, 564 N.W.2d 387, 391 (Iowa 1997). We will not reverse the district court's decision on this question unless an abuse of discretion has been shown. *Id.* We

are more reluctant to find an abuse of discretion where the judgment has been vacated than when relief has been denied. *Id.*

III. Default Decree.

A. Irregularity or Fraud. Rachena filed a petition to vacate the default decree pursuant to Iowa Rule of Civil Procedure 1.1012, which allows the court to vacate a final order if "irregularity or fraud [was] practiced in obtaining it." Iowa R. Civ. P. 1.1012(2). "Irregularity" has been defined as

> [t]he doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unseasonable time or improper manner.

In re Marriage of Cutler, 588 N.W.2d 425, 428-29 (Iowa 1999). There are three guiding principles that assist a court in determining whether an irregularity has occurred: (1) a party suffers an adverse ruling due to action or inaction by the court or court personnel; (2) the action or inaction is contrary to some prescribed rule, mode of procedure, or court practice involved in the conduct of the lawsuit; and (3) the party alleging the irregularity must not have caused, or had prior knowledge of the breach of the rule, mode of procedure, or practice of the court. *Id.*

Rachena alleges she suffered an adverse ruling because "the court failed to assure the rules and procedures governing default procedures were followed." A default is defined as a failure "to serve and, within a reasonable time thereafter, file a motion or answer," or a failure "to be present for trial." Iowa R. Civ. P.

1.971(1), (3). Rachena contends the district court erred in failing to follow the protocol set forth in Iowa Rule of Civil Procedure 1.972(2) for entry of default judgment because she did not receive the requisite ten-day notice.

"No default shall be entered unless the application contains a certification that written notice of intention to file the written application for default was given after the default occurred and at least ten days prior to the filing of the written application for default." Iowa R. Civ. P. 1.972(2). This notice provision does not apply to certain enumerated proceedings.[2] Iowa R. Civ. P. 1.972(4). Dissolution proceedings are not among the excluded proceedings.

Iowa Code chapter 598 (2009), however, specifies that a court may find a party in default for failing to file a timely appearance or a motion or pleading in the case. Specifically, section 598.19 allows the court to "enter an order finding the respondent in default and waiving conciliation when the respondent has failed to file an appearance within the time set forth in the original notice." *See In re Marriage of Thompson*, 275 N.W.2d 406, 409-10 (Iowa 1979) (finding respondent was in default for failure to appear because he "made no general appearance in response to the original notice and dissolution petition," and was not entitled to notice of trial date); *In re Marriage of Hobart*, 375 N.W.2d 290, 291 (Iowa Ct. App. 1985) ("The legislature has contemplated not only the finding of a default

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[2] *Applicability.* The notice provisions of this rule shall not apply to a default sought and entered in the following cases:

a. Any case prosecuted under small claims procedure.

b. Any forcible entry and detainer case, whether or not placed on the small claims docket.

c. Any juvenile proceeding.

d. Against any party claimed to be in default when service of the original notice on that party was by publication.

but also the waiver of conciliation if a respondent failed to appear."); *see also* Iowa Code § 598.8 (allowing the court to enter a decree of dissolution without a hearing). It is undisputed Rachena never appeared or defended in response to the original notice. Nearly one year later, the matter came for trial. Rachena failed to appear at trial; the default decree was entered. As the district court observed: "The case file itself provides all the basic information necessary to resolve this matter. There was an acceptance of service by Rachena and she never appeared until the default and decree had been entered. Those facts are dispositive and establish Matthew's right to a motion to dismiss."

Rachena failed to offer any evidence the court or its personnel acted or failed to act contrary to a rule, mode of procedure, or court practice with respect to the dissolution proceeding, which could support a finding of irregularity. *See Cutler*, 588 N.W.2d at 429. The district court did not abuse its discretion in finding Rachena in default. Rachena's argument as to this issue fails.

Rachena also contends the default decree should by vacated under Iowa Rule of Civil Procedure 1.1012(2) based on fraud. To prove fraud a party must prove the following factors by clear and convincing evidence: "(1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage." *Id.* at 430. Not all fraud, however, will justify vacating a final judgment. *B.J.H.,* 564 N.W.2d at 392. The fraud that will justify a judgment being vacated must be "extrinsic fraud." *Id.* Extrinsic fraud "is some act or conduct of the prevailing party which has prevented a fair submission of

the controversy." *Id.* at 391 (internal citations omitted). Extrinsic fraud includes a party lulling another into a false sense of security or preventing the party from making a defense. *Costello v. McFadden*, 553 N.W.2d 607, 612 (Iowa 1996). In other words, extrinsic fraud keeps a party from presenting her case or prevents an adjudication on the merits. *Mauer v. Rohde*, 257 N.W.2d 489, 496 (Iowa 1977). "Examples of extrinsic fraud are a bribed judge, dishonest attorney representing the defrauded client, or a false promise of compromise." *Id.*

Rachena argues Matthew "engaged in several actions designed to perpetuate the likelihood [she] would not receive notice of the trial and therefore not be afforded the opportunity to present her case." She further alleges "Matthew took affirmative steps toward [her] which effectively and inappropriately interfered with her ability to obtain information regarding the upcoming trial." As the district court observed:

> [Rachena] contends [Matthew] fraudulently misrepresented her appropriate address. This Court knows of no rule or requirement that a petitioner has any obligation to advise the clerk of court of a respondent's address or change of address or advise the nonappearing party of any pending hearing date. Rachena appears to contend that because the acceptance of service stated that it was accepted in Newton when at least arguably she was in Missouri, that Matthew perpetrated a fraud. Matthew's counsel may have typed the location of the acceptance of service, but it was Rachena's acceptance of service and her signature and not Matthew's. If the location was incorrect, it was her right and duty to correct it. Rachena may also be contending that she was actually living in Missouri rather than Newton at the time that the petition was filed which contained her address. Her contention is that the incorrect address reflecting that she still lived in Newton was fraudulent. The testimony as to her location as of the date the petition was filed was not specific. Once again, because there was no appearance and no denial of the location listed, there was no requirement that the address contained in the petition ever be used.

> Furthermore, it's too late to deny an allegation in a petition after default has been entered.

Upon our review, we do not find the record includes evidence of extrinsic fraud. Specifically, Rachena did not offer evidence that Matthew lulled her into a false sense of security or prevented her from making a defense. *See Costello*, 553 N.W.2d at 612. Although it is clear the parties remained amicable prior to the entry of the default decree, Rachena offered no evidence to show Matthew kept her from presenting her case or made false promises of compromise. *See Mauer*, 257 N.W.2d at 496. Indeed, the parties agreed to divorce and both testified there were no attempts to reconcile. The manner in which this default judgment was obtained was not fundamentally unfair. We find Rachena failed to offer any evidence that would support vacating the default decree on the basis of fraud or irregularity under rule 1.1012(2).

B. Iowa Rule of Civil Procedure 1.977. Although Rachena filed her petition to vacate under rule 1.1012 only, it appears the court considered the petition under both rule 1.1012 and rule 1.977. She asks us to do the same.

The burden to support setting a judgment aside under rule 1.977 is lighter than the burden to vacate a judgment under rule 1.1012. *See In re Marriage of Heneman*, 396 N.W.2d 797, 799 (Iowa Ct. App. 1986). Rule 1.977 provides that on "motion and for good cause shown . . . the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty."

> In ruling on a motion to set aside a default judgment, the district court is vested with broad discretion and will only be reversed if that discretion is abused. We are bound by the district court's factual

> findings if supported by substantial evidence. The determination of whether a movant has established good cause is not a factual finding; rather, it is a legal conclusion and is not binding on us.

Sheeder v. Boyette, 764 N.W.2d 778, 780 (Iowa Ct. App. 2009) (internal citations omitted).

The burden was on Rachena to plead and prove good cause. *Id.* Good cause is a "sound, effective, and truthful reason. It is something more than an excuse, a plea, apology, extenuation, or some justification, for the resulting effect." *Cent. Nat'l Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 754 (Iowa 1994). The underlying purpose of rule 1.977 is to allow a determination of controversies on their merits. *Sheeder*, 764 N.W.2d at 780. However, "this objective is qualified because it cannot be extended to the point where a default judgment will be vacated when the movant has ignored the rules of procedure with ample opportunity to abide by them." *Id.*

Rachena alleges "Matthew was well aware [she] wanted custody of the children," and he "knew where she was residing in Missouri, yet represented her address in the petition for dissolution as her old address in Newton." She further contends "Matthew never mentioned any upcoming trial or trial date." At the hearing on Matthew's motion to dismiss Rachena's petition to vacate, Rachena testified she did not receive notice of the scheduling hearing or the scheduling order itself. She also stated she did not have internet at home so she did not receive Matthew's emails about the trial date.

These excuses fall short of establishing good cause for setting aside the default decree. As the district court observed:

> Rachena contends that the default should be set aside because the clerk of court failed to advise her of the date of the scheduling conference and failed to notify her of the trial date. Under Iowa R. Civ. P. 1.453, the clerk of court is obligated to mail or deliver "to each party appearing" certain matters which would include at a minimum the scheduling order. Rachena, however, made no appearance; therefore, the clerk had no such obligation.

A party has no right to receive documents filed in an action in which that party is in default. *Thompson*, 275 N.W.2d at 409 (party in receipt of original notice of petition for dissolution, who failed to make an appearance, is not entitled to receive further notice of hearing date); *Kreft v. Fisher Aviation, Inc.*, 264 N.W.2d 297, 302 (Iowa 1978) (non-appearing defendant not entitled to receive copies of papers filed by other defendants in the case). Rachena was served with a copy of Matthew's petition that explained the consequences for failing to enter an appearance. Rachena chose to default and lost her right to object on the ground she failed to receive documents. Accordingly, we affirm the district court's entry of default decree.[3]

IV. Appellate Attorney Fees.

Rachena requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006); *McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010). In determining whether to award appellate attorney

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[3] We have cautioned against making physical care orders via default judgment without establishing a factual basis for the finding and a determination it was in the children's best interest. *See Fenton v. Webb*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005) ("A child does not lose his or her rights because a parent fails to comply with court rules or orders."); *see also Flynn v. May*, 852 A.2d 963, 975 (Md. Ct. Spec. App. 2004). Under the facts and circumstances of this case, however, we find the court had ample evidence to support the physical care provisions of the decree.

fees, we consider the parties' financial positions and the relative merits of the appeal. *Sullins*, 715 N.W.2d at 255. After considering the appropriate factors, and also the underlying reason this appeal was necessary, we decline to award appellate attorney fees. Costs on appeal are assessed to Rachena.

V. Conclusion.

We affirm the district court's entry of default decree.

AFFIRMED.