

FILED

AUG 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DAVID HOPP AND SHARON HOPP

298

Upon the Petition of)

DAVID HOPP,)

Petitioner-Appellant,)

Filed August 26, 1982

And Concerning)

SHARON HOPP,)

Respondent-Appellee.)

2-154
2-66911

Appeal from Mills District Court - Keith E. Burgett, Judge.

Petitioner husband, David Hopp, appeals from the lower court's ruling to vacate the property division provisions of the parties' January 1980 divorce decree on the ground that it had been obtained by irregularity and fraud. Petitioner contends there is insufficient evidence of extrinsic fraud to support this ruling. REVERSED.

John M. Peters of The Peters Law Firm, P.C., Council Bluffs, for petitioner-appellant.

Robert J. Laubenthal of Smith, Peterson, Beckman & Willson, Council Bluffs, for respondent-appellee.

Heard en banc.

Petitioner husband, David Hopp, appeals from the lower court's ruling to vacate the property division provisions of the parties' January 1980 divorce decree on the ground that it had been obtained by irregularity and fraud. The respondent wife, Sharon Hopp, filed the petition to vacate or modify the decree pursuant to Iowa R. Civ. P. 252 alleging that David had taken unfair advantage of her emotional distress and fear of losing custody of their children to secure a stipulation concerning child custody, support, property division and other matters of the marriage. The stipulation was incorporated in the final decree. Among other things Sharon claimed, and the court so found, that as a result of the fraud and irregularity she was unable to demand a fair share of the marital property. The trial court set aside the property division and ordered a hearing to determine an equitable division of the property. The court did not vacate or modify any other aspect of the final decree. David Hopp appeals from this ruling and order alleging insufficient evidence in the record to support a finding of irregularity and extrinsic fraud. We agree and reverse accordingly.

A petition to vacate or modify a judgment under Iowa R. Civ. P. 252 is an ordinary action to the court and our review is on assigned errors and is not triable de novo. Mishler v. Stouwie, 301 N.W.2d 744, 747 (Iowa 1981). The trial court's findings of fact have the effect of a jury verdict and are binding on us if there is substantial evidence in the record to support them. Id. While the trial court has considerable discretion in deciding whether to afford relief, its decision is not final or conclusive since support in the record is required. Cook v. Cook, 259 Iowa 825, 830, 146 N.W.2d 273, 275 (1966). When support is lacking we will find the court abused its discretion, although we are more inclined to find an abuse of discretion when relief from the judgment has not been granted than when it has been. Kreft v. Fisher Aviation Inc., 264 N.W.2d 297, 303 (Iowa 1978).

I.

300

The parties, David and Sharon Hopp, were married in 1964 and had two children before experiencing marital problems in the summer of 1979. In September 1979, Sharon began having an affair with another man. On October 22, 1979, she told David about the affair and informed him that she wanted a divorce. David was very upset and persuaded Sharon to call her place of employment and take a leave of absence so they could attempt to work things out. The following day, October 23, 1979, the couple sought marriage counseling and were referred to a psychiatrist in Council Bluffs. Sharon testified that the counseling made her feel more guilty and more ashamed about her affair. She felt as though the psychiatrist was siding with David since he told her that David was a good father and husband. After a few more counseling sessions, the doctor recommended that Sharon enter the hospital in order to get away from the home environment so she could come to terms with her feelings. Toward the end of November, David told Sharon that he wanted her to check out of the hospital because he felt it wasn't helping her to make a decision about the man with whom she was having an affair. Without the doctor's permission, Sharon checked out of the hospital and returned to the couple's home for Thanksgiving. While part of that holiday weekend went smoothly, the parties fought on one occasion and David talked about Sharon's affair, saying he might kill himself. This made Sharon especially upset since David had attempted suicide earlier in their marriage when he had a drinking problem. David no longer had a drinking problem when their marital difficulties arose.

David filed for dissolution on December 6, 1979. Thereafter, Sharon retained a Council Bluffs attorney to represent her in the dissolution proceeding. He filed an answer on her behalf placing custody, support and property division in issue. During this time, Sharon stayed with her parents but spent the Christmas holiday

with David and the children at their farm home. After Christmas, Sharon moved to an apartment. The children, however, remained in the marital residence pursuant to an ex parte court order granting David's application to keep them with him in the family home during the pendency of the dissolution action. Sharon was upset when she learned of the temporary order because she thought it may indicate who would be awarded custody if the case went to trial.

The parties had informally discussed how the farm property would be divided and who would get custody. David told Sharon that a lump sum property settlement would be very fair to her. He repeatedly told her that he did not want her to take the farm from him; that if she would let him have the farm, she could have custody of the children. Sharon's main concern was that she get custody. She was afraid that if she went to court she wouldn't get custody because of her extra-marital affair and because the children were temporarily ordered to remain in the family home with David.

Sharon expressed these concerns to her attorney and told him about David's threat to kill himself. Her attorney appraised Sharon of her legal rights and told her not to worry about what he considered idle threats. He explained to her that in many dissolutions, the property is divided equally and that the court would look to the childrens' best interest in awarding custody. He further explained to her that, with reference to the settlement terms the parties had informally discussed, she may be able to get more if she went to court but that there was a chance that the court would not award custody of the children to her. He recommended that Sharon secure an appraisal of the real estate because he doubted the accuracy of the property valuations contained in David's financial statement.

Nevertheless, Sharon did not have the property appraised and, even though she had inspected David's financial statement setting forth the assets and their value, she never complained of its content. Her attorney told her that she could

file a financial statement of her own but she never authorized him to do so.

Testifying at trial, Sharon's attorney indicated that he had had several conversations with her in December and January. Her attorney's impression was that Sharon didn't want to be exposed to even the slightest risk of losing custody of the children; custody was "priceless" to her. He indicated that Sharon sought to have the mandatory 90-day waiting period reduced or waived as well.

These desires were incorporated into a letter addressed to David's attorney setting forth the proposed settlement terms. The main provisions of the settlement agreement were that Sharon would receive full custody of the children with David having visitation rights; David would pay \$250 per month per child in child support; Sharon would receive no alimony; Sharon would receive a \$50,000 lump sum property settlement, a motorcycle and an automobile; and David would receive the farm of 240 acres, approximately \$48,000 in savings, farm equipment and crops, an automobile and other personal property. David would pay \$600 in Sharon's attorney fees; and both parties would attempt to waive the 90-day waiting period. In the letter, addressed to David's attorney, Sharon's attorney indicated in strong terms that he believed the proposed settlement terms to be unfair to Sharon. He expressed his doubts about the accuracy of the appraisal of the parties' assets and his belief that Sharon was making a substantial compromise in waiving a claim for alimony. In the last paragraph of the letter, Sharon's attorney noted that Sharon had authorized him to make the proposal despite his own personal reservations.

A copy of the letter was sent to Sharon before it was sent to David's attorney. Her attorney wanted her to look it over and decide if that is what she wanted before he sent it. Sharon met with her attorney to discuss the letter and to determine whether it should be sent. After she authorized her attorney to send the letter, a stipulation was drawn up incorporating all of the proposals that were

set forth therein. Again, Sharon met with her attorney to decide whether she should sign the agreement. During these discussions he, once more, fully advised her of her right to present the matter to a court. He discussed all of the provisions in the stipulation with her and testified that she expressed no confusion as to the contents. She signed the stipulation on January 22, 1980, but at no time did she indicate that she was signing because of any fear other than that associated with her concern for securing custody of the children.

The dissolution was finalized soon after the stipulation was signed by both parties. On January 22, David filed a motion to waive the ninety (90) day waiting period. The following day, Sharon filed a motion advising the court that she did not resist David's motion to waive the waiting period. On January 24, 1980, the stipulation was filed. The final decree of dissolution was entered on January 28, 1980, after Sharon had approved the decree incorporating the stipulation and had authorized her attorney to submit it to the court. At no time either before or after entry of the decree did Sharon indicate to her attorney or to David that she was confused about any of the terms of the decree. Indeed, her attorney testified to his belief that she fully understood the matters involved and made a rational choice as to what she wanted to do. Moreover, immediately after the decree was entered, Sharon received the benefits due her under the stipulation. No complaint was made by her until this petition to vacate or modify the decree was filed on August 25, 1980.

II.

David's first contention on appeal is that Sharon failed to meet the requirements set forth in Iowa R. Civ. P. 253 to maintain an action under Iowa R. Civ. P. 252(b) to vacate or modify the decree due to irregularity or fraud. Rule 253(a) requires the petitioner in an action to vacate to state the grounds for relief, and, if a new trial is sought, show that the grounds could not have been discovered in

time to proceed under R.C.P. 236 or 244, and were discovered afterwards.

Sharon's petition was amended to allege that her grounds for relief—fraud and irregularity—became known and understood by her only after the time for appeal or request for new trial under Rule 244 had passed. She further alleged that she could not have discovered these grounds within these time limits because of the duress and misunderstandings under which she had been functioning. David contends that Sharon did not demonstrate that her grounds were not known or could not have been discovered in time to proceed within 60 days following the final decree, and further, that the court made no factual finding or legal conclusion as to this matter.

The procedural posture of this case is important in analyzing this contention. After Sharon filed her petition, David moved the court to dismiss the case or grant him summary judgment. He further requested the court to make a preliminary determination under Rule 253(d) to determine the validity of Sharon's grounds to vacate or modify the decree. Rule 253(d) provides that:

(d) Preliminary determination. The court may try and determine the validity of the grounds to vacate or modify a judgment or order before trying the validity of the cause of action or defense claimed. (Emphasis added).

Having granted this request, a hearing was set to determine whether Sharon presented valid grounds upon which to vacate or modify the decree. While this hearing was set to determine this issue before determining the validity of her Rule 252 cause of action, it appears as though both matters were resolved in the same proceeding. The court found as fact that the proceeding was pursuant to Rule 253(d); that proof of irregularity or fraud is a valid ground on which to vacate or modify the decree under Rule 252(b) when the party alleges extrinsic fraud in procurement of the final decree; and the party alleging such fraud has the burden of proving it by clear and convincing evidence. The court went on to hold as

conclusions of law that, from the evidence, Sharon proved that the decree was obtained through irregularity and extrinsic fraud and, therefore, was vacated as to the property division only, with a hearing to be set to determine a more equitable distribution. In effect, the court, in the action to preliminarily determine the validity of the grounds to vacate, decided the case on the merits; it determined the validity of the cause of action and vacated a portion of the decree. Necessarily implicit in this determination is the finding that the fraud and irregularity could not have been discovered by Sharon within 60 days, the time she had to appeal or move for a new trial. Because we find that on the merits there was insufficient evidence of fraud or irregularity in the procurement of the stipulation, we need not decide whether the implied finding that such fraud or irregularity could not have been discovered within the 60 days is supported by substantial evidence.

III.

The rule with respect to fraud is that it must be shown by clear and convincing proof and be extrinsic or collateral to the matter first tried in order to invalidate the decree. Stearns v. Stearns, 187 N.W.2d 733, 735 (Iowa 1971). Extrinsic fraud is some act or conduct of the prevailing party which has prevented a fair submission of the controversy. Cook v. Cook, 259 Iowa 825, 830, 146 N.W.2d 273, 276 (1966). This would include lulling the other party into a false sense of security or preventing her from presenting a defense to the action. Stearns, 187 N.W.2d at 735. On the other hand, proof of intrinsic fraud will not vitiate a judgment. Id. Intrinsic fraud is that which inheres in the issues submitted to and decided by the court during the course of the trial. Id. David contends that if there is any fraud at all, it is intrinsic rather than extrinsic fraud and will not suffice to vacate the decree.

In Melton v. Melton, 256 N.W.2d 200 (Iowa 1977), the wife claimed that her

husband had practiced fraud in procuring her signature to a stipulation giving him custody of their child. He had taken the child from the state and threatened that she wouldn't see the child again unless he was given custody. Nevertheless, the wife's attorney had prepared the stipulation and she admitted that she was not forced to sign it. On these facts, the court affirmed a finding that the fraud alleged (namely, duress in signing the stipulation) was intrinsic because it inhered in the issues submitted to and decided by the court when the decree was entered. Id. at 206.

In the present case, Sharon was not forced to sign the stipulation. Her attorney had originally submitted the settlement terms to David after explaining them fully to Sharon. She makes no claim that she was not fairly represented or that she was not appraised of her right to take the matter to trial. Moreover, her attorney told Sharon that he was dissatisfied with the terms that she was authorizing him to submit to David. He had her review the letter indicating his dissatisfaction before it was sent. This case is, therefore, quite unlike Cook v. Cook, 259 Iowa 825, 146 N.W.2d 273 (1966); and Stearns v. Stearns, 181 N.W.2d 733 (Iowa 1971) cited by the trial court in finding clear and convincing evidence of extrinsic fraud.

In Cook, the court found no irregularity or fraud where the wife claimed that because of her distressed emotional state, she was not adequately represented by counsel in the dissolution proceeding. The court found that even though the wife had been in and out of the hospital and was in a dazed condition, she had been properly represented by her attorney and fully advised of her rights. Id. at 278. There, as here, the wife did not offer any medical evidence as to her capacity to understand and conduct her affairs during the time pertinent to the dissolution proceedings. Id. at 277.

In Stearns, the court affirmed the trial court's findings that the foreign

dissolution decree obtained by her husband was not procured by extrinsic fraud. There, the wife claimed that when she was served with notice of the action her husband told her to forget about it; he started the action only to scare her into not drinking and, therefore, lulled her into believing that she did not need to defend. There was, however, testimony that the wife did have knowledge of the divorce proceeding and of the decree entered therein. In finding that the wife failed to carry her burden of proving extrinsic fraud on these facts, the court stressed that setting aside a judgment "is a step which should not be undertaken lightly." Stearns, 187 N.W.2d at 736.

A careful examination of the record in light of these authorities leads us to conclude that there is insufficient evidence to support a finding of extrinsic fraud. While Sharon may have been confused and anxious about the events which were taking place at the time of her marital difficulties and divorce, there is no evidence that she was lulled into a false sense of security which prevented her from presenting her case to the court. On the contrary, every effort was made to advise her of her right to do so. It is apparent from the record that because she was afraid of losing custody of her children, she forewent this opportunity. Under the stipulation she received that which was most important to her—her children. In addition, she took \$50,000 in a lump sum property settlement believing this sum to be fair and reasonable. She disregarded the advice of her lawyer that she should question the fairness of the \$50,000 lump sum and have the property appraised to determine its actual value. She presents no medical evidence and makes no claim that she was operating under any mental disability which would cause her to misunderstand the nature of his advice, the stipulation or its ramifications. We believe that this was an agreement freely entered and truly bargained for. She cannot take the benefits under the stipulation and then complain of its burdens, asking the court to vacate the decree as to these alone.

Accordingly, the decision of the trial court is reversed and the decree of dissolution is reinstated in full.

The parties are to be equally responsible for the costs of this appeal.

REVERSED.