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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHERIE C. WILSON AND CLARK E. WILSON

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Upon the Petition of)
CHERIE C. WILSON,)
Petitioner-Appellee,)
And Concerning)
CLARK E. WILSON,)
Respondent-Appellant.)

Filed November 29, 1982

2-299
2-67430

Appeal from Poweshiek District Court - James D. Jenkins, Judge.

Respondent-husband appeals from the economic provisions of the parties' dissolution decree, asserting (1) that a default judgment was not properly entered in the absence of a motion therefor; (2) that a default judgment should have been set aside for good cause shown or a new trial should have been granted; and (3) that the economic provisions of the decree were as a whole inequitable. AFFIRMED.

Bruce J. Nuzum of Matthias, Tyler, Nuzum & Feuerhelm, Newton, Iowa, for respondent-appellant.

Charles M. Manly III of the Manly Law Firm, Grinnell, Iowa, for petitioner-appellee.

Submitted en banc.

Respondent-husband, Clark E. Wilson, appeals from the economic provisions of the parties' dissolution decree. He asserts: (1) that a default judgment was not properly entered in the absence of a motion therefor; (2) that a default judgment should have been set aside for good cause shown or a new trial should have been granted; and (3) that economic provisions of the decree were as a whole inequitable. Respondent further asserts that this court may properly consider the trial court's summary of the evidence presented at the unreported trial, while petitioner-wife, Cherie C. Wilson, asserts that no consideration should be given to any such summary because the request for such a summary was untimely under various procedural rules. We affirm.

When respondent was properly served with the original notice and petition in this action, he filed an affidavit of financial status but no answer or other appearance. Judgment was entered following a trial at which he did not appear. Respondent then filed posttrial motions which requested that the decree be vacated or modified or that a new trial be granted. At a hearing on the posttrial motions, respondent testified that he thought that filing the affidavit of financial status was all that was required of him. The trial court overruled the motions.

The parties' affidavits of financial status lists gross monthly income of $510 for petitioner and $1,666.66 for respondent. The decree awarded each party various items of personalty. Respondent was made responsible for debts of $158.76, petitioner's attorney fees of $750, various medical and dental expenses of the children, and the continuing maintenance of insurance for them. Petitioner was awarded custody of the three minor children and child support of $50 per week per child, subject to an annual cost of living adjustment. She was also awarded alimony of $50 per week for a five-year period and substantially all of the approximately $11,000 in remaining proceeds from sale of the parties' home which was purchased in part with a $3,000 gift to the wife and a $1,400 loan from

her father. This loan remained substantially unpaid at the time of trial. Petitioner also received an inheritance of $2,000 sometime during the marriage, but the evidence does not show when these funds were received or the use made of them.

Trial was not recorded and respondent subsequently requested the trial court to prepare a summary of the evidence presented at trial. After notice of appeal was filed, the trial court did prepare such a summary but stated that it lacked jurisdiction to rule on the petitioner's objection that any request for such a summary was untimely under various procedural rules.

I. **Scope of Review.** Our review is **de novo.** Iowa R. App. P. 4.

II. **Default Judgment.** Respondent argues that petitioner is not entitled to a default judgment and in the alternative that the default judgment should be set aside or that the decree should be vacated and a new trial ordered. We disagree.

A. Notice. Respondent argues that a default judgment should not have been entered due to the lack of notice provided him regarding trial. Petitioner argues that respondent was not entitled to notice since he did not appear in the action.

This court finds the rationale of the court in In re Marriage of Thompson, 275 N.W.2d 406 (Iowa 1979), to be persuasive. In Thompson the court found that rule 120, which directs notice to be given to parties appearing, and rules 82(a) and (f), which "direct service on parties 'not in default for failure to appear.' " require a general appearance "to trigger the respective notice and service provisions." Id. at 409.

> We believe the purpose underlying both rules 120 and 82 is to assure parties participating in the case are provided notice of all judgments, orders or decrees and copies of all relevant court papers. Parties who have appeared only for a limited purpose and have not generally appeared, however, have not demonstrated that they are

> participating in the disposition of the case. In these circumstances, we do not believe the requirements of notice and service under rules 120 and 82 are applicable.

Id. The court in that case found participation in a temporary support hearing to be insufficient to be an appearance.

In the present controversy, respondent concedes that he was properly served with an original notice, with a copy of petitioner's dissolution petition attached, and a copy of petitioner's financial affidavit, all in proper form. He further concedes that he did not file any written special appearance, motion or answer until after petitioner "proved up" the dissolution decree and presented the decree to the trial court for approval. Respondent did, however, file a financial affidavit with the court and requests that we find this to be sufficient to warrant notice being given to him.

We find respondent's argument unpersuasive and conclude that respondent did not appear in the action. As a result, we find respondent was not entitled to notice.

B. Rule 236 Motion. Respondent argues that the default judgment should be set aside due to his failure to understand the proper procedure in filing an appearance and answer. We disagree.

Rule 236 provides that:

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the jdugment. Its filing shall not affect the finality of the judgment or impair its operation.

In reviewing a trial court's ruling on a rule 236 motion:

> A trial court is vested with broad discretion in ruling on a motion to set aside a default judgment. Such a ruling will be reversed on

> appeal only if this discretion is abused. Generally abuse will be found only where there is a lack of substantial evidence to support the trial court's ruling. We view the evidence in the light most favorable to the trial court's ruling and will uphold the same even where the trial court made no findings of fact or based its ruling upon a different ground. (Authorities cited).
>
> The burden is upon the movant to show good cause as to one of the grounds stated in rule 236. [R.Civ.P.] "Good cause" for setting aside a default judgment is a sound, effective, truthful reason, something more than an excuse, a plea, an apology, an extenuation or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence, want of ordinary care or attention, or to his carelessness or inattention. The movant must affirmatively show he intended to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. (Authorities cited.) By the plain language of rule 236 good cause must be based on (1) mistake, (2) inadvertence, (3) surprise, (4) excusable neglect, or (5) unavoidable casualty.

In re Marriage of Huston, 263 N.W.2d 697, 698 (Iowa 1978) (quoting Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977)).

The court in Huston found that respondent's reliance on petitioner's statement that there would be negotiations with petitioner's attorney regarding settlement and his failure to "appear" in the action did not warrant setting aside a default judgment.

In the present controversy respondent consulted an attorney and took what action he believed to be necessary. Respondent argues that such consultation shows that his failure to appear constitutes a mistake for which he should be excused, since it affirmatively shows he did intend to appear and defend, and took steps to do so. We believe, however, that the record fails to reflect evidence which warrants setting aside a judgment under rule 236. We find respondent failed to meet his burden to show "good cause" for setting aside the judgment.

C. Rule 244 Motion. Respondent further contends that the judgment should be vacated under rules 244(a) and (f). We disagree.

Rules 244(a) and (f) provide:

> The aggrieved party may, on motion, have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted, for any of the following causes, but only if they materially affected his substantial rights:
>
> (a) Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial;
>
> * * *
>
> (f) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.

The trial court has considerable discretion in ruling on such motions. Iowa R. App. P. 14(f)(3).

In reviewing the record, we find the trial court did not abuse its discretion in denying respondent's motion under 244(a) for the reasons stated previously in this opinion. With regard to rule 244(f), we must first determine what constitutes the record before this court.

III. The Record. In the present case there was no record made of petitioner's "prove up" of the dissolution. Respondent alleged that he learned in November of 1981 that no record was made of the June 5, 1981, hearing, although we note that respondent's motions attacking the judgment were filed only seven days after the entry of judgment.

Iowa Rule of Appellate Procedure 10(c) provides:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be filed with the clerk of the trial court and served on appellee within twenty

> days after the filing of the notice of appeal. Appellee may file with the clerk of the trial court and serve on appellant objections or proposed amendments to the statement within ten days after service of appellant's statement. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included in the record on appeal.

Respondent's failure to file a timely statement of the evidence is predicated upon his lack of knowledge regarding the local rules for default judgments in dissolution proceedings.

In the present situation respondent filed the proposed statement of facts on December 23, 1981. This was beyond the 20 days after the notice of appeal was filed on September 15, 1981. The trial court filed a statement of facts but reserved for the appellate court the ruling on timeliness.

> It is the duty of counsel to abstract and thus present to this Court the evidence. The Court cannot undertake this duty for counsel. In order that this Court may try the suit **de novo** it must have before it the record made in the lower court presented in accordance with the statute and rules. Such a record is not here. . . . The presumption is that the decree of the trial court is correct. [citation omitted]

Merritt v. Ludwig-Wiese, 212 Iowa 71, 72, 235 N.W. 292, 292-93 (1931). We find respondent's statement of facts to be untimely, however, even if we were to consider it, the statement would not add anything substantially different from the facts found in petitioner's petition, financial affidavits and the trial court order. On the basis of the record properly before us, we conclude there was sufficient evidence to substantiate the trial court's findings.

V. Equities. It has been determined that a default decree may be appealed like any other judgment. In re Marriage of Huston, 263 N.W.2d at 699.

> Appellate review of default divorce decrees, like contested or dispositive litigated adjudications in such proceedings, is de novo. But it is review de novo, not trial de novo or trial anew as Svoboda

> suggests. Phrased otherwise, this is a court of review, without original jurisdiction to "retry" dissolution proceedings. [citations]. Accordingly, our review of litigated dissolution proceedings is de novo on issues properly raised of record below. [citations].
>
> Consistent therewith, this court has on several occasions declined to review issues raised the first time by dissolution appeals. [citations]
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> Naturally, when a default judgment is involved no specific issues could have been preserved. Therefore, in such instances, review is ordinarily limited "to determin[ing] whether the relief granted exceeded or was inconsistent with the demands made in the petition. [citation] . . .
>
> It therefore follows a defaulting party to a dissolution proceeding may seek appellate review on the merits. But, our de novo review will generally be limited to (1) scope of relief granted, and (2) equities of the decree as determined by an examination of the entire record made at trial.

The facts of this case have been previously discussed in prior portions of this opinion. We realize that the decretal provisions are factually weighed in favor of petitioner, but they are not so inequitable or injust to mandate appellate modification of this default judgment. We affirm the trial court's decree in all respects.

VI. Attorney Fees. Under the existing circumstances, petitioner's and respondent's request for allowance of attorney's fees on appeal is denied. Costs of the appeal are assessed equally against the parties.

AFFIRMED.

All judges concur except Donielson, J., who dissents.

I dissent.

I believe the provisions of the decree are extremely inequitable. Respondent-husband's gross income is $1,666.66 per month. After deductions, his net income is $1,288.52. Under the provisions of the decree he is required to pay $908.76 in debts and petitioner-wife's attorney fees. The additional monthly expenses include $650.00 in child support ($50.00 per week for each of the parties' three children); $216.88 in alimony for five years ($50.00 per week); an estimated $50.00 in future medical and dental expenses for which respondent is entirely responsible; and $20.40 in additional premiums for the increased life insurance respondent is required to purchase. Thus, under the decree, respondent must make monthly payments totaling $937.28 and, on top of that, must finance repayment of the $908.76 debt with which he is charged. Subtracting only the monthly payments from his net income leaves respondent $351.24. The effect of the decree, therefore, is to leave respondent with less than $90.00 per week on which to live. This solution is unreasonable.

Moreover, petitioner-wife was awarded all of the parties' $11,155.99 proceeds from the sale of their house. While it is true that the $3,000 down payment for the house was a gift from petitioner's parents, it is clear that respondent contributed to the additional $8,000 equity the parties had built up in the house. He was awarded nothing for this. Additionally, petitioner's gross income is $510.00 per month which, along with the support monies paid to her, is $850.00 more than respondent is left after paying his support obligations.

With the exception of inherited or gifted property, all marital property is to be divided equitably after considering, among other things, the amount and duration of an order granting support payments. See Iowa Code § 598.21(h) (1981). I believe the trial court granted excessive support awards and, when doing so,

failed to take into account that petitioner was granted all of the proceeds from the sale of the marital home. The obligation to provide support depends on the particular circumstances and is to be awarded in accordance with the parent's ability to pay. See In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). Clearly, respondent does not have the ability to make the payments established in the instant case.

Even though respondent was in default, we are to review the decree de novo to assure that the provisions of the decree are equitable and that justice is accomplished. See In re Marriage of Huston, 263 N.W.2d at 699. This was not accomplished in the instant case. I would modify the decree, reducing the alimony and child support awards.

Because I believe the decree is inequitable without modification, I dissent from the majority's opinion.