IN THE COURT OF APPEALS OF IOWA

No. 0-248 / 09-1279
Filed July 14, 2010

IN RE THE MARRIAGE OF LAURA A. FALLS AND MICHAEL K. FALLS

Upon the Petition of
LAURA A. FALLS n/k/a
LAURA A. DAVIS,
Petitioner-Appellee,

And Concerning
MICHAEL K. FALLS,
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Michael Falls appeals from the district court order denying his petition to vacate the entry of an amended qualified domestic relations order. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Elaine F. Eschman of Fehseke & Eschman Law Offices, Fort Madison, for appellant.

Scott E. Schroeder of Schroeder Law Office, Burlington, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

Michael Falls appeals from the district court order denying his petition to vacate the entry of an amended qualified domestic relations order (QDRO). He contends the amended QDRO was entered without proper notice to him and that it does not comport with the provisions of the parties' dissolution decree. He also contends the court erred in denying his request for attorney fees in regard to this matter. Both parties seek an award of their appellate attorney fees.

I. Background Facts and Proceedings.

The parties were married on May 1, 1993. During the course of the marriage Michael was a driver for UPS. The marriage of Michael and Laura was dissolved on May 21, 1999. The decree provided in pertinent part:

> It is agreed by the parties that they will, subsequent to the Dissolution execute a Qualified Domestic Relations Order (QDRO) with regard to the 401(k) Plan currently in the name of Michael K. Falls. Said division to be completed in the QDRO will cover the assets accumulated in the 401(k) Plan from the date of the marriage of 5/1/93 to the date of the entry of this Decree of Dissolution of Marriage, with each party receiving 50%.

A QDRO was drafted and presented to the court for filing on July 23, 1999. For reasons unknown, the QDRO was never submitted to Michael's employer or the administrator of the 401(k) plan.

In 2008, Laura learned that it might be possible for her to access a portion of Michael's 401(k) plan prior to his retirement. Upon contacting Michael's employer, Laura learned she needed a QDRO to access her portion of the 401(k). The plan administrator provided suggested language for the QDRO, which was then prepared by Laura's counsel and submitted to the court for

approval. On April 15, 2008, the plan administrator sent both Laura and Michael letters stating the proposed order constituted a valid QDRO. That letter states in pertinent part:

> Our compliance with the proposed order will be in accordance with our interpretation of its terms as set forth in this letter. If this interpretation does not reflect the intention of the parties, please let us know within two weeks of the date of this letter.
>
> *Paragraph 5 of the proposed order provides the Alternate Payee shall receive an amount from the Participant's account balance under the Plan equal to fifty percent (50%) of said account balance, as of May 21, 1999.*
>
> The Alternate Payee shall be credited with a pro-rata share of any investment income and/or loss from May 21, 1999 through the date his or her separate account is distributed. Contributions from the Participant's account under the plan after May 21, 1999 will belong to the Participant alone and shall not be subject to division or distribution pursuant to this proposed order.

Laura's attorney sent a copy of the letter to Mr. Hahn, the attorney who represented Michael during the dissolution proceedings. On April 28, 2008, the amended QDRO was approved by the court and filed.

On April 29, 2008, Laura's counsel received a letter from Mr. Hahn. It stated:

> I have received your Falls QDRO and think it conforms to the Decree requirements. I haven't talked to Mr. Falls for years and I have written to him to let him know what's going on. I assume that he will let you know directly if he has any objections or I will notify you as promptly as I hear from him otherwise. I really don't know his position at this point.

A copy of the letter was likewise sent to Michael.

The amended QDRO was sent to the plan administrator on May 20, 2008. Copies were likewise sent to Laura and Michael. In August 2008, Laura received a gross payment of $17,810.43, which resulted in a net cash distribution of

approximately $13,357.34. When Michael received a letter informing him how much had been taken out of his 401(k) account, he called the plan administrator, his former counsel, and Laura's counsel because he believed there had been a mistake as to the amount.

On March 10, 2009, Michael filed a petition to vacate the amended QDRO. He alleged the amended QDRO should be vacated because it was obtained by irregularity or fraud pursuant to Iowa Rule of Civil Procedure 1.1012(2). He contended it did not comport with the provisions of the dissolution decree, claiming Laura received more than she should have under the terms of the decree. He also alleged he did not receive proper notice of the amended QDRO. Following a May 28, 2009 hearing, the district court entered its June 25, 2009 order finding no irregularity or fraud sufficient to vacate the QDRO. Michael subsequently filed a motion to enlarge, amend and reconsider on July 1, 2009. The court's ruling on said motion was filed on July 28, 2009. Michael then filed his notice of appeal on August 20, 2009.

II. Scope and Standard of Review.

Although Michael's action was filed in equity, actions to vacate orders are law actions, not equity actions. *In re Marriage of Cutler*, 588 N.W.2d 425, 429 (Iowa 1999). This is true even if the judgment vacated was rendered in an equity case. *In re Adoption of B.J.H.*, 564 N.W.2d 387, 391 (Iowa 1997). Accordingly, the district court's findings are binding if supported by substantial evidence. *Cutler*, 588 N.W.2d at 430. A negative finding of fact concerning a party's failure

to prove an element of its case may be overturned on appeal only if we determine this element was shown to exist as a matter of law. *Id.*

The district court enjoys wide discretion in deciding whether to vacate an order under rule 1.1012. *B.J.H.*, 564 N.W.2d at 391. We will not reverse the trial court's decision on this question unless an abuse of discretion has been shown. *Id.* We are more reluctant to find an abuse of discretion where the judgment has been vacated than when relief has been denied. *Id.*

III. Analysis.

Michael brought a motion to vacate pursuant to Iowa Rule of Civil Procedure 1.1012(2), which allows the court to vacate a final order if irregularity or fraud was practiced in obtaining it.

> This court has defined "irregularity," as contemplated in rule 1.1012(2), as
>
> [t]he doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unseasonable time or improper manner.

Cutler, 588 N.W.2d at 429 (quoting *Forsmark v. State*, 349 N.W.2d 763, 767 (Iowa 1984)). Where a party brings a rule 1.1012(2) motion to vacate due to irregularity, our supreme court has set forth the following general principles:

> First, the rule covers cases in which a party suffers an adverse ruling due to action or inaction by the court or court personnel. Second, the action or inaction must be contrary to (1) some prescribed rule, (2) mode of procedure, or (3) court practice involved in the conduct of a lawsuit. Finally, the party alleging the irregularity must not have caused, been a party to, or had prior knowledge of the breach of the rule, mode of procedure, or practice of the court.

Id. (citation omitted).

Michael alleges the amended QDRO was entered without notice and an opportunity to be heard. He contends this irregularity warrants vacating the order. A QDRO is void and subject to collateral attack where it is issued without notice and an opportunity to be heard. *In re S.P.*, 672 N.W.2d 842, 845 (Iowa 2003) (stating we are required to address "lack-of-notice issues because they go 'to the heart of the district court's jurisdiction,'" and stating a void judgment is subject to attack at any time and may be vacated at any time); *In re Marriage of Meyer*, 285 N.W.2d 10, 10-11 (Iowa 1979) ("The parties are entitled to notice and an opportunity to resist before changes in the original decree are made."); *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992) (stating "a departure from established modes of procedure can render a judgment void where the procedural defects are serious enough to constitute a violation of due process or to be considered jurisdictional").

The district court did not initially address this issue in its ruling denying Michael's motion to vacate, but in the ruling to enlarge, amend, and reconsider, found as follows:

> In this proceeding, although there had been an intervening period of time, Mr. Hahn was provided with information concerning Laura's intentions. Mr. Hahn advised Laura's attorney that the proposed QDRO appeared to satisfy the terms of the parties' Decree of Dissolution of Marriage. The record fully supports a finding the Michael had constructive knowledge of Laura's intentions either through his attorney or the plan administrator. Michael's attorney had not withdrawn of record as Michael's attorney in this matter as the QDRO required by the parties' Decree of Dissolution of Marriage had not been implemented since 1999.

We conclude the court erred in finding Michael had proper notice of the QDRO. Although a copy of the suggested QDRO language was sent to Michael's former counsel, Laura's counsel was informed that he had not spoken with Michael in "years." The letter further stated, "I really don't know his position at this point." This letter was received by Laura's counsel on April 29, 2008, the day after the amended QDRO was entered. Although Mr. Hahn had never withdrawn as Michael's counsel in these proceedings, it can be presumed from the facts of this case that the parties both believed the litigation to be closed some nine years previously. Mr. Hahn's statements indicate he was no longer representing Michael in the matter.[1] "While the court's jurisdiction continues after a divorce decree, an attorney's representation does not." *Meyer*, 285 N.W.2d at 11-12. We conclude the lack of proper notice in this case does not pass the due process test.

We further conclude the record does not support the district court's finding the amended QDRO complies with the terms of the parties' dissolution decree. The language of the decree states Laura is entitled to one-half of "the assets accumulated in the 401(k) Plan from the date of the marriage of 5/1/93 to the date of the entry of this Decree of Dissolution of Marriage" on May 21, 1999. In contrast, the amended QDRO provides Laura "shall receive an amount from the Participant's account balance under the Plan equal to fifty percent (50%) of said account balance, as of May 21, 1999." The amended QDRO does not account for the fact that Michael had contributed $5793.40 to his 401(k) plan prior to the

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[1] We also note that in August of 2008, while this matter was still pending Laura became an employee of the law firm where Mr. Hahn practiced.

parties' marriage. Under the unambiguous terms of the decree, Laura is not entitled to any share of these premarital assets or to any accumulation in their value; rather she is entitled to one-half of the amount of assets placed in Michael's 401(k) between May 1, 1993 and May 21, 1999, as valued at the time they were withdrawn.

We remand this matter to the district court for further proceedings consistent with this decision. The district court shall address the issue of any excess funds received by Laura. We affirm the district court's decision on trial attorney fees. Each party should be responsible for their own appellate attorney fees. The costs of this appeal are taxed to Laura.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.