FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARGARET MARY TIESKOTTER AND MARK LEONARD TIESKOTTER

Upon the Petition of)

MARGARET MARY TIESKOTTER,)

Petitioner-Appellant,)

And Concerning)

MARK LEONARD TIESKOTTER,)

Respondent-Appellee.)

Filed November 30, 1983

3-255
83-171

Appeal from Chickasaw District Court - Joseph C. Keefe, Judge.

Petitioner appeals from the trial court's order vacating the parties' dissolution decree pursuant to Iowa Rule of Civil Procedure 252. AFFIRMED.

Mary Jane White,Decorah, Iowa, for petitioner-appellant.

R. L. Donohue of Donohue & Wilkins, New Hampton, Iowa, for respondent-appellee.

Frank H. Holschag, New Hampton, Iowa, for the parties' children.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Petitioner, Margaret Tieskotter, appeals from the trial court's order vacating the parties' dissolution decree pursuant to Iowa Rule of Civil Procedure 252. She asserts that the trial court erred as a matter of law in holding that the confusion between the parties and the court concerning the appointment of an attorney for the minor children constituted an irregularity sufficient to vacate the dissolution decree. We affirm.

Margaret and Mark were married in 1973. They have two children: Joseph, born in 1975; and Laura, born in 1978. Margaret filed a petition for dissolution of marriage on May 27, 1982, and Mark answered on June 7, 1982. The parties and their attorneys met on July 19, 1982, and negotiated a stipulation covering child custody and support, alimony, property division, attorney fees and court costs. Under the stipulation, Margaret was to have custody of the children and Mark was to have liberal visitation. The parties also agreed both would waive any further conciliation procedures. The final stipulation further provided that the dissolution could be proved up at any time without further appearance by Mark.

Mark, through his attorney, filed a request on August 9, 1982, for appointment of attorney to make an "independent investigation and report to the court." The request specifically stated that Mark "had no wish to change this stipulation [the July 19 agreement], but during a recent visitation the children have indicated to him some dissatisfaction . . . ." Judge Keefe, in an order filed on August 26, 1982, appointed attorney Frank Holschlag to represent the children temporarily. He was ordered to "make a brief investigation and report to the Court, not his findings but whether he feels further representation on behalf of the children is required." (emphasis in original). Holschlag interviewed Mark as to whether there was evidence of abuse or neglect or whether either of the children had health problems not previously revealed to the court. Holschlag did not

interview Margaret or the children. Although it was disputed at trial, Holschlag testified that during the meeting with Mark, he informed Mark that there was a procedure whereby he could repudiate the stipulation previously agreed upon by the parties.

Margaret and her attorney appeared in court on August 30, 1982, shortly after the statutory ninety-day waiting period ended, for entry of a dissolution decree pursuant to the stipulation. The district court telephoned Mark's attorney to inquire whether there was any objection to proceeding with entry of the decree. Mark's attorney expressed surprise that judgment would be entered prior to receiving a report from the children's attorney. Holschlag orally reported to the court, on the same day that a dissolution decree was entered, that he had talked to Mark and had found no evidence of abuse or neglect of the children or any serious health problems. He also reported that he knew of no reason why an attorney should be appointed to further investigate. It is unclear whether this report was made before or after the phone call to Mark's attorney. The trial court then entered a decree incorporating the stipulation.

Mark filed a petition to vacate the decree on October 4, 1982, asserting irregularity and fraud in obtaining the decree, as well as newly discovered evidence. In an affidavit attached to the petition Mark claimed that he had been coerced into signing the stipulation by Margaret, who had refused to allow him to see the children until he signed it. Mark also asserted during trial that he had not understood that the stipulation established permanent custody of the children. Mark sought to vacate only the custody provisions of the decree.

The trial court treated the respondent's petition to partially vacate judgment as a petition brought pursuant to Iowa Rules of Civil Procedure 252 and 253. Judge Keefe ruled that the confusion surrounding the appointment of Holschag to represent the minor children constituted an "irregularity" within the

meaning of rule 252, and, accordingly, entered an order vacating the dissolution decree. This appeal followed.

I. Scope of Review

A petition to vacate a judgment pursuant to Iowa Rules of Civil Procedure 252 and 253 is triable at law. Jacobson v. Leap, 249 Iowa 1036, 1041, 88 N.W. 2d 919, 922 (1958). A trial court has wide discretion in making its ruling. The burden is on the petitioner to plead and prove good cause to correct, vacate, or modify a final judgment. Mishler v. Stouwie, 301 N.W. 2d 744, 747 (Iowa 1981). Our review of a proceeding for the vacation of a judgment is not de novo. In re Marriage of Bauder, 316 N.W. 2d 697, 700 (Iowa Ct. App. 1981). The trial court has considerable discretion in deciding whether to afford relief when a vacation of judgment is sought. Id. We should not reverse unless an abuse is shown. Windus v. Great Plains Gas, 122 N.W. 2d 901, 905 (Iowa 1963). An appellate court should be more reluctant to find an abuse of discretion where, as here, judgment has been set aside than where relief has been denied. Id.

In his order vacating the parties' dissolution decree, Judge Keefe found that "[i] t is clear that all of the confusion between the parties and the Court would amount to an irregularity." Because of such irregularity, Judge Keefe ordered the decree vacated. Judge Keefe made the finding he did based not only on the record before him but also on his own memory of the facts surrounding the entry of the decree.

Judge Keefe's findings of fact have the effect of a jury verdict, and those findings are binding upon us if there is substantial evidence to support them. Mishler v. Stouwie, 301 N.W. 2d 744, 747 (Iowa 1981).

II. Irregularity

Margaret initially contends that an alleged irregularity sufficient to vacate a judgment under Iowa Rule of Civil Procedure 252 must be perpetrated by or in some manner connected with the actions of the opposing party or her counsel. See

Ware v. Eckman, 224 Iowa 783, 788, 277 N.W. 725, 728 (1938) (before a court will set aside a decree duly entered, on the grounds that there was fraud in the securing of the decree, there must be evidence that the opposing party or his attorney was in some way connected with the alleged fraud). Rule 252 provides: "[u]pon timely petition . . . the court may . . . vacate or modify a final judgment . . . on any of the following grounds: . . . (b)Irregularity or fraud practiced in obtaining the same" (emphasis added). Margaret asserts that because the facts of this case do not show that either she or her attorney perpetrated or practiced the alleged irregularity, the trial court erred as a matter of law in granting the relief requested.

Irregularity is defined in Black's Law Dictionary 744 (rev. 5th ed. 1979) as:

> The doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. The technical term for every defect in mechanics of proceedings, or the mode of conducting an action or defense, as distinguishable from defects in pleadings. . . .

This definition, as pointed out by Mark, does not require culpability. Moreover, we believe the phrase "practiced in obtaining the same" modifies the word "fraud," rather than "irregularity." The word "or" may be construed as having a conjunctive meaning rather than disjunctive meaning. Lahn v. Incorporated Town of Primghar, 225 Iowa 686, 689-90, 281 N.W. 214, 216 (1938). We may construe "or" as having a conjunctive meaning rather than a disjunctive meaning in order to prevent an absurd or unreasonable result. Id. The construction urged by petitioner would promote rather than prevent an absurd result. Therefore, we construe the "or" in rule 252(b) as having a disjunctive, rather than a conjunctive, meaning. There are irregularities which may occur without any culpability by the opposing party which should entitle the movant to relief. See Calvert Fire

Insurance Company v. Reick, 39 Md. App. 620, 387 A.2d 789 (Md. Ct. Spec. App. 1978) (the failure of the clerk of court to mail a notice of default judgment constituted irregularity sufficient to vacate judgment). An irregularity practiced by a party or their attorney in obtaining judgment, furthermore, would have little to distinguish itself from fraud. We believe Iowa Rule of Civil Procedure 252 was intended to reach situations not involving culpability where there is "the doing or not doing that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not be done." Id. at 625, 387 A.2d at 792. Thus, the failure of the children's attorney to report to the court, while not concerning any conduct on the part of Margaret or her attorney, may constitute an "irregularity" within the meaning of rule 252(b).

III. Confusion

Margaret next asserts that the "confusion" surrounding the appointment of the children's attorney is the result of the actions of Mark and his attorney and that Holschlag fully complied with the court order.

Judge Keefe noted several times in the record that he was unable to recall the events surrounding the entry of judgment and appointment of the children's attorney. This is entirely understandable where a judicial officer must be involved with several matters simultaneously. Moreover, there was no record made at the entry of judgment.

Judge Keefe made the following findings with respect to the petition to vacate:

> 1. On August 26, 1982, an Order was entered appointing Attorney Frank Holschlag to represent the children temporarily. On August 30, 1982, this matter was proved up by way of default, and a Stipulation signed by the parties July 19, 1982, was filed herein.
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> 2. At this hearing, the record supports the fact that the Court on two occasions talked to Attorney Holschlag, and on August 30, 1982, had a conversation with Respondent's attorney, Bob Story, and Petitioner's attorney, Mary Jane White. The Court clearly remembers that the conversations were held but has no independent recollection of the conversations themselves.
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> 3. This record further shows there was different recall by the attorneys as to what occurred on August 30, 1982. Mr. Story's testimony indicates that he thought he

> was still going to get some report from Mr. Holschlag. Ms. White's position was that Mr. Story informed the Court it was all right to proceed.
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> 5. It is clear that all of the confusion between the parties and the Court would amount to an irregularity, and Respondent would be permitted to have the judgment entered August 30, 1982, modified as to custody. However, it would not be equitable at this point for him to be able to only address the issue of custody if in fact Petitioner gave up some of her rights in the Stipulation filed.

Based upon these findings, Judge Keefe ordered that the decree be vacated in all respects, except that portion of the decree which dissolves the marriage.

As we noted above, Judge Keefe's findings of fact have the effect of a jury verdict, and those findings are binding upon us if there is substantial evidence to support them. Mishler v. Stouwie, 301 N.W. 2d 744, 747 (Iowa 1981). Upon an examination of the record, we find that the evidence supports the findings of the district court. We agree that the confusion between the parties and the court amounts to an "irregularity" for purposes of rule 252. Because we find no abuse of discretion on the part of the trial court, we affirm the order vacating the judgment entered in the dissolution proceedings.

AFFIRMED.