

REVERSE and REMAND; and Opinion Filed January 11, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-01596-CV

IN THE ESTATE OF MARIE MERKEL, DECEASED

**On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-05-00375-3**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Francis

Rupert Pollard appeals the probate court's November 18, 2014 order finally disposing of this case. In seven issues, Pollard contends the trial court abused its discretion by (1) failing to grant his motion to disqualify the independent executor's counsel, (2) rendering final relief without providing him notice of a trial setting, and (3) determining he abandoned his homestead rights and no successor executor to the estate was needed. In five other issues, Pollard contends the trial court abused its discretion when, in a May 10, 2006 order, it dismissed his claims for failure to timely amend his pleadings. Because we conclude Pollard was not afforded proper notice, we reverse the trial court's order and remand this cause for further proceedings.

The record on appeal does not contain the complete history of this case. We draw the following historical facts, in large part, from the various opinions issued by this Court and the Fifth Circuit Court of Appeals. Marie Merkel and Pollard married on September 4, 1964. Merkel filed for divorce on February 25, 1992. After the trial court signed a final decree of

divorce on January 30, 1996, Pollard appealed the judgment. This Court concluded the trial court erred by granting judgment on a repudiated mediated settlement agreement, reversed the trial court's judgment, and remanded the cause to the trial court. Following remand, Merkel filed an amended petition for divorce asserting fault-based grounds for divorce. After a jury trial, the trial court signed an amended May 7, 2001 final decree of divorce which included awarding the house at 4231 Beverly Drive to Merkel. Pollard again challenged the trial court's judgment on appeal. This Court ruled in Pollard's favor, concluding the trial court abused its discretion by denying Pollard's motion to disqualify Merkel's attorney and reversed the trial court's judgment, remanding the cause to the trial court.

On October 10, 2004, Merkel died. At that time, she and Pollard were still parties to a divorce action in district court. A probate of Merkel's estate was filed in a Dallas County statutory probate court in January 2005, and Merkel's will was subsequently admitted to probate on February 14, 2005. That same day, Matthew Pollard, Merkel and Pollard's son, was appointed independent executor of Merkel's estate. Pollard learned of Merkel's death in "late February 2005," and in June 2005, filed a number of authenticated unsecured claims against Merkel's estate in the probate action, along with *lis pendens* notices asserting community and homestead interests in the Beverly Drive house.

In October 2005, Pollard filed a petition on his rejected claims, claiming the independent executor had "failed and refused to file a memorandum or memoranda allowing or rejecting said claims." The independent executor filed an answer and asserted counterclaims and special exceptions. The trial court granted the special exceptions and ordered Pollard to amend his pleadings by May 3, 2006. When he did not do so, the trial court struck Pollard's petition and dismissed all the claims he pleaded. Almost two years later, Pollard filed a motion to vacate the May 2006 order of dismissal. When the trial court denied the motion, Pollard appealed. Noting

that the order was interlocutory because the independent executor's counterclaims remained pending, this Court dismissed that appeal for lack of jurisdiction.

In the meantime, the trial court in the divorce action dismissed "the case" for want of prosecution on February 23, 2005, being unaware of Merkel's death. No party appealed the dismissal order until August 23, 2007, when Pollard filed a motion to vacate the trial court's dismissal for want of prosecution and filed a motion to dismiss the divorce action for lack of subject matter jurisdiction, supported by filing a suggestion of Merkel's death in the trial court. On September 12, 2008, the trial court signed an order vacating as void the February 23, 2005 order of dismissal for want of prosecution and, "in light of Marie A. Merkel's death on October 10, 2004," dismissing the "divorce action in this case" for want of jurisdiction. The independent executor appealed the trial court's order. We noted there had been no timely challenge of the trial court's February 2005 order dismissing for want of prosecution and the order became final thirty days later; we concluded the trial court had no authority to issue the September 2008 order. Consequently, we held we lacked jurisdiction and dismissed the independent executor's appeal.

In October 2006, Merkel's estate filed a federal-question action, seeking to quiet title to the house and establish that Pollard had no interest in the Beverly Drive house. Pollard counter-claimed, seeking a declaration that he and Merkel were married at the time of her death and that he owned an undivided one-half interest in the house. In July 2008, the federal district court awarded partial summary judgment to Pollard, holding, among other things, that he and Merkel were married at the time of her death. The remainder of the case proceeded to trial. In January 2009, a jury found the estate had failed to prove Pollard abandoned the property. A final judgment provided that Pollard and Merkel were married as of her death and Pollard had a one-half community property interest and a homestead interest in the house. On appeal, the Fifth Circuit took judicial notice of the "*five* actions pending in state court, all of which are related to

the Merkel and Pollard's divorce" and, concluding it should abstain from deciding the state-law questions raised, vacated the judgment and dismissed the cause.

In August 2014, Pollard filed a motion to disqualify the independent executor's counsel, and a hearing was set for September 26, 2014. At the conclusion of the hearing, the trial court did not rule on the motion but requested each side file letter briefs. One week later, the trial court issued a show cause order, ordering the independent executor to appear on November 12 to show why he should not be removed from office. On November 11, the independent executor filed his resignation.

The record from the November 12 hearing reflects that, prior to the hearing, an "in-chambers conference" was held "between the court and the lawyers involved in the case." Following that conference, the trial court announced it was accepting the independent executor's resignation and was finding Pollard had abandoned the homestead. Pollard's counsel objected to opposing counsel's participation in the hearing "for the same reasons that we objected to it at the time of the Motion for Disqualification. You have not yet ruled on that Motion for Disqualification." Pollard's counsel then noted:

[T]he court has determined today that my client has abandoned his homestead, yet that is not an issue that was set for today. Today's hearing was specifically on the question of whether or not Matthew Pollard should be removed for having committed gross mismanagement and gross misconduct in his performance of his duties as Executor; that is the only issue that is before the court today. And so I believe it is improper for the court to enter any other orders not directly related to that issue.

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My client extremely objects to the court ordering that his house be sold. My client extremely extremely [sic] objects to the fact that the court has entered a finding that he's abandoned his homestead. There's been no evidence of that fact, and so we would ask that instead of — we would ask the court vacate its orders that have orally been issued today, and that you would instead enter an order removing Matthew Pollard based on the accounting that he's filed for his gross mismanagement and gross misconduct in the conduct of his duties as Independent Executor.

The trial court noted Pollard's objections and overruled them, stating, "I think the purpose of this hearing is to move this case along and make it a mere 20-year-old case as opposed to a 40 year old case [sic]." In its November 18, 2014 order, the trial court (1) accepted the resignation of the independent executor, stating the show cause order was thereby rendered moot; (2) ordered Matthew Pollard to file a final accounting by November 12 and to tender any cash remaining in the estate into the trial court's registry by November 21; (3) found that a successor executor was not necessary "at this time;" and (4) found, adjudicated, and declared "that Rupert Pollard has abandoned any claim or right of homestead in and to the real property commonly known as 4231 Beverly Drive, Dallas, Texas 75205." Pollard then filed this appeal.

In his second issue, Pollard contends the trial court abused its discretion when it rendered final relief without providing Pollard notice of a final trial setting. Pollard argues that due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." We agree.

The law is well settled that a party who appears in a case is entitled to notice of a trial setting or hearing as a matter of due process. *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 391 (Tex. 1989) (per curiam); *Bradford v. Bradford*, 971 S.W.2d 595, 597 (Tex. App.—Dallas 1998, no pet.). Due process is satisfied if notice is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988).

Rule 245 of the Texas Rules of Civil Procedure provides:

The Court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties.

TEX. R. CIV. P. 245. Thus, whether it is a first setting or a subsequent setting, a party is entitled to reasonable notice. *See id.* If a timely answer has been filed in a contested case or the defendant has otherwise made an appearance, due process rights are violated when a judgment is subsequently entered without the party having received notice of the setting of the case. *Peralta*, 485 U.S. at 86–87. This is true even in cases in which a party previously waived notice of citation. *See In re K.M.L.*, 443 S.W.3d 101, 119 (2014). A trial court’s failure to comply with the notice requirements in a contested case deprives a party of his constitutional right to be present at the hearing, to voice his objections in an appropriate manner, or present his side resulting in a violation of fundamental due process. *In re K.M.L.*, 443 S.W.3d at 119 (citing *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

Here, the record shows the trial court set the show cause hearing for November 12. The record does not contain any notice for any other hearing that day, nor does it contain notice of a final trial setting. Thus, while Pollard had reasonable notice that the issue before the trial court on November 12 was whether the independent executor should be removed, he had no notice that the hearing would result in a final determination of his homestead rights. To the extent the trial court considered and ruled Pollard abandoned his homestead rights in the Beverly Drive house or on any issues other than the show cause, the trial court erred. Because Pollard did not receive proper notice, his due process rights were violated, and we must reverse the trial court’s order. We sustain Pollard’s second issue.

In his first issue, Pollard contends the trial court abused its discretion when it did not grant his motion to disqualify the independent executor’s legal counsel. We first question whether this issue is moot in light of the independent executor’s November 11 resignation. Nevertheless, the trial court did not rule on Pollard’s motion to disqualify. As a prerequisite to raising a complaint on appeal, the record must show the motion was brought to the trial court’s

attention and that the trial court denied the motion or refused to rule on the motion and the complaining party objected to the refusal. *See* TEX. R. APP. P. 33.1; *see also* *Bryant v. Jeter*, 341 S.W.3d 447, 451–52 (Tex. App.—Dallas 2011, no pet.) (appellant failed to preserve error when she did not bring motion to court’s attention and record did not show trial court denied or refused to rule on motion). Here, although the record shows Pollard’s motion for disqualification was brought to the trial court’s attention, nothing in the record shows the trial court either denied or refused to rule on the motion. Thus, we conclude this issue has not been preserved for appellate review. We overrule his first issue.

In light of our disposition of Pollard’s second issue, we conclude we need not address his remaining ten issues. *See* TEX. R. APP. P. 47.1. We reverse the trial court’s November 18, 2014 order and remand this cause for further proceedings.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE ESTATE OF MARIE MERKEL,
DECEASED

No. 05-14-01596-CV V.

On Appeal from the Probate Court No. 3,
Dallas County, Texas
Trial Court Cause No. PR-05-00375-3.
Opinion delivered by Justice Francis,
Justices Evans and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that each party shall bear his own costs of this appeal.

Judgment entered this 11th day of January, 2016.