2016 IL App (2d) 150787-U
No. 2-15-0787
Order filed January 6, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE of TRACY A. WALSH, Petitioner-Appellant, and TRAVIS SPIROPOULOS, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 14-MR-495 Honorable Robert E. Douglas, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion by denying Tracy's motion to vacate; therefore, we reversed and remanded.

¶ 2 In August 2014, respondent, Travis Spiropoulos, filed a petition to modify a joint parenting agreement entered into with petitioner, Tracy A. Walsh, for their son, D.S. A hearing was held on Travis's petition on April 7, 2015, but Tracy did not appear. The trial court granted Travis's petition to modify the joint parenting agreement, and Tracy subsequently moved to vacate the April 7, 2015, order granting Travis's petition. The trial court denied Tracy's motion to vacate, and she appeals. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In 2002, Travis and Tracy were married. Also that year, they had one child, D.S. In 2009, Travis and Tracy divorced and entered into a joint parenting agreement (agreement). Pursuant to the agreement, the parties shared joint legal custody of D.S., and Tracy was designated as the residential custodian. The parties agreed that Travis would pay monthly child support of $880.

¶ 5 On August 5, 2014, Travis filed a petition to modify the agreement based on a substantial change in circumstances. In his petition, Travis alleged that D.S., now age 11, had received a pediatric neuropsychological evaluation in March 2012. Although the evaluation provided some specific recommendations, Tracy had failed to implement any of them. In addition, Travis alleged that D.S. had a high number of school absences in 2013 to 2014, and that a truancy officer had conducted an investigation. Finally, Travis alleged that: (1) Tracy interfered with his parenting time by excessively calling D.S.; (2) the State's Attorney's office had received a referral related to D.S.'s well-being; and (3) the police had been involved in several parenting incidents between Travis and Tracy. Travis requested that the court grant him residential custody of D.S., enter a new parenting schedule, and abate his child support obligation.

¶ 6 The case was continued to August 21, 2014, and then to September 8, 2014, so that Tracy could retain counsel. Tracy appeared *pro se* on September 8, 2014, and a guardian *ad litem* was appointed. The case was then continued several times, and Tracy continued to appear *pro se*. For example, on October 8, 2014, Travis was granted leave to file a motion to appoint a counselor or a therapist for D.S., and on October 29, 2014, the parties agreed that D.S. should be enrolled in counseling. The case was then continued to December 19, 2014, and an order entered

that day continued the case to February 17, 2014, for status, and to February 20, 2015, for a hearing on Travis's petition to modify the agreement.

¶ 7 On February 19, 2015, when the case was "not on call," Travis and his counsel appeared in court. As stated, the case had previously been set for February 20, 2015, and Tracy had no notice that Travis and his counsel appeared in court on February 19, 2015. An order was entered that day setting the case for March 2, 2015, so that Travis could file a motion to maintain the status quo. Travis sought to keep the status quo after D.S. changed schools and began attending one near where Travis lived. The February 19, 2015, order also struck the February 20, 2015, hearing date for Travis's petition to modify the agreement and re-set it for April 7, 2015.

¶ 8 Travis filed his motion to maintain the status quo on February 25, 2015. In his motion, Travis stated that when D.S. was in Tracy's residential custody, he attended the Gower Middle School in Willowbrook. Approximately five weeks before, however, the parties had agreed to enroll D.S. in the Westchester Middle School in Westchester, where Travis lived. Since being enrolled at the Westchester Middle School, D.S. had attended school every day, except for one day when he stayed overnight with Tracy. Travis argued that it was in D.S.'s best interests to continue attending the Westchester Middle School. As a result, Travis requested that the court order the parties to maintain the status quo and revise the parenting schedule to allow the child to continue attending the Westchester Middle School.

¶ 9 On March 2, 2015, the parties and the GAL appeared in court. Tracy was still acting *pro se*. The court granted Travis's motion to maintain the status quo and ordered as follows. D.S. would continue to attend school in Westchester, and the parenting schedule was modified such that D.S. would spend the night with Travis whenever he had school the next day.

¶ 10 Travis and his counsel appeared in court on April 7, 2015, for a hearing on his petition to modify the agreement. Tracy did not appear. The court heard testimony from the GAL and Travis, and it considered numerous exhibits. The court then granted Travis's petition to modify the agreement, noting in its order that Tracy failed to appear and that it "proceeded by default." The court awarded Travis residential custody, ruled that the March 2, 2015, order maintaining the status quo would stay in effect until the GAL proposed a revised parenting schedule, and ruled that Tracy would have no overnight visits with D.S. if he had school the next day.

¶ 11 On May 1, 2015, Tracy, represented by counsel, filed a motion to strike and dismiss Travis's petition to modify the agreement as well as a motion to vacate the April 7, 2015, order. In her motion to vacate, brought pursuant to section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2014)), and in her attached affidavit, she alleged the following. Originally, the case was set for February 20, 2015, for a hearing on Travis's petition to modify the agreement. However, on February 19, 2015, unbeknownst to her, and without proper notice, the February 20, 2015, court date was stricken even though the case not "on call." The order entered on February 19, 2015, set the case for March 2, 2015, to hear Travis's motion to maintain the status quo, and set the case for April 7, 2015, to hear Travis's petition to modify the agreement. Tracy appeared in court on March 2, 2015. On that date, when Travis's counsel and the GAL were discussing the next court date, she believed that the case was continued to April 20, 2015, and that the April 7, 2015, court date had been stricken. Tracy stated that her failure to appear on April 7, 2015, was not intentional but based on confusion and the changes in court dates.

¶ 12 Travis responded to Tracy's motion to vacate. In his response, Travis argued that notice of the February 19, 2015, court order was given to Tracy along with a letter from his attorney to the GAL, dated February 20, 2015, which had been sent to Tracy. The letter thanked the GAL

for appearing in court on February 19, 2015, even though the case was not on the court call. In addition, the letter stated that Travis would present a motion to maintain the status quo at the next court date, which was March 2, 2015, and that notice would go out to Tracy, as required. The letter further referred to the GAL's need to follow up with Travis prior to the hearing date of April 7, 2015.

¶ 13 The parties appeared in court on July 6, 2015, for a hearing on Tracy's motion to vacate. Tracy testified first as follows. Tracy was not present in court on February 19, 2015. She was also not present on April 7, 2015, because she "had gotten mixed up." Tracy believed that the court date was April 20, 2015; she was not aware it was April 7, 2015. Tracy admitted that her assumption was not correct. She would have appeared on April 7, 2015, if she had known about it. She did not learn of the April 7, 2015, hearing until she spoke to Travis, either that night or the next day, and he said that she had missed the hearing. Tracy also received papers in the mail afterwards. Once she realized she missed the date, she hired an attorney and filed a motion to vacate.

¶ 14 On cross-examination, Tracy admitted appearing on March 2, 2015, and being given a copy of the March 2, 2015, order; she admitted representing herself; and she admitted receiving the February 20, 2015, letter from Travis's counsel to the GAL.

¶ 15 Travis testified next as follows. He had a conversation with Tracy on the phone two or three days before the April 7, 2015, hearing date and mentioned "that there was court in a few days from now." Tracy responded that she knew.

¶ 16 On cross-examination, Travis admitted that during that conversation with Tracy on the phone, he did not specify that the court date was April 7, 2015.

¶ 17 Following the testimony, Tracy argued that the April 7, 2015, order should be vacated because she was mistaken as to the court date. She argued that to rule in favor of Travis on an issue as serious as custody was unfair, based on "a scrivener's error in writing in the date that" she was supposed to appear in court. Travis responded that Tracy was aware that there was a court date on April 7, 2015, and that she chose not to appear. In addition, Travis argued that the April 7, 2015, order was more than simply a default order, in that the court heard testimony from Travis and the GAL and reviewed evidence that was submitted. According to Travis, regardless of whether Tracy was present at the April 7, 2015, hearing, she "would not have been able to contravene the records clearly showing what was going on" when she was the residential custodian, which was not in the "child's best interest." Finally, Travis argued that the effect of the April 7, 2015, order was not to change custody but to change only the residential custodian. Travis pointed out that the court had not even entered a new parenting schedule at that point.

¶ 18 In making its ruling, the court noted that Tracy had chosen to represent herself prior to the current round of motions and that there were risks in doing so. Tracy chose to accept those risks and had since hired an attorney, which she had every right to do. Nevertheless, Tracy received the letter from Travis's counsel that set the hearing date for April 7, 2015. The court stated that Tracy had managed her litigation up until that point without any problem. According to the court, it "heard testimony on the date of the hearing. She chose not to appear. The Court does not feel that there would be a change otherwise and does not accept that it was just a scrivener's error." Based on these findings, the court denied Tracy's motion to vacate.

¶ 19 Tracy timely appealed.

¶ 20 II. ANALYSIS

¶ 21 Tracy's sole argument on appeal is that the trial court erred by denying her motion to vacate. Section 2-1301(e) provides that a trial court "may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2014). The moving party has the burden of showing sufficient grounds to vacate the judgment of default. *Aurora Loan Services, LLC v. Kmiecik,* 2013 IL App (1st) 121700, ¶ 27. Nevertheless, the litigant need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. *In re Haley D.*, 2011 IL 110886, ¶ 57. Rather, the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits. *Id*. We review a trial court's denial of a section 2-1301 motion to vacate for an abuse of discretion. *Aurora Loan Services,* 2013 IL App (1st), 121700, ¶ 27. An abuse of discretion occurs when the trial court acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted. *Id*.

¶ 22 In exercising its discretion, the trial court must be mindful that entry of default is a drastic remedy that should be used only as a last resort. *In re Haley D.*, 2011 IL 110886, ¶ 69. The law prefers that controversies be determined according to the substantive rights of the parties, and the provisions of the Code of Civil Procedure governing relief from defaults are to be liberally construed toward that end. *Id*. A trial court should consider all events leading up to the judgment; what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome. *Id*.

¶ 23 As support for her argument that the trial court abused its discretion, Tracy argues that the issue of parental rights is substantial; that she had been actively involved in the case; that she missed the hearing through an "inadvertent docketing mistake"; and that the inconvenience of holding another hearing would be relatively minor. Travis responds that Tracy's motion to vacate was more akin to a motion to reconsider based on the fact that a hearing was held on his petition to modify the agreement, and based on the fact that Tracy had already agreed to modify the custody arrangement by allowing D.S. to stay with Travis and attend the school in Westchester.

¶ 24 At the outset, we reject Travis's argument that Tracy's motion was anything other than a motion to vacate under section 2-1301(e). Indeed, the record shows that the April 7, 2015, order was in fact a default judgment. Given that our analysis must proceed under section 2-1301, the overriding consideration, as stated, is whether substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits. See *In re Haley D.*, 2011 IL 110886, ¶ 69.

¶ 25 It is undisputed that Tracy had appeared in court for several court dates while acting *pro se*. It is also undisputed that she had notice of the April 7, 2015, hearing. A disputed issue is why she failed to appear at the April 7, 2015, hearing, and the trial court rejected her claim that she was mistaken. According to the court, Tracy's failure to appear on April 7, 2015, was not simply the result of a scrivener's error; rather, she chose not to appear. The court also stated that it did not believe that the result of the hearing on Travis's petition to modify the agreement would change even if she did appear. For the following reasons, we determine that the trial court abused its discretion in denying Tracy's motion to vacate.

¶ 26 First, it was improper for the court to speculate as to what its ruling would be without Tracy appearing at the hearing and presenting evidence. Second, even assuming that the trial court was correct that its result would not change, it still was not necessary for Tracy to show the existence of a meritorious defense in order to set aside the April 7, 2015, order. Third, Tracy did not necessarily have to show a "reasonable excuse" for not appearing at the hearing on April 7, 2015, and the fact that she managed her case before, even while acting *pro se*, supports her case rather than hurts it. Fourth, the hearing on Travis's petition to modify the agreement had originally been scheduled for February 20, 2015, but was changed to April 7, 2015, *without notice to Tracy* when Travis and his counsel appeared in court on February 19, 2015, when the case was "not on call." Therefore, even though Tracy admitted receiving notice of the April 7, 2015, court date, the change in date occurred when she was not present in court, and not represented, all of which supports her claim of confusion over the change in court dates. Fifth, at the hearing on the motion to vacate, Travis admitted that he never specified April 7, 2015, as the date of the upcoming hearing, which is consistent with her testimony that she knew that the hearing was approaching but was mistaken as to the date. Finally, we rely on the liberal construction of section 2-1301(e) itself. See *In re Haley D.*, 2011 IL 110886, ¶ 69 (the trial court must be mindful that entry of default is a drastic remedy that should be used only as a last resort; the law prefers that controversies be determined according to the substantive rights of the parties; and the provisions of the Code of Civil Procedure governing relief from defaults are to be liberally construed toward that end).

¶ 27 In sum, we believe that substantial justice requires that the April 7, 2015, default judgment be set aside. It is reasonable, under the circumstances, to hold another hearing on Travis's petition to modify the agreement so that Tracy can appear and present evidence. Also,

given the extension in the briefing schedule, we have good cause for issuing our decision after the 150-day deadline under Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010)).

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we reverse the Du Page County circuit court judgment denying Tracy's motion to vacate the April 7, 2015, order and remand the case for further proceedings.

¶ 30 Reversed and remanded.