

**IN THE COURT OF APPEALS OF IOWA**

No. 1-437 / 10-1924  
Filed July 27, 2011

**IN RE THE MARRIAGE OF ANN KIRKEGAARD  
AND KIRK KIRKEGAARD**

**Upon the Petition of**

**ANN MONTGOMERY KIRKEGAARD,**  
Petitioner-Appellant,

**And Concerning**

**KIRK DUANE KIRKEGAARD,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Warren County, Gregory A. Hulse,  
Judge.

Appeal from the district court's denial of a petition to vacate or modify the  
decree dissolving the parties' marriage. **AFFIRMED.**

David H. Skilton of Cronin, Skilton & Skilton, Charles City, for appellant.

Carmen E. Eichmann of Eichmann Law Firm and Steven P. Wandro and  
Kara M. Simons of Wandro & McCarthy, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Ann Montgomery Kirkegaard appeals following the district court's denial of her petition to vacate or modify the November 3, 2010 decree dissolving her marriage to Kirk Duane Kirkegaard. She contends due to new evidence and alleged fraudulent misrepresentations made by Kirk she should have received the relief she requested. We affirm.

**BACKGROUND.** Ann was born in 1961, and Kirk was born in 1957. They were married in June of 1981. Kirk is a graduate of Iowa State University and for a substantial portion of the marriage engaged in a business dealing with hogs. Ann received a business degree from Iowa State and among other things was a CPA and certified financial planner. She handled the family's income tax filings. Ann sought a dissolution of the marriage. A five-day trial was held before the Honorable Gregory A. Hulse in June and July of 2007. At the time of the hearing neither party was working outside the home. They had substantial assets and each had had substantial incomes in prior years, in part from commodity dealings. They have four children. Two were in grade school and their custody and support was at issue.

The district court filed a decree dissolving the marriage on October 10, 2007. The decree was lengthy and carefully crafted. The district court provided, among other things, the parties should share the children's care on a weekly basis. The court calculated child support based on time the children were with each parent and each parties' respective earnings. The court determined that, looking at current incomes, Ann would owe child support to Kirk, but Kirk, based

on the property division, had waived it so no child support was ordered. The court ordered a hog facility referred to as Greenfield sold and the balance of the proceeds after payment of sale costs were to be divided equally and each party was to pay one-half of the federal and state income tax liability owed as a result of the sale. The court valued and divided the other assets and liabilities and determined that each party should receive some \$2,477,896 in equities. To arrive at this division the court ordered Ann to pay Kirk an equalization payment. The court denied Ann's request for alimony, finding she has the ability to earn \$69,000 annually, she received \$2.5 million in equities, and she has investments that should yield income of \$300,000 annually.

Ann appealed the decision, contending she was only required to make one equalization payment to Kirk, the division of tax deductions was not equitable, and that she should have been awarded \$15,000 in monthly alimony. The case was transferred to this court. We affirmed on all issues except for clarifying the issue of the equalization payment and awarded Ann \$1000 in attorney fees. *In re Marriage of Kirkegaard*, No. 07-1851 (Iowa Ct. App. Dec. 17, 2008).

**PROCEEDINGS.** In July of 2010 Ann filed a petition to vacate or modify the decree. She contended Kirk misrepresented his future earnings and he should have been ordered to pay child support and alimony. She further contended, because the parties were unable to agree on issues relating to the children, the decree should be modified. On July 21, 2010, the district court set a hearing on Ann's petition for August 31, 2010. The hearing was fixed for the

purpose of determining the validity of the grounds pursuant to Iowa Rule of Civil Procedure Rule 1.1013(4). On August 13, 2010, through new counsel, Ann amended her petition by adding her affidavit in support of an equitable request the dissolution decree be vacated. She alleged Kirk committed fraud by continuing to trade commodities and earning a higher income than he represented at trial. She further contended there was newly-discovered evidence to show that Kirk bought Greenfield from the party who purchased it at the time of the dissolution. She contended Kirk should be required to pay child support and alimony, reimburse her for taxes, and pay her attorney fees as a sanction for his alleged fraud.

A hearing before Judge Hulse was held on August 31, 2010. The court considered Ann's affidavit and testimony from Kirk and Ann. On November 3, 2010, the district court filed a ruling dismissing Ann's petition. On November 9, 2010, Ann filed a motion to reconsider the court's prior ruling, contending it had committed a number of errors at law and abused its discretion in the earlier ruling. The motion too, was denied.

Ann appeals, contending Kirk committed fraud by continuing to trade commodities and earning a higher income than he represented at trial. She contends that based on this fact, she is entitled to alimony and Kirk should pay child support. The district court, in denying this claim, noted Ann supplied no evidence other than her affidavit, which was based her receipt in April of 2010 of a K-1 showing one of the children had income from trading. The district court noted Kirk testified in 2008 he created a limited liability corporation (L.L.C.) for

the parties' four children and in the next year gifted ninety-nine percent of the L.L.C. to the children. The court found there was no evidence Kirk had traded commodities other than through the entity set up for the children. The court denied Ann's request for alimony and child support saying as to the court's conclusion in the dissolution decree that Kirk should not pay alimony and neither party should pay child support:

It was not based upon any determination that either party would have income in the future beyond the amount earned from investments at the time of trial. It was never assumed that Kirk or Ann would never work in the future.

In addressing the Greenfield issue the district court found Ann had failed to show any extrinsic fraud was practiced on the court requiring vacation or modification of the decree, noting that Greenfield sold for an amount larger than Ann's appraisal. The court noted it had found the offer to purchase the hog buildings to be fair. The district court found there was no evidence to support Ann's assertion of collusion between Kirk and the purchaser of Greenfield. The court found the fact Kirk repurchased the property does not in and of itself indicate any fraud was practiced upon the court or Ann.

The court recognized Ann's assertion that the parties are unable to agree on most issues relating to the child and her claim the decree should be modified based on a substantial change of circumstances. The court found the proceedings before it were not the proper place to address these issues but that a modification action could be pursued by Ann if necessary.

**SCOPE OF REVIEW.** Ann contends this is an equity matter and we should review de novo. Kirk contends that a petition to vacate a judgment under

Iowa Rule of Civil Procedure 1.1012 is reviewed for correction of errors at law, not de novo. Actions under rule 1.1012 are law actions, not equity actions. See *Kreft v. Fisher Aviation, Inc.*, 264 N.W.2d 297, 303 (Iowa 1978); *Jacobson v. Leap*, 249 Iowa 1036, 1041, 88 N.W.2d 919, 922 (1958) (cases addressing rule 252(b), the forerunner to the current rule 1.1012). Cases addressing modification of custody and child support are reviewed de novo. See *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998).

We agree with the district court in all respects.<sup>1</sup> Ann has failed to prove that Kirk committed fraud on her and the court in repurchasing Greenfield or in trading commodities on their children's account. To prove fraud a party must prove several factors by clear and convincing evidence, including (1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage. *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996); see also *In Marriage of Cutler*, 588 N.W.2d 425, 430 (Iowa 1999). Ann has failed to present evidence supporting any of the above factors. Proving fraud is a difficult task. *Cutler*, 588 N.W.2d at 430.

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<sup>1</sup> Although we agree with the district court's conclusions, we note the hearing was fixed for a preliminary determination pursuant to Iowa Rule of Civil Procedure 1.1013. This rule provides for a bifurcation of the petitioner's evidence of the alleged grounds and if the grounds appear valid, the validity of the claim or defense would be heard at a later date. Procedurally, the district court should have rendered its ruling solely upon the evidence as sought by Ann's counsel, judicial notice of the entire record and the pleadings without consideration of any evidence submitted by Kirk. However, no objections were raised at trial and Ann has not raised this procedural issue on appeal.

Furthermore, even if Kirk has earned income after the dissolution, and there is no showing he has, it does not support an award of alimony—Ann having been denied alimony in the original proceeding.<sup>2</sup>

As to child support and custodial issues raised in the district court, we recognize that a party's change in income may require a modification of child support. However, because the petition was treated as a petition to vacate or modify under rule 1.1012, and not a modification action under Iowa Code chapter 598, we decline to address whether Ann has shown a substantial change in circumstances since the entry of the decree.<sup>3</sup>

Kirk has requested attorney fees and we believe under this record they are justified. Ann has the ability to pay fees and we assess her with \$2500 in appellate attorney fees and the costs of this action.

**AFFIRMED.**

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<sup>2</sup> This court affirmed this finding on appeal.

<sup>3</sup> As a petition to vacate and modify under rule 1.1012 our scope of review is at law and the district court's fact findings are binding on us if supported by substantial evidence. See *In re Marriage of Butterfield*, 500 N.W.2d 95, 97-99 (Iowa Ct. App. 1993.) We also question whether a modification action could be joined with a petition to vacate or modify a judgment. See Iowa Code § 598.3.