IN THE COURT OF APPEALS OF IOWA

No. 8-291 / 97-1464

IN RE THE MARRIAGE OF JONATHAN CUTLER AND TERE P. CUTLER

FILED
AUG 28 1998
CLERK SUPREME COURT

Upon the Petition of
JONATHAN CUTLER,

Petitioner-Appellant\Cross-Appellee,

And Concerning
TERE P. CUTLER,

Respondent-Appellee\Cross-Appellant.

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

The respondent appeals, and petitioner cross-appeals, from a district court ruling there was clear and convincing evidence the parties decree was obtained by such irregularity as requiring a new trial. **AFFIRMED.**

J.W. McGrath of McGrath & McGrath, P.C., Keosauqua, and Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines, for appellant.

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, L.L.P., Ottumwa, for appellee.

Heard by Cady, C.J., Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

CADY, C.J.

Jonathan Cutler appeals and Tere Cutler cross-appeals the district court ruling determining there was clear and convincing evidence the parties' dissolution decree was obtained by irregularity pursuant to Iowa Rule of Civil Procedure 252(b). Jonathan claims the district court erred by concluding there were irregularities in the dissolution proceeding warranting a new trial. On cross-appeal Tere contends the district court erred by failing to find the decree was obtained through fraud. We affirm the decision of the district court.

Jonathan and Tere married in December 1984. They had one child, Mollie, born February 7, 1991. The parties dissolved their marriage of approximately ten years on October 6, 1995.

Jonathan is a doctor specializing in ophthalmology. He has a primary practice as well as several satellite offices. Tere has a high school education.

Jonathan and Tere contacted family friend and attorney, Kenneth Ketterhagen, after deciding to dissolve their marriage. The parties initially decided they wanted Ketterhagen to represent them both. Ketterhagen explained, however, he could only represent Jonathan. Ketterhagen and Jonathan participated in various business dealings together, including loans of up to $6,000 from Jonathan to Ketterhagen.

Prior to meeting with Ketterhagen, the parties reached an agreement concerning most of the financial aspects of the dissolution. Under the agreement, Tere received a life-long alimony award in the amount of $2773 per month. She also

received a $250,000 property settlement, including a fully paid home and vehicle. She later requested and received horses and equipment valued at $46,400 and a note worth $41,986. Jonathan received primary physical care of Mollie under the agreement. Tere agreed to pay Jonathan $50 per month in child support.

Despite advice to the contrary, Tere considered Ketterhagen her attorney. Prior to a meeting held to finalize the agreement, Ketterhagen contacted Stephen Small, an attorney, to represent Tere at the stipulation. After Tere met with Small, the parties signed the agreement.

Prior to the entry of the dissolution decree, Ketterhagen asked the district court to waive the filing of financial affidavits. The district court did not require the filing of financial affidavits and stated in the decree good cause existed for the waiver. Also, while the stipulated decree stated Tere would pay only fifty dollars per month in child support due to the parties' earning capacities, the district court did not provide a more specific written explanation for the deviation from the child support guidelines. The stipulated decree was signed and approved by the trial court.

Tere later discovered correspondence concerning a proposed sale of Jonathan's practice following the entry of the decree. She became concerned she lacked full information concerning the parties' assets and the terms of the decree. Consequently, she filed a petition to vacate the decree based on fraud. The trial court determined fraud had not been proven, but sufficient irregularities existed to vacate the decree.

On appeal Jonathan maintains the district court erred by concluding irregularities existed warranting a new trial. On cross appeal Tere claims the district court erred by failing to determine the decree was obtained through fraud.

We review appeals from judgments rendered on a rule 252 petition at law. *See In re Marriage of Butterfield,* 500 N.W.2d 95, 97 (Iowa App. 1993). The district court has wide discretion in determining whether to vacate an order pursuant to rule 252. *See In re Adoption of B.J.H.,* 564 N.W.2d 387, 390-91 (Iowa 1997). We will not reverse the decision of the trial court unless an abuse of discretion has been shown. *Id.* The fact findings of the trial court are binding on us if substantial evidence exists to support them. *Butterfield,* 500 N.W.2d at 97. Additionally, we can affirm the trial court on any basis appearing in the record and urged by the prevailing party. *In re Estate of Voss,* 553 N.W.2d 878, 879 n.1 (Iowa 1996).

Iowa Rule of Civil Procedure 252(b) allows a judgment to be vacated for irregularity in obtaining it. *Forsmark v. State,* 349 N.W.2d 763, 766 (Iowa 1984). Generally, an irregularity includes:

> 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 unseasonable time or improper manner.

Id. at 767 (quoting Black's Law Dictionary 744 (rev. 5th ed. 1979)). An irregularity includes cases where a party suffers an adverse ruling based on some

action or inaction on the part of the court. *Costello v. McFadden,* 553 N.W.2d 607, 612 (Iowa 1996). The action or inaction must also be contrary to some prescribed rule, mode of procedure, or court practice. *Id.*

The trial court found an irregularity based upon the totality of the circumstances resulting in the entry of the decree, including instances of apparent dual representation by Ketterhagen, the underlying personal circumstances of Tere supporting her need for separate counsel, and the financial ties between Ketterhagen and Jonathan. These circumstances, however, solely concerned the conduct of the parties and counsel. Although questionable, they did not relate to the court, its personnel, or the conduct of the litigation. *See Costello*, 553 N.W.2d at 612. Consequently, they cannot support a finding of an irregularity for purposes of rule 252(b).

Notwithstanding, Tere points to other evidence in the record which would support a finding of an irregularity. This evidence includes the waiver of the financial affidavits by the trial court, deviation by the court from the uniform child support guidelines without written findings, and the oral agreement between the parties for the reimbursement of the court-ordered child support. We consider each specific claim.

Generally, parties to a dissolution of marriage proceeding must disclose their financial status prior to the dissolution hearing. Iowa Code § 598.13 (1997); *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). This requirement, however,

may be waived by the parties with the approval of the court. Iowa Code § 598.13. In this case, the parties requested to waive the filing of the financial affidavits and the trial court approved of the waiver in the written decree. Consequently, the trial court did not disregard the proper procedure in dealing with the request, and no irregularity under rule 252(b) occurred. *See Butterfield*, 500 N.W.2d at 98 (failure of parties to file financial affidavits did not constitute an irregularity to justify setting aside the decree for dissolution of marriage).

On the other hand, trial courts are not permitted to deviate from the child support guidelines without making written findings that the application of the guidelines would be unjust or inappropriate. *See In re Marriage of Thede*, 568 N.W.2d 59, 61 (Iowa App. 1997). In this case, the trial court was informed that the stipulated amount of child support deviated from the guidelines, but no written findings were made supporting the departure from the guidelines. The proper procedure mandated the court to make specific findings. Nevertheless, this irregularity does not necessarily require the decree to be set aside.

Before an irregularity can serve to set aside a decree, the court's action or inaction must work to the prejudice of the movant. *See Costello*, 553 N.W.2d at 612 (rule 252(b) covers cases where a party suffers an adverse ruling because of the actions or inactions of the court); *Forsmark*, 349 N.W.2d at 767 (irregularity deprived the plaintiff of an opportunity to file a motion for recusal). Here, the specific irregularity at issue did not result in any court ruling adverse to Tere. There is no

dispute over the amount of child support. Tere only claims the property settlement was not equitable. Thus, the irregularity by the court did not impact the property settlement.

Furthermore, a party seeking relief under rule 252(b) must not have counsel, been a party to or had prior knowledge of the breach of the irregularity. *Costello*, 553 N.W.2d at 612. In this case, the parties stipulated to the amount of child support and submitted the stipulation to the court without financial affidavits. They acknowledged the guidelines were not used to reach the stipulated amount. Under these circumstances, they were involved in the irregularity.

Consequently, the undisclosed agreement between Jonathan and Tere does not constitute an irregularity. It did not involve the actions of the court.

The circumstances surrounding the dissolution, however, are properly considered in the context of fraud. Iowa R. Civ. P. 252(b). In this case the district court found the conduct did not rise to the level of fraud.

We may vacate a judgment pursuant to Rule 252(b) if "fraud was practiced in obtaining" it. *B.J.H,* 564 N.W.2d at 391. While fraud may be either extrinsic or intrinsic, fraud sufficient to vacate a judgment under rule 252(b) must be extrinsic to the judgment. *Id.* Extrinsic fraud includes an act or conduct of the prevailing party which has prevented a fair submission of the controversy as well as conduct which lulls a party into a false sense of security or prevents the party from making a defense. *Costello,* 553 N.W.2d at 612.

The record indicates Jonathan and Ketterhagen intentionally misled Tere into accepting terms in the decree without a full financial disclosure and adequate representation. First, we consider Tere's legal representation. Ketterhagen and Jonathan clearly had past and current business dealings together. While Ketterhagen initially informed Tere he could not represent both parties, he continued to negotiate the stipulation and advised her the settlement was "pretty good." Further, Ketterhagen selected an attorney to represent her at the stipulation. The circumstances leading to the stipulation were not disclosed to this attorney, and his main function was to ensure Tere understood the terms of the stipulation already drafted by Ketterhagen. In light of Jonathan and Ketterhagen's business dealings, we find the record supports Tere's claim that Jonathan and Ketterhagen lulled her into a false sense of security concerning the terms of the decree and prevented the fair submission of the controversy to the district court.

Secondly, we are concerned about the inadequate financial disclosure. After the entry of the decree, Tere discovered papers concerning an offer to purchase Jonathan's business. The financial information she relied upon during the dissolution negotiations came from Ketterhagen and Jonathan. Considering Tere's lack of adequate representation and the questionable nature of the financial information provided to her, we find the record supports a finding of extrinsic fraud pursuant to rule 252(b).

We have considered all of the claims of each party. We conclude the district court was correct to vacate the judgment and order a new trial, but did so for the wrong reason. The evidence did not support a finding of an irregularity, but did support a finding of fraud. Considering all the evidence, it was an abuse of discretion for the district court to fail to find sufficient evidence of fraud to vacate the judgment. Jonathan's conduct lulled Tere into a false sense of security, and prevented her from mounting a defense.

AFFIRMED.