

FILED 485

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LEANNE B. VAN WYHE AND WILLIAM A. VAN WYHE

Upon the Petition of	)	
LEANNE B. VAN WYHE,	)	Filed September 21, 1978
Appellee,	)	
And Concerning	)	
WILLIAM A. VAN WYHE,	)	623
Appellant.	)	3-61580

Appeal from Johnson District Court - Clinton E. Shaeffer, Judge.

Respondent-husband appeals overruling of his motion to set aside default dissolution decree claiming petitioner-wife's extrinsic fraud prevented his defense in the action. Reversed and remanded.

Joseph C. Johnston & J. D. Merris, of Cahill, Johnston, Poula & Goetz, of Iowa City, counsel for appellant.

Patricia C. Kamath, of Kamath & Clark, of Iowa City, counsel for appellee.

Submitted to Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

PER CURIAM

Respondent William A. Van Wyhe appeals the trial court order overruling his motion to set aside the default judgment which terminated his five year marriage with petitioner Leanne B. Van Wyhe. We reverse and remand for trial on the merits.

In the instant case as the time neared for the original 90 days to run on the dissolution petition filed March 24, 1977, the parties reconciled, with William never having filed an appearance or responsive pleading. Thereafter, they settled in Colorado to build their future as a family unit. On November 1, 1977 Leanne left William. The note she left behind said she would contact him within a week and a half or two to let him know the family's whereabouts. She drove to Iowa and presented her evidence on November 3, 1977 to prove up a default decree upon the petition previously filed. William's first realization of Leanne's decision to proceed with dissolution came when he received a copy of the default decree.

We are persuaded William has established on this record that Leanne's conduct amounted to extrinsic fraud sufficient to require that the default decree be set aside. Extrinsic fraud was recently defined in *In re Marriage of Short*, 263 N.W.2d 720, 723 (Iowa 1978) as: "... some act or conduct of the prevailing party which has prevented a fair submission of the controversy. It includes lulling a party into a false sense of security or preventing him from making a defense."

Even with notice of her abrupt decision to stop the reconciliation, three days would hardly accord William sufficient time to act from Colorado to get his Iowa resistance filed. Here, Leanne's conduct kept William from realizing there was any need to appear in court. Her unilateral termination of their reconciliation was couched in terms designed to keep him unaware of what was going on or where to register his response to this state of confusion.

Leanne's conduct constituted a direct denial to William of his right to present evidence and make his record upon the important issues of the marriage breakdown, custody, division of marital assets and child support. Under the Short decision, William must be given such an opportunity since "... It is the policy of the law that every cause of action shall be tried upon its merits, that every party to an action shall have his day in court." 263 N.W.2d at 723.

We reverse and remand for entry of an order setting aside the default decree so that the parties may proceed to a trial on the merits.

CARTER, J., concurs in result only. DONIELSON, Acting C.J., dissents.

DONIELSON, Acting C. J. (dissenting)

I dissent. William does not appeal from the default dissolution decree but from the order overruling his motion to set aside default. A trial court is vested with broad discretion in ruling on such a motion, and we should reverse on appeal only if this discretion is abused. In re Marriage of Huston, 263 N.W.2d 697, 698 (Iowa 1978); Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). I can find no abuse of discretion here.

William testified that he "was trying to avoid--any court appearance or anything like that." He contacted neither Leanne's attorney nor one of his own. He filed no answer, motion, financial statement or any other document. He lived apart from his wife from the date the petition was filed until about one week before the mandatory 90-day waiting period was up. Upon being informed by Leanne of its impending expiration, he removed the children and certain personal property belonging to Leanne from her apartment to force a reconciliation. Leanne testified that she remained with William for four months in Colorado because of her fear that he would again remove the children from her custody. She denied having told William that the dissolution action was dismissed, and William testified that while it was his understanding that "it was all over," he did not "check it out." Both parties testified to continued discontent throughout the period. William refused Leanne's requests to see a marriage counselor. Leanne left William and returned to Iowa City shortly before the dissolution hearing.

I would distinguish In re Marriage of Short, 263 N.W.2d 720 (Iowa 1978) cited by the majority. In Short, the parties reconciled four days after the petition for dissolution was filed and stayed together more than 2 years, including through the time the dissolution decree was issued. Respondent-husband could point to specific and repeated assurances by the petitioner-wife that the dissolution action was inactive and he need not be concerned or take any further action. The motion to set aside default was overruled without allowing respondent-husband any hearing on the merits or an opportunity to introduce testimony regarding extrinsic fraud.

That is not the case here. Rather, the facts here indicate mere inexcusable neglect on the part of William. Huston, supra, at 698. Further, he was given a hearing on the merits and failed to convince the trial court of either excusable neglect or

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extrinsic fraud. I would hold that no abuse of discretion attended trial court's refusal to set aside the default decree, and would affirm the trial court.