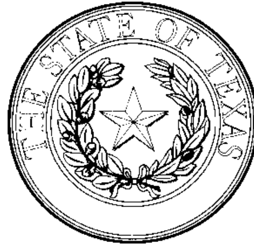
Opinion issued May 20, 2010.



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00649-CV

SALLY IRENE SHOOK, Appellant

V.

GERALD PAUL SHOOK, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Case No. 2008-49572

MEMORANDUM OPINION

Sally Irene Shook (Sally) appeals the trial court's April 14, 2009 decree of divorce, contending that it should be reversed because (1) she did not receive notice of the hearing in which the trial court signed the decree, and (2) the decree

fails to divide the marital estate. We hold that Sally failed to receive requisite notice of the hearing and reverse.

Background

Citing marital discord, Gerald Paul Shook (Gerald), acting through his attorney, Casie Gotro, petitioned for a divorce from Sally on August 20, 2009. Sally, through her attorney, Michael Gillespie, answered and counterpetitioned. The trial court set the case for trial on April 6, 2009.

On that date, the parties appeared and requested a continuance. The trial court continued the trial date until the week of April 20th so that they could attend mediation.

On April 9, the date of the scheduled mediation, Sally, at Gerald's request, arrived alone at Gotro's office. Gotro gave her a proposed agreed final divorce decree, which she signed. The decree recites that the parties "agreed to a just and equitable division of the community property" as set forth in an "Agreed Settlement." Shortly after that meeting, Sally returned to her home in Washington State.

According to Gotro, her direct contact with Sally and not Gillespie proceeded from her understanding that Sally had terminated Gillespie. Gillespie himself received a letter from Sally informing him that she no longer needed his services. Gillespie, however, did not move to withdraw from representing Sally; to

the contrary, he continued to represent Sally in connection with the motion for new trial.

The trial court set the proposed final agreed divorce decree for entry on April 14, 2009. The record does not contain either a notice of hearing to Sally or Gillespie or certificate of service showing that Gerald, either individually or through his counsel, otherwise informed Sally or Gillespie of the setting.

On April 14, Gerald and his counsel, Gotro, appeared before the trial court. The judgment recites that Sally did not appear. The trial court signed the agreed decree that Sally, Gerald, and Gotro had signed five days earlier. The signed decree refers to, but does not attach, the agreed settlement memorializing the parties' property division.

On May 8, Sally, acting through Gillespie, moved for new trial, on the grounds that the decree's division of marital property was not just and equitable and that Gerald had failed to provide notice of the April 14 hearing. A visiting judge heard the motion for new trial and, after an evidentiary hearing on the motion, denied relief. Sally timely appealed.

Discussion

The dispositive issue in this appeal deals with the application of the rules of civil procedure to undisputed facts, which is a question of law we review de novo. *See Moore v. Wood*, 809 S.W.2d 621, 623 (Tex. App.—Houston [1st Dist.] 1991,

no writ) (holding rules of statutory construction also apply to rules of procedure). Under Texas Rule of Civil Procedure 8,

> an attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.
>
> All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

TEX. R. CIV. P. 8. Once an attorney becomes the attorney in charge, he "may withdraw from representing a party only upon written motion for good cause shown." TEX. R. CIV. P. 10. Gillespie signed Sally's original answer and counterpetition. He did not move to withdraw, and no motion to substitute was before the court. Thus, according to Rule 8, Gillespie is Sally's attorney in charge and was so when Gerald filed the proposed divorce decree.

Notice properly sent pursuant to Rule 21a raises a presumption that a party received notice. TEX. R. CIV. P. 21a; *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). "But we cannot presume that notice was properly sent; when that is challenged, it must be proved according to the rule." *Mathis*, 166 S.W.3d at 745. Rule 21a provides:

> Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, . . . may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either

> in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct.

TEX. R. CIV. P. 21a; *see also* TEX. R. CIV. P. 10 (if attorney is substituted for attorney who withdrew, he or she must be designated of record).

Gerald does not attempt to show that he served either Gillespie, or, for that matter, Sally, with notice of the hearing in the trial court for entry of the proposed judgment. Instead, he contends that Texas Rule of Civil Procedure 305, which requires that a party serve a proposed judgment on "all other parties to the suit who have appeared and remain in the case," relieved him of the obligation to serve Gillespie because Gillespie was no longer Sally's attorney. *See* TEX. R. CIV. P. 305.

Rule 305 does not support Gerald's position. Rule 305 expressly requires service of the proposed judgment "in accordance with Rule 21a." *Id.* The rules therefore required Gerald to serve Gillespie, as Sally's attorney of record, with notice of the hearing date on the proposed judgment.[1] *See* TEX. R. CIV. P. 21a; *see also* TEX. R. CIV. P. 21 (requiring parties or their attorneys in charge of application to court for order to serve notice of hearing on other parties' attorneys in charge at

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[1] We further note that the divorce decree does not comply with either Texas Rule of Civil Procedure 167.2, applicable to certain settlement offers, including those under the Family Code, or section 6.602 of the Family Code governing mediated settlement agreements. *See* TEX. R. CIV. P. 167.1, 167.2; TEX. FAM. CODE ANN. § 6.602(b) (Vernon 2006).

least three days before hearing date and requiring serving attorney to certify compliance with rule). Even though Sally reviewed the proposed agreed judgment, she also was entitled to notice of the scheduled hearing for entry of that judgment. It is undisputed that neither she nor her lawyer was ever served with a notice of the hearing date and time.

The evidence before the trial court on Sally's motion for new trial shows that Gerald did not serve notice of the hearing date on either Gillespie or Sally. The trial court thus erred in refusing to grant Sally's motion for new trial and set aside the divorce judgment. *See Mathis*, 166 S.W.3d at 745.

Conclusion

We reverse the judgment of the trial court and remand the case for further proceedings.

Jane Bland
Justice

Panel consists of Justices Jennings, Hanks, and Bland.