IN THE COURT OF APPEALS OF IOWA

No. 2-028 / 91-638

FILED
JUL 30 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KATHY A. NEWCOMB AND RONALD M. NEWCOMB

Upon the Petition of
KATHY A. NEWCOMB,

Appellant,

And Concerning
RONALD M. NEWCOMB,

Appellee.

Appeal from the Iowa District Court for Shelby County, Keith E. Burgett, Judge.

The wife appeals a district court order denying her petition to vacate or modify the dissolution decree. **AFFIRMED.**

Robert Kohorst of Kohorst Law Firm, Harlan, for appellant.

Joseph C. Lauterbach of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

Kathy and Ronald Newcomb were married in May 1973. They had two children during the marriage and lived in Harlan, Iowa. The parties were divorced on January 16, 1990. The dissolution decree was entered into pursuant to a stipulation between the parties. Among other provisions dividing the parties' property, the decree awarded Ronald all antiques in his possession.

On June 11, 1990, Kathy filed a petition to vacate or modify the judgment under Iowa Rule of Civil Procedure 252. She alleged that Ronald had not disclosed the full extent of his assets in the original proceeding, and she asked for a new trial. The dispute apparently involves the value of the antiques awarded to Ronald. Kathy later voluntarily dismissed this motion.

On January 14, 1991, Kathy refiled her petition to vacate or modify. Kathy instructed the Shelby County Sheriff to serve notice on Ronald. A deputy attempted to serve Ronald on January 16, but Ronald was not home. Ronald was personally served on January 17.

Ronald filed a motion to dismiss on January 18, arguing that Kathy failed to come within the one-year time limitation found in rule 253 for bringing petitions pursuant to rule 252. The district court found that even if Kathy's petition had been timely, she failed to allege sufficient grounds to set aside the decree under rule 252. Kathy filed a motion pursuant to rule 179(b). The district

court then specifically found Kathy's petition was not timely. She now appeals.

I. Our scope of review in this equity case is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(7).

II. Kathy contends that Iowa Rule of Civil Procedure 55 should apply to the present action. That rule provides "the filing of a petition shall be deemed a commencement of the action" for purposes of determining whether the action was commenced within the time allowed by the applicable statute of limitations. Iowa R. Civ. P. 55. Thus, if rule 55 applied, the date of filing, January 14, 1991, would be the date used to calculate the commencement of the action.

However, the supreme court has previously determined a petition to vacate pursuant to rule 252 is not an original action. In re Marriage of Fairall, 403 N.W.2d 785, 787 (Iowa 1987). The court specifically found that rule 55 does not apply to toll the statute of limitations in an action pursuant to rule 252. Id. The court stated:

> We thus hold that to invoke the power of the district court to correct, vacate, or modify a final judgment or order through a rule 252 petition, the petition must be filed and the notice must be served within one year as required by rule 253(a) and (b).

Id. at 788.

We conclude Kathy was required to file her petition to vacate and serve notice on Ronald within one year after the decree of dissolution was filed on January 16, 1990. Because she did not serve Ronald until January 17, 1991, her petition did not come within the one-year service requirement of rule 253(b). We affirm the district court's dismissal of her petition as untimely.

III. Kathy also contends Division II of her petition sets forth a claim for general equitable relief. She relies on the case of Shaw v. Addison, 236 Iowa 720, 729, 18 N.W.2d 796, 801 (1945), which states:

> It has been the uniform holding of this court that where the petitioner has not in the exercise of proper diligence discovered the fraud or other grounds upon which he relies within the year after the entry of final judgment or decree, he may institute suit in equity invoking the equitable powers of the court to vacate the judgment or grant him a new trial, after the time fixed in the statute for so doing has passed.

The grounds alleged for equitable relief in such an action must be among those specified in rule 252. Id. A court of equity will not exercise its power to set aside a decree except upon a strong showing of equitable considerations. Ash v. Ash, 172 N.W.2d 801, 803 (Iowa 1969).

In Division II of her petition, Kathy alleges Ronald hid some assets. She asks that the decree be vacated because of "unfortunate misunderstandings of the Petitioner and because of the obvious errors in the wording of the Decree, and the newly discovered evidence set forth in Division I." The allegedly "newly discovered evidence" is

that Ronald paid $6000 down on a new house within two months after the decree was entered.

The district court found Kathy did not allege sufficient grounds to set aside the decree under rule 252 or general equitable principles. We agree. Kathy apparently only disputes the value of some assets awarded to Ronald. This cannot be considered "newly discovered evidence." Furthermore, as the court pointed out, Ronald was awarded more than $15,000 in antiques in the property settlement. Therefore, the fact that he could pay $6000 down on a house does not require the inference that he hid assets during the dissolution proceedings.

IV. Ronald asks for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We find each party should be responsible for his or her own attorney fees. Costs of this appeal are assessed to Kathy.

AFFIRMED.