IN THE COURT OF APPEALS OF IOWA

No. 7-339 / 06-2037
Filed June 27, 2007

IN RE THE MARRIAGE OF JONATHAN D. DAVIES AND BEATE L. COLLINS

Upon the Petition of
JONATHAN D. DAVIES,
Petitioner-Appellant,

And Concerning

BEATE L. COLLINS,
Respondent-Appellee.

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

Petitioner appeals the district court's ruling that it did not have subject matter jurisdiction over his dissolution petition. **AFFIRMED.**

Kevin C. Neylan of Neylan Law Office, Guttenberg, for appellant.

Jean Curtis, Guttenberg, for appellee.

Considered by Mahan, P.J., and Baker, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.

I. BACKGROUND FACTS AND PROCEEDINGS

Jonathan Davies and Beate Collins were married in California on January 4, 2003. They have two minor children. On January 27, 2006, Jonathan filed a petition for dissolution of marriage in Iowa. He gave a Delaware address for Beate. The petition stated Jonathan had "resided in Clayton County for twenty years after deducting a period of military service and other absences from the State . . . ."

Beate was personally served notice in Delaware on February 10, 2006. Subsequently, Jonathan sought temporary custody of the children. Beate did not respond, and on March 21, 2006, the district court granted temporary custody to Jonathan. On March 31, Beate sent a letter to the court stating she had not received the petition for provisional custody. No action was taken on her letter.

In the meantime, Jonathan had filed notice of intent to seek a default judgment. On May 30, 2006, the district court found Beate in default. The court entered a dissolution decree for the parties the next day. Custody and physical care of the children was awarded to Jonathan. Beate was ordered to pay child support of seventy-five dollars per month.

In an undated pro se letter received by the court on August 25, 2006, Beate stated she had not received any paperwork for the dissolution after the original notice. Beate stated she attempted to get an attorney in Iowa, but was unsuccessful until June 24. That attorney had not filed anything for her. Beate asserted she was not receiving any regular visitation with the children. She asked for joint legal custody with physical care awarded to her.

The district court considered Beate's letter to be a request to vacate the decree, and set the matter for hearing.[1] On October 19, 2006, the court set aside the dissolution decree for the following reasons: (1) Beate filed a response prior to the default judgment and default was not appropriate; (2) Iowa was not Jonathan's state of residence because he has lived in North Carolina and New Jersey after separating from the military in May 2005, before moving to Iowa in December 2005; and (3) Iowa was not the children's home state. The court concluded it did not have subject matter jurisdiction and the parties were returned to the status of married individuals.

Jonathan filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). He claimed his residence remained in Iowa, and attached evidence attempting to show he maintained his residency here. The district court denied the motion. Jonathan appeals.

II. STANDARD OF REVIEW

Where the district court lacks subject matter jurisdiction over dissolution proceedings, a challenge to the decree may be raised in a motion to vacate. *Miller v. Miller*, 242 Iowa 706, 708, 46 N.W.2d 732, 733 (1951). A motion to vacate based on lack of jurisdiction may be raised at any time. *In re Marriage of Thrailkill*, 438 N.W.2d 845, 848 (Iowa Ct. App. 1989). A motion to vacate for lack of jurisdiction is heard de novo based on the record before the district court. *Id.*

III. MERITS

A. Jonathan contends the district court failed to follow the procedures of Iowa Rules of Civil Procedure 1.1012 and 1.1013, governing the vacation of

[1] There is no transcript of this hearing.

judgments. The residency requirements of Iowa Code section 598.5(1)(k) (Supp. 2005) confer subject matter jurisdiction to the court. *In re Marriage of Bouska*. 256 N.W.2d 196, 198 (Iowa 1977). If a decree has been entered absent such subject matter jurisdiction, it must be vacated. *Id.* Rule 1.1012 is not applicable to a motion to vacate a decree which is void for lack of subject matter jurisdiction. *Jacobson v. Leap*, 249 Iowa 1036, 1039, 88 N.W.2d 919, 921 (1958); *Thrailkill*, 438 N.W.2d at 848.

B. Jonathan states the district court had previously determined Beate had failed to respond to his petition. He claims the court improperly reversed its earlier decision and concluded in the ruling on the motion to vacate that Beate's letter dated March 31, 2006, should be considered an answer. It is clear the court did not reverse its decision about the nature of Beate's response, but the court stated it "was not aware of the fact [Beate] had filed something with the Court that can only purport to be an answer to the petition for dissolution of marriage." Beate's pro se letter stated it was in response to Jonathan's petition concerning custody of the children. We conclude the letter is sufficient to show Beate contested Jonathan's request in the petition for custody.

C. Jonathan contends he was unaware the issue of residency would be raised during the hearing on the motion to vacate. He admits, however, a court may raise the issue of subject matter jurisdiction sua sponte. *See Pierce v. Pierce*, 287 N.W.2d 879, 882 (Iowa 1980). Jonathan asserts he was denied due process because he did not have the opportunity to present evidence on this issue. There is no contention Jonathan sought a continuance to allow him time to respond to the issue of residency. There is also no contention he requested

the court to reopen the record to present additional evidence. *See Ag Partners, L.L.C. v. Chicago Cent. & Pac. Ry. Co.*, 726 N.W.2d 711, 714 (Iowa 2007). (noting a party may make such a request). As the district court noted in its ruling on the rule 1.904(2) motion, "[h]ow each party determined to present his or her evidence was not up to the Court." We conclude Jonathan has not shown he was denied due process of law.

D. Jonathan asserts there is insufficient evidence in the record to support the district court's conclusion that he changed his residence to North Carolina after he left the military. As noted above, there is no transcript of the hearing on the motion to vacate. Furthermore, no statement of the evidence was provided pursuant to Iowa Rule of Appellate Procedure 6.10(3). Beate testified by telephone at the hearing, and the court stated it rendered its decision on the evidence received from Beate. Thus, contrary to Jonathan's assertions, the district court decision is not based on a complete lack of evidentiary support.

We are unable on appeal to assess the sufficiency of the evidence. The appellant, Jonathan has the responsibility to provide the court with a sufficient record to decide the appeal. *Smith v. Iowa Bd. of Med. Exam'rs*, 729 N.W.2d 822, 824 (Iowa 2007). Where a party claims a district court's finding is not supported by the evidence, the appellant must include in the record a transcript of all evidence relevant to the finding. *In re F.W.F.*, 698 N.W.2d 134, 135 (Iowa 2005). Where there is no transcript, a party should produce a statement of evidence under Iowa Rule of Appellate Procedure 6.10(3). *Id.* at 136. Where there is not a proper record on appeal, there is nothing for us to review. *Alvarez*

v. IBP, Inc., 698 N.W.2d 1, 3 (Iowa 2005). In this situation we must affirm. *F.W.F.*, 698 N.W.2d at 136; *Alvarez*, 696 N.W.2d at 4.

E. Finally, Jonathan asks to overrule the holding in *In re Marriage of Bouska* that the absence of the requisite residency under section 598.5(1)(k) negates subject matter jurisdiction in the court. *See Bouska*, 256 N.W.2d at 197-98. We do not have authority to overrule *Bouska* and furthermore we decline to do so.

IV. ATTORNEY FEES

Jonathan seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court.

AFFIRMED.