

IN THE COURT OF APPEALS OF IOWA

No. 3-231 / 12-1573
Filed April 24, 2013

**IN RE THE MARRIAGE OF JASMINE A. MARSH
AND BRANDON A. MARSH**

**Upon the Petition of
JASMINE A. MARSH,**
Petitioner-Appellant,

**And Concerning
BRANDON A. MARSH,**
Respondent-Appellee.

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

Jasmine Marsh appeals from an order setting aside a dissolution-of-
marriage decree entered by default judgment. **AFFIRMED.**

Sarah E. Stork Meyer of Clemens, Walters, Conlon & Meyer, L.L.P.,
Dubuque, for appellant.

Stephanie R. Fueger of O'Connor & Thomas, P.C., Dubuque, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

The parties' decree of dissolution of marriage was entered by default judgment. Upon Brandon's petition to vacate the judgment, the district court set the decree aside, finding an "irregularity in the proceedings." Jasmine appeals, and we affirm.

I. Background Facts and Proceedings.

Jasmine and Brandon Marsh were married in 2004 and were the parents of two minor children at the time these proceedings were commenced. On September 20, 2011, Jasmine filed a petition for dissolution of marriage. Brandon accepted service of the suit papers shortly thereafter. Brandon did not file an answer or any other responsive pleading. On November 9, 2011, a notice of intent to file written application for default was sent by ordinary mail to Brandon's last-known address in Dubuque. See Iowa R. Civ. P. 1.972(3) (setting forth notice procedures for entry of default).

By December 20, 2011, the case had been on file for more than ninety days, service of process had been obtained, but Brandon had not filed an appearance. Noting these circumstances, the clerk of court entered an order setting a default judgment hearing for January 12, 2012. The court file indicates the order was mailed to Brandon, but it does not indicate the address to which it was sent.

Sometime after the petition had been on file for more than ninety days, Brandon stopped by the courthouse to see when "our court date was going to be." He was not provided with any paperwork, but he was told there was a hearing set for January 12.

During order hour on January 5, 2012, Jasmine presented to the district court an application for default judgment and proposed decree of dissolution of marriage. Given no facts other than Brandon had not filed an answer, the court signed the decree, and it was filed the same day.

Brandon was unaware of the court's order and entry of decree, and he appeared for the scheduled January 12 hearing. He was informed at that time a default judgment had already been entered.

On May 23, 2012, Brandon filed a petition to vacate the default judgment pursuant to Iowa Rules of Civil Procedure 1.1012 and 1.1013. He asserted he had not received a copy of the notice of intent to file written application for default or application for default as "these documents were sent to an address at which [Brandon] did not live." Brandon asserted "irregularity in obtaining [the judgment]" as grounds for vacating the judgment, citing rule 1.1012(2). Jasmine resisted.

The matter was heard by the court on July 6, 2012. At the hearing, Brandon testified he had moved from his Dubuque address in October, after having received the petition for dissolution. He was living in Peosta at the time of the hearing. He claimed he did not receive the default notice because he no longer lived at the address to which it was mailed. He testified he did not receive the notice of the January 12 hearing and only found out about it when he happened to stop by the courthouse. Jasmine testified she had remarried on June 16 and was pregnant with a child conceived during her marriage to Brandon, but Brandon was not the father.

After taking the testimony and hearing arguments, the district court discussed the legal ramifications of vacating the decree and suggested the parties engage in discussions concerning an agreed upon amendment to the decree.¹ The court's July 9, 2012 order related: "The parties have now informed the court that an agreement may have been reached." The court suspended its review of the motion for two weeks to allow the parties to present an agreement.

However, no agreement was forthcoming. On July 30, 2012, the court entered its order vacating the decree, finding there was "irregularity in the proceedings, as the court was not made aware of the fact that [Jasmine] was pregnant at the time of the entry of the decree." Additionally, the court found, "due to the fact that [Jasmine] caused the default judgment to be presented to the court one week prior to the scheduled hearing," the entry of a default at that time was "inconsistent with the court's design to bring matters to resolution by proper procedure and ability for all parties to be heard prior to the entry of any judgment."

Jasmine gave birth to her third child July 31. She now appeals.

II. Scope and Standards of Review.

For appeal purposes, an order setting aside a default judgment in an action for dissolution of marriage is a final order. Iowa R. App. 6.103(1). A proceeding to vacate a judgment under rule 1.1012 is an action at law. *In re Marriage of Heneman*, 396 N.W.2d 797, 799 (Iowa Ct. App. 1986). Therefore,

¹ It is apparent from the record that the dispute between the parties centered on custody of the children.

our review is not de novo.² *Id.* The appropriate standard is that the district court's findings of fact have the effect of a jury verdict, and those findings are binding upon us if there is substantial evidence to support them. *Id.* at 799-800. Furthermore, the trial court has considerable discretion in deciding whether to vacate a judgment. *Id.* at 799. Finally, we are more inclined to find abuse of discretion when relief from the judgment has not been granted than when it has been. *Hastings v. Espinosa*, 340 N.W.2d 603, 608 (Iowa Ct. App. 1983).

III. Discussion.

Rule 1.1012(2) provides: "Upon timely petition and notice under rule 1.1013 the court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds: . . . Irregularity or fraud practiced in obtaining it." Rule 1.1013(1) in turn mandates that a "petition for relief under rule 1.1012 . . . must be filed and served in the original action within one year after entry of the judgment or order involved." Brandon's petition was timely filed under this rule.³

"Irregularity" is not defined in the rule, but the question for the court under this rule is whether the judgment was obtained following some action or inaction of the court or court personnel in violation of a recognized rule, procedure, or court practice. See *In re Marriage of Cutler*, 588 N.W.2d 425, 429 (Iowa 1999).

² We note Jasmine's brief fails to comply with Iowa Rule of Appellate Procedure 6.903(2)(g)(2) because it lacks a statement addressing the scope and standard of appellate review.

³ Jasmine argues Brandon failed to timely file a motion to set aside default judgment under rule 1.977, which requires that such a motion be filed no later than sixty days after entry of the judgment. Brandon did not file such a motion within the sixty-day period, but such a motion was not the only remedy available to him. "If the motion [to set aside a default under rule 1.977] is not filed in time, there is still a chance under [rule 1.1012], if the circumstances warrant relief under the more limited grounds prescribed by that rule." See Iowa R. Civ. P. 1.977 official cmt.

“The purposes for vacating judgments resulting from irregularities are to (1) promote the policy of law that every cause of action should be tried on the merits, and (2) ensure that litigation is fair and orderly.” *Id.*

When the decree was presented to the district court, it was “not given the facts other than the fact that there was no answer.” It is apparent from the district court’s order that had it been informed of the default hearing previously set for January 12, it would not have entered the decree by default on January 5. Entering judgment prior to a scheduled hearing was “inconsistent with the court’s design to bring matters to resolution by proper procedure.” In other words, the decree was obtained following some action by the court in violation of a recognized procedure or practice. Under the circumstances presented, we find no abuse of discretion on the part of the district court in vacating the decree based on irregularity. We therefore affirm.

AFFIRMED.