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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-22

	Opinion Delivered JANUARY 20, 2010
BRANDY MAE DUNCAN APPELLANT	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT, [NO. DR-08-141]
V.	HONORABLE CRAIG HANNAH, JUDGE
JEREMY SCOTT DUNCAN APPELLEE	REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

This is an appeal of domestic-relations proceedings heard in White County Circuit Court. Appellant Brandy Mae Duncan appeals the trial court's divorce decree[1] that granted her ex-husband, appellee Jeremy Scott Duncan, a divorce from her, granted him primary custody of their two children, and divided marital property and debts. Her arguments on appeal are (1) that the trial court abused its discretion by permitting her attorney to be relieved from representing her thirteen days prior to the trial and without proper notice; (2) that the trial court clearly erred in dividing the marital estate unevenly in appellee's favor; and (3) that

[1]The notice of appeal is timely as to the decree entered on October 7, 2008, but does not name that order. We certified the question of whether the notice of appeal was effective, and our supreme court held that appellant's notice of appeal substantially complied with Arkansas Rule of Appellate Procedure 3(e). *Duncan v. Duncan*, 2009 Ark. 565. Thus, we have jurisdiction of this appeal.

the trial court was without authority to order real property in Louisiana to be appellee's sole property. Because we find merit in her first argument, we reverse and remand for further proceedings.

We begin our discussion with an overview of the events leading to this appeal. In February 2008, appellant filed a complaint for divorce against appellee in which she asked for custody of the children, commensurate child support, and an equitable division of marital property and debts. Appellant was represented by counsel, James Morgan. Appellee answered and filed a counterclaim for divorce in which he sought custody of the parties' two children and of appellant's daughter (the children's teenage half-sister) as well as an equitable division of the parties' debts and assets. In April 2008, appellant changed attorneys from Mr. Morgan to attorney Randall W. Henley. An attorney ad litem was appointed to represent the children's interests. The children were ages three (Wyatt) and one (Josey) at the time.

At the temporary hearing in May 2008, both parties appeared with their attorneys. Both parties testified. Appellant recited her current address into the record as 904 Fifth Avenue, Canyon, Texas. Appellant testified that she moved to Texas for a job opportunity, that she made approximately $48,000 per year, taking home $900 per week, and that she was provided housing by her live-in boyfriend. Appellee testified that he was a foreman in the pipe-laying industry. Appellee complained that appellant moved to Texas, taking the vast majority of the household goods and the equipment in his shop. He also stated that appellant charged up credit card debts he did not even know existed, and appellant inexplicably spent

around $75,000 in marital cash. Appellee believed that appellant had psychiatric problems and was not attending to the children's medical and dental needs when the children were in her care. Appellee expressed grave concern about appellant's boyfriend being around his children.

The temporary order, filed on May 28, 2008, recited that appellee would have temporary custody, that appellant would have "standard" visitation privileges to be conditioned upon appellant not residing with her boyfriend, and that appellant would pay child support based upon her weekly net pay of $900 as applied to the Family Support Chart. The temporary order also directed the parties to maintain current telephone and address information with each other for contact purposes.

On July 14, 2008, appellant's attorney (Mr. Henley) filed a request to be relieved as counsel due to "irreconcilable differences" between him and appellant. Mr. Henley served the motion to opposing counsel and appellant by regular mail. For appellant, Mr. Henley used the address appellant recited into the record at the temporary hearing. On August 6, 2008, appellee's attorney mailed to appellant's attorney a notice of a final hearing, set for September 2, 2008.

On August 11, 2008, Mr. Henley mailed a notice of hearing on the motion to withdraw to his client at the same residential address in Texas. The notice came back from the post office marked "8/14/08 MOVED LEFT NO ADDRESS UNABLE TO FORWARD RETURN TO SENDER." At the hearing on August 19, 2008, Mr. Henley stated to the trial judge that the last contact he had with his client was six to eight weeks

prior, which would have been in June or July 2008. Appellee's attorney stated that he understood that neither the children's attorney ad litem nor his client (appellee) had any contact with appellant since the temporary hearing. The judge ensured that Mr. Henley had no property of appellant's and then signed an order permitting Mr. Henley to withdraw. The judge ordered appellee's counsel to send appellant a notice of the final hearing by certified mail. That letter, sent on August 21, came back to opposing counsel as "NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD."

At the final hearing on Monday, September 2, 2008, appellee and his attorney appeared, along with the children's attorney ad litem, but appellant did not. Appellee's attorney represented that his client had not heard from appellant since the temporary hearing, save one telephone conversation the day before (on Sunday). Appellee said he told appellant about the final hearing but that she did not respond other than crying. The children had remained with appellee, and appellant had paid no child support.

Appellee testified as to the marital property and debts. In part, appellee testified that there was a bank note of approximately $33,800 secured by land owned in Louisiana, which appellee asked to be responsible for as well as to be declared the owner. Appellee elaborated on his belief that he had been "cleaned out" financially by appellant and encumbered without his knowledge or consent. As to the marital home, appellee said there was approximately $13,800 in home-equity debt that appellant took out without his knowledge or consent. Appellee asked to be declared the owner of that property subject to the debt. Appellee stated

that appellant had prepared their and his parents' tax returns and had wrongfully taken the refunds of approximately $30,000. At the conclusion, appellee was granted his requests overall, plus an attorney fee of $1500. Appellee was granted a divorce, he was awarded custody of the children, and appellant was given visitation privileges "at the discretion of the father."

The decree provided for orders commensurate with the trial judge's oral findings, including that with regard to the thirty-three acres of Louisiana real estate:

> This Decree is hereby found to grant any and all legal title for the aforesaid lands to the Defendant. This Decree shall be construed in any way necessary or possible to allow the State of Louisiana by legal means to transfer the parties' interest in the real property described above for the reasons which are set forth hereinbelow. Defendant shall be responsible for any and all indebtedness on said properties and agrees to indemnify and defend and hold the Plaintiff harmless from the indebtedness on the aforesaid property. The Defendant shall retain the interest in said properties as his sole and separate property, including all right, title, interest and ownership in all oil, gas and other minerals lying in, under or upon the aforesaid real properties.

The decree set out the remaining property and debts, dividing those as noted during the final hearing. The decree also stated that appellant "has completely absconded from the State of Arkansas, withdrawn herself from these proceedings, failed to attend or do anything as Court ordered despite being giving [sic] reasonable notice and appearing at the temporary hearing in this matter."

A notice of appeal was filed on appellant's behalf by another attorney, Hubert Alexander. We are now faced with appellant's points on appeal. Because the first point presents reversible error, we reverse and remand.

Arkansas Rule of Civil Procedure 64 governs the addition and withdrawal of counsel, and it states in pertinent part in subsection (b) that a lawyer may not withdraw without permission of the trial court, which may be granted if it is shown that he "has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel," and has tendered or stands ready to tender any client papers and unearned fees. This section is aimed at protecting the client's interests. *See Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996). The trial court must play an active role in determining whether the requirements of the rule have been met. *Id*. Appellant contends on appeal that proper notice was not given and that it was error to grant such a request within two weeks of the final hearing, where she was unrepresented.

Providing notice to the party affected by the withdrawal is important. *See Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000). While appellant did not provide an accurate mailing address to her attorney or the court, more was required of her attorney to provide his client notice than mere regular mailing of a motion to withdraw as counsel so close to a trial date unknown to his client. We acknowledge that our law imposes a duty on lawyers and litigants to exercise reasonable diligence to keep up with the status of their case. *Arnold v. Camden News Publishing Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003); *Jetton v. Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978); *McCormick v. McCormick*, 246 Ark. 348, 438 S.W.2d 23 (1969). *See also Diebold v. Myers General Agency*, 292 Ark. 463, 731 S.W.2d 183 (1987). Nonetheless,

we are firmly convinced that the facts in this case compel reversal because there lacked reasonable notice and because the trial court failed to ensure that the client's interests were protected.

Upon remand, the trial court should conduct further proceedings. At some later point, the trial court will be in a position to determine whether either party is entitled to a divorce, and if so, the trial court must equitably divide the marital property. *See* Ark. Code Ann. § 9-12-315 (Repl. 2008). While not expressly provided by our Code, the trial court is vested with authority to allocate marital debt in an equitable manner. *See Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001). Further, as was noted in *Knighton v. Knighton*, 259 Ark. 399, 533 S.W.2d 215 (1976), while one state's courts cannot directly affect title to lands situated in another state, the acting court may order a party to convey the party's interest in such lands to achieve that result.

For the foregoing reasons, we reverse the trial court's order granting Randall W. Henley's motion to withdraw as appellant's attorney, and the decree of divorce, and we remand for further proceedings.

PITTMAN and GRUBER, JJ., agree.