IN THE COURT OF APPEALS OF IOWA

FILED
JUL 27 1988
CLERK SUPREME COURT

IN RE THE MARRIAGE OF TODD ALAN GINTHER
AND DEBBIE KAY WITHAM GINTHER

Upon the Petition of)

TODD ALAN GINTHER,)

Petitioner-Appellee,)

And Concerning)

DEBBIE KAY WITHAM GINTHER,) 8-182
n/k/a DEBBIE KAY RUTLEDGE,) 87-1683

Respondent-Appellant.)

Appeal from the Iowa District Court for Linn County (DM 13585), Lynne E. Brady, Judge.

Respondent appeals the order of the district court vacating that portion of its previous decree of dissolution which related to child custody, physical care, and support. **AFFIRMED.**

Michael F. Harrington and Robert T. *Yeager, Des Moines,* for respondent-appellant.

Eric Borseth of Wright, Wright & Borseth, Des Moines, for petitioner-appellee.

Crystal L. Usher, Des Moines, as guardian ad litem for the minor child.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Respondent, Debbie Kay Witham Ginther (n/k/a Debbie Kay Rutledge), appeals the order of the district court vacating that portion of its previous decree of dissolution which related to child custody, physical care, and support. Rutledge asserts the motion to vacate by petitioner, Todd Ginther, did not fulfill the requirements of Iowa Rule of Civil Procedure 253(a) in that Ginther did not show the alleged irregularities upon which his motion relied could not have been discovered in time to proceed under a motion for new trial. Rutledge also contends there was not, in any event, irregularities in the dissolution process which justified vacating the decree. We affirm.

On October 23, 1986, the dissolution decree was entered by stipulation of the parties. The decree awarded the parties joint legal custody and granted Rutledge primary physical care, although Ginther was to have 181 days of visitation per year. On February 2, 1987, Ginther filed an application to vacate the decree. He later was allowed to amend this application, which amendment became the application by order of the district court on May 26, 1987. Ginther's amended application alleged the parties' attorneys were informed by the district court, prior to the stipulation, that an injunction against Rutledge, relating to allegations of child abuse, would be lifted if the Department of Human Services (DHS) did not recommend remov-

ing the parties' son, Andrew, from Rutledge's home. The DHS had previously determined the allegations were founded and the suspected perpetrator was Rutledge's then live-in boyfriend. Ginther alleged he only then agreed to the stipulated decree. His reasoning was that he could not apparently hope to obtain physical care of Andrew if he couldn't get merely temporary care even when there were founded child abuse allegations against Rutledge's roommate. Ginther requested the district court to set aside the terms of the decree which related to custody, visitation, and child support, and to grant any other relief the court deemed appropriate. The district court thereupon vacated the requested portions of the decree, set a hearing to establish temporary care and support, and ordered a new trial on the issues relating to the care and support of Andrew. This appeal followed.

Our review of a proceeding for the vacation of a judgment is at law, not de novo. Hastings v. Espinosa, 340 N.W.2d 603, 607 (Iowa App. 1983); In re Marriage of Bauder, 316 N.W.2d 697, 700 (Iowa App. 1981). The district court has considerable discretion in deciding whether to grant relief when the vacation of a judgment is sought, and we are more inclined to find an abuse of discretion when relief from the judgment has not been granted than when it has been. Kraft v. Fisher Aviation, Inc., 264 N.W.2d 297, 303 (Iowa 1978).

Ginther sought relief pursuant to Iowa Rule of Civil Procedure 252, which provides in pertinent part:

> Upon timely petition and notice under R.C.P. 253 the court may correct, vacate, or modify a final judgment or order, or grant a new trial on any of the following grounds:
>
> * * *
>
> (b) Irregularity or fraud practiced in obtaining the same.

Under Iowa Rule of Civil Procedure 253:

> A petition for relief under R.C.P. 252 must be filed in the original action within one year after the rendition of the judgment or order involved. It shall state the grounds for relief, and, if it seeks a new trial, show that they could not have been discovered in time to proceed under R.C.P. 236 or 244, and were discovered afterwards.

Rutledge's first contention is Ginther sought a new trial and, therefore, was required to show the grounds upon which he relied for relief could not have been discovered in time to proceed under R.C.P. 244, governing motions for new trial. Ginther does not dispute he failed to make such a showing; he argues he did not seek a new trial. We find merit in Ginther's position. Although his initial application requested the district court to "set aside the decree pertaining to the terms of custody, visitation rights, and child support and set a date for trial on the same," his amended application, with which we are concerned here, merely requested the district court to set aside the decree and "grant any other relief that may be appropriate." We do not believe Ginther need show he could not have

discovered his grounds for relief within the time limitations for a motion for a new trial merely because the district court, as a practical matter, ordered a new trial date after deciding to vacate the decree due to irregularity in the previous proceedings.

Nor do we agree with Rutledge's second contention on appeal, that sufficient irregularity was not shown. In this regard we find In re Marriage of Hitchcock, 265 N.W.2d 599 (Iowa 1978), instructive although not controlling. In Hitchcock the district court heard the evidence of one party and then called the parties' attorneys into his chambers and advised them how the case should and could be settled. Id. at 602-04. Our supreme court had to determine:

> [W]hether the announcements and conduct of the trial judge were sufficient to actually induce assent on the part of [the party] who claim[ed] to be the victim of duress thereby rendering it inequitable to permit enforcement of the distribution as provided in the decree.

Id. at 605. The court found such an inducement had occurred and had left the victim of duress without a reasonable alternative to succumbing to it since she could only:

> [F]ollow the judge's suggestion and settle the matter in accordance therewith or proceed to try her case on its merits before a tribunal which had appar- ently prejudged the issue to be determined by the court as mandated by section 598.21, The Code.

Id. at 606.

Although the district court's action in this case only involved temporary care and not the provisions of the decree, we conclude its effect here was similar to the effect in Hitchcock. Having been informed the court intended to lift the injunction against Rutledge if the DHS did not recommend removal, Ginther justifiably could have concluded the tribunal which was to determine custody had apparently already made its decision. We conclude the district court in this action did not abuse its discretion by granting Ginther's motion to vacate the child custody and support-related portions of the decree.

AFFIRMED.