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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SUSAN K. LINDGREN
and DANIEL A. LINDGREN

Upon the Petition of **SUSAN K. LINDGREN,**	)	234
Petitioner-Appellee,	)	
And Concerning **DANIEL A. LINDGREN**	)	9-26 88-806
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Scott County (38184), John A. Nahra, Judge.

Respondent challenges the trial court's refusal to set aside a default decree. **REVERSED AND REMANDED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for the respondent-appellant.

Phil L. Goedken, Bettendorf, for the petitioner-appellee.

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

SACKETT, J. 235

The question is whether a dissolution decree entered without notice against a pro se respondent who accepted service of the original notice and entered his appearance should be set aside under Iowa R. Civ. P. 236. We determine the decree should be set aside. We reverse and remand to the trial court.

Petitioner-appellee Susan K. Lindgren filed a petition for dissolution of her marriage to respondent-appellant Daniel A. Lindgren on August 7, 1987. An original notice issued. The original notice was not personally served on Daniel. Jurisdiction was obtained over Daniel when on August 11, 1987, there was filed with the clerk of court a document captioned Acceptance of Service of Original Notice and Entry of Appearance. Daniel in the document acknowledged receipt of the original notice. He entered a voluntary appearance and consent to the full and complete jurisdiction of the court both over the subject matter and his person. He further consented the cause could be heard and determined by the court. The document was witnessed by an employee of Susan's attorney.

On December 16, 1987, the court entered an order for temporary child support.

On January 29, 1988, an order was entered setting the dissolution for trial on April 13, 1988 at 9:00 a.m. The same order set a pretrial conference for March 23 at 2:00

p.m. The notice showed a copy went to Susan's attorney. Despite his appearance, no copy went to Daniel. No one else is shown served.

On April 6, 1988, a decree of dissolution was entered. Daniel was not notified of the hearing. In the decree the court found Daniel was served with sufficient original notice and was not represented and did not appear. The court made no finding Daniel was in default.

On April 11, 1988, Daniel filed a motion to set aside the default. He contended at all times he intended to defend, he was in contact with Susan's attorney about the trial date, he had a defense and the finding in the decree as to his income was not accurate. The motion was resisted by Susan. Daniel's motion included the following statement with which Susan in her resistance agreed:

> 2. On January 29, 1988, a trial was set by order of this court for April 13, 1988. The petitioner and the respondent discussed the trial date and the respondent told the petitioner that he intended to be present at the time of trial. The petitioner confirmed the fact to the respondent that trial would be held on April 13, 1988.
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> 3. On the evening of April 6, 1988, the petitioner advised the respondent that she had obtained a decree earlier that day. She told the respondent that it was a complete surprise to her that her appearance on the morning of the 6th of April was for the purpose of proving up the allegations of her petition and obtaining a decree.

It was also undisputed Daniel had at least two contacts with Susan's attorney. The only factual dispute was whether Daniel had more than two contacts with Susan's attorney. The trial court made no factual findings;

consequently this factual dispute was not resolved in the trial court. Because of our holding, a remand on this factual issue is not necessary. We consider only the two contacts.

The trial court determined after reviewing the file Daniel's failure to defend could not be founded on mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. It denied Daniel's motion.

Iowa Rule of Civil Procedure 236 provides for setting aside defaults as follows:

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation. (emphasis added).

Daniel's motion was filed well within the sixty-day period, it was timely filed.

A proceeding under rule 236 is at law. Flexsteel Industries, Inc. v. Morbern Industries Ltd., 239 N.W.2d 593, 596 (Iowa 1976). A trial court has wide discretion in making its ruling. The burden is on the movant to plead and prove good cause to set aside the default or judgment thereon. Good cause is shown only if one of the grounds in the rule is proved. Sher v. Burche, 335 N.W.2d 859, 862 (Iowa App. 1984). We will not interfere with a trial court's order in the absence of a showing of abuse of

discretion. Insurance Co. of North America v. Sperry & Hutchinson Co., 168 N.W.2d 753, 756 (Iowa 1969).

A "good cause" is a sound, effective, and truthful reason. It is something more than an excuse, a plea, apology, extenuation, or some justification, for the resulting effect. It also requires "at least a claimed defense asserted in good faith." Hobbs v. Martin Marietta Co., 257 Iowa 124, 128, 131 N.W.2d 772, 775 (1964); Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953).

Neglect as used in rule 236 has been defined as "omission of proper attention; disregard of duty, from indifference or willfulness; failure to do, use, or heed anything; negligence." Booth v. Central States Mutual Insurance Association, 235 Iowa 5, 9, 15 N.W.2d 893, 895 (1944). Precedents are of little aid in proceedings of this kind in the determination of a particular appeal as there is much difference in the facts in the various cases. The facts in each case must rule its decision. Svoboda v. Svoboda, 245 Iowa at 118, 60 N.W.2d at 863. We determine the default should be set aside.

Because there were no findings of fact made by the trial court, the question is one of law and this court is not bound by the determination of the trial court. Hobbs v. Martin Marietta Co., 257 Iowa at 130, 131 N.W.2d at 776.

We look to the undisputed evidence that Susan and Daniel both anticipated Daniel would have his day in court

to challenge the financial issues of the dissolution and he would hire a lawyer when that time came.

Susan did not go to the court house on April 6 for the purpose of obtaining a default dissolution. She was surprised by what happened. Susan and her attorney had a misunderstanding about the course the proceeding would take. Daniel, who was not then represented by an attorney, also had a misunderstanding about the course the proceeding would take. He too was surprised when a final decree was entered.

The courts of this state have frequently said a nonlawyer who fails to utilize professional assistance must be ready to take the consequences. State v. Walker, 236 N.W.2d 292, 295 (Iowa 1975); Simmons v. Brenton Nat. Bank of Perry, 390 N.W.2d 143, 145 (Iowa App. 1986).

Susan had understood there was to be a hearing and had communicated that fact to Daniel. Daniel was in contact with Susan's attorney and Susan's attorney was not advised he would be defaulted. Susan's attorney obtained Daniel's acceptance of service and waiver of jurisdiction and appearance without clearly representing to Daniel he was not giving him legal advice and Daniel should seek independent advice.

We note too, Daniel had accepted service and he had appeared. He had filed no answer. The status of an appearance alone is addressed by Iowa Rule of Civil Procedure 87, which provides:

> The court shall have no power to treat an appearance as sufficient to delay or prevent a default or any other order which would be made in absence thereof, or of timely pleading. Notice and opportunity to respond to any motion for judgment under R.C.P. 232(b) shall be given to any party who has appeared.

Iowa R. Civ. P. 230 provides a party is in default when among other things:

> . . . has appeared, without thereafter serving any motion or pleading as stated in R.C.P. 87 . . . .

R.C.P. 232(b) provides in all cases where a judgment rendered is not for a sum certain, or which by computation can be made certain:

> . . . the court on motion of the prevailing party, shall order the judgment to which he is entitled, and the clerk shall enter the judgment so entered. . .

A dissolution decree is not a decree for a sum certain. Daniel has appeared. He did not receive notice and did not have an opportunity to respond before a decree was entered. Because a trial on the merits is favored, a liberal approach should be taken in granting relief from a default judgment. First Nat. Bank in Lenox v. Claiser, 308 N.W.2d 1, 3 (Iowa 1981). It is better to allow determination of a controversy on its merits rather than on the basis of nonprejudicial inadvertance or mistake. See Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977); Hannan v. Bowles Watch Band Co., 180 N.W.2d 221, 222 (Iowa 1980).

We determine the undisputed facts show mistake on Daniel's part and excusable neglect. Daniel has shown he

has grounds to challenge the economic provisions in the decree. We reverse. We set aside the decree and remand for trial on the merits.

REVERSED AND REMANDED.