

**IN THE COURT OF APPEALS OF IOWA**

No. 1-970 / 11-0980  
Filed February 1, 2012

**IN RE THE MARRIAGE OF  
STEVEN D. MURRAY AND  
NICOLLE MARIE MURRAY**

**Upon the Petition of  
STEVEN D. MURRAY,**  
Petitioner-Appellee,

**And Concerning  
NICOLLE MARIE MURRAY, n/k/a  
NICOLLE MARIE AVENSON,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Chickasaw County, Margaret L. Lingreen, Judge.

A wife appeals the denial of her petition to vacate the stipulated dissolution decree on the ground of irregularity, fraud, unsound mind, and unavoidable casualty. **AFFIRMED.**

David H. Skilton of Cronin, Skilton & Skilton, Nashua, for appellant.

John J. Wood and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**VAITHESWARAN, P.J.**

Steven Murray and Nicolle Avenson divorced after a ten-year marriage. Nicolle now appeals the denial of her petition to vacate the stipulated dissolution decree on the ground of irregularity, fraud, unsound mind, and unavoidable casualty.

***I. Background Facts and Proceedings***

Steven and Nicolle had two children who were the subject of Steven's dissolution petition. Also at issue was the parties' property.

The parties lived together during the dissolution proceedings. Eventually, they signed a stipulation agreeing to joint physical care of the children. They also agreed in pertinent part that (1) Nicolle would receive a 1999 vehicle, with Steven paying the remaining debt on the vehicle, (2) Steven and Nicolle would each receive their own retirement benefits, (3) Steven would pay an outstanding credit card bill of \$8500, and (4) Steven would receive the tax exemptions for both children until "Nicolle's wages increase to the level that the exemption has value to her." The parties finally agreed in pertinent part that they had "equitably divided their household furnishings and personal property." The stipulation was drafted by Steven's attorney. By the time it was signed, Nicolle's attorney had withdrawn based on a lack of communication with her.

The dissolution decree incorporated the terms of the signed stipulation and was approved as to form by both parties. Steven and Nicolle subsequently disagreed on how to exchange the personal property, with Steven stating the items were in his garage and could be picked up, and Nicole stating that she

feared getting into trouble with Steven if she unilaterally picked them up. The parties also had trouble with the transfer of title to the 1999 vehicle.

Nicolle filed a motion for rule to show cause, alleging that Steven had not delivered certain items she was due under the decree. She later dismissed the motion and, in its stead, filed a petition to vacate the dissolution decree. The district court dismissed the petition following a hearing. Nicolle filed a “motion for new trial and reconsideration,” which the court denied. This appeal followed.

## **II. Analysis**

Iowa Rule of Civil Procedure 1.1012 allows a court to vacate or modify a final judgment or order, or grant a new trial on the judgment or order under specified circumstances. Nicolle cites the following grounds for relief:

- (2) Irregularity or fraud practiced in obtaining it.
- (3) Erroneous proceedings against a minor or person of unsound mind, when such errors or conditions of mind do not appear in the record.
- • • •
- (5) Unavoidable casualty or misfortune preventing the party from prosecuting or defending.

Iowa R. Civ. P. 1.1012. She does not challenge the custody portion of the stipulation; she only seeks to have the property division portion of the stipulation and decree set aside on these grounds. The district court did not find a basis for doing so. Our review of the court’s ruling is on error, with the court’s fact findings binding us if supported by substantial evidence. *In re Marriage of Cutler*, 588 N.W.2d 425, 429–30 (Iowa 1999).

Nicolle first asserts that the stipulation was marred by “irregularity” in that “no disclosure was ever made by Steve[n] to Nicolle of his financial status as

required by [Iowa Code section] 598.13, nor did he file any disclosure with this court in any form.” Section 598.13 provides:

Both parties shall disclose their financial status. A showing of special circumstances shall not be required before the disclosure is ordered. A statement of net worth set forth by affidavit on a form prescribed by the supreme court and furnished without charge by the clerk of the district court shall be filed by each party prior to the dissolution hearing. However, the parties may waive this requirement upon application of both parties and approval by the court.

Iowa Code § 598.13(1) (2009). The last line of this provision allows for a waiver of the filing requirement and, as Steven points out, the decree explicitly states, “The parties have exchanged and made a full disclosure of all financial information and waive filing financial affidavits with the Court.” This language is dispositive. We conclude the district court did not err in declining to find an irregularity on this ground.

Nicolle next asserts Steven engaged in “extrinsic fraud . . . in his dealings with [her] to convince her to sign the Stipulation and Decree.” She cites

[d]eception . . . lack of disclosure of retirement account information, Steve’s assurances and representations to [her] that everything would work out between them and that things would still be the same and that she should trust him, and finally, Steve’s later admission that the property had not been equitably divided leaving her with no property at all or only property Steve believes he wants to get rid of and, importantly, failure to disclose the equity in the house.

She suggests Steven threatened to take away the children if she did not agree to the stipulation, took advantage of her vulnerable condition caused by her abuse of prescription drugs, and domestically abused her.

Extrinsic fraud “may consist of acts or promises lulling the defrauded party into false security, or preventing him from making defense, and many other acts.”

*Cook v. Cook*, 259 Iowa 825, 830, 146 N.W.2d 273, 276 (1966) (quoting *Scheel v. Superior Mfg. Co.*, 249 Iowa 873, 882, 89 N.W.2d 377, 382–84 (1958)). “A finding of extrinsic fraud as a basis for vacating a judgment would be justified only by the most egregious misconduct; at the very least would require a showing of fault, willfulness, or bad faith.” *In re Marriage of Heneman*, 396 N.W.2d 797, 800 (Iowa Ct. App. 1986).

The district court did not find this type of egregious misconduct. The court found that Nicolle “was present when [Steven] went on the Internet to determine the values of” their retirement plans and “was shown the value of the plans.” The court further found that the “parties discussed the division of the household property” and Steven agreed Nicolle could have everything but his hunting and fishing supplies. The court found that, prior to executing the stipulation, Steven outlined a possible division of assets and debts that was consistent with Nicolle’s expectation of receiving half the assets. The court noted that, when the stipulation was proffered to Nicolle, she suggested certain changes which “were incorporated in a final draft.” The court found that Steven went through the stipulation with Nicolle, encouraged her to speak to an attorney, and gave her the names of three attorneys. The court found “no credible evidence” that Steven threatened to have the children taken away from her if she did not sign the stipulation, “no indication that anyone detected drug use by [Nicolle]” around the time she signed the stipulation, and an inconsistency between Nicolle’s claim of domestic abuse and her decision to continue living under the same roof with Steven “throughout the dissolution proceedings and immediately following entry of the Dissolution Decree.”

The court determined and concluded,

Under the credible evidence of this case, the Court does not find any misrepresentation of assets by [Steven]. [Nicolle] had the opportunity to view the amounts in [Steven's] retirement accounts. She secured the amount of indebtedness owing on the marital home and could have determined the home's assessed valuation from County records. [Nicolle] was familiar with the motor vehicles owned by the parties, as well as the household and personal property, including the sporting/recreational equipment. Although bank accounts were not specifically addressed in the stipulation, [Nicolle] clearly had knowledge of the existence of [Steven's] checking account. Furthermore, the Court does not find [Steven] lulled [Nicolle] into a false sense of security or prevented her from making a defense. In fact, he encouraged her to consult with an attorney. The court does not find any proof of fraud warranting a vacation of the Dissolution Decree.

The court further determined and concluded,

This court does not find any credible evidence of unavoidable casualty or misfortune to warrant setting aside the Dissolution Decree. Although [Nicolle] claims she was abused by [Steven], the court is unable to make such a finding from the credible evidence before the court. The court specifically notes [Nicolle] and [Steven] continued to reside together throughout the dissolution proceedings and following the dissolution. Had [Nicolle] needed to vacate the marital home, the evidence indicates her family would have provided financial support for such a move.

Although there is evidence [Nicolle] has a history of taking prescription medications, she did not exhibit any physical indicators of excessive use of medications when she was provided the final stipulation and subsequently signed it. Furthermore, there is no evidence in the record as to what consequences, if any, [Nicolle] could experience if she was abusing her medications. Questions concerning the amount of the drug which would be considered as being of significance, or the relative effect of a specific amount, are not matters which judicial notice will properly be taken.

. . . .

From the credible evidence, it appears to this court, [Nicolle] valued an agreement whereby she would share in the children's legal custody and physical care and avoid the risk of the custody fight. When she was assured of that, she did not give much, if any, thought to the other provisions of the stipulation of settlement. Historically, her parents have shown a willingness to provide for her financial support. She may have assumed they would continue to do so.

The court's findings are supported by substantial evidence. They are also supported by credibility determinations in favor of Steven, determinations that we are in no position to second-guess. See *Etchen v. Holiday Rambler Corp.*, 574 N.W.2d 355, 360 (Iowa Ct. App. 1997) ("The district court has a better opportunity than the appellate court to evaluate the credibility of witnesses. This court is prohibited from weighing the credibility of witnesses." (citation omitted)). While Nicolle did not have an attorney when she executed the stipulation, it is clear she got what she wanted, which was joint physical care of the children, notwithstanding evidence of sustained prescription drug abuse culminating in a criminal proceeding. We conclude the district court did not err in dismissing Nicolle's motion to vacate the dissolution decree.

Nicolle also contends the district court abused its discretion in failing to grant a new trial. She specifically argues the district court "did not give any indication of what [her] share of the household property should be and the decision leaves no recourse to [her] to recover any household property to which she was due." Nicole premises her argument on the court's "inherent right to grant another trial where substantial justice has not been effectuated." See *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 660 (Iowa 1969) ("[T]he trial court in its consideration of a motion for new trial is not limited by the status of the record in this respect when it feels the verdict fails to administer substantial justice or it appears the jury has failed to respond truly to the real merits of the controversy. In addition to the grounds stated in rule [1.1004] for granting a new trial, the trial court has the inherent right to grant another trial where substantial

justice has not been effectuated.”). Our review of this argument is for an abuse of discretion. *Id.* at 661.

We discern no abuse of discretion in the court’s summary rejection of Nicolle’s new trial motion. Steven testified that Nicolle was free to pick up the personal property items that were hers and noted she had not done so. Nicolle’s only response was that she had not picked up the items because she did not want to jeopardize the motion to vacate and did not want to get in trouble with Steven. The district court’s credibility findings in its original ruling suggest that the court generally credited Steven’s testimony. The court reasonably could have concluded that Nicolle had ample opportunity to recover her personal property. For that reason, we affirm the court’s denial of Nicolle’s new trial motion.

### ***III. Appellate Attorney Fees***

Steven seeks appellate attorney fees. He concedes the trial court did not award trial attorney fees on the ground that these fees were not authorized on a petition to vacate a final judgment. We believe the same rule applies to a request for appellate attorney fees. *See Tel. Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 536–37 (Iowa 1980) (stating that in order to tax attorney fees against a party, a statute or rule must clearly allow it, even in the case of appellate attorney fees); *see also Cutler*, 588 N.W.2d at 429 (noting actions under rule 1.1012 are law, not equity actions); *Costello v. McFadden*, 553 N.W.2d 607, 614 (Iowa 1996) (noting that there is nothing in what is now rule 1.1012 that allows for the collection of attorney fees); *Severson v. Peterson*, 364 N.W.2d 212, 214 (Iowa 1985) (noting that despite the fact that the underlying



proceeding that was sought to be vacated was a landlord-tenant action, which normally would allow for the collection of attorney fees, fees were not allowed in an independent proceeding under what is now rule 1.1012); *Home Fed. Sav. & Loan Ass'n of Harlan v. Robinson*, 464 N.W.2d 894, 896 (Iowa Ct. App. 1990) (indicating that although the mortgage that was originally sued upon allowed for payment of attorney fees, there is no authority under what is now rule 1.1012 for taxation of attorney fees). Accordingly, we decline Steven's request for an award of appellate attorney fees.

**AFFIRMED.**