FILED
JAN 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DAVID R. KINGERY AND DEBORAH L. KINGERY

Upon the Petition of)
DAVID R. KINGERY,) 48
Petitioner-Appellee,) Filed January 26, 1982
And Concerning)
DEBORAH L. KINGERY,) 1-420
3-66595
Respondent-Appellant.)

Appeal from Marion District Court - Thomas S. Bown, Judge.

Respondent wife appeals from the decree dissolving the parties' marriage asserting: (1) that she was not personally served with the original notice; and (2) that under Iowa R. Civ. P. 234, service by publication and mailing was insufficient to enable the trial court to enter a default dissolution decree after respondent failed to appear. AFFIRMED.

Fred J. Kreykes, Pella, for respondent-appellant.

John M. Wharton of Peddicord, Simpson & Sutphin, Des Moines, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Respondent wife appeals from the decree dissolving the parties' marriage asserting: (1) that she was not personally served with the original notice; and (2) that under Iowa R. Civ. P. 234, service by publication and mailing was insufficient to enable the trial court to enter a default dissolution decree after respondent failed to appear. We affirm.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7).

I.

The parties were married in 1972 and have one child, Darrel, born in 1974. In April 1980, after the parties began having marital problems, respondent moved out of the family home and took Darrel with her. Respondent had previously filed dissolution actions, but never pursued them beyond filing. In May of 1980, petitioner concluded that there was no reasonable hope of maintaining the marriage and he told respondent that he had decided to file for dissolution. The petition was filed on May 14, 1980, and on the same day the trial court issued a temporary injunction prohibiting respondent from taking Darrel out of the state. On May 15, 1980, before she could be served with original notice and the injunction, respondent and Darrel left the state to live with her parents in Orinda, California. After it was determined that respondent could not be personally served in Iowa, service was made by mailing and publication. The original notice was mailed to respondent at "30 Descanso Drive, Olinda, California" (emphasis

added) on July 7, 1980, and published in the Knoxville Journal in Marion County, Iowa, on July 14, 21, and 28, 1980. An affidavit of mailing and a proof of publication were filed.

Respondent retained a California attorney and on August 18, 1980, commenced an action in California to seek custody of Darrel and improperly alleged that Darrel had lived in California for the past five years. Petitioner obtained a California attorney in a timely manner and contested the California custody action. The California court, in a decision filed on January 16, 1980, found that Darrel's home state was Iowa and declined to exercise jurisdiction under California's Uniform Child Custody Jurisdiction Act.

On November 12, 1980, petitioner filed a proof of service indicating that the original notice had been personally served on respondent at "30 Descanco, Orinda, California" (emphasis added) on October 18, 1980. On January 23, 1981, petitioner filed an affidavit of mailing and service indicating that notice of the trial date had been mailed to respondent at the Descanso Drive address on January 2, 1981, and delivered to respondent's father at his home at the Descanso Drive address on January 7, 1981. Respondent denied receiving either notice and asserts that she moved away from the Descanso Drive address on January 5, 1981.

Trial was held on January 29, 1981. Respondent did not appear either personally or by counsel. The trial court's findings of fact, conclusions of law, and default dissolution decree were filed at the conclusion of the trial. Petitioner was awarded custody of Darrel and respondent was allowed reasonable visitation.

On February 2, 1981, respondent's present Iowa counsel entered a written appearance and filed a motion to reconsider the custody award asserting: that she had been unable to return to Iowa for the trial, and that despite numerous attempts she had been unable to retain Iowa counsel to represent her until January 30, 1981, the day after the trial. Respondent requested that the trial

court set aside the decree and reschedule the matter for trial. Petitioner resisted respondent's motion, and a hearing was held on March 13, 1981.

On March 17, 1981, the trial court denied respondent's motion to reconsider for the following reasons: (1) respondent had been personally served with original notice on October 18, 1980, in addition to being served earlier by mailing and publication; (2) respondent had been notified on January 7, 1981, of the January 29 trial date; (3) respondent's California attorney should have been able to anticipate the California court's January 16, 1981, decision; and (4) respondent had refused to obey the trial court's orders and process. Respondent filed notice of appeal on April 11, 1981.

II.

Respondent asserts on appeal that: (1) the trial court lacked personal jurisdiction over her because she was not personally served with original notice; (2) the service by publication and mailing was defective because respondent's street address was misspelled and the zip code was omitted; and (3) that even if notice by publication and mailing was not defective, it was insufficient under Iowa R. Civ. P. 234 to enable the trial court to enter a default dissolution decree after respondent failed to appear. These issues are not dispositive.

As previously stated, this court has a responsibility to review both the facts and law on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d at 156. The parties' dissolution decree was entered on January 29, 1981. Respondent filed her motion to reconsider on February 2, 1981, in which she did not specifically assert that trial court lacked personal jurisdiction. We find that respondent's February 2 motion was not equivalent to a motion for a new trial or a motion pursuant to Iowa R. Civ. P. 179(b); therefore, respondent's appeal filed on April 11, 1981, was untimely. See Iowa R. App. P. 5(a). Furthermore, even if respondent's appeal could be considered timely, her appeal would still fail. While

it is true that subject matter jurisdiction cannot be waived or conferred by consent, this is not the case with personal jurisdiction. Objections to personal jurisdiction will be deemed waived unless raised at the first opportunity or in due or reasonable time. In re Marriage of Ivins, 308 N.W.2d 75, 77 (Iowa 1981).

Respondent's failure to raise her objections to personal jurisdiction at the first opportunity available is understandable when the record is examined as a whole. Our de novo review of the record depicts a nearly classic case of an individual who purposely attempted to avoid the process and orders of the trial court. Respondent left Iowa with the parties' son the day after the petition for dissolution was filed and an injunction was issued. The trial court found that respondent was personally served on October 18, 1981, at her California residence. This finding is supported by a proof of service which was properly filed. She claims technical defects in the notice by publication and mailing. Respondent falsely asserted the child had lived only in California for 5 years prior to her institution of a dissolution and child custody action in that state. Respondent claims to have moved away from her parents' home 2 days prior to service of notice that the final Iowa hearing would be on January 29, 1981. Respondent then argues that she failed to appear or be represented at that hearing due to a lack of communication between her California and Iowa attorneys. The record indicates that both respondent and her California attorney knew that the Iowa action was pending and being properly pursued at least from the date of October 18, 1981, when respondent was given personal service of original notice, and yet she has a convenient excuse at nearly every significant juncture to claim the court lacked jurisdiction. Armed with this knowledge, at the latest, respondent's challenge to the court's jurisdiction should have been specifically raised in her February 2, 1981, motion to reconsider. A special appearance prior to this date would have been even more appropriate. We find she has waived her rights to assert lack of

personal jurisdiction by failing to contest this issue at the first opportunity. Id.

In conclusion, we affirm the trial court for two reasons. Respondent's appeal was untimely, and she waived her right to assert that the trial court lacked personal jurisdiction.

AFFIRMED.