STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1399

In the Matter of the Petition of: J. E. E. and L. R. E. to Adopt A. J. E. and B. D. E.

Filed January 23, 2012
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27JVFA09325

David C. Gapen, Walling, Berg & Debele, P.A., Minneapolis, Minnesota (for appellants)

Anna Prettyman, Prettyman Law, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from a vacation of an adoption and subsequent denial of the adoption petition, appellants argue that the district court abused its discretion by vacating an order granting the petition and that the district court's finding that respondent had not abandoned the children is clearly erroneous. We affirm.

FACTS

Appellants J.E.E. and L.R.E. are, respectively, the biological mother and stepfather of A.J.E. and B.D.E. (collectively, the children). Respondent K.M.W. is the biological father of the children.

Appellants petitioned to permit L.R.E. to adopt the children in October 2009, five months after appellants were married. In the petition, appellants alleged that "[respondent] has abandoned the children . . . [and as] a result of such abandonment, his Consent to this adoption is not required." *See* Minn. Stat. § 259.24, subd. 1 (2010) (stating that no child shall be adopted without the consent of the child's parents and guardian, but "[c]onsent shall not be required of a parent who has abandoned the child . . . and upon whom notice has been served"). In her affidavit supporting the petition, J.E.E. stated that she did not know how to contact respondent. She attached an envelope from a notice of an earlier name-change application that she had tried to send respondent that showed she was "at least two addresses behind," and requested that she be allowed to serve notice of the adoption proceeding by publication. Based on the affidavit information, the district court issued an order for service upon respondent by publication.

On May 6, 2010, the district court issued an order finding that respondent had abandoned the children, that his consent to their adoption by appellants was therefore not required, and granting appellants' petition to adopt the children.[1] In late November, J.E.E.

[1] We recognize that the district court issued two orders on May 6, 2010, one pertaining to the adoption of each child. Because both orders were issued under the same court file

informed respondent that the adoption petition had been granted and, as a result, the children "weren't his kids anymore."

On December 23, approximately 30-to-45 days after learning of the adoption order, respondent filed a pro se motion to vacate the children's adoption.[2] Appellants contested the motion, arguing that it was not supported by an affidavit, was not timely, and failed on the merits. The district court heard arguments on the motion on April 22, 2011. Following the hearing, the district court found that J.E.E.'s statement that she did not know how to contact respondent "was not true," as "she knew how to contact [him] by email and by phone." While acknowledging that appellants "had no obligation to serve [respondent] with notice of the adoption hearing by email," the district court nonetheless found that they "obtained an order for service by publication by intentionally representing a material fact to the court that [J.E.E.] knew to be false." The district court concluded that as a result of this false statement, "the order for service by publication was fraudulently obtained and therefore inherently invalid." The court declined to address the timeliness of respondent's motion as the publication order "was per se invalid due to [J.E.E.]'s misrepresentation to the court." The district court vacated the adoption order and set the matter for a new hearing.

On July 25, 2011, the district court issued an order in which it found that respondent had not abandoned the children, as that term is used in Minn. Stat. § 259.24

---

number and are substantively identical but for the name and date of birth of the child, we refer to the orders jointly.

[2] Respondent's motion also requested vacation of the children's name change. The district court did not reach the name-change issue, concluding that "it is not properly venued." This conclusion is not challenged on appeal.

(2010). Because respondent did not consent to the adoption petition, and no exception to the consent requirement existed, the district court denied and dismissed the petition. This appeal follows.

D E C I S I O N

I.

Appellants challenge not only the district court's denial of their adoption petition, but also the district court's order vacating the earlier grant of the petition. An appeal in an adoption proceeding must be taken within 30 days of the service of notice by the court administrator of the filing of the court's order. Minn. R. Adopt. P. 48.02, subd. 2. This appeal was filed on August 8, 2011, 97 days after the order vacating the adoption. But there is nothing in the record that shows when—if at all—the court administrator served a notice of filing as to that order. Because there is nothing in the record indicating that a notice of filing on the vacation order was served, the 30-day time limit for appeal under Minn. R. Adopt. P. 48.02 never started to run on that order. *See Curtis v. Curtis*, 442 N.W.2d 173, 176 (Minn. App. 1989) (discussing predecessor time limit under Minn. R. Civ. App. P. 104.01).

Furthermore, "the appellate courts may review any order affecting the order from which the appeal is taken." Minn. R. Civ. App. P. 103.04; *see also* Minn. R. Adopt. P. 48.01 (stating that, except as otherwise provided, "appeals of adoption matters shall be in accordance with the Minnesota Rules of Civil Appellate Procedure"). By vacating the original order granting the adoption and setting the matter for a new trial, the district court's May 3, 2011 order unquestionably affects the July 25 order denying the adoption,

from which this appeal was timely filed. Appellants' challenge to the vacation order is therefore properly before this court.

"The decision to vacate a judgment is within the district court's discretion and that decision will not be reversed on appeal absent a clear abuse of discretion." *Safeco Ins. Co. of Am. v. Dan Bosworth, Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). A district court abuses its discretion if its underlying findings of fact are clearly erroneous, if it misapplies the law, or if it resolves the matter in a manner that is against logic and the facts on record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (noting that clearly erroneous findings and a misapplication of law constitute an abuse of discretion); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (stating that resolving a matter in a manner contrary to logic and facts on the record constitutes an abuse of discretion).

A. Timeliness of Motion to Vacate

The district court has the authority to relieve a party from a final order and order a new trial in an adoption proceeding for reasons justifying relief from the operation of the order—including misconduct of an adverse party or voidness of the order—upon motion by a party. Minn. R. Adopt. P. 47.02. "The motion shall be made within a reasonable time, but in no event shall it be more than ninety (90) days following the filing of the court order." *Id.*

Here, the original adoption order was filed on May 6, 2010. Respondent's motion was not filed until December 23, seven-and-one-half months after the filing of the

adoption order and almost five months after the rule's 90-day deadline. Respondent's motion was therefore untimely under Minn. R. Adopt. P. 47.02.

But under the circumstances of this case, we conclude the procedure articulated in rule 47.02 was not the only means available to respondent to seek relief from the district court's original adoption decree. We have held that the district court "has the inherent power to set aside a final judgment if it determines that such a judgment amounts to fraud upon the court." *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 303 (Minn. App. 2009) (quotation omitted). Appellants argue that even if they did commit fraud upon the court, the 90-day deadline articulated in the rule nonetheless applies here and renders respondent's motion untimely. We disagree.

A majority of the caselaw interpreting fraud upon the court arises from matters governed by Minn. R. Civ. P. 60.02. Under rule 60.02, the civil-procedure equivalent of Minn. R. Adopt. P. 47.02, a motion to set aside a judgment and decree based on fraud must be made within a reasonable time, but not more than one year after entry of the judgment and decree. But the rule states that it "does not limit the power of a court . . . to set aside a judgment for fraud upon the court." Minn. R. Civ. P. 60.02. Because of this disparate treatment of the two bases for obtaining relief from a judgment, the supreme court has opined that "there must be a difference between ordinary fraud and fraud on the court." *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989) (quotation omitted).

We recognize that Minn. R. Adopt. P. 47.02 does not contain any language regarding fraud upon the court. But we conclude that the omission of such language does not restrict the district court's inherent authority to provide relief in situations where such

fraud upon the court exists. Rule 46.02 of the Minnesota Rules of Juvenile Protection Procedure—the material rule in *R.A.J.*—similarly does not explicitly exempt fraud upon the court from the rule's 90-day deadline. And while the motion to vacate in *R.A.J.* was timely, timeliness of the motion was not a prerequisite for the district court's "inherent power" to grant relief when the facts present a situation of fraud upon the court. *See R.A.J.*, 769 N.W.2d at 303 (recognizing district court's inherent power, and *then* commenting that a district court may also relieve a party from judgment for fraud upon a timely motion). We therefore conclude that a district court's inherent power to set aside a final judgment if it determines that the judgment was procured by means of fraud upon the court operates independently of Minn. R. Adopt. P. 47.02.

B. Fraud upon the Court

Having concluded that a district court's inherent power to provide relief in the presence of fraud upon the court operates independently of the rule's 90-day deadline, we next address whether the appellants committed fraud upon the court. Fraud upon the court exists when "a court is misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair." *In re Welfare of C.R.B.*, 384 N.W.2d 576, 579 (Minn. App. 1986) (quoting *Halloran v. Blue & White Liberty Cab Co.*, 253 Minn. 436, 442, 92 N.W.2d 794, 798 (1958)), *review denied* (Minn. May 29, 1986).

The statement that constitutes fraud upon the court is contained in the affidavit supporting appellants' petition to adopt the children and requesting that they be allowed to serve respondent by publication. In her affidavit, J.E.E. states "I do not know how to

contact [respondent]. . . . I ask that I be allowed to serve the Petition for Adoption and Notice of the Final Adoption Hearing on [respondent] by publication." Attached as an exhibit to the affidavit is an envelope that allegedly established that appellants were "at least two addresses behind [respondent]." The district court found that this statement was false as "[J.E.E.] testified that at the time she signed the affidavit, she knew how to contact [respondent] by email and by phone," and that the order allowing appellants to serve respondent was therefore fraudulently obtained.

In their brief and at oral argument, appellants posit that the statement that J.E.E. did not know how to contact respondent "must be read in the context of her affidavit" as limited to J.E.E. not having respondent's mailing address. But such an argument is unavailing.

The preferred method of service in an adoption proceeding is personal service. Minn. R. Adopt. P. 31.04, subd. 2(a). However, the rules provide that "[s]ervice by publication substitutes for personal service where authorized by the court." Minn. R. Adopt. P. 25.02, subd. 3. And the district court may authorize service by publication only when "the petitioner has filed a written statement or affidavit describing unsuccessful efforts to locate the party to be served." *Id.* In addition to the efforts made to locate the parent, the affidavit must set forth "the names and addresses of the known kin of the child." Minn. R. Adopt. P. 31.04, subd. 2(b). Even if we were to read J.E.E.'s affidavit in the manner encouraged by appellants—that not knowing how to contact respondent meant that she did not have his current mailing address—the affidavit is nonetheless plainly deficient under the rule. And this deficiency, especially given that

J.E.E. admitted to knowing how to contact respondent by e-mail and phone, constitutes fraud upon the court.[3]

Because appellants committed fraud upon the court by requesting service by publication with a deficient affidavit containing a false statement, and the district court's inherent power to provide relief from an order is not limited by the 90-day deadline expressed in Minn. R. Adopt. P. 47.02, we conclude that the district court did not abuse its discretion by vacating the May 6, 2010 order granting the adoption petition.[4]

II.

Having concluded that the district court did not abuse its discretion by vacating its order granting appellants' petition to adopt the children, we next address the district court's finding that respondent did not abandon the children as that term is used in Minn. Stat. § 259.24. Abandonment occurs "when the desertion is accompanied by an intention to entirely forsake the child." *In re Welfare of Staat*, 287 Minn. 501, 505, 178 N.W.2d 709, 713 (1970) (quotation omitted). "There must be an intention to sever the parental relation and wholly throw off all obligations that spring from it." *Id.* Here, the district

[3] While appellants' fraud upon the court primarily affected the district court's order allowing them to serve respondent by publication, we note that the fraud upon the court unquestionably affected the district court's May 6, 2010 order finding that respondent abandoned the children. By representing to the district court that she did "not know how to contact" respondent, J.E.E. failed to give the district court all of the relevant information regarding respondent's involvement—however limited—in the children's lives.

[4] Appellants allege that the policy favoring permanency in child-custody proceedings necessitates reversing the district court's order vacating the adoption. We disagree. Regardless of whether the adoption is granted or denied, the children continue to reside with appellants. We therefore conclude that the policy favoring permanence does not weigh for or against vacating the adoption decree.

court found that respondent "did not 'intend to forsake the duties of parenthood'" and accordingly did not abandon the children. This finding will not be disturbed on appeal unless it is clearly erroneous. *In re Petition of M.G.*, 375 N.W.2d 588, 590 (Minn. App. 1985).

Respondent has not had contact with the children since approximately May 2006. The record indicates that respondent communicated with J.E.E. electronically from May 2006 to March 2008, seeking "to see the children, to talk to his children, or to obtain from [J.E.E.] information regarding the children," but respondent made no effort to complete a court-ordered drug test or psychological evaluation—required prerequisites to have contact with the children—until May 2011, well into the proceedings in this matter. As of July 2011, respondent had only paid $10,669.73, or approximately 16%, of the $63,650 he owed to J.E.E. in child support. Based on these findings, the district court found that respondent had deserted the children, thereby satisfying the first prong of the definition of abandonment. This finding is not challenged on appeal. *See City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996) (stating that issues decided adversely to respondent are not properly before the court of appeals in the absence of a notice of review, now known as a notice of related appeal), *review denied* (Minn. Aug. 6, 1996).

The district court then addressed the second prong of the abandonment analysis—whether the parent intended to forsake his or her parental responsibilities. A parent's failure to have contact with the child, failure to show sincere interest in the child's well-being, and failure to provide emotional or financial support are factors that support a

district court's conclusion that the parent has abandoned the child. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 398–99 (Minn. 1996). Inferences as to a parent's intentions are best made by the district court and will not be disturbed on appeal. *Id.* at 399. Despite commenting that it found respondent's actions "reprehensible" and "embarrassing," it nonetheless found that respondent "has maintained a consistent interest in the children's well-being in that he has continually emailed and called [J.E.E.] to inquire about the children, and he has also sent the children presents."

Based on the record before the district court, and the substantial amount of deference accorded to a district court's determination as to a parent's intentions, we conclude that the district court's finding that respondent "did not 'intend to forsake the duties of parenthood' as that phrase has been interpreted by Minnesota caselaw" was not clearly erroneous. As such, the district court's finding that respondent has not abandoned the children is similarly not clearly erroneous.

Because respondent has not abandoned the children, as that term is used in Minn. Stat. § 259.24, subd. 1(b), the district court properly found that the children could not be adopted without his consent. And, no consent having been given, the district court properly denied the adoption petition.[5]

Affirmed.

[5] Just as stated by the district court, our opinion here does not alter the previous orders entered by the Georgia court regarding visitation and/or child support and other payments.