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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF STEPHEN ROBERTS AND MARY ANN ROBERTS

Upon the Petition of)
STEPHEN ROBERTS,) Filed November 30, 1983
Petitioner-Appellee,)
And Concerning)
MARY ANN ROBERTS,) 3-233 / 83-195
Respondent-Appellant.)

Appeal from Montgomery District Court - J. C. Irvin, Judge.

Respondent-wife appeals from the trial court's order refusing to set aside the parties' dissolution decree. AFFIRMED.

Timothy I. Markel of Meldrum & Markel, Glenwood, Iowa, for respondent-appellant.

John K. Petersen, Red Oak, Iowa, for petitioner-appellee.

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

SCHLEGEL, J.

Respondent-wife appeals from the trial court's order refusing to set aside the parties' dissolution decree. Respondent sought to set aside the dissolution decree pursuant to Iowa Rules of Civil Procedure 252 and 253 alleging irregularities in jurisdiction and in procurement of the final dissolution decree by petitioner-husband. We affirm.

The parties were contemplating dissolving their marriage in April, 1982. There were two minor children, aged five and three. Petitioner, Stephen Roberts, signed a petition for dissolution of marriage on April 15, 1982. The parties met at the office of Stephen's attorney on April 16, 1982, where respondent, Mary Ann Roberts, signed a document entitled "ACCEPTANCE OF SERVICE AND TERMS OF AGREEMENT." Mary was unrepresented by counsel at that time. The document provided:

> I, the undersigned Mary Ann Roberts, being of legal age, do hereby acknowledge receipt of a copy of the Original Notice of the pendency of the above entitled cause of action, together with a copy of the Petition filed herein, and do hereby accept service of said Original Notice, consent to the jurisdiction of the District Court of Iowa for Montgomery County over the Parties and subject matter of this cause of action.
>
> I do further state the Parties have entered into an agreement in respect to their property, both real and personal, and that the division of same is fair and equitable, and that Petitioner will receive the real property.
>
> I do further state that Parties have entered into an Agreement in respect to the care, custody and control of the children of the marriage, and that Petitioner shall receive same, subject of reasonable rights of visitation.
>
> I do further state the above and foregoing Acceptance of Service was by me made under oath and the statements therein contained are true and correct as I verily believe. I know that I have the right to and may have an attorney represent me at any time herein. I do further waive right to notice of any further proceedings in respect to this action.

This document and Stephen's petition for a dissolution of marriage were simultaneously filed in district court on April 19, 1982.

A hearing on the petition for dissolution was held on July 19, 1982, in Mary's absence. She had left for California from Montgomery County, Iowa, on July 17 where she remained for five weeks. The trial court in a dissolution decree filed on July 19, 1982, placed the parties' two children in joint legal custody but awarded the children's physical custody to Stephen subject to the right of visitation by Mary. Mary testified at the hearing to set aside the decree that she first received a copy of the dissolution decree on August 20, 1982.

The trial court refused to set aside the dissolution decree pursuant to Iowa Rules of Civil Procedure 252 and 253. The trial court held that there was no defect in personal jurisdiction and that the dissolution decree merely incorporated the child custody provisions as agreed upon by the parties in the "ACCEPTANCE OF SERVICE AND TERMS OF AGREEMENT" signed by Mary. The trial court did, however, specify a visitation schedule pursuant to the application to modify under Iowa Code section 598.21.

I. 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 trial court adjudication under Iowa Rule of Civil Procedure 252 is on assigned error; it is not de novo. Id. The trial court'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. Id. The only issue presented is the propriety of the trial court's ruling on the petition to set aside the judgment under Iowa Rule of Civil Procedure 252. Neither party appeals the modification of the visitation schedule.

II. Mary argues that the irregularities in obtaining the dissolution decree required the trial court to vacate the final decree of dissolution of marriage.

Iowa R. Civ. P. 252(b). First, she asserts that because the acceptance of service was obtained prior to the filing of the dissolution petition, it was invalid; and the trial court, therefore, had lacked personal jurisdiction over her. Initially we note for purposes of analysis, Iowa Rules of Civil Procedure 252 and 253 are not applicable where the judgment is void. Jacobson v. Leap, 249 Iowa 1036, 1039, 88 N.W.2d 919, 921 (1958). Petitions filed under those rules, based on a jurisdictional question, may be considered as motions in the absence of objections to the procedure adopted. Id. Apparently all the parties and the trial court considered them as motions and we shall do likewise.

The trial court held that "[t]here is no prohibition in the Iowa law for the execution of acceptance of service or waiver of process prior to the commencement of the action." We agree. "A person for whose benefit or protection a notice should be given may waive it, but he cannot waive notice so as to affect the rights of third persons. 66 C.J.S. Notice § 15 (1950). The supreme court in Collinson v. City of Dubuque, 242 Iowa 986, 989, 47 N.W.2d 839, 841 (1951), quoted the following language from the case of Johnson v. Monell, 13 Iowa 300 (1862):

> A waiver of service is equivalent to an acknowledgement of service, and the manner in which the acknowledgement is taken is pointed out by the language of the section by the defendant's dating and signing same. If it had been contemplated by the legislature that proof of the taking, etc., should be made there would have been some language used to indicate such a design. The signature to the waiver, dated etc., is prima facie evidence of service. It is to be regarded by the court in the same light as the signature to a pleading.

An acknowledgement of service is something that renders service of the notice unnecessary. Collinson v. City of Dubuque, 242 Iowa at 989, 47 N.W.2d at 841.

The situation where a party will sign an acknowledgement of service rather than the original notice will usually occur prior to the filing of the petition. After the petition and the original notice is filed, the signing of a separate

acknowledgement of service, with the exception of instances where service cannot be had, would be duplicitious. We hold that, in the absence of fraud, the signing of an acknowledgement prior to the filing of the petition is sufficient to confer personal jurisdiction over the party signing the acknowledgement to the court. There was no showing of fraud in this case. The trial court, therefore, was correct in denying Mary relief on the ground of lack of personal jurisdiction.

III. Mary also asserts as an irregularity that Stephen had promised to ask the court to place the children in joint physical custody as well as joint legal custody. Mary alleged that her failure to appear had been based upon Stephen's assurances that he would seek joint physical custody. The trial court found the dissolution decree to be consistent with the terms of the agreement entered into between the parties as reflected by the statement contained in the "ACCEPTANCE OF SERVICE AND TERMS OF AGREEMENT." We need only determine whether the trial court's decision is supported by substantial evidence. Mishler v. Stouwie, 301 N.W.2d at 747.

Mary's primary complaint is that she did not understand that under "joint legal custody" the physical care was to be given to Stephen. She testified, however, that she had read the agreement which she signed on April 16, 1982, and that she understood the terms of the agreement. It is clear that under paragraph three of that agreement, the "care, custody and control of the children of the marriage" is to be given to Stephen. Moreover, it appears that after Mary returned from California she did not challenge that disposition until Stephen refused to cooperate in allowing her "reasonable visitation." There is substantial evidence supporting the trial court's decision that the terms of the dissolution decree does not vary the agreement reached by the parties prior to the filing of the dissolution petition. There was no irregularity in granting physical custody to Stephen subject to reasonable visitation by Mary. The trial court did not abuse its discretion in denying Mary's petition to vacate the judgment or modify the custody

provisions of the parties' dissolution decree pursuant to Iowa Rules of Civil Procedure 252 and 253.

IV. Mary has submitted an application for allowance of attorney fees on appeal. The application was filed nine days after oral arguments. Mary's attorney has not cited us to any authority for allowance of fees under Iowa Rules of Civil Procedure 252 and 253, nor have we found any. Without commenting on the timeliness of the application, we deny the request for attorney fees.

AFFIRMED.

Donielson, P.J., concurs and Sackett, J., dissents.

SACKETT, J. (dissenting)

Because I believe the trial court abused its discretion in refusing to vacate the parties' dissolution decree on the basis of irregularity, I would reverse. The trial court found "no prohibition in the Iowa law for the execution or acceptance of service or waiver of process prior to the commencement of the action." Since the trial court found that the acknowledgment was sufficient to confer personal jurisdiction over the party signing it, the court concluded that there was no "irregularity" for purposes of Rule 252. The supreme court in Claeys v. Moldenschardt, 148 N.W.2d 479, 482 (Iowa 1967) found that Rule 252 relief was inapplicable where the basis for relief asserted is that the court acted without, or in excess of, its jurisdiction. Clearly, then, a finding by the trial court that jurisdiction was properly had should not be dispositive in a Rule 252 petition. The issue faced by this court is not whether the trial court had personal jurisdiction over Mary Ann Roberts. The issue is whether, under Rule 252, the trial court was correct in refusing to vacate the judgment entered below because of "[i]rregularity or fraud practiced in obtaining the same."

Notwithstanding the arguments addressed in the parties' briefs, I believe that the irregularities practiced with respect to the acknowledgment of service, together with the confusion surrounding the content and effect of the stipulation, provide sufficient grounds for a vacation of judgment under Rule 252. "The courts favor the disposition of cases on their merits, and are ever ready to relieve for mistake and misunderstanding when they can do so without violating settled and necessary rules and substantial rights of adversaries." Dimick v. Munsinger, 202 Iowa 784, 785, 211 N.W. 404, 405 (1926). The trial court's failure to look beyond the jurisdictional issue when considering the petition to vacate amounted to an abuse of discretion. I would reverse the trial court decision and remand for the entry of an order vacating the decree, except that portion of the decree which dissolves the marriage.