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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

247

IN RE THE MARRIAGE OF C. ROSS BARROWS and JUDITH L. BARROWS

Upon the Petition of)
C. ROSS BARROWS,) Filed March 22, 1979
Petitioner-Appellant,)
And Concerning,) 754
JUDITH L. BARROWS,) 2-60903
Respondent-Appellee.)

Appeal from Clinton District Court - C. H. Pelton, Judge.

Petitioner appeals and respondent cross-appeals from trial court's order modifying economic provisions of original decree. Affirmed with modifications.

John P. Murphy of Holleran, Shaw, Murphy & Stoutner, Clinton, for appellant.

Donald G. Sennell of Shaff, Farwell & Senneff, Clinton, for appellee.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

Petitioner, C. Ross Barrows, appeals from trial court's order modifying the economic provisions in the parties' 1975 decree of dissolution. He asserts that trial court erred in modifying the economic provisions of the original decree because they were part of a property distribution and not subject to modification. He argues, in the alternative, that if the provisions constitute alimony, the modified amount ordered by trial court is excessive.

Respondent, Judith I. Barrows, cross-appeals alleging trial court erred in dismissing her motion to vacate the original decree filed pursuant to Iowa R. Civ. P. 252, in finding the property division provisions of the original decree were not modifiable, and in ordering the modification to be prospective only rather than retroactive to the date that the application for modification was filed. We affirm trial court's judgment with modifications.

We will address the issues in the following order: 1) whether trial court erred in finding insufficient grounds to vacate the original decree; 2) whether trial court erred in finding it had no authority to modify the property distribution in the original decree; 3) whether trial court erred in characterizing the economic provisions of the original decree as alimony; 4) whether trial court erred in finding a change of circumstances warranting modification of the economic provisions of the original decree; 5) whether trial court erred in refusing to make the modification decree retroactive to the date that the application was filed; and, 6) whether trial court's award in the order of modification was excessive.

I. Upon timely petition and notice, a final judgment can be vacated or modified on grounds, inter alia, of irregularity or fraud practiced in obtaining the judgment. Iowa R. Civ. P. 252(b). In her motion to vacate, Respondent, Judith I. Barrows, alleged that at the time of the original proceedings she had been unrepresented by counsel and was in such a state of mind that she was not competent to properly defend herself. She further asserted that the decree was obtained by fraud, deceit and misrepresentation on the part of Petitioner, C. Ross Barrows, and his attorney because the joint financial statement filed by the parties failed to disclose over $150,000 worth of the parties' assets. Trial court found that Respondent's motion was weak and largely unsupported, particularly since she had participated in and agreed to the judgment and decree by stipulation.

Our review of trial court's refusal to vacate the original decree of dissolution is on assigned error only. The trial court's findings must be upheld if there is substantial

evidence to support them. Lemke v. Lemke, 206 N.W.2d 895, 897 (Iowa 1973). We believe there is substantial evidence in this case.

Allegations of fraud necessary for the vacation of a judgment must be extrinsic. "... [I]ntrinsic fraud will not vitiate a judgment when the court which renders it has jurisdiction of the subject matter and the parties." Stearns v. Stearns, 187 N.W.2d 733, 735 (Iowa 1971). The burden is on the party making the allegation to prove fraud by clear and convincing evidence. Id. Extrinsic fraud is collateral to the matter or issues tried and consists of some act or conduct which prevents a fair submission of the controversy. This includes "lulling a party into a false sense of security or preventing him from making a defense". In re Marriage of Short, 263 N.W.2d 720, 723 (Iowa 1978). It does not pertain to the judgment itself but rather to the manner in which the judgment was procured. Cook v. Cook, 259 Iowa 825, 830, 146 N.W.2d 273, 276 (1966). Intrinsic fraud, on the other hand, relates to matters that were in conflict at trial such that the fraud inheres in issues originally submitted to and decided by the court. This includes false testimony, fraudulent instruments or any other fraudulent matter that was presented and considered by the court in rendering its judgment. Cook v. Cook, 259 Iowa at 830, 146 N.W.2d at 276.

Respondent's allegations appear to be those of extrinsic fraud in that lack of disclosure of certain assets affected her decision to sign the stipulation which was later incorporated into the court's decree. However, the trial court found that there was no fraud, deceit, or misrepresentation perpetrated by Petitioner or his attorney and that the omission of these items was inadvertent. While we might reach a different conclusion, there is substantial evidence in the record to support trial court's finding that Respondent failed to meet her burden of proof by clear and convincing evidence.

II. The trial court retains jurisdiction to modify alimony and child support provisions in a decree of dissolution when a change in circumstances renders them expedient. § 598.21, The Code 1977. Except where specifically provided by statute, however, a court has no authority to modify a judgment providing for an adjustment of property rights between the parties to a dissolution in the absence of fraud, coercion or other grounds on which any ordinary judgment could be modified or vacated. Knipfer v. Knipfer, 259 Iowa 347, 355, 144 N.W.2d 140, 144 (1966).

Respondent argues, in addition to her allegations of fraud which were found to be unsupported by sufficient evidence, that the property distribution should be modified on

the basis of mistake, primarily in the omission from the financial statement filed by the parties of assets valued at more than $150,000.00.

Respondent relies on In re Marriage of Full, 255 N.W.2d 153 (Iowa 1977), for the apparent proposition that mutual mistake of fact is a sufficient basis for modification of a property distribution in a decree of dissolution even if there are insufficient grounds to justify vacation of the judgment under Iowa R. Civ. P. 252.[1] The court, however, distinguishes both cases relied on by the petitioner in Full by noting that "the alleged mistakes [in Cummings and Regan] were easily identifiable, and indisputable . . ." and that "[p]roof . . . was easily adduced."[2] 255 N.W.2d at 157. The type of mistake alleged in Full involved computations based on subjective judgment. The court, however, did not reach the issue of whether that type of mistake could be the basis for a modification because it found petitioner's evidence insufficient to show any mistake in fact inhered in the original decree. 255 N.W.2d at 157.

We are confronted with a similar failure of proof in this case. The record shows that Respondent was aware of Petitioner's interest in Barrows Enterprises, Inc., the existence of the real property in Minnesota and the houseboat. Petitioner had provided Respondent with a full financial statement of Barrows Enterprises, Inc. Respondent was advised and encouraged on several occasions to retain independent counsel which, unfortunately, she declined to do. Respondent ultimately signed a stipulation which gave Petitioner all the stock interests held by the parties in Barrows Enterprises and other corporate activities of Petitioner.

If Respondent had been represented by counsel or had a better understanding of the financial matters, she probably would have received a greater proportion of the

[1] Petitioner in Full sought modification on the grounds that the original decree was based on a mutual mistake in valuation of stock in a closed corporation. Petitioner's application was denied.

[2] The two cases cited in Full were Cummings v. Cummings, 248 Iowa 831, 82 N.W.2d 676 (1970) and Regan v. Regan, 23 Mich. App. 409, 178 N.W.2d 807 (1970). The parties in Cummings believed the property was subject to a mortgage in the amount of $14,500.00 at the time of the original decree and later discovered the actual balance was $19,000.00. The court held that trial court was correct in modifying the decree to require one party to pay the $4,500.00 difference to the other. The court in Regan allowed modification of a property settlement to correct a mistake as to the actual location of a property line.

accumulated property of the parties. However, a court cannot modify a decree on the basis of a party's failure to understand its import and arrangements. Guisinger v. Guisinger, 201 Iowa 409, 205 N.W. 752 (1925). Based on the evidence before it, trial court correctly found it had no authority to modify the property provisions of the original decree on the grounds of mistake.

III. Trial court has no power to modify the provisions in an original decree to include future alimony if the decree made no provision for alimony or expressly denied it. Cappel v. Cappel, 243 Iowa 1363, 1366, 55 N.W.2d 481, 483 (1952). The original decree in the case at bar provided the following:

> The Court further finds that the Respondent is to be denied permanent alimony and that the Petitioner should provide her with a minimum support payment of $400.00 per month from the date of entry of this Decree for the period of one year and during which she will be attending the Clinton Community Junior College, or such school of her preference; that the Petitioner should provide the Respondent with the necessary matriculation fee and any books required therefore during a one year term (4 quarter) at said college but not to exceed the sum of $825.00; .... (emphasis added)

Petitioner argues that the language "denied permanent alimony" clearly places this case within the second prong of the test in Cappel and that the provision for "a minimum support payment" is part of the property settlement. We disagree and find that the language "denied permanent alimony" should be construed as relating to the duration of the support award. (emphasis supplied)

When the character of an award in a decree of dissolution is in doubt, the substance, not the form, is controlling. Knipfer v. Knipfer, 259 Iowa at 351, 144 N.W.2d at 142-43. Alimony is based upon the common law obligation of the husband to support his wife.[3] It is an allowance for her support and maintenance in lieu of the legal obligation to support which otherwise is terminated by a decree of dissolution. Knipfer v. Knipfer, 259 Iowa at 352, 144 N.W.2d at 143. A lump or fixed sum allowance, on the other hand, is a settlement of property rights between the parties in lieu of dower or other property interests.

In determining whether the award constitutes alimony or a property division, "[t]he determinative factor is the intention of the [trial] Court as gathered from all parts of the Judgment." In Re Marriage of Woodward, 229 N.W.2d 274, 277 (Iowa 1975). Considering such relevant factors as the other provisions of the decree, the circumstances under which

[3] Alimony can be awarded to either spouse under Iowa law. See § 598.21, The Code 1977.

the agreement was made, the nature and value of the property to be divided, and the fact that the original trial court also heard the application for modification, we conclude that trial court had the power to modify the support provisions of the original decree.

IV. A decree of dissolution is subject to modification if the moving party establishes by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the decree such that enforcement of the original provisions would be attended by positive wrong or injustice. See Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978); Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). The original decree is conclusive as to all facts and circumstances which were within the knowledge and contemplation of the trial court. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973).

Considering the record as a whole, we agree with trial court's finding that there has been a sufficient showing of changed circumstances to warrant modification. See Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974); In Re Marriage of Campbell, 204 N.W.2d 638 (Iowa 1973).[4]

V. The minimum support provisions of the original decree expired July 16, 1976; Respondent filed her application for modification on June 23, 1976; trial court filed its order modifying the decree on May 17, 1977, with its provisions to be effective as of June 1, 1977. In its order the court stated that "[t]hose provisions for 'minimum support', school expenses and automobile and medical and hospitalization insurance shall continue and not terminate as provided in the original Decree." (App. p. 76). Respondent cites Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973), and Pucci v. Pucci, 259 Iowa 427, 431, 143 N.W.2d 353, 356 (1966), for the proposition that the increase and continuation of the support awards should relate back to June 23, 1976, the date her Application for Modification was filed. Our interpretation of the case law in Iowa leads us to conclude trial court did not err in establishing June 1, 1977, as the effective date.

Pucci addresses itself to the issue of the right to modify. Such right can be prospective (from the date of application) only because a court has no authority to divest

[4] Campbell involved an appeal of the alimony and child support provisions in the original decree. In that case the court stated that "trial court was justified in considering the property division in assessing the needs and resources of the parties in order to fix alimony and child support." 204 N.W.2d at 639. (emphasis supplied)

a party of a right which has accrued under the terms of the original decree. Pucci v. Pucci, 259 Iowa at 431, 143 N.W.2d at 356. See also Wren v. Wren, 256 Iowa 484, 489, 127 N.W.2d 643, 646 (1964). This, however, does not mandate a conclusion that all terms of an order modifying a decree must become effective on the date that the application for modification is filed. We believe the trial court, in drafting its order modifying the original decree, can elect but is not required to make the terms retroactive to that date. See Wernli v. Wernli, 216 N.W.2d 322, 325 (Iowa 1974).[5]

VI. Our de novo review of trial court's order modifying the original decree leads us to conclude, however, that its terms are excessive and should be modified to provide $400.00 per month support for Respondent until her remarriage or the death of either party and up to $825.00 annually for Respondent's educational expenses for two additional years unless Respondent remarries, at which time Petitioner's obligation for payment of support and Respondent's educational expenses shall cease.

Affirmed with modifications.

[5] In Wernli, the trial court made its reduction of alimony from $300 to $200 per month effective several months after the modified decree was filed. In reference to that date the court said: "We are not disposed to dispute the trial court's holding as to the date the reduced alimony payments were to start." 216 N.W.2d at 325.