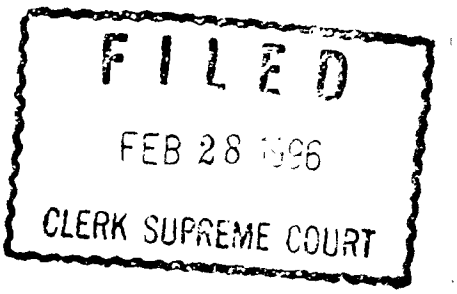
IN THE COURT OF APPEALS OF IOWA



No. 5-663 / 94-2086

IN RE THE MARRIAGE OF MICHELLE RENEE GRAHAM AND DOUGLAS KYL GRAHAM

Upon the Petition of
MICHELLE RENEE GRAHAM,
n/k/a MICHELLE RENEE WALL,

Appellee,

And Concerning
DOUGLAS KYL GRAHAM,

Appellant.

Appeal from the Iowa District Court for Wapello County, Dan Morrison, Judge.

Gregory Graham appeals the district court's denial of his motion to vacate a default order entered against him. **AFFIRMED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Theodore F. Sporer of the Sporer Law Office, P.C., and James R. Cook, West Des Moines, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Michelle and Douglas Graham were divorced in 1988. Douglas accepted service in the case but did not appear, and he was found to be in default. The dissolution decree gave the parties joint legal custody of their child, Zachary, who had been born in 1986. Michelle was awarded primary physical care of Zachary Later, by the parties' agreement, the decree was modified to give Douglas primary physical care of the child.

In April 1991 Michelle filed a new application to modify the decree. Douglas was represented by Iowa counsel in the modification action. The district court entered its ruling on August 20, 1992. The court found there had been a substantial change in circumstances since the previous modification and determined Michelle should have primary physical care of Zachary. Douglas was ordered to pay child support of $330 per month.

Douglas refused to return Zachary to Michelle after Christmas 1992 visitation and instead fled with the child. Michelle went to Colorado, and with the assistance of police officers, found Zachary and brought him back to Iowa.

On June 14, 1993, Michelle filed an application to modify the dissolution decree to obtain sole legal custody of Zachary and to limit Douglas to supervised visitation. While the case was pending, the parties entered into an agreement to allow Douglas to exercise summer visitation. Douglas was represented by Colorado counsel, J. Tyler Makepeace, during these visitation negotiations.

On August 31, 1993, Douglas's signed acceptance of service was filed in Wapello County District Court. Douglas did not file an answer or make any other appearance in the action. Douglas did not obtain Iowa counsel. Michelle's attorney, Theodore F. Sporer, contacted Makepeace and informed him the action was scheduled for hearing on September 7, 1993. Sporer told Makepeace Michelle wanted a complete resolution of all issues by this date or appropriate action would be taken, but he did not specifically inform Makepeace he intended to obtain a default order.

On September 7, 1993, no appearance was made by Douglas or anyone on his behalf at the hearing. Douglas was found to be in default, and the district court modified the dissolution decree to award Michelle sole legal custody of Zachary. The court also modified the decree to allow Douglas only supervised visitation.

On November 9, 1993, Douglas filed a pro se motion to reconsider the modification of the decree. He alleged he had no funds to be present or to hire an attorney for the hearing. The court denied the motion as an untimely motion pursuant to Iowa Rule of Civil Procedure 179(b).

Douglas then hired Iowa counsel, and on June 13, 1994, filed a motion to vacate the modification under rule 252. He claimed there was irregularity or fraud practiced in obtaining the modification and unavoidable casualty or misfortune prevented him from defending against the action.

Douglas filed a motion seeking to have the court order Sporer to be removed as Michelle's counsel because of the possibility he would be called as a witness. The court denied the motion.

On November 18, 1994, the district court determined Douglas had failed to meet his burden to vacate the modification decree. The court found Douglas had notice of the action, knew he needed to answer, and was aware the hearing was scheduled for September 7, 1993. The court concluded he was simply negligent and failed to respond. Douglas has appealed.

Douglas contends the district court abused its discretion by not granting his motion to vacate the modification of the parties' dissolution decree. He claims Michelle's attorney should have informed Makepeace she intended to obtain a default order. He believes it is the custom and practice in Iowa and Colorado to inform opposing counsel if a party intends to obtain a default order. Douglas asserts the failure to notify Makepeace of the impending default order amounted to unavoidable casualty or misfortune preventing him from defending the case. He also claims the relief granted in the modification was so severe the modification should be set aside.

A proceeding for the vacation of a judgment is on assigned errors. *Home Fed. Sav. & Loan Ass'n v. Robinson*, 464 N.W.2d 894, 895 (Iowa App. 1990). It is not triable de novo. *Id.* The trial court has considerable discretion in deciding whether to

afford relief when a vacation of judgment is sought. *Hastings v. Espinosa*, 340 N.W.2d 603, 610 (Iowa App. 1983).

Under rule 252(e), a district court may vacate a previous order on the ground of unavoidable casualty or misfortune preventing the party from prosecuting or defending. The burden of showing unavoidable casualty or misfortune is on the party making this claim. *Home Fed.*, 464 N.W.2d at 896. The supreme court has defined unavoidable casualty or misfortune as follows:

> Unavoidable casualty or misfortune means some casualty or misfortune growing out of conditions or circumstances that prevented the party or his attorney from doing something that, except therefor would have been done, and does not include mistakes or errors in judgment growing out of misconstruction or misunderstanding of the law, or the failure of parties or counsel through mistake to avail themselves of remedies, which if resorted to would have prevented the casualty or misfortune.

Mishler v. Stouwie, 301 N.W.2d 744, 748 (Iowa 1981) (quoting *Claeys v. Moldenschardt*, 260 Iowa 36, 43, 148 N.W.2d 379, 483-484 (1967)).

Rule 252 does not include a right to vacate a judgment for mistake, inadvertence, or excusable neglect. *Copic v. Copic*, 325 N.W.2d 766, 769 (Iowa App. 1982). These grounds are sufficient to set aside a default under rule 236, but are not sufficient to constitute unavoidable casualty or misfortune under rule 252. *Id.*

The supreme court has recently criticized the practice of obtaining a default order without first notifying opposing counsel. *See Vlotho v. Hardin County*, 509 N.W.2d 350, 353 (Iowa 1993). In *Central National Insurance Co. v. Insurance Co. of*

North America, 513 N.W.2d 750, 755 (Iowa 1994), the supreme court considered whether a party's failure to notify the other party of an intent to obtain a default order should be considered an unavoidable casualty under rule 236. The court determined "unavoidable casualty" arose only where a party's failure to act was due to reliance on local custom or practice to give notice before obtaining a default. *Id.*

We first note the amount of evidence required to support an application to vacate a final judgment under rule 252 is greater than the amount of evidence necessary to warrant setting aside a default judgment under rule 236. *In re Marriage of Heneman*, 396 N.W.2d 797, 799 (Iowa App. 1986). However, even if we assume "unavoidable casualty" should be defined similarly under rules 236 and 252, we conclude Douglas has not shown his failure to act was due to reliance on local custom or practice of notifying the other party of an impending default.

There are several reasons for our conclusion. First, Sporer did inform Douglas's Colorado counsel Michelle wanted a complete resolution of all issues by September 7, 1993, or appropriate action would be taken. Second, in his motion to vacate, Douglas did not allege his failure to act was due to reliance on local custom of notification before obtaining a default. He claimed he did not appear at the hearing because he did not have sufficient funds to come to Iowa or hire an attorney. Third, the history of this case shows Douglas was aware a default order could be obtained if he did not appear, which is what happened at the time of the original dissolution decree. Douglas was

also aware he needed to obtain Iowa counsel to respond to an action in Iowa, as he did for the 1992 modification.

Finally, under rule 253, when a party seeks to vacate a judgment and obtain a new trial, the party must state why the grounds for relief were not discovered in time to proceed under rule 236 (sixty days) or rule 244 (ten days). *See Stoner v. Kilen*, 528 N.W.2d 648, 650 (Iowa App. 1995). Where a party does not give any reason, the party may not be afforded relief under rule 252. *Id.* Here, Douglas does not give any reason for not filing a motion to set aside the default under rule 236. It is clear Douglas knew of the default order at least by October 25, 1994.

Based on all of the reasons discussed above, we conclude Douglas is not entitled to relief under rule 252. We find no abuse of discretion in the district court's refusal to vacate the default order.

Douglas has also raised an issue claiming the district court erred by not requiring Sporer to withdraw as Michelle's attorney because he intended to call him as a witness. A motion to disqualify an attorney is addressed to the discretion of the trial court and a court's ruling on the motion will not be disturbed in the absence of abuse. *Killian v. Iowa District Court*, 452 N.W.2d 426, 428 (Iowa 1990). A party is not entitled to disqualification of opposing counsel on the ground opposing counsel may be called as a witness at trial, in the absence of an indication of what the attorney's testimony might

be, other than it might be adverse to his or her client's interests. *National Child Care, Inc. v. Dickinson*, 446 N.W.2d 810, 812 (Iowa 1989).

Sporer's testimony in the present case was not adverse to Michelle. Michelle agreed to have Sporer continue as her counsel. We conclude there was no abuse of discretion in the district court's decision not to require Sporer to withdraw as counsel in this case.

Michelle seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We order Douglas to pay $1500 toward Michelle's attorney fees for this appeal.

We affirm the decision of the district court. Costs of this appeal are assessed to Douglas.

AFFIRMED.