

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 20 1984

CLERK SUPREME COURT

IN RE THE MARRIAGE OF WALLY E. HORN AND BEVERLY H. HORN

Upon the Petition of)

40

WALLY E. HORN,)

Petitioner-Appellee,)

Filed March 20, 1984

And Concerning)

BEVERLY H. HORN,)

3-414
83-105

Respondent-Appellant.)

Appeal from the Iowa District Court for Linn County - Paul J. Kilburg,
Judge. Judge in contempt proceeding: William L. Thomas.

In a consolidated proceeding, respondent wife challenges various orders in underlying dissolution of marriage proceedings relating to disposition of property and the judgment finding her in contempt of court, asserting: (1) that she was denied due process by the notice given her of a hearing on the husband's application for an order directing sale of a home owned by the parties; (2) that a continuance should have been granted for the purpose of allowing time to obtain evidence that the proposed sale price of the home was too low; and (3) that she should not have been found to be in contempt for failure to vacate the home as previously ordered by the court due to vagueness of the terms of the previous orders and insufficiency of the evidence to support a finding that her failure to comply was willful. REVERSED ON THE JUDGMENT OF CONTEMPT; AFFIRMED ON ALL OTHER ISSUES.

Benjamin W. Blackstock and Joseph E. Peiffer of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for respondent-appellant.

Donna L. Paulsen and Robert R. Rush of Lynch, Dallas, Smith & Harman, Cedar Rapids, for petitioner-appellee.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ.

This case arises out of that portion of a 1982 decree dissolving the marriage of Wally E. Horn and Beverly H. Horn which awarded a home to each party and required that a third home be listed for sale immediately. The parties were directed to accept any reasonable offer based upon the agreed value of \$55,000; if they disagreed as to the manner or terms of the sale, it was provided that the court "after hearing on five days notice may prescribe the terms of said sale" (emphasis added). The decree further provided that Beverly would have "the right to reside in the home until 30 days after offer to purchase said property has been accepted." The decree specified how sale proceeds would be distributed and stated that the parties could apply to the court for further orders "should disputes arise in carrying out the terms of this provision."

On January 24, 1983, the parties' realtor received an offer of \$55,000 for the home. On January 25, 1983, Wally filed an application for further orders, requesting the court to order that the parties accept the offer. The same day, the court set a hearing date of January 28, specifying that notice of hearing should be given to Beverly through mail and that telephone notice be given to her attorney of record. Wally's counsel also mailed notice to Beverly. On the day of the hearing, Beverly specially appeared to object to the sufficiency of the three-day notice, and also moved to continue the action to a later date to allow time to obtain evidence that a better offer for the house could be obtained. The court overruled both the special appearance and the motion for continuance. The hearing was held, during which the realtor testified that the \$55,000 offer was to have expired on January 26, but that he had requested the prospective buyers to extend it. The court entered an order on January 31, directing that the offer be accepted. Thus, according to the original decree, Beverly was to vacate the house by March 3. On March 2, the supreme court denied an application for stay of the order of January 31 directing sale of the home; the sale has now been completed.

On March 10, Wally filed an application for contempt and an application for orders, reciting that Beverly had not vacated the premises. Beverly filed a special appearance, alleging that she had not been served personally with notice of the contempt application. Hearing was held March 16. Beverly was ordered to vacate the house by six p.m., March 23. Her special appearance relating to the contempt proceeding was sustained; hearing was fixed for March 24.

Beverly was unable to appear at the March 24 hearing because she had entered a hospital on March 9 for treatment of her physical and emotional problems, but she was represented at the hearing by counsel. The recent death of two close friends and her poor physical and emotional condition were given as reasons for not having moved out of the house within the required time.

The district court held Beverly in contempt of court on March 28, for failure to vacate the house as previously ordered. The order provided that, if she had not removed her belongings by eight a.m., March 30, the county sheriff was directed to enter the premises and remove her things. Beverly filed both a notice of appeal and a petition for writ of certiorari relating to the orders of March 17 and 28. By order of the supreme court, certiorari was granted, see Iowa Code § 665.11 (1983), and all pending proceedings involving the parties were consolidated.

I. Notice. The main question in this case is whether notice to Beverly was adequate. To comply with due process, notice must be reasonably calculated to give the adverse party knowledge of the proceedings and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950). The district court in this case set the hearing date for three days, instead of the five days required in the decree, and ordered that Beverly be notified of the hearing "by mailing a copy of this Order to her attorney of record and notifying the attorney of record promptly by telephone of the date and time of this hearing." In the case of In re Marriage of Meyer, 285 N.W.2d 10 (Iowa 1979), notice of a hearing for modification of a dissolution decree

was mailed to the attorney who had represented the husband in the original dissolution proceedings, but no notice was given to the husband. The supreme court noted that the flaw in the notice in Meyer was that:

[I]t was served on an attorney who had represented [the husband] in the dissolution matter which terminated some eight months earlier. While the court's jurisdiction continues after a divorce decree, an attorney's representation does not [T]his notice was not the kind calculated to afford [the husband] an opportunity to appear and resist. That it did so in this case is merely fortuitous and does not remove the fatal deficiency in the procedure followed. The special appearance should have been sustained.

Id. at 11-12.

In this case, the court ordered notice to Beverly's attorney of record by telephone and by mail. Beverly received actual notice when Wally's attorney mailed notice to her; she was present at the hearing. In Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981), the supreme court states:

To comport with due process, a person must ordinarily be informed somehow of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare The test is fundamental fairness, not whether the notice meets technical rules of common law pleading.

Id. at 16.

The judge who presided over the hearing concerning whether the offer should be accepted was the same judge that had presided in the original dissolution proceedings and had required the five-day notice. The original decree stated that the property in this dispute:

shall be listed for sale immediately, and upon the basis of the agreed valuation of \$55,000, the parties shall accept any reasonable offer based upon that agreed value The sale shall be in the method, manner, time and on terms that are agreed to by the parties, however, in the absence of an agreement the Court after hearing on five days notice may prescribe the terms of said sale.

At the hearing to consider the \$55,000 offer, after Beverly made a special appearance and requested a continuance, the judge made the following comments:

I had ordered this property to be sold at what I consider to be a reasonable offer price. While it's true I put in the decree that five days notice language, I wanted people to have an opportunity to come into court on this. I don't think in my own mind this is jurisdictional. I don't think I can set the jurisdictional perimeters in a divorce decree. The question is, what's reasonable notice under the circumstances. If you were a new attorney to this, [Beverly's attorney], I would feel much more strongly about this cause, ... because you wouldn't be aware of what was going on, but as things stand, you're very familiar with this whole file. I don't think anything would be served by my standing on my decree and overruling [the] notice requirement order.

The purpose in the decree of requiring a hearing was to come to an agreement on the method, manner, time and terms of the sale once an offer "based upon" the agreed value of \$55,000 was received. The facts show that an offer "based upon" the agreed value had been received. Thus, the hearing was not to determine whether the offer should be accepted or rejected, but rather to determine on what terms the offer should be accepted. As noted by the court, Beverly and her attorney were acquainted with the facts in the case. The terms of the offer in dispute were before them. They requested more time to bring evidence that the offer was unreasonable or that a better offer existed. That was not the purpose of the hearing. Although Beverly did not receive the full five-day notice set forth in the original decree, she did receive notice, which was about as effective as the situation permitted. See Van Grundy v. Van Grundy, 244 Iowa 488, 493-94, 56 N.W.2d 43, 45-46 (1952). We hold that, under the circumstances in this case, Beverly was informed of the issues involved and had "a real opportunity to appear and present [her] case." Smith v. Iowa Employment Security Commission, 212 N.W.2d 471, 473 (Iowa 1973). The order requiring the parties to accept the \$55,000 offer is affirmed.

II. Contempt. We reverse the trial court's decision to hold Beverly in contempt of court for failure to vacate the house as previously ordered. Although it certainly appears that Beverly dragged her feet at the prospect of moving out

of the house, she did have physical and emotional problems that appear to relieve⁴⁵ her of any willful disobedience of the court order.

When a judgment of contempt is challenged, we examine the evidence, not de novo, but to assure ourselves that proof of contempt is clear and satisfactory. See Sound Storm Enterprises, Inc. v. Keefe, 209 N.W.2d 560, 565 (Iowa 1973). In this regard, we note that two of Beverly's long-time friends had died since the time of the order to accept the offer. During the same period, she helped with funeral arrangements and chose a casket for her sister, who was dying of cancer. Beverly was in the hospital for her physical and emotional problems at the times the second order to vacate and the subsequent contempt order were entered. Wally argues that the house had been on the market for over a year and that Beverly had ample opportunity to move out of the disputed house before the order to accept the offer was made. However, the original dissolution decree gave Beverly the right to reside in the house until thirty days after the offer to purchase was accepted. Her failure to move out before the offer was accepted is not a ground for holding her in contempt.

Neither is her failure to move out after the offer was accepted a ground for holding her in contempt. Only willful disobedience of a court order will justify a contempt order. See Huston v. Huston, 255 Iowa 543, 549, 122 N.W.2d 892, 896 (1963).

In this context a finding of disobedience pursued "willfully" requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). After examining the record, we do not find that Beverly's conduct reaches the required level of "willful" disobedience of the court orders. The circumstances of that thirty-day period and afterwards mitigate her failure to comply.

REVERSED ON THE JUDGMENT OF CONTEMPT OF COURT; AFFIRMED
ON ALL OTHER ISSUES.