AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed May 4, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00886-CV

IN THE INTEREST OF L.H. AND A.H.

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-56081-2012

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Brown
Opinion by Justice Lang-Miers

This is an appeal from a no-answer default final decree of divorce rendered in favor of Mother. On appeal, Father argues that he filed an answer and, as a result, the trial court erred by granting a no-answer default final decree of divorce. He also argues that the trial court abused its discretion by denying his motion for new trial. We sustain Father's issues, reverse in part the final decree of divorce, and remand to the trial court for a new property division.

BACKGROUND

Mother and Father were married for approximately 20 years, had two children, and lived in Illinois. In mid-2012, Mother moved to Texas with the oldest child, and the younger child stayed with Father in the marital home in Illinois. In late 2012, Mother filed an original petition for divorce. She served Father in Illinois in early 2013, but Father did not file an answer by the answer date. Nothing happened in the case for another year.

In January 2014, Mother filed a motion to appoint a receiver to sell the house in Illinois. Three months later, she appeared in court to obtain a no-answer default final decree of divorce. Mother answered questions to prove up the divorce. *See* TEX. FAM. CODE ANN. § 6.701 (West 2006) ("In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer."). With regard to the property division, Mother said she and Father had not agreed to the division of property, and she asked the court to appoint a receiver and force the sale of the house in Illinois. The court expressed concern about whether it had jurisdiction of the Illinois property and the fact Father was still living there as his homestead. The court asked Mother's attorney to provide a brief on the property issue within two weeks. Mother asked the court to grant her a divorce that day, and the court said it did not "mind doing that," but said "until I get this issue resolved, I can't actually sign a decree or do anything else." The court said it would "grant the divorce in this case, but I'm taking the property division issue under advisement until we resolve the jurisdictional issue."

Thirteen days after this hearing, on April 15, 2014, Father, pro se, filed an answer. Again, nothing happened in this case until a year later. On April 14, 2015, the trial court signed a final decree of divorce. The decree stated that Father "failed to Answer and failed to appear and wholly made default." The decree ordered Father to maintain the house in Illinois until the property was sold; ordered the house "to be immediately listed with a real estate agent"; divided the remaining community property, including household goods, clothing, jewelry, cash, retirement accounts, and motor vehicles; and divided the debts on the home, credit card accounts, and other liabilities.

Father timely moved for new trial. At the hearing on Father's motion, the trial court explained to Father that because he had not filed an answer, the court rendered a default final decree of divorce. Father told the court that he had filed an answer. The court looked in the file

and found what the court said "can be construed as an answer," but told Father that the prove-up was done two weeks before Father filed the answer. Father said, "I'm getting motions that are a day before court dates I'm getting served." He said, "She files a motion. A prove-up date is – I'm getting a letter mailed to me the day of your court date. That's what constitutes service[?]" The court told Father he should have "[f]ile[d] an answer, sir" to which Father responded, "You're missing the point. She did not notify me that – I didn't get notification." Mother's attorney did not object or otherwise argue that notice had been sent to Father.[1]

The court told Father it "can't grant you a new trial based on what you're presenting me. The law doesn't let me." The court told Father that the "first hurdle" he had to cross to get a new trial was to show that he had "a very good reason [he] didn't file an answer." But the court said, "I haven't heard one yet" and denied Father's motion for new trial. Father appeals; Mother did not file a brief.

STANDARD OF REVIEW & APPLICABLE LAW

We review a trial court's ruling on a motion for new trial for an abuse of discretion. *See In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006) (per curiam). To set aside a default judgment, a party must ordinarily show (1) the failure to answer was not intentional or the result of conscious indifference, (2) he has a meritorious defense, and (3) a new trial would not result in delay or otherwise injure the plaintiff. *Id*. at 114–15 (citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 125 (Tex. 1939)).

ANALYSIS

Father contends that the trial court did not have discretion to grant a no-answer default final decree of divorce because he filed an answer before the final decree was rendered. He also

[1] Mother also did not object to Father's statements as being unsworn. *See Mathis v. Lockwood*, 166 S.W.3d 743, 744–45 (Tex. 2005) (where counsel for father and pro se mother both made statements on record that were not under oath, oath requirement was waived when neither raised objection in circumstances clearly indicating each was tendering evidence based on personal knowledge of sole contested issue).

contends that he was entitled to notice of the final hearing, did not receive notice, and the trial court abused its discretion by denying his motion for new trial. We agree.

A trial court does not have discretion to grant a no-answer default judgment when an answer has been filed. *See In re K.B.A.*, 145 S.W.3d 685, 691–92 (Tex. App.—Fort Worth 2004, no pet.); *see also Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989) ("A default judgment may not be rendered after the defendant has filed an answer."); *R.T.A. Int'l, Inc. v. Cano*, 915 S.W.2d 149, 151 (Tex. App.—Corpus Christi 1996, writ denied) ("A default judgment may not be granted . . . when the defendant has an answer on file, even if the answer was filed late."). Additionally, a party who has filed an answer is entitled to 45 days' notice of the contested trial setting. *See* TEX. R. CIV. P. 245 (requiring 45 days' notice of trial setting); *see also* TEX. R. CIV. P. 21a (setting out methods of service).

The record shows that Father filed an answer before the trial court resolved the property division issue and before the court signed the final decree of divorce. But the record does not show that Father received notice of the final hearing. Father argued at the hearing on his motion for new trial that he was not getting notifications timely. Mother's attorney did not respond, object, or offer evidence that proper notice was provided. The trial court's docket sheet does not contain an entry that could be construed as notice of a final hearing for April 2015, nor does it show a final hearing date.[2] And the final decree of divorce contains a blank space where the date of the final hearing should be.

We conclude that the trial court did not have discretion to grant a no-answer default final decree of divorce on the property division issue because Father had filed an answer and was entitled to notice of the final hearing to resolve that issue. *See In re Marriage of Villa*, No. 05-

[2] The docket sheet contains two entries on April 10, 2015, neither of which purports to be a final hearing: "Status (Judicial Officer, Oldner, Chris) *Of Order*" and "General Docket Entry *DTBFC receiver not available*."

12-00233-CV, 2013 WL 1838620, at *2 (Tex. App.—Dallas Mar. 25, 2013, no pet.) (mem. op.) ("A party who appears in the case is entitled to notice of a trial setting or hearing on a motion for default judgment as a matter of due process."). When a party did not receive notice of trial, the first element of *Craddock* is satisfied and the party is not required to satisfy the other elements. *See Kuykendall v. Beverly*, 436 S.W.3d 809, 814–15 (Tex. App.—Texarkana 2014, no pet.); *see also Mathis v. Lockwood*, 166 S.W.3d 743, 744–45 (Tex. 2005) (per curiam) (new trial required for party who did not receive notice of trial setting); *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989) (per curiam) (same); *Lopez v. Lopez*, 757 S.W.2d 721, 722–23 (Tex. 1988) (per curiam) (same); *Villa*, 2013 WL 1838620, at *3 (same); *In re K.B.A.*, 145 S.W.3d at 692 (same). Consequently, the trial court abused its discretion by granting the no-answer default final decree of divorce and denying Father's motion for new trial. We sustain Father's issues.

CONCLUSION

We reverse that part of the final decree of divorce concerning the division of property and remand to the trial court for a new division of the community estate. *See McKnight v. McKnight*, 543 S.W.2d 863, 868 (Tex. 1976); *Collins v. Collins*, 345 S.W.3d 644, 651–52 (Tex. App.—Dallas 2011, no pet.). We otherwise affirm the final decree of divorce.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF L.H. AND A.H.,

No. 05-15-00886-CV

On Appeal from the 416th Judicial District Court, Collin County, Texas
Trial Court Cause No. 416-56081-2012.
Opinion delivered by Justice Lang-Miers.
Justices Evans and Brown participating.

In accordance with this Court's opinion of this date, the trial court's final decree of divorce is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the final decree of divorce concerning the division of the community estate. In all other respects, the final decree of divorce is **AFFIRMED**. We **REMAND** this cause to the trial court for a new division of the community estate.

It is **ORDERED** that appellant Kevin Haag recover his costs of this appeal from appellee Lisa Ann Randall.

Judgment entered this 4th day of May, 2016.