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IN THE
COURT OF APPEALS OF INDIANA

Sergio Alberto Cruz,
Appellant-Respondent,

v.

Elizabeth Saldivar Cruz,
Appellee-Petitioner.

April 4, 2022

Court of Appeals Case No. 21A-DN-1954

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-1904-DN-197

Weissmann, Judge.

[1] After Sergio Alberto Cruz (Husband) and Elizabeth Saldivar Cruz (Wife)[1] had purportedly been married for some fifteen years, Husband left for Mexico. Months later, having had no contact with Husband, Wife petitioned for dissolution of marriage and served Husband by publication. While the dissolution was pending, Wife discovered evidence suggesting that Husband had been married to someone else when Husband and Wife were married. In response, Wife petitioned for annulment in the dissolution action. When Husband failed to appear for the final hearing, the trial court entered a decree of annulment by default, although Husband had never been served with the annulment petition. Husband later moved under Indiana Trial Rule 60(B)(6) to set aside the decree as void for lack of personal jurisdiction, alleging that the petition for annulment asserted a new claim for relief that had to be served on him by summons. The trial court denied the motion.

[2] On appeal the parties dispute whether the petition for annulment merely amended the petition for dissolution of marriage. We conclude that a petition for dissolution of marriage and a petition for annulment are separate and distinct causes of action, so Wife's petition for annulment asserted a new claim for relief. Therefore, under Indiana Trial Rule 5(A), Husband should have been served with the petition for annulment by summons as provided in Indiana

[1] The terms "Wife" and "Husband" are used for clarity and not as a comment on the legitimacy of the marriage.

Trial Rule 4. Because he was not, we reverse the trial court's denial of his 60(B) motion.

Facts

[3] Husband and Wife were married in 2005 and separated at the end of 2018. Though both were living in Goshen, Indiana at the time of their separation, Husband did not see or speak to Wife again before she petitioned to dissolve their marriage in April 2019. Wife served the petition by publication, alleging Husband was living at an unknown location in Guadalajara, Mexico. Wife amended her dissolution petition in July 2019, again serving Husband by publication. However, in the time between the published notices, Wife received a hint that Husband may have returned from Mexico when she received Husband's new license plates, mailed to the marital home where Wife continued to live.

[4] In August, Wife discovered information suggesting she was never legally married to Husband. Wife then filed in the dissolution action a petition for annulment alleging Husband had "defrauded" her by representing himself as single when he was married to another woman from whom his divorce was not final. App. Vol. II, p. 28. Wife claimed her marriage to Husband was

"voidable" under Indiana law due to the fraud.[2] Wife never served the annulment petition on Husband.

[5] At the annulment hearing, Wife presented Mexican documents in Spanish that were not translated. Presumably based on this evidence, the trial court found Husband married Wife seven months before he finalized his divorce to his prior spouse. *Id.* at 30. Finding the parties' marriage void, the court issued a decree of annulment and ordered Husband to pay Wife's $3,000 attorney fees.

[6] Nine months later, Husband moved to set aside the trial court's judgment under Indiana Trial Rule 60(B)(6) because he had never been served with the petition for annulment. Tr. Vol. II, pp. 20-21. Husband objected to an annulment, but not a divorce, because he feared the fraud allegations from the annulment could adversely impact his immigration status. Tr. Vol. II, p. 34, Appellee's Br., p. 9 (citing Tr. Vol. II, p. 36). Husband argued that a dissolution of marriage and an annulment are different causes of action requiring separate service by summons under Indiana Trial Rules 4 and 5. Arguing the decree of annulment was void for lack of service, Husband asked the trial court to set aside the decree under Indiana Trial Rule 60(B).

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[2] Bigamy renders a marriage *void* as opposed to voidable. Ind. Code § 31-11-8-2; *see, e.g.*, *Marriage of Thomas*, 794 N.E.2d 500, 503 (Ind. Ct. App. 2003), *trans. denied*; Ind. Code § 31-11-8-1. On appeal, Wife seems to acknowledge that instead of seeking an annulment, she should have sought a declaratory judgment that the marriage was void due to bigamy. Appellee's Br., p. 11. Given our reversal, which is based on the Wife's pleadings and the trial court's judgment on those pleadings, we leave this matter to the parties and trial court to sort out on remand.

[7] Wife acknowledged Husband was never served by summons with the annulment petition. But she claimed the annulment petition was merely an amended version of an existing pleading—the dissolution petition—so she was not required to serve Husband by summons. After an evidentiary hearing, the trial court agreed with Wife and denied Husband's request to set aside the decree of annulment.

Discussion and Decision

[8] Husband appeals the trial court's denial of his 60(B) motion, claiming the annulment was void because the trial court lacked jurisdiction to rule on the annulment petition in light of Wife's failure to serve him. We review de novo a trial court's ruling under Trial Rule 60(B)(6). *Chapo v. Jefferson Cnty. Plan Comm'n*, 164 N.E.3d 131, 133 (Ind. Ct. App. 2021), *reh. denied*, *trans. denied*, *cert. denied*, 142 S. Ct. 429.

[9] Indiana Trial Rules 4 and 5 provide the context for Husband's arguments. Indiana Trial Rule 4(B) and (D) require service by summons of an initial complaint in an action. That summons triggers the court's acquisition of jurisdiction over the served party. Indiana Trial Rule 4(A). Once the complaint is filed and summons is served, Indiana Trial Rule 5(A) requires service of any later pleadings by one party on the other but not service by summons.

> No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided by service of summons in [Indiana Trial] Rule 4.

T.R. 5(A).

[10] Husband argues the annulment petition was a new claim for relief for which service by summons was required. Wife contends the annulment petition was an amendment of the dissolution petition and not a new claim for relief. She argues she was not required to serve the annulment petition on Husband at all, given his failure to appear in the dissolution action. Husband is right.

[11] The legislature, by creating distinct statutes for annulment of marriage and dissolution of marriage, has already signified that each is a separate cause of action. *See* Ind. Code chs. 31-11-8 through -10 (governing void marriages and marriages voidable through annulment); Ind. Code § 31-15-2-2 (establishing cause of action for dissolution of marriage); *see generally* Ind. Code art. 31-15 (concerning dissolution of marriage and legal separation).

[12] Not only do these causes of action arise under different articles of the Indiana Code, but the legislature requires the pleading of different grounds for each. For instance, a dissolution of marriage must be based on one of four grounds: "1) Irretrievable breakdown of the marriage[;] 2) The conviction of either of the parties, subsequent to the marriage, of a felony[;] 3) Impotence, existing at the time of the marriage[;] and (4) Incurable insanity of either party for a period of at least two (2) years." Ind. Code § 31-15-2-3. An annulment, by comparison, may be obtained if the marriage is voidable, rendered so by a party's incompetence or fraud. *See generally* Ind. Code § 31-11-9-1; Ind. Code §§ 31-11-10-1, -2.

[13] The disparate relief granted in a dissolution action and in an annulment also stands as convincing proof that an annulment is a distinct action from a dissolution of marriage. If an annulment is granted, the marriage is voided—that is treated as if it never legally existed. *Demoss v. Demoss*, 135 Ind. App. 548, 195 N.E.2d 496, 499 (1964) (ruling that voidable marriage could be declared void by court upon spouse's request); *Trook v. Lafayette Bank & Tr. Co.*, 581 N.E.2d 941, 944 (Ind. Ct. App. 1991) (defining both "void" and "void *ab initio*" as void from the beginning and denoting "an act or action that never had any legal existence at all because of some infirmity in the action or process"), *trans. denied*. If a court finds the material allegations of a dissolution petition are proven, a dissolution court has two options: 1) enter the dissolution decree, or 2) continue the matter and order the parties to seek reconciliation through any available counseling if the court finds that there is a reasonable possibility of reconciliation. Ind. Code § 31-15-2-15(a). Unlike an annulment decree, a dissolution of marriage decree only ends the marriage as of the date of the summary disposition order or decree. *See* Ind. Code §§ 31-15-2-14, -16. As Wife acknowledges, a dissolution court cannot enter a dissolution decree for a marriage that is void. Appellee's Br., p. 9; *see Marriage of Thomas,* 794 N.E.2d at 503.

[14] Wife's pleadings also describe different causes of action. In her dissolution petition, Wife alleged an irretrievable breakdown of the marriage but did not attribute fault to either party. Appellant's App. Vol II, p. 18. Yet, fault was the focus of her annulment petition, which alleged the marriage was voidable under

Indiana Code ch. 31-11-10 because Husband had "defrauded" her by representing he was single when he was not. *Id.* at 28.

[15] Wife's fraud claim in her annulment petition created a question of fact that the trial court decided in her favor when it granted her request for relief. *See* I.C. §§ 31-11-9-3, -10-2. By contrast, the outcome of her dissolution petition did not require the court to engage in factfinding. One spouse is entitled to a dissolution of marriage, even if the other spouse opposes it, assuming the procedural and jurisdictional requirements are met. *See Clark v. Clark,* 578 N.E.2d 747, 751 (Ind. Ct. App. 1991) (ruling that Indiana's no-fault divorce statutes do "not provide for factoring in any pre- or post-petition conduct of either party"); *Persinger v. Persinger*, 531 N.E.2d 502, 505 (Ind. Ct. App. 1987) (ruling that because Indiana is a no-fault divorce state, "court must grant a dissolution of marriage once an irretrievable breakdown in the marriage is found to exist.").

[16] The factual circumstances giving rise to the dissolution differ from those of an annulment: an irretrievable breakdown of the marriage versus a misrepresentation of Husband's marital status. The general injuries sustained in each action also vary, with the dissolution action involving only a failed legal relationship and the annulment action involving an additional fact that renders the marriage void or voidable by law. The general conduct causing those injuries also is disparate. The parties' inability to preserve their relationship prompted the dissolution before Wife ever learned of the alleged fraud. Yet the fraud was the conduct underlying the annulment.

[17] Given the clear legislative intent to create separate causes of action for annulment and dissolution and the varying proof required and remedies available for each, the trial court erred in finding Wife's annulment petition was a mere amendment of her dissolution petition.

[18] We also reject the trial court's finding, adopted by Wife on appeal, that even if service were inadequate to confer personal jurisdiction over Husband, the court had *in rem* jurisdiction sufficient to allow it to enter the annulment judgment. The changing of parties' status from married to unmarried is treated as an *in rem* proceeding. *D.L.D. v. L.D.*, 911 N.E.2d 675, 678 (Ind. Ct. App. 2009), *reh. denied*, *trans. denied*. A trial court therefore may dissolve a marriage at the sole request of a spouse who meets the residential requirements for dissolution when personal jurisdiction over the other party cannot be obtained. *See, e.g.*, *id.*; *Persinger*, 531 N.E.2d at 504 (finding trial court had *in rem* jurisdiction to enter dissolution decree where husband provided old address for wife and wife did not appear). But this theory has been applied only in dissolution matters, and Wife does not support applying it in an annulment proceeding. *See* Appellee's Br., p. 7.

[19] We conclude that the trial court never obtained personal jurisdiction over Husband as to the annulment petition because he was not served with it as

required by Indiana Trial Rules 4 and 5. Given this lack of jurisdiction, the trial court erred in entering a decree of annulment.[3]

[20] We reverse the trial court's decree of annulment and remand for further proceedings consistent with this opinion.[4]

Najam, J., and Vaidik, J., concur.

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[3] Given this result, we do not address Husband's other arguments.

[4] The exhibits in this appeal include Mexican documents written in Spanish that were never translated. If this action proceeds on remand, the parties will need to ensure any such exhibits are properly translated to aid the trial court in resolving this case.