

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2008 Session

HARVEY ROSALES v. AMY S. ROSALES

**Appeal from the Circuit Court for Davidson County
No. 07D-258 Carol Soloman, Judge**

No. M2008-00462-COA-R3-CV - Filed January 22, 2009

This is an appeal from the denial of a Tenn. R. Civ. P. 60.02 motion to set aside an order striking the Wife's pleadings and entering a default judgment against her in a divorce action. Wife contends that the trial court erred in striking her pleadings and entering a default judgment against her because she never received notice of the hearings. She claims that although she notified both Husband and his attorney of her new address, all court papers continued to be sent to her previous address. The trial court denied Wife's motion finding that she had failed to notify Husband, his counsel, or the court of her new address. We affirm the trial court's denial of the Wife's motion to set aside the entry of the default judgment and order striking Wife's pleadings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Stephen E. Grauberger, Mt. Juliet, Tennessee, for the appellant, Amy S. Rosales.

Timothy T. Ishii, Nashville, Tennessee, for the appellee, Harvey Rosales.

MEMORANDUM OPINION¹

Harvey Rosales and Amy S. Maddry married in Davidson County, Tennessee, on February 14, 2000. Their union produced two children. After residing in Nashville, Tennessee, for a period of time, the couple moved to Virginia. In 2003, the couple separated while living in Virginia. Thereafter, Husband moved back to Nashville, while Wife continued to reside in Virginia.

¹Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

On January 23, 2007, Husband filed for divorce citing *inter alia* Wife's drug abuse and neglect of their two minor children as grounds. Wife retained legal counsel who filed an Answer on her behalf on April 12, 2007. Wife's legal counsel was granted permission to withdraw as her attorney on May 9, 2007. At the time her attorney withdrew, the pleadings on file with the Clerk's office listed Wife's address as 797 Frontier Road, Dugspur, Virginia 24235.

Wife moved back to Nashville in the summer of 2007; however, it is undisputed that she did not notify the Clerk of her new address. Although she had moved to Nashville, all pleadings, discovery, motions and orders were mailed to her former address in Virginia.

On July 17, 2007, after Wife had failed to respond to discovery, Husband filed a motion to compel discovery, following which the trial court issued an order, on September 25, 2007, stating that if discovery responses were not filed within twenty days, a default judgment would be entered against Wife. Wife did not respond to the order; therefore, on October 19, 2007, Husband filed a Motion to Strike Pleadings and for Default. The trial court granted the motion in an order entered on November 5, 2007.

Wife filed a Tenn. R. Civ. P. 60.02 motion for relief on January 18, 2008, in which she asserted, *inter alia*, that she first learned of the default judgment during a meeting with her new counsel on January 10, 2008. She also asserted that Husband and his counsel had actual knowledge of her Nashville address when discovery, motions and orders were mailed to her former Virginia address. For this reason, she contended that she was entitled to relief.

On March 11, 2008, the trial court denied Wife's motion for relief finding that Wife did not notify Husband, Husband's counsel, or the court of her new address, and that Husband's counsel did not become aware of her new address until January 15, 2008. Wife appealed.

Our standard of review of the denial of Tenn. R. Civ. P. 60.02 relief was stated in *Underwood v. Zurich Insurance Co.*, 854 S.W.2d 94 (Tenn. 1993). A motion for relief based on Rule 60.02 addresses itself to the sound discretion of the trial judge, and the scope of review of an appellate court is to determine if that discretion was abused. *Id.* at 97. Thus, the trial court's decision to deny relief under Rule 60.02 is reviewed under an abuse of discretion standard. *See Day v. Day*, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996). Under the abuse of discretion standard, the appellate court may not substitute its judgment for that of the trial court. *Id.* (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

The party seeking relief from a judgment bears a heavy burden. Rule 60.02 provides an "exceptional remedy." *Nails v. Aetna Insurance Co.*, 834 S.W.2d 289, 294 (Tenn. 1992); *Steioff v. Steioff*, 833 S.W.2d 94, 97 (Tenn. Ct. App. 1992). Its function is "to strike a proper balance between the competing principles of finality and justice." *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976). It is "an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Thompson v. Firemen's Fund Insurance Co.*, 798 S.W.2d 235, 238 (Tenn. 1990).

The party seeking relief under Tenn. R. Civ. P. 60.02 has the burden “to set forth in a motion or petition, or in affidavits in support thereof, facts explaining why movant was justified in failing to avoid mistake, inadvertence, surprise or neglect.” *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991) (citing *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978)). In deciding whether to grant a Rule 60.02 motion to set aside the default judgment, courts consider three criteria: (1) whether the default was willful; (2) whether the defendant has asserted a meritorious defense; (3) the amount of prejudice which may result to the non-defaulting party. *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003) (citing *Tenn. Dep’t of Human Res. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985)). If there is any reasonable doubt about whether the judgment should be set aside, the court should grant relief. *Id.* (citing *Nelson v. Simpson*, 826 S.W.2d 483, 486 (Tenn. Ct. App. 1991)).

If a litigant proceeding *pro se* relocates during the course of litigation, she has the responsibility of notifying the clerk of the court of her new address. *Reynolds*, 108 S.W.3d at 251. Without such notification, the clerk cannot assure that subsequent notices to the litigant will be received. *Id.* When Wife moved from Virginia to Nashville, she was unrepresented by counsel, and therefore, she was under the duty to notify the court of her new address. Wife did not notify the court and presented no reason for her lack of notification. Wife contends that she informed Husband and his counsel of her new address; the trial court obviously did not find her statement credible. Determination of the credibility of witnesses and parties is within the discretion of the trial court. *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (citing *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991)). Based on the record before us, we find no abuse of discretion.

We also note that Mother did not assert a meritorious defense to the divorce claim in her motion for relief. On appeal, she argues that her meritorious defense was in her initial denial of Husband’s allegations in her original Answer, which contained a denial of Husband’s claims and the affirmative defense that Husband’s ill conduct was the cause of her conduct. Yet, there was no mention of this in her motion nor in her affidavit which was attached, and there are no facts which indicate that she could raise a meritorious claim to Husband’s grounds for divorce. Thus, we find no basis upon which to find that the trial court erred by not setting aside the decision to grant Husband the divorce.

When Wife’s motion for Rule 60 relief was at issue, the one important issue remaining for the trial court to decide was the Permanent Parenting Plan, which required determinations of who would be the primary residential parent and the parties’ respective parenting time. That issue was to be decided at a hearing on January 28, 2008. Wife and her new counsel had actual notice of this hearing; however, for reasons unexplained by Wife, she failed to appear. This fact greatly undermines Wife’s arguments on appeal.

Based on our foregoing discussion, we find nothing in the record to indicate the trial court abused its discretion in denying Wife's motion for relief under Tenn. R. Civ. P. 60.02, and therefore, the judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Amy S. Rosales.

FRANK G. CLEMENT, JR., JUDGE