

**BRIDGET MARIE WILLIAMS,
WIFE OF BRECK LAWRENCE
FALCON**

*

NO. 2005-CA-0804

*

COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

BRECK LAWRENCE FALCON

*

STATE OF LOUISIANA

*

*

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 47-141, DIVISION "A"
Honorable Anthony D. Ragusa, Judge

Judge Terri F. Love

(Court composed of Judge Terri F. Love, Judge Leon A. Cannizzaro Jr.,
Judge Roland L. Belsome)

David M. Hufft
PIVACH, PIVACH, HUFFT & THRIFFILEY, L.L.C.
8311 Highway 23, Suite 104
P. O. Box 7125
Belle Chase, LA 70037

COUNSEL FOR DEFENDANT/APPELLANT

MARCH 29, 2006

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Breck Lawrence Falcon appeals the trial court's default judgment granting Bridget Marie Williams Falcon a divorce, child custody, child support, and the child dependency tax deduction. Mr. Falcon asserts the trial court erred by rendering a default judgment on the ancillary matters of the divorce. Post-hearing, he filed a Motion for a New Trial. The trial court denied the motion and Mr. Falcon's timely appeal followed. We find the trial court erred in rendering the default judgment determining child custody, child support, and the child dependency tax deduction. The trial court did not conduct a hearing in open court or take evidence that substantiated a prima facie case. We affirm the divorce and remand for a hearing to procure evidence regarding child custody, child support, and the child dependency tax deduction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Bridget Marie Williams Falcon ("Ms. Williams") filed a Petition for Divorce on March 26, 2001, alleging separation from Breck Lawrence Falcon ("Mr. Falcon") since June 2000. Ms. Williams also prayed for child custody, child support, and the child dependency tax deduction. Mr. Falcon

received domiciliary service via his father on April 3, 2001. However, he made no court appearances or filed responsive pleadings. The trial court entered a preliminary default granting Ms. Williams' divorce petition in its entirety on May 14, 2001.

On May 30, 2001, Ms. Williams filed an Affidavit in Lieu of Testimony to support and prove her divorce petition. The trial court rendered a default judgment the same day. The judgment granted Ms. Williams: 1) a divorce; 2) joint custody of the minor child, with Ms. Williams designated as the primary domiciliary parent; 3) five hundred and fifty-five dollars (\$555.00) in child support per month; 4) the child dependency tax deduction; and 5) the right to return to the use of her maiden name.

Mr. Falcon averred he never received notice of the default judgment. Thus, he filed a Motion for a New Trial on July 8, 2004, alleging the trial court erred by granting child custody, child support, and the tax deduction without the presentation of any evidence, testimony, or witnesses. The trial court denied the Motion for a New Trial on March 11, 2005. Mr. Falcon devolutively appealed alleging the trial court erred by determining child custody, child support, and the child dependency tax deduction without a hearing, evidence, or testimony to support a prima facie case.

TIMELINESS OF MOTION FOR NEW TRIAL AND APPEAL

Mr. Falcon filed a Motion for a New Trial on July 8, 2004, three years after the trial court entered the default judgment in favor of Ms. Williams. This violated La. C.C.P. Art. 1974, which requires that a motion for a new trial be filed within seven (7) days of the service of the judgment. However, Mr. Falcon alleges he never received notice of the signing of the default judgment as required by La. C.C.P. Art. 1913(B).

The record is void of evidence of personal or domiciliary service of the judgment or notice of signing the judgment on Mr. Falcon. Thus, the time delay to file a motion for a new trial or appeal never commenced. *Vitrano v. Vitrano*, 346 So.2d 303, 303-04 (La. App. 4 Cir. 1977). Mr. Falcon's 2004 Motion for a New Trial and devolutive appeal were timely.

STANDARD OF REVIEW

Default judgments receive the manifest error standard of review. *Cornish v. Doctors Care, L.L.C.*, 02-0285, p. 4 (La. App. 4 Cir. 6/12/02); 819 So.2d 1158, 1161. Additionally, the trial court's decisions regarding child custody are "entitled to great weight." *Fountain v. Waguespack*, 93-1077 (La. App. 4 Cir. 7/8/94); 639 So.2d 882, 887. Thus, the judgment will not be disturbed absent an abuse of discretion. *Id.* Child support determinations are also entitled to the abuse of discretion standard of review.

Farrar v. Farrar, 00-1487, p. 2 (La. App. 4 Cir. 7/11/01); 791 So.2d 796, 798.

DEFAULT JUDGMENT

A default judgment may be confirmed without the taking of evidence or a hearing in open court in certain situations as provided in La. C.C.P. Art. 1702 and 1702.1. The petitioner must prove a prima facie case “as though each allegation of the petition had been denied.” *Cornish*, 819 So.2d at 1161. A presumption also exists that the record proves a prima facie case. *Id.* However, this presumption is nonexistent if “the record indicates otherwise.” *Id.*

DIVORCE

The trial court granted Ms. Williams a divorce pursuant to La. C.C. Art. 103(1). As noted in La. C.C.P. Art. 1702(E), a La. C.C. Art. 103(1) divorce may be granted by default judgment if there is evidence or an affidavit to prove a prima facie case. Ms. Williams’ divorce petition stated that she and Mr. Falcon had not lived together since June 2000. This separation met the time requirement of La. C.C. Art. 103(1) for living separate and apart for at least six (6) months prior to filing the divorce petition.

Ms. Williams submitted an Affidavit in Lieu of Testimony following

the preliminary default to prove a prima facie case for divorce. Based on this evidence, the trial court granted the divorce via default judgment. Ms. Williams' affidavit provided sufficient prima facie evidence that she had not resided with Mr. Falcon for at least six (6) months prior to filing her divorce petition. Therefore, we find the trial court's divorce by default judgment did not constitute manifest error.

ANCILLARY MATTERS TO THE DIVORCE

Ancillary matters to a divorce are not included in a default judgment without evidence to support a prima facie case, as required by La. C.C.P. Art. 1702 and 1702.1. However, the trial court has discretion whether to conduct a hearing in open court on the ancillary matters if no other Louisiana provisions are contradictory to holding a hearing. La. C.C.P. Art. 1702(E). In the case, *sub judice*, Louisiana law requires certain factors or guidelines to be considered and followed to determine these ancillary matters to a divorce. Thus, absent consent between the parties, child custody, child support, and the allocation of the child dependency tax deduction require evidence and testimony to prove a prima facie case.

First, Louisiana law requires that child custody be determined in accordance with the best interest of the child. La. C.C. Art. 131. Courts must consider twelve (12) factors in determining the best interest of the

child. La. C.C. Art. 134. The consideration of these factors is required in all custody awards. *Dalferes v. Dalferes*, 98-1233/98-1234 (La. App. 4 Cir. 11/18/98); 724 So.2d 805, 807. The record is void of evidence examining the best interest of the child.

Second, Louisiana law requires the trial court to consider the “totality of the circumstances” when determining the amount of child support. *Barkemeyer v. Barkemeyer*, 598 So.2d 550, 552 (La. App. 4 Cir. 1992). Louisiana law provides statutory guidelines that must be used when weighing factors to determine the amount of child support. LSA-R.S. 9:315.2. However, the trial court may deviate from the guidelines with “adequate reasons.” *Glorioso v. Glorioso*, 99-3222, p. 9 (La. App. 4 Cir. 11/15/00); 776 So.2d 536, 540. In the present case, the trial court disregarded the guidelines and the record lacks evidence which assists in determining child support under Louisiana law.

Third, the child dependency tax deduction cannot be allocated without the trial court considering evidence and/or testimony unless it is by consent between the parties. Income tax law awards the deduction to the custodial parent. *Rovira v. Rovira*, 550 So.2d 1237, 1238 (La. App. 4 Cir. 1989). The trial court may consider other factors when determining which parent should get the deduction. *Id.* at 1238-39. The record lacks evidence that the trial

court examined evidence or testimony to select the best recipient of the deduction.

The trial court granted Ms. Williams child custody, child support, and the deduction, based solely on her petition and affidavit. Ms. Williams' affidavit lacked evidence or facts relative to the three ancillary matters. The trial court did not conduct a hearing in open court to take additional evidence or testimony to substantiate or examine Ms. Williams' requests for custody, support, and the deduction as required by Louisiana law.

Further, the trial court did not examine the factors weighing in the best interest of the child. Nor did Ms. Williams or the trial court provide information regarding the proper amount of child support. A misappropriation of child custody also interferes with the allocation of the child dependency tax deduction.

Louisiana law requires the examination of factors and guidelines when determining these ancillary matters to a divorce. In the case, *sub judice*, this required a hearing in open court to collect evidence and oral testimony in order to properly address the issues of child custody, child support, and the child dependency tax deduction. The affidavit substantiated a prima facie case solely for the divorce in the default judgment. Therefore, the trial court failed to award child custody, child support, and the child dependency tax

deduction according to the guidelines set forth in Louisiana law.

We find the trial court was manifestly erroneous and abused its discretion when it rendered a default judgment awarding child custody, child support, and the child dependency tax deduction without requiring a hearing in open court to acquire evidence and testimony sufficient to examine the ancillary matters and prove a prima facie case.

DECREE

We affirm the divorce between Ms. Williams and Mr. Falcon. We reverse and remand the issues of child custody, child support, and the child dependency tax deduction for a hearing to consider the factors, guidelines, and evidence as required by Louisiana law.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART