

DA 19-0153

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 23N

IN RE THE MARRIAGE OF:

PHILIP M. HOFFMAN, JR.,

Petitioner and Appellee,

v.

PATRICIA S. HOFFMAN,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DR 18-466
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jock B. West, West Law Firm, P.C., Billings, Montana

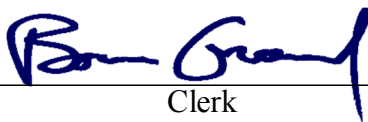
For Appellee:

Adrian A. Miller, Sullivan Miller Law PLLC, Billings, Montana

Submitted on Briefs: October 16, 2019

Decided: January 28, 2020

Filed:


Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Patricia S. Hoffman (Patricia) appeals from the Findings of Fact, Conclusions of Law and Final Decree of Dissolution of the Thirteenth Judicial District Court, Yellowstone County, dissolving her marriage to Phillip M. Hoffman (Phillip) and equitably dividing the parties' marital assets and debts. We affirm.

¶3 Phillip and Patricia were married in January 2002. In September 2015, Phillip executed a durable general and healthcare power-of-attorney document designating Patricia as his attorney-in-fact and Kevin Hoffman (Kevin), his adult son from a previous relationship, to act as the alternate. Phillip eventually became incapacitated from Alzheimer's dementia. On April 3, 2018, Patricia resigned her power-of-attorney, at which point Kevin took over. On April 18, 2018, Kevin moved Phillip to Minnesota to reside near him and oversee Phillip's healthcare. On April 30, 2018, Kevin, acting under the power-of-attorney, petitioned the District Court for dissolution of Phillip's marriage to Patricia in an attempt to recover marital property from Patricia to pay for Phillip's continuing healthcare. The District Court, aware of Phillip's advanced age and declining health, set a trial for November 13, 2018. At this point, both Phillip and Patricia were represented by counsel.

¶4 On August 15, 2018, Patricia filed a notice of substitution of counsel. Less than a week before trial was set to begin, Patricia’s new counsel filed a motion to withdraw, stating that communication between her and Patricia “ha[d] broken down to the degree that zealous representation [was] no longer possible.” Counsel’s motion also requested a continuance of the trial so that Patricia could obtain substitute counsel.

¶5 On November 10, 2018, Patricia signed her written consent to her counsel’s withdrawal but did not file the consent until the morning of trial. Patricia appeared at the trial pro se and acknowledged the breakdown in communication with her counsel stemmed from her refusal to sign the documents necessary to finalize the settlement agreement reached during the parties’ mediation. Patricia verbally represented to the District Court that she was ready to proceed to trial without counsel. The District Court signed a written order formally allowing Patricia’s counsel to withdraw but denied counsel’s motion to continue, allowing the trial to proceed.

¶6 On February 5, 2019, the District Court entered its Findings of Fact, Conclusions of Law and Final Decree of Dissolution distributing the marital estate and specifically finding no good cause had existed to continue the trial because both parties “recognized the need” for an expedited trial setting due to Phillip’s advanced age and fragile health, and Patricia validly consented to her counsel’s withdrawal “on the eve of trial.”

¶7 Patricia argues on appeal that the District Court erred by denying her motion to continue and allowing the dissolution trial to proceed without first requiring opposing counsel give Patricia statutorily required notice after her attorney withdrew.

¶8 “Any motion for a continuance is within the sound discretion of the district court and we will not overrule the court’s decision . . . unless there is an affirmative showing [a party] has suffered prejudice.” *In re Marriage of Pospisil*, 2000 MT 132, ¶ 18, 299 Mont. 527, 1 P.3d 364. As such, we apply an abuse of discretion standard when reviewing a district court’s grant or denial of a motion for a continuance. *Pospisil*, ¶ 18. An abuse of discretion occurs when a district court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Pospisil*, ¶ 19 (citations omitted).

¶9 In cases where an attorney representing a party in an action withdraws or is removed, opposing counsel is required to “make a good faith effort, by written notice, both to notify the unrepresented party that he should retain counsel or appear in person and to notify the unrepresented party regarding the nature and timing of the next pending proceeding.” *Quantum Electric, Inc. v. Schaeffer*, 2003 MT 29, ¶ 21, 314 Mont. 193, 64 P.3d 1026. Section 37-61-405, MCA, provides that when an attorney in an action “dies or is removed or suspended or ceases to act as an attorney,” the opposing party must, “before any further proceedings are had” in the action, provide written notice to the unrepresented party to appoint another attorney or appear in the action in person.

¶10 In addition to the statutory requirement, Mont. Unif. Dist. Ct. R. 10 specifically requires an unrepresented party, “before any further proceedings are had against him/her,” be given notice by the opposing party:

- (1) That [the unrepresented] party must appoint another attorney or appear in person, and

- (2) The date of the trial or of the next hearing or action required in the case, and
- (3) That if [the unrepresented party] fails to appoint an attorney or appear in person by a date certain, which may not be less than twenty-one days from the date of the notice, the action or other proceeding will proceed and may result in a judgment or other order being entered against him/her, by default or otherwise.

Mont. Unif. Dist. Ct. R. 10(b).

¶11 Both notice requirements function “to protect unrepresented litigants . . . from procedural unfairness.” *Stewart v. Rice*, 2013 MT 55, ¶ 35, 369 Mont. 203, 296 P.3d 1174 (citing *Puhto v. Smith Funeral Chapels, Inc.*, 2011 MT 279, ¶ 16, 362 Mont. 447, 264 P.3d 1142). The policy behind the notice requirements “is clearly to ensure that a party, abandoned by counsel in the midst of litigation, is not left hanging ‘out to dry.’” *In re Marriage of Hardin*, 2008 MT 154, ¶ 18, 343 Mont. 254, 184 P.3d 1012. As such, we generally require strict compliance with both § 37-61-405, MCA, and Rule 10 when a party becomes unrepresented. *Stewart*, ¶ 32.

¶12 However, § 37-61-405, MCA, and Rule 10 do not apply to protect an unrepresented party when that party intentionally causes counsel’s removal. *See Hardin*, ¶ 18 (holding husband was not entitled to § 37-61-405, MCA, and Rule 10 protections and therefore not entitled to a continuance of dissolution trial after husband discharged counsel two weeks before trial); *In re A.M.M.*, 2015 MT 250, ¶¶ 33-34, 380 Mont. 451, 356 P.3d 474 (holding § 37-61-405, MCA, and Rule 10 protections did not apply to adult son seeking guardianship and conservatorship of his incapacitated mother after he discharged his two attorneys prior to trial because he had not been abandoned by counsel

but rather intentionally removed his counsel). Rigidly applying § 37-61-405, MCA, and Rule 10 to those situations where an unrepresented party intentionally discharges counsel prior to trial impermissibly allows the unrepresented party to control the function and progress of the proceeding rather than the district court. *Hardin*, ¶ 18 (citations omitted).

¶13 In this case, the District Court found Patricia was represented by two different attorneys pretrial and failed to cooperate with her second attorney in finalizing the case after mediation, causing a breakdown in communications that required the attorney's withdrawal. Patricia engaged in this conduct knowing trial was imminent and aware of the overall time-sensitive nature of the proceedings given Phillip's advanced age and fragile health. Under these facts, Patricia cannot rely on the notice protections of § 37-61-405, MCA, and Rule 10. The District Court acted within its discretion when it declined to continue the dissolution trial without requiring opposing counsel provide Patricia § 37-61-405, MCA, and Rule 10 notice.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's ruling was not an abuse of discretion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JIM RICE