

NO. 12-12-00037-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

<i>IN THE MATTER OF THE</i>	§	<i>APPEAL FROM THE 321ST</i>
<i>MARRIAGE OF JERRODERICK</i>	§	<i>JUDICIAL DISTRICT COURT</i>
<i>GILLIAM AND MANDI GILLIAM</i>	§	<i>SMITH COUNTY, TEXAS</i>

MEMORANDUM OPINION

Jerroderick Gilliam appeals the trial court's denial of his motion to reinstate his suit after it was dismissed for want of prosecution. In one issue, Gilliam argues that the trial court erred in denying his motion to reinstate. We reverse and remand.

BACKGROUND

Gilliam is an inmate. In August 2009, Gilliam filed a pro se petition for divorce and sought unsuccessfully to have the respondent, Mandi Gilliam, served with process. On October 25, 2011, the trial court dismissed Gilliam's case for want of prosecution. On November, 22, 2011, Gilliam filed a motion to reinstate his suit supported by a sworn declaration. On November 17, 2011, Gilliam sent a letter to the trial court coordinator requesting that the motion be set for a hearing. On December 5, 2011, the trial court denied Gilliam's motion to reinstate, and this appeal followed.

MOTION TO REINSTATE

In his sole issue, Gilliam argues that the trial court erred in denying his motion to reinstate his suit. As part of this issue, Gilliam contends that the trial court erred in failing to hold a hearing on the motion

The decision to dismiss a case for want of prosecution rests within the sound discretion of the trial court, and can be disturbed on review only if it amounted to a clear abuse of discretion. *See State v. Rotello*, 671 S.W.2d 507, 508-09 (Tex. 1984); *Bevil v. Johnson*, 307 S.W.2d 85, 87

(1957); *Herrera v. Rivera*, 281 S.W.3d 1, 6 (Tex. App.–El Paso 2005, no pet.). A trial court abuses its discretion when it acts in an arbitrary and unreasonable manner, or when it acts without reference to any guiding principles. See *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Rivera*, 281 S.W.3d at 6. Similarly, we review the denial of a motion to reinstate under a clear abuse of discretion standard. See *State v. Rotello*, 671 S.W.2d 507, 509 (Tex. 1984); *Rivera*, 281 S.W.3d at 8; see also *Downer*, 701 S.W.2d at 241. We may not reverse for abuse of discretion merely because we disagree with the decision of the trial court. See *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

Requisites of a Motion to Reinstate and Required Hearing

A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. TEX. R. CIV. P. 165a(3). It shall be filed with the clerk within thirty days after the order of dismissal is signed or within the period provided by Rule 306a. *Id.* The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. *Id.* The court shall reinstate the case upon finding, after a hearing, that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake, or that the failure has been otherwise reasonably explained. *Id.*

Once a motion to reinstate meets the threshold requirements of being timely filed and verified, a hearing must be held on it regardless of whether the motion states meritorious grounds or whether the facts verified in the motion are sufficient to sustain the movant’s burden of proof to warrant reinstatement. *Daley v. Powerscreen Tex. Holdings, Inc.*, No. 14-98-00132-CV, 1999 WL 771283, at *2 (Tex. App.–Houston [14th Dist.] Sept. 30, 1999, no pet.) (not designated for publication) (citing *Thordson v. City of Houston*, 815 S.W.2d 550, 550 (Tex. 1991)).

In the instant case, the trial court dismissed Gilliam’s suit for want of prosecution on October 25, 2011. Gilliam timely filed his motion to reinstate on November 22, 2011. Gilliam’s motion contained a “verification” paragraph, in which he declared “under penalty of perjury” that the facts set forth in the motion are true and correct.¹ On November 17, 2011, Gilliam sent a letter to the trial court coordinator requesting that the motion be set for a hearing.² We hold that because

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(a), (e) (West Supp. 2012). Gilliam’s verification is in substantially correct form. See *Id.*; *L.J. v. Tex. Dep’t of Family and Protective Servs.*, No. 03-11-00435-CV, 2012 WL 3155760, at *5 (Tex. App.–Austin Aug. 1, 2012, no pet. h.) (only language that governing statutes “actually mandates should be included” in inmate declarations is “under penalty of perjury[,]” and if that phrase is included, “the instrument is sufficiently qualified to be subject to perjury”).

² Gilliam’s letter requesting a hearing on his motion bears a file stamp dated November 28, 2011.

Gilliam filed a timely motion to reinstate that was supported by a sworn declaration, the trial court erred in failing to hold an oral hearing on it. *See Daley*, 1999 WL 771283, at *2; *see also* TEX. R. Civ. P. 165a(3). Gilliam's sole issue is sustained in part.³

DISPOSITION

Having sustained Gilliam's sole issue in part, we *reverse* the trial court's judgment and *remand* the cause for an oral hearing on Gilliam's motion to reinstate.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 12, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

³ Because our resolution of this portion of Gilliam's first issue is dispositive of his appeal, we need not address remaining arguments concerning the merits of his motion to reinstate. *See* TEX. R. APP. P. 47.1.



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

SEPTEMBER 12, 2012

NO. 12-12-00037-CV

IN THE MATTER OF THE MARRIAGE OF
JERRODERICK GILLIAM AND MANDI GILLIAM

Appeal from the 321st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 09-2492-D)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment be **reversed** and the cause **remanded** to the trial court for an oral hearing on Gilliam's motion to reinstate, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.