

IN THE COURT OF APPEALS OF IOWA

FILEDIN RE THE MARRIAGE OF LARRY E. LACEY AND JEANNETTE LUCILE LACEY
AUG 29 1985Upon the Petition of
LARRY E. LACEY,

)

Petitioner-Appellant,

)

And Concerning
JEANNETTE LUCILE LACEY,

)

Respondent-Appellant,

)

CLERK SUPREME COURT

Filed August 29, 1985

5-38984-1758

Appeal from the Iowa District Court for Jefferson County - James D. Jenkins, Judge.

Petitioner appeals from trial court's denial of his motion to set aside a default decree. AFFIRMED.

Gregory J. Epping and Richard D. Raymon, Cedar Rapids, for petitioner-appellant.

Robert J. Baudino, Jr., and Barbara A. Buhr, of Neiman, Neiman, Stone & Spellman, Des Moines, for respondent-appellee.

Considered by Oxberger, C.J., and Snell, and Sackett, JJ.

The marriage of Larry and Jeannette Lacey was dissolved in 1981. On May 24, 1984, Jeannette filed a petition to modify the decree and an application for order to show cause why Larry should not be held in contempt for failure to comply with the decree. The district court entered an order to show cause and scheduled a hearing on the application for order to show cause for June 11, 1984. The contempt action alleged Larry had failed to pay ordered support and provide ordered medical insurance. The modification sought to continue support past high school if the children remained students and to require Larry to contribute to post-high school education expenses. On May 31, 1984, Larry was served with a rule to show cause. At the same time the deputy sheriff of Linn County served him with an original notice of the modification proceeding. Larry appeared pro se at the contempt hearing. He failed, however, to appear or respond to the modification petition.

On August 27, 1984, Jeannette filed a Motion for Default on the modification action claiming Larry had been served on May 31, 1984, and had failed to appear. The motion was granted and a decree modifying the original decree was entered on August 27, 1984.

On September 5, 1984, Larry, through an attorney, filed an application for rehearing on the modification and stated he did not have notice nor did he understand an application for modification was pending. He argued that he should have had notice of the motion for default. On September 14, 1984, Larry filed a motion to set aside the default claiming he was not properly served with notice of the modification and the court was without jurisdiction. He also claimed his default was the result of mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty.

At the hearing Larry contended he was seeking to have the default set aside under Iowa Rule of Civil Procedure 236. Larry appeared at the hearing and testified he was served with papers. When asked what papers he was served with he answered:

Well, I just took it in the house, and I read it. And it was just a deal on the child support and wanting more money for child support and school for the kids.

Larry's girlfriend, who presently lives with Larry, testified she was present when the papers were served and she read all the papers after they were served.

The trial court determined Larry was served with a notice of the modification hearing and that Larry failed to prove he had a meritorious defense. The court failed to find good cause for Larry's failure to appear and refused to set aside the default. Larry appeals contending the court erred in finding that he had been served with notice of the petition to modify and the trial court abused its discretion in overruling Larry's motion to set aside default.

I. Service

The court determined the notice was served on Larry on May 31 at 2:45 p.m. per return of the deputy sheriff of Linn County.

The return of the sheriff upon the original notice is presumptively correct and is not to be impeached except upon clear and satisfactory proof. Heater v. Bagan, 206 Iowa 1298, 1306-07, 221 N.W. 932, 934 (1928). The return is not conclusive, but is strong evidence of the facts as to which the law requires the officer to certify. Thompson Bros. v. Phillips, 198 Iowa 1064, 1066, 200 N.W. 727, 728 (1924). The presumption should ordinarily be upheld, unless contradicted by clear and satisfactory proof. Id. A deputy sheriff, not being known to the court, and being deemed to act not for himself but for the sheriff, should sign a return in the name of the sheriff, by himself as deputy or should designate the sheriff for whom he purported to act. Id.

There is insufficient evidence in this record to contradict the service. Neither Larry nor his girlfriend offered any positive testimony that Larry was not served. The trial court's determination that Larry was served is affirmed.

II. Refusal to Vacate

Larry contends the trial court abused its discretion in overruling the motion to set aside the default. He makes two arguments. First, that there was no evidence in the record to support the modification. This argument is raised for the first time in the appellate court. See Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). Error was not preserved.

Secondly, Larry claims the court erred in finding that Larry's reason for wanting to set aside the default was he did not understand the legal importance of the papers served on him. Larry's apparent sole contention was that he never received the notice of suit. The trial court determined Larry was served and we have affirmed this determination. We agree with the trial court that Larry's application and motion seek relief in the alternative. The trial court did not abuse its discretion in ruling on the issue.

AFFIRMED.