In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00163-CV

ANITA DEANN STONE, Appellant

V.

ERIC STONE, Appellee

On Appeal from the 231st District Court
Tarrant County, Texas
Trial Court No. 231-566793-14

Before Kerr, Birdwell, and Bassel, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

Anita Deann Stone appeals from the trial court's amended final divorce decree. In two issues, Anita—whose attorney withdrew roughly 45 days before trial—complains that the trial court abused its discretion by denying her new-trial motion because she did not get reasonable notice of the trial setting under Rule 245 and by denying her motions to continue the trial because her withdrawing attorney did not deliver her file to her. Concluding that Anita did not preserve either issue for our review, we will affirm.

Background

Anita and Appellee Eric Stone were married in 1984 and had two sons, both of whom are now adults. After Eric left Anita in October 2014, she sued for divorce the following month. Eric answered and countersued.

In April 2015, the parties appeared before the trial court, and the court set the case for trial in November 2015. *See* Tex. R. Civ. P. 245 (requiring at least 45 days' notice of first trial setting). In September 2015, Anita, through her attorney, served Eric with discovery requests that went unanswered. Shortly before the November 2015 trial setting, Eric filed for bankruptcy, which stayed the trial. *See* 11 U.S.C.A. § 362(a)(1) (providing that filing bankruptcy petition automatically stays the commencement or continuance of any action against the debtor), § 362(b)(2)(A)(iv) (limiting application of stay in divorce proceedings to the extent the parties seek to

divide the marital estate). In March 2016, the bankruptcy court modified the stay to allow the case to go forward.

The following month, Anita's attorney moved to withdraw. On May 11, 2016, the trial court heard and granted the motion. Later that day, the associate judge set the case again, for a bench trial 43 days later on June 23, 2016. According to the "Notice of Final Trial" form that the associate judge filled in by hand, both Anita—then appearing pro se—and Eric's attorney appeared before her on that day. Eric's attorney signed the trial-setting notice, but Anita did not.

Even though the May 11, 2016 trial-setting notice stated that Anita was present when the associate judge set the case for trial some 43 days later, Anita later complained in a letter to the associate judge that she had less than 30 days' notice of the trial setting. But Anita never made this complaint in a motion. Twenty-three days before trial, Anita moved to continue the trial because she needed more time to hire a lawyer and to "obtain [Eric's] discovery and financial records." The trial court heard and denied the motion two days before trial.[1]

The day of trial—with the help of pro bono counsel retained only to seek a continuance—Anita again moved to continue the trial. In her motion (which Anita's attorney filed on her behalf), Anita stated that she was unfamiliar with the Texas Rules of Civil Procedure because she was pro se, and she complained about not having an

[1]There is no order denying the motion, but the trial court's docket sheet and the trial judge's statements on the record at trial indicate that the motion was denied.

attorney, about the bankruptcy stay's interrupting the case, and about a lengthy motion Eric had filed less than 48 hours before trial.

After the district-court judge called the case to trial, Anita and the judge discussed her continuance motions, and Anita agreed to proceed to trial without an attorney:

> MRS. STONE: My name is Anita Stone.
>
> THE COURT: And you're here representing yourself; is that correct?
>
> MRS. STONE: Yes, sir.
>
> THE COURT: Okay. You understand that you could have hired an attorney before today, correct?
>
> MRS. STONE: Yes.
>
> THE COURT: And you're here representing yourself anyway.
>
> MRS. STONE: Yes, sir.
>
> THE COURT: And you wish to proceed forward, correct?
>
> MRS. STONE: Yes, sir.
>
> THE COURT: Okay. Then we will proceed.
>
> All right. If you will call your first -- Well, first of all, ma'am, you did file -- you filed a motion for continuance the other day[,] and I denied it at that time, and since then, I just want to make sure for the record that there is a motion -- another motion for continuance that you have filed, correct?
>
> MRS. STONE: Yes, sir.

THE COURT: And that was filed by [pro bono counsel]; is that correct?

MRS. STONE: Yes, sir.

THE COURT: And my understanding from him with prior conversation prior to going on the record is that he was here for the sole purpose of asking for a continuance; is that correct?

MRS. STONE: Yes.

. . . .

THE COURT: So -- but he was here --

My question is today he was here just for the purpose of asking for a continuance, correct.

MRS. STONE: Yes, and so that's -- that's why I hired him because I figured that I wouldn't be able to do this correctly without an attorney.

THE COURT: Okay. But my -- my question to you is that he is not going to stick around for the hearing; is that correct? Did you relieve him of his duties?

MRS. STONE: Yes.

THE COURT: Okay. So --

MRS. STONE: That was his choice. He felt like he couldn't -- he couldn't do it correctly for me not knowing --

THE COURT: Ma'am, listen to my question. Okay. You relieved him of his duties, correct?

MRS. STONE: Yes.

THE COURT: So we can proceed without him is what you're telling me?

MRS. STONE: Yes.

THE COURT: Okay. All right. I just want[ed] to make sure.

After hearing testimony from Anita and Eric, the trial court granted the divorce. Almost nine months later, the trial court signed a final divorce decree on March 17, 2017.

Anita timely moved for a new trial. In her motion, Anita argued, among other things, that (1) the trial court abused its discretion by denying her continuance motion based on Eric's failure to provide discovery and (2) she had received insufficient notice of the trial setting under Texas Rule of Civil Procedure 245.[2] After a hearing, the trial court granted Anita's motion on May 12, 2017.

Eric moved for reconsideration. On February 9, 2018, the trial court signed an "Order on Motion to Reconsider the Court's Order Granting the Motion for New Trial," which granted Eric's reconsideration motion and denied Anita's new-trial motion. Believing this was a final judgment, Anita moved for a new trial and filed a notice of appeal from that order. On June 20, 2018, we abated the appeal because it

[2]Although not pertinent to our analysis, we note that Anita's insufficient-notice complaint in her new-trial motion was based on the idea—incorrect, as we explain later—that the June 2016 setting was the first setting and thus subject to Rule 245's mandatory 45-day notice. (Anita's motion asserted that "TRCP 245 requires reasonable notice of not less than 45 days to the parties. In this matter, a Notice of Final Trial was entered on May 11, 2016 and final trial was set for June 23, 2016 – 43 days later.")

was unclear whether the trial court had reinstated the March 2017 divorce decree when it "ungranted" the new trial.

After the abatement, Eric moved to reinstate the March 2017 divorce decree, asserting that during a June 7, 2018 hearing, the trial court had stated that the initial decree was to be reinstated. Eric thus asked the trial court to "sign and reinstate" the March 2017 decree, attaching to his motion a copy of the signed March 2017 decree with an extra page appended that had spaces for the trial court to sign and date.

On July 24, 2018, the trial court re-signed the March 2017 divorce decree, thereby reinstating it. Upon receiving a copy of the reinstated decree, we continued the appeal.

Eric then moved to modify the decree. Still within its plenary power, the trial court signed an amended divorce decree on August 8, 2018. Anita timely moved for a new trial, but she did not file another notice of appeal or amend her original notice.

On appeal, Anita complains about the trial court's denying her 2017 motion for new trial and her 2016 motions for continuance.[3] But before addressing the merits of Anita's appeal, we must address our jurisdiction.

Appellate Jurisdiction

Eric asserts that we lack jurisdiction because the trial court did not in fact reinstate the March 2017 divorce decree and because Anita failed to amend her notice

[3]Pro bono appellate counsel appeared on Anita's behalf roughly five months after Anita filed her pro se notice of appeal.

of appeal to reflect that she was appealing from the real final judgment in this case—the August 2018 amended divorce decree.

As noted, Anita filed a notice of appeal from the trial court's February 2018 "Order on Motion to Reconsider the Court's Order Granting the Motion for New Trial," which effectively "ungranted" her 2017 new-trial motion. When a trial court grants a new-trial motion, "the case is reinstated on the trial court's docket as though no trial had occurred, and the slate is essentially wiped clean as to orders such as an oral pronouncement of judgment and written judgment based on the trial." *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 644 (Tex. 2009) (orig. proceeding) (citing *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 230–31 (Tex. 2008) (orig. proceeding)). But the trial court can set aside the new-trial order at any time before it signs another final judgment. *Hidalgo v. Hidalgo*, 310 S.W.3d 887, 889 (Tex. 2010); *Baylor Med. Ctr.*, 280 S.W.3d at 231. If the trial court later reconsiders its order granting a new trial and reinstates the judgment, the appellate deadlines run from the order reinstating the judgment. *See Baylor Med. Ctr.*, 280 S.W.3d at 231; *Rosenstein v. Rosenstein*, No. 02-09-00272-CV, 2011 WL 3546592, at *5 (Tex. App.—Fort Worth Aug. 11, 2011, no. pet.) (mem. op.).

Because we could not tell whether the trial court had reinstated the March 2017 final divorce decree when it "ungranted" Anita's new-trial motion in February

2018, we abated the appeal in June 2018 for the trial court to clarify its ruling.[4] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001) ("An order must be read in light of the importance of preserving a party's right to appeal. If the appellate court is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court."); *see also* Tex. R. App. P. 27.2. On July 24, 2018—at Eric's request—the trial court signed a copy of the March 2017 decree attached to his motion, effectively reinstating that decree.

Eric first contends that the trial court did not really reinstate the decree because it "only signed a copy of a judgment attached to a motion and filed the copy of the motion in the record," and thus did not sign a "stand-alone" judgment. But Eric's motion to modify stated that the "judgment in this case" had been "reentered and rendered on July 24, 2018." More important, the trial court's amended decree stated that the trial court had "reinstated" the final divorce decree on July 24, 2018.

Eric next argues that Anita's prematurely filed notice of appeal—filed months before the trial court reinstated the March 2017 decree and then signed an amended final decree—was insufficient to invoke our jurisdiction because Anita's notice stated

[4]The trial court's February 2018 order did not state whether the March 2017 decree was reinstated. It appeared that Anita thought it had been reinstated because on March 12, 2018, she filed a "Motion for New Trial, to Set a Discovery Period, and to Reopen the Evidence," in which she referred to the February 2018 order as "the judgment." But the trial court had entered January 2018 temporary orders, stating that they would "continue in force until the signing of the Final Decree of Divorce or until further order of this Court." This language presaged the trial court's signing another final decree. Additionally, the trial-court clerk informed us that the trial-court proceedings were ongoing and that another decree had not been signed.

that she was appealing from the trial court's February 2018 order "ungranting" her new-trial motion rather than from the final judgment (the August 2018 amended decree). *See* Tex. R. App. P. 25.1(d)(2). If a judgment's finality is uncertain—as it was here—we can (and did) abate the appeal to get clarification from the trial court. *See* Tex. R. App. P. 27.2; *Lehmann*, 39 S.W.3d at 206. During the abatement, the trial court re-signed the March 2017 decree in July 2018, thereby reinstating the decree and thus (at least implicitly) clarifying that its February 2018 order "ungranting" Anita's new-trial motion had not itself reinstated the March 2017 decree. Anita's notice of appeal from the February 2018 order was thus premature but nevertheless effective. *See* Tex. R. App. P. 27.1(a) ("In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal."). And the trial court's later amending the decree is of no moment because the appellate rules dictate that we must treat Anita's notice of appeal as if it were from the amended decree. *See* Tex. R. App. P. 27.3 (providing that if the trial court issues a second judgment or order that modifies the judgment or order that has been appealed, appellate court must treat the notice of appeal as if it were from the second judgment or order). We thus conclude that we have jurisdiction over Anita's appeal. *See In re M.D.G.*, 527 S.W.3d 299, 303 (Tex. App.—El Paso 2017, no pet.) (concluding that although pro se appellant's notice of appeal did not comply with Rule 25.1(d), appellee was able to discern what order appellant was challenging on appeal, and declining to dismiss appeal or require appellant to amend notice of appeal).

Reasonable Notice Under Rule 245

In her first issue, Anita complains that the trial court abused its discretion by denying her 2017 new-trial motion because she did not receive reasonable notice of the trial setting under Rule 245. She asserts that, at most, she had 29 days' notice, which was not reasonable in this case. Eric counters that Anita failed to preserve error because she did not timely and specifically object to the lack of reasonable notice and, alternatively, that she waived any error by participating in the trial.

Under Rule 245, a trial court must give the parties at least 45 days' notice of the first trial setting in a contested case. Tex. R. Civ. P. 245. But when, as here, a case has been previously set for trial, the court may reset it to a later date on reasonable notice to the parties. *Id.* To preserve a complaint about insufficient notice under Rule 245, "[a] party must timely and specifically object to insufficiency of notice under [R]ule 245, or the error is waived." *In re A.H.*, No. 2-06-211-CV, 2006 WL 3438179, at *1 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) (mem. op.). "The objection must be made before trial; a [R]ule 245 objection made in a motion for new trial is untimely and preserves nothing for review." *Id.*

Here, Anita raised her lack-of-reasonable-notice argument in her new-trial motion (and even then, she seems to have incorrectly relied on the rule's mandatory 45-day first-setting requirement). But she failed to object on that basis before trial. Although Anita contends that her pretrial continuance motions sufficed to preserve error, neither motion raised lack of notice. Her first motion complained that she

needed more time to hire an attorney and to get discovery from Eric. Her second complained about her lack of familiarity with the civil-procedure rules, her not having an attorney, Eric's bankruptcy's interrupting the case, and a motion Eric had filed shortly before trial. And she did not raise a lack-of-reasonable-notice complaint at trial.

We have held that a specific reference to Rule 245 is not required to preserve a complaint regarding insufficient notice—so long as the party's objection somehow raises an inadequate-notice issue. *See $2,424.21 in U.S. Currency v. State*, No. 02-18-00303-CV, 2019 WL 3244495, at *5 (Tex. App.—Fort Worth July 18, 2019, no pet.) (mem. op.) (concluding that incarcerated pro se appellant's continuance motions claiming that appellant had no knowledge of the hearing, that the hearing was "not in the court record of the Sheriff Dept.," and that he was unfamiliar with criminal law, coupled with his complaints at trial about not having the necessary documents and not being familiar with civil law, were sufficient to preserve error regarding lack of mandatory 45 days' notice of first trial setting); *see also Campos v. Nueces Cty.*, No. 13-07-488-CV, 2008 WL 331067, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 7, 2008, no pet.) (mem. op.) (concluding that objections to lack of notice not specifically mentioning Rule 245 were sufficient to preserve error). But here, Anita's motions did not complain about lack of reasonable notice, and the complaints she did make were insufficient to alert the trial court to her notice complaint. *See* Tex. R. App. P. 33.1(a)(1)(A) (stating that to preserve a complaint for appellate review, a party must

present to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if not apparent from the request's, objection's, or motion's context).

Anita also argues that letters to the associate judge and to Eric's attorney that she had filed with the court sufficed to preserve error. Most of these letters complained about Eric's failure to respond to discovery. In one letter to the associate judge, Anita did complain about lack of notice: she stated that she had received less than 30 days' notice of the June 23 trial setting and that she "was not called or sent mail asking for [her] approval of the date." But to preserve a complaint for appellate review, the record must show that the party brought the complaint to the trial court's attention by making a timely request, objection, or motion and that the trial court ruled on the request, objection, or motion. *See* Tex. R. App. P. 33.1(a). Nothing shows that Anita brought this argument to the trial court's attention or requested a ruling on it. *See Pedroza v. Tenet Healthcare Corp.*, 555 S.W.3d 608, 612 (Tex. App.—El Paso 2018, no pet.) ("Merely filing a motion with the trial court clerk is insufficient to show that the party brought the motion to the trial court's attention or requested a ruling.").

Because Anita failed to preserve her complaints regarding the sufficiency of the notice given under Rule 245, we overrule her first issue.

Motions for Continuance

In her second issue, Anita argues that the trial court abused its discretion by denying her motions to continue the trial so that she could have additional time to hire an attorney because her withdrawing attorney did not return her file to her.[5]

We review a trial court's ruling on a continuance motion for an abuse of discretion. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). We do not substitute our judgment for the trial court's. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding). Instead, we must determine whether the trial court's action was so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The test is whether the trial court acted without reference to guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). When, as here, the ground for continuance is counsel's withdrawal, the movant must show that the failure to have representation at trial was not due to the movant's own fault or negligence. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).

Here, Anita argues that the trial court should have granted her continuance motions because her withdrawing attorney never delivered her file to her (or at least

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[5]The trial court did not sign orders expressly denying these motions. As noted, the trial court's docket sheet and the trial judge's statements on the record at trial indicate that it had denied Anita's first motion; the trial court implicitly overruled her second by proceeding to trial. *See Finley v. Finley*, No. 02-11-00045-CV, 2015 WL 294012, at *11 n.14 (Tex. App.—Fort Worth Jan. 22, 2015, no pet.) (per curiam) (mem. op.).

had not done so as of a month before trial). When a trial court allows an attorney to voluntarily withdraw, it must give the party time to hire a new attorney and time for the new attorney to investigate and prepare for trial. *Id.* "Before a trial court allows an attorney to withdraw, it should see that the attorney has complied with the Code of Professional Responsibility," by among other things, "delivering to the client all papers and property to which the client is entitled and complying with applicable law and rules." *Id.*

Anita raises the complaint about her file for the first time on appeal. Neither of her continuance motions raises the issue of needing more time to hire a lawyer because of her former attorney's failure to return her file, and she did not raise this argument at trial.[6] She thus did not preserve this specific complaint for our review. *See* Tex. R. App. P. 33.1(a)(1)(A).

Even if we were to construe Anita's issue as generally complaining about needing more time to hire an attorney, she agreed to proceed to trial without one. As we quoted above, the trial court questioned Anita about proceeding pro se, and she stated that she wished to proceed without an attorney. In light of this colloquy, we cannot say that the trial court abused its discretion by denying Anita's continuance motions.

We overrule Anita's second issue.

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[6]Nor did she raise this complaint in her new-trial motion.

Conclusion

Having overruled both of Anita's issues, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: May 28, 2020