

IN THE COURT OF APPEALS OF IOWA

No. 8-685 / 08-0367
Filed December 17, 2008

IN RE THE MARRIAGE OF DAVID GENE BARKER AND RUTH ANN BARKER

**Upon the Petition of
TRACY PLESCHOURT and JENNIFER
ROBERTS as Executors of the ESTATE
OF DAVID GENE BARKER,**

Substituted for

DAVID GENE BARKER,
Petitioner-Appellant,

And Concerning

RUTH ANN BARKER,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

The executors of the estate of David Gene Barker appeal from the district court order dismissing an application to set aside a nunc pro tunc order.

REVERSED.

A.W. Tauke and Dustin P. Kreifels of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Thomas Blount, Bellevue, Nebraska, for appellee.

Heard by Eisenhauer, P.J., and Doyle, J., and Zimmer, S.J.*

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

EISENHAUER, J.

Tracy Pleschourt and Jennifer Roberts, as executors of the estate of David Gene Barker, appeal from the district court order dismissing an application to set aside a nunc pro tunc order. The nunc pro tunc order set aside the order dissolving the marriage of David and Ruth Barker. Because the district court did not have subject matter jurisdiction to enter the nunc pro tunc order, we reverse.

I. Background Facts and Proceedings. David and Ruth Barker were married in 1984. On February 28, 2007, David filed a petition for dissolution of marriage. In her answer, Ruth denied that the petition had been filed in good faith. She also disputed that there had been a breakdown of the marriage relationship.

Trial commenced on June 8, 2007. During a break, the parties reached a settlement agreement. The same day, the district court entered an order stating, "The marriage of the parties is dissolved as of today's date. Decree to be submitted." After the settlement agreement was reduced to writing, Ruth refused to sign

On July 5, 2007, Ruth filed a notice of appeal of the dissolution. However, on July 13, 2007, David informed his attorney via email that he and Ruth were reconciling, and that he wanted to "dismiss" the divorce. During a telephone conversation, David told his attorney to "stop" the divorce. His attorney then prepared a joint application for order nunc pro tunc. In a letter dated July 16, 2007, David's attorney informed Ruth's attorney of David's wish to set aside the dissolution order. He stated possible grounds for setting aside the order and also

stated the trial court would lack jurisdiction to do so until Ruth dismissed her appeal. David, Ruth, and their attorneys signed the application, and on July 20, 2007, the district court signed an order setting aside the dissolution decree and dismissing the petition for dissolution. On July 23, Ruth's appeal of the dissolution was voluntarily dismissed. On July 30, 2007, procedendo was issued by the Clerk of the Iowa Supreme Court acknowledging the dismissal of the appeal and directing the district court to "proceed with diligence and according to law in the same manner as if there had been no appeal."

David died on August 27, 2007. As executors to his estate, Pleschourt and Roberts filed a petition to set aside and vacate the July 20, 2007 order, which had set aside the dissolution of marriage. The district court dismissed the petition, finding the petitioners failed to establish grounds for setting aside the order. Motions for new trial and to enlarge and amend were denied, and the executors now appeal.

II. Scope and Standard of Review. Our review is for corrections of errors at law. Iowa R. App. P. 6.4.

III. Analysis. Among other things, the executors contend the district court erred in dismissing their petition to set aside and vacate the nunc pro tunc order because the district court did not have the subject matter jurisdiction necessary to enter the order. We agree and therefore reverse.

At the time the order setting aside the decree was entered, July 20, 2007, the issue of whether the dissolution of marriage was properly granted was on

appeal. Although Ruth voluntarily dismissed her appeal, the procedendo issued on July 30, 2007, states the appeal was dismissed on July 23, 2007.

Lack of subject matter jurisdiction may be raised at any stage of a proceeding and cannot be conferred by waiver, estoppel, or consent. *Linn County Sheriff v. Iowa Dist. Ct.*, 545 N.W.2d 296, 299 (Iowa 1996). Any action taken by a court not having jurisdiction of the subject matter is void. *Id.*

Although the filing of a notice of appeal generally deprives the district court of jurisdiction, the court “retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal.” *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa 2004). So where a nunc pro tunc order effects only a collateral matter that has nothing to do with the substantive issues on appeal, such as correcting the name of a party, the district court retains jurisdiction to enter it. *See Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 311 (Iowa 1995). Here, however, the order addressed the issue that was on appeal, and the court was without jurisdiction.

REVERSED.