[Cite as *Jensen v. Jensen*, 2007-Ohio-894.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

WILLIAM C. JENSEN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2005-G-2671**
- vs -	:	
MARINA SUSANA LILLIAN COLUMBO JENSEN,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 04 D 000915.

Judgment: Reversed and remanded.

John S. Salem, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #22, Mentor, OH 44060 (For Plaintiff-Appellee).

Alan H. Kraus, 25700 Science Park Drive, #250, Beachwood, OH 44122 and *Mark L. Hoffman*, Ohio Savings Building, 20133 Farnsleigh Road, Shaker Heights, OH 44122-3613 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Marina Susana Lillian Columbo Jensen ("Marina") appeals from the judgments of the Geauga County Court of Common Pleas overruling her objections and adopting and affirming the magistrate's decision in an uncontested divorce, and denying her motion for a new trial. We reverse and remand.

{¶2} Marina, a psychiatrist and native of Argentina, met William C. Jensen ("William") in Cleveland, Ohio, in 1996. They were married in 1998. Marina was working on various medical board examinations which would allow her to practice psychiatry in the United States. Eventually, Marina was accepted to a residency program in Boston, Massachusetts, commencing in the summer of 2003. Marina moved to Boston, while William remained in Cleveland.

{¶3} September 29, 2004, William filed for divorce. The matter was assigned to the magistrate. Marina was properly served with the complaint and summons by certified mail. She never filed an answer to the complaint. According to William's "Motion to Dismiss Defendant's Objections," he submits that Marina attempted to obtain her own divorce in the state of Massachusetts, even filing a motion with the Massachusetts' court attempting to transfer jurisdiction to that state. However, there is no evidence in the record to support this assertion.[1] Furthermore, there is no evidence in the record which shows that Marina obtained counsel in Massachusetts or filed for divorce there.

{¶4} On November 9, 2004, the record does reflect that the Geauga County Court of Common Pleas received a letter from Marina. In the letter, she states, "[a]s per your conversation with my Massachusetts attorney, Stephen H. Merlin, please consider this letter as a request for a continuance of the hearing scheduled at 1:15 p.m. on November 5, 2004." Again, there is no evidence in the record that the alleged

1. William did attach an unsigned letter to his motion, purportedly from Attorney Stephen H. Merlin, referencing the case *Marina Susana Lillian* Columbo *Jensen v. William C. Jensen*, No. 04D-1081-DV1, and stating, "[e]nclosed please find Plaintiff's Motion to Retain Jurisdiction in Massachusetts for docketing and filing in the above-referenced matter." The unsigned letter indicates that copies of the letter and attached pleading (that was neither signed by Attorney Merlin, nor time-stamped by a Massachusetts court) were sent to William, William's attorney, and Marina.

conversation between Magistrate Mullen and Attorney Merlin actually occurred. Furthermore, there is no affidavit or signed pleading indicating that this is in fact true.

{¶5} November 19, 2004, the magistrate filed a notice that hearing on the uncontested divorce would be held December 17, 2004. Certificates evidencing the mailing of this notice to Marina, personally, and to William's counsel, are in the file, and the trial court's docket notes the order was mailed November 23, 2004. William retained new counsel shortly before the scheduled hearing, and moved for a continuance, which the magistrate granted by an order filed December 30, 2004. Hearing was reset for January 25, 2005. Neither certificates nor any docket entry indicates this order was actually mailed.

{¶6} January 21, 2005, the magistrate filed a notice scheduling hearing for March 14, 2005. Following normal procedure, the names of the parties to be served with the notice were typed in the lower left corner of the document; in this instance they include Marina and her Massachusetts counsel, as well as William's counsel. However, neither certificates of mailing nor any docket entry actually reflects the notice was sent.

{¶7} March 14, 2005, hearing went forward before the magistrate, with only William and his counsel present.[2] March 25, 2005, the magistrate issued his decision granting the divorce, and ordering Marina to pay William $42,000 in spousal support over seven years, for his alleged assistance in her psychiatric training.

{¶8} April 8, 2005, Marina, still pro se, moved the trial court for an extension of time in which to file her objections to the magistrate's decision. The basis of her motion

2. According to Marina's "Objection to Magistrate's Decision," she asserts that she was in Argentina at the time of the final hearing, and thus, unable to attend. However, we note that there is no evidence in the record to support this claim.

was that the court reporter required until April 20, 2005 to prepare the transcript of the March 14 hearing. April 12, 2005, the trial court granted Marina's motion, effective until May 20, 2005.

{¶9} May 18, 2005, Marina, now represented by counsel, moved the trial court for a second thirty-day extension of time to file her objections, so her counsel could familiarize himself with the case. May 20, 2005, the trial court granted her until June 8, 2005, to file her objections. William's response was set for June 24, 2005. Marina filed her objections to the magistrate's decision, and a request for rehearing, June 6, 2005. In her objections, she argued: "[t]he court's docket does not reflect whether the notices of the March 14, 2005 hearing was mailed to defendant." June 24, William moved the trial court to dismiss the objections, arguing that Marina still had not filed the transcript of the March 14, 2005 hearing, and that she was attempting to introduce evidence via the objections. July 1, 2005, Marina opposed William's motion to dismiss, and moved to file the transcript of the March 14 hearing, instanter.

{¶10} July 21, 2005, the trial court denied Marina's motion to file instanter the transcript

{¶11} of the March 14, 2005 hearing. That same day, by a separate judgment entry, it denied William's motion to dismiss Marina's objections to the magistrate's decision; denied Marina's objections and request for rehearing; and adopted the magistrate's decision.

{¶12} August 2, 2005, Marina moved for a new trial, which the trial court denied September 26, 2005. October 20, 2005, Marina timely noticed this appeal, making three assignments of error:

{¶13} "[1.] It was error to conduct an uncontested divorce hearing when appellant was not given notice of said hearing as mandated by Civ.R. 75(L).

{¶14} "[2.] The trial court erred when it failed to grant appellant's unopposed motion for a new trial which alleged that appellee had engaged in misconduct.

{¶15} "[3.] The trial court erred when it denied appellant's motion to file transcript instanter and denied appellant's objections to the magistrate's decision without reviewing the transcript [.]"

{¶16} By her first assignment of error, Marina argues that the magistrate erred in conducting the March 14, 2005 hearing, and that the trial court erred in relying on the decision emanating from that hearing, due to failure to comply with Civ.R. 75(L). That rule provides, relative to divorce, annulment, and legal separation proceedings:

{¶17} "*** In all cases where there is no counsel of record for the adverse party, the court shall give the adverse party notice of the trial upon the merits. The notice shall be made by regular mail to the party's last known address, and shall be mailed at least seven days prior to the commencement of trial."

{¶18} As Marina notes, she was unrepresented by Ohio counsel at the time of the March 14, 2005 hearing; and, her Massachusetts counsel, if she did indeed have one, never made an appearance in this case. She had no counsel of record. And nothing in the record indicates that the magistrate's January 21, 2005 notice, setting hearing for March 14 of that year, was mailed to her. Marina maintains that this is a clear violation of Civ.R. 75(L), and reversible error.

{¶19} We agree. The lead case on this issue is the Ninth Appellate District's decision in *King v. King* (1977), 55 Ohio App.2d 43. In that case, appellant husband

received notice of the hearing date in his wife's divorce action from her attorney, by letter. Id. at 43-44. He failed to appear; and the trial court entered judgment. Id. at 44. Husband appealed, arguing that the trial court erred in going ahead with trial in the divorce, since it had not noticed the trial date to him in compliance with Civ.R. 75(L).[3]

{¶20} The Ninth District agreed, holding as follows:

{¶21} "It is clear that this rule [75(L)] mandates that the *court* shall give the adverse party notice of the trial. Compliance with this rule is not achieved through the informal notice procedure that occurred in this case. The husband was not under any duty to appear in response to a notice from his wife's attorney. He did not lose his right to notice under Civ.R. 75(L). As a consequence, the trial court committed reversible error by entering a judgment without proper notice to the husband.

{¶22} "The purpose of Civ.R. 75(G) and (L) was to prevent or reduce the number of divorces which are granted without the court hearing the merits from both sides. Additionally, it tends to prevent fraud by one party upon the other. The integrity of the system requires that the court send out the notices for trial upon the merits." *King* at 44-45. (Emphasis sic.)

{¶23} In the instant case, Marina timely objected that she had no notice of the March 14, 2005 hearing. Nothing in the record indicates that the trial court sent her notice by regular mail service, as required by Civ.R. 75(L). The common pleas clerk of courts has a duty to make a record of all mesne process and orders issuing from that court, R.C. 2303.13; the clerk has a duty to maintain the books of that court and the record of its proceedings. R.C. 2303.14. We deem that in cases where the Civil Rules

3. During the pendency of the case in *King*, Civ.R. 75(L) was redesignated Civ.R. 75(K). *King* at 44. The designation has reverted.

require the *court* to send notice to a party, the clerk must make a record of the mailing, and enter that on the docket. There being no evidence that Marina received notice of the hearing as required by Civ.R. 75(L), the trial court committed reversible error by entering judgment against her. *King* at 44-45.

{¶24} The first assignment of error has merit.

{¶25} In view of our disposition of the first assignment of error, the second two are moot. A new hearing is required.

{¶26} The judgment of the Geauga County Court of Common Pleas is reversed, and this matter is hereby remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion,

DONALD R. FORD, J., Ret., Eleventh Appellate District, sitting by assignment, concurs.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶27} The majority reverses the decision of the court below on the grounds that "nothing in the record indicates that the trial court sent her notice by regular mail, as required by Civ.R. 75(L)." Civ.R. 75(L) ("In all cases where there is no counsel of record for the adverse party, the court shall give the adverse party notice of the trial upon the merits. The notice shall be made by regular mail to the party's last known address, and shall be mailed at least seven days prior to the commencement of trial.").

{¶28} Contrary to the majority's position, there is abundant evidence in the record that Marina Susana Lilian Jensen was served with notice of the March 14, 2005 final hearing.

{¶29} On the Notice of Hearing recorded in the common pleas court's docket on January 21, 2005, in the lower left-hand corner of the page, are listed three names indicating persons to whom the Notice of Hearing is to be sent. These names are "Stephen Merlin, Esq." (Marina's Massachusetts attorney), "Marina Jensen," and John Salem, Esq." (William Jensen's attorney). Beside each name is a check mark, indicating that notice has been sent. This procedure for identifying the names of the parties for service of a particular document is customary in many courts of this state. This January 21, 2005 judgment entry demonstrates that the hearing notice had been sent by regular U.S. mail to Marina Jensen at her address of record.

{¶30} Still, there is further evidence in the record that Marina Jensen was served with notice of the final hearing. In the transcript of the March 14, 2005 trial, filed with the common pleas court on October 20, 2005, the magistrate carefully reviewed the court's docket, reciting the case's history with particular attention paid to notice of hearings. When the magistrate comes to the final hearing, he states that "January 21, 2005 *** is the time stamped notice of hearing *** scheduling it for today, March 14, at 9:00" and indicates that "Mr. Merlin, the Defendant [Marina Jensen], and John Salem" were the recipients of this notice. The magistrate concludes: "It's almost 9:30. Defendant has not appeared. She has not contacted the Court to request a continuance. We will proceed without her." Thus, the magistrate duly confirmed that Marina Jensen had

been sent notice of the hearing prior to conducting the hearing. The magistrate's comments are part of the record in this case.

{¶31} If any doubt remained as to whether notice was actually sent, the issue is confirmed by referencing the cost bill, which records a charge of $3.86 for "postage" to mail the January 21, 2005 notice.

{¶32} Thus, this case is distinguishable from *King v. King* (1977), 55 Ohio App.2d 43, relied upon by the majority. In *King*, in contrast to the present case, there was "nothing in the record to indicate that defendant was provided with notice." *Hightower v. Hightower*, 10th Dist. No. 02AP-37, 2002-Ohio-5488, at ¶18; *King*, 55 Ohio App.2d at 45. Here, the January 21, 2005 notice, the transcript of the March 14, 2005 trial, and the bill of costs all attest that Marina received notice.

{¶33} Civil Rule 75(L) only requires that notice be sent to a party's last known address, it does not require the trial court to enter a separate docket entry attesting that notice is actually sent. Cf. Civ.R. 58(B), requiring the clerk of courts to "note the service [of judgment] in the appearance docket."[4] Once service has been indicated, there is a presumption of proper service by ordinary mail. Cf. *Thompson v. Thompson* (June 16, 1995), 11th Dist. No. 94-P-0068, 1995 Ohio App. LEXIS 2680, at *23-*24.

{¶34} Additionally, Marina's first assignment of error should be rejected because she failed to properly raise this issue in her objections to the magistrate's decision. Civil

4. The import of Civ.R. 75(L) is not service by ordinary mail, but service directly to the pro se litigant. The majority's decision would require all court notices to be recorded in the court's docket, otherwise service could be deemed invalid and due process violated. As noted above, courts routinely rely upon the informal method of indicating to the clerk of courts to whom a document should be sent, used by the lower court in the present case.

Rule 53 states that "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). The majority misleadingly states that Marina "argued: 'the court's docket does not reflect whether the notices of the March 14, 2005 hearing was mailed to defendant.'" In fact, Marina merely stated this fact in her brief in support. The failure to properly serve notice is not raised as a specific objection to the magistrate's decision nor is it used to support any of the objections properly raised.[5] Since the issue of service was not raised as an objection to the magistrate's decision, Marina has waived the right to raise this argument on appeal. Civ.R. 53(D)(3)(b)(iv); see *Tippie v. Patnik*, 11th Dist. No. 2005-G-2665, 2006-Ohio-6532 at ¶44; *Planin v. Planin*, 11th Dist. No. 2005-G-2644, 2006-Ohio-2933, at ¶19.

{¶35} Accordingly, Marina's second and third assignments of error are not moot. I would reject both assignments as the trial court acted within its discretion by denying Marina's motion for a new trial and motion to file transcript instanter, and by overruling Marina's objections to the magistrate's decision.

{¶36} For these reasons, I respectfully dissent. The judgment of the Geauga

5. Marina raised the following objections to the magistrate's decision: "A. The Magistrate erred by ordering defendant to pay spousal support to plaintiff in the amount of $42,000 over seven years as reimbursement for plaintiff's expenditures towards defendant's education because such expenditures have been discharged in bankruptcy. B. The Magistrate erred by not accounting for defendant's reimbursement to plaintiff for expenses paid by plaintiff to assist her in becoming a U.S. citizen and/or in pursuing her education. C. The Magistrate erred by not identifying all real property owned by plaintiff as a result of plaintiff's willful concealment of such property. D. The Magistrate erred by improperly relying upon defendant's erroneous and unsupported testimony as to defendant's alleged earnings as a first-year resident in psychiatry. E. The Magistrate erred by improperly relying upon defendant's erroneous and unsupported testimony that defendant would obtain employment at the Cleveland Clinic Foundation upon completion of her residency and earn $125,000.00 per year. F. The Magistrate erred by incorrectly determining that although plaintiff has a bachelor's degree in elementary education, he has never taught school. Plaintiff willfully concealed that he taught for at least five years in Florida."

County Court of Common Pleas should be affirmed.