

IN THE COURT OF APPEALS OF IOWA

No. 2-790 / 12-0762
Filed November 29, 2012

**Upon the Petition of
DWIGHT LEE MOSER,**
Petitioner-Appellant,

**And Concerning
ANGELA MARIE BIEHN,**
Respondent-Appellee.

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

Father appeals the district court's dismissal of his petition to vacate
custody order. **AFFIRMED.**

Robert R. Anderson, Des Moines, for appellant.

Ryan J. Ellis, Indianola, and Cathleen J. Siebrecht of Siebrecht Law Firm,
Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Dwight Moser and Angela Biehn are the unmarried parents of a minor child. Moser filed a petition to determine custody and physical care. Discovery disputes arose, and the district court granted Biehn's motion for sanctions and attorney fees, ruling: "[Moser] shall provide full and complete responses . . . by March 8, 2011, or he is barred from presenting any evidence at trial." Moser did not comply with the order.

When Moser arrived at the courthouse for the August 4 trial, he was told he would not be allowed to present evidence. Thereafter, the parties stipulated to a resolution of the issues. The August 5 court order established paternity, custody, support, and visitation as stipulated by the parties.

On September 15, 2011, Moser filed a petition to vacate under Iowa Rules of Civil Procedure 1.1012(2) (irregularity or fraud) and/or 1.1012(5) (unavoidable casualty or misfortune). Moser requested the court "vacate the Order issued on August 5, 2011, modify its previous Orders barring [him] from presenting evidence, permit [him] to present evidence, and to set the matter for trial." Moser's accompanying affidavit stated his attorney's failure to communicate and her misinformation led to a complete failure to present his case. The district court granted Biehn's motion to dismiss the petition to vacate, ruling:

Rule 1.1013 [procedure for vacating or modifying judgment] provides that the petition "shall state the grounds for relief, and, if it seeks a new trial, show that [the grounds] were not and could not have been discovered in time to proceed under . . . [rule] 1.1004." . . . The time to proceed under Rule 1.1004 is found in Rule 1.1007 and states that motions must be filed within [fifteen] days of the decision. Iowa R. Civ. P. 1.1007.

....

The irregularity or unavoidable casualty that [Moser] uses as grounds for his petition to vacate the Order is that he was not allowed to present evidence at his trial to support his request for custody of his child. He now seeks a new trial so that he may present his evidence. Under the Rules, [Moser] must demonstrate that the grounds for his relief, the irregularity or unavoidable casualty, were not and could not have been discovered within [fifteen] days of the Order. However, [Moser] knew before the trial began that he would not be able to present evidence. The grounds were thus discoverable within [fifteen] days of the filing of the Order and [Moser] cannot satisfy the requirements under Rule 1.1013.

On appeal, Moser argues a trial was not held on August 4, therefore, his petition did not request a “new” trial and rule 1.1013(1) allows him “one year after the entry of the order involved.” Biehn contends Moser’s requested relief is for a “new” trial because (1) he specifically requested he be allowed to present evidence and (2) he requested the court “set the matter for trial.” Biehn requests appellate attorney fees for being required to defend the district court’s ruling. Our review of the district court’s ruling is on assigned error. *In re Marriage of Marconi*, 584 N.W.2d 331, 334 (Iowa 1998).

We find no error. Rule 1.1002 defines “new trial”: “A new trial is the reexamination in the same court of any issue of fact or part thereof, after a verdict, or master’s report, or a decision of the court.” Iowa R. Civ. P. 1.1002. Moser’s petition to vacate clearly seeks a “reexamination in the same court” of the August 5 “decision of the court” and, therefore, is a request for a new trial. Moser’s affidavit shows he was aware of his alleged grounds to vacate on August 4, the day he appeared at the courthouse for trial. Accordingly, Moser’s September petition to vacate the court’s August 5 order constitutes an untimely request for a new trial and was properly dismissed.

We decline Biehn's request for an award of appellate attorney fees. Costs are taxed to Moser.

AFFIRMED.