

SUPREME COURT OF WYOMING

Vernier v. Vernier

92 P.3d 825 (Wyo. 2004) · Decided June 29, 2004

SUMMARY

The Wyoming Supreme Court affirmed a divorce decree dividing the parties’ marital property and debts. It held that the appellant failed to provide an adequate appellate record to challenge the property division and that the default was entered after the applicable response period, with no procedural violation shown.

CASE DETAILS

COURT	Supreme Court of Wyoming
WRITING FOR THE COURT	Voigt, Justice; Golden; Hill; Kite; Lehman; Voigt
JURISDICTION	Wyoming
DECIDED	June 29, 2004
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a divorce decree in which the district court divided the parties' marital property and debts and entered default after the incarcerated appellant failed to plead or otherwise defend within the applicable period.
STANDARD OF REVIEW	The division of marital property is reviewed for abuse of discretion. When the appellant does not provide a sufficient record, the appellate court accepts the trial court's findings as the basis for deciding evidentiary issues and may limit review to issues that do not require inspection of the missing record.
PRECEDENTIAL VALUE	published opinion
PARTIES	Gilbert Paul Vernier v. Agnes Marie Vernier

TOPICS

- divorce
- default
- equitable distribution
- appellate procedure
- attorney fees

PRACTICE AREAS

- family law
- civil procedure
- appellate procedure

QUESTIONS PRESENTED

1. Whether the district court's division of the marital property was equitable.
2. Whether the Wyoming Rules of Civil Procedure were violated by entering default before the appellant had the required time to respond.
3. Whether the appellee was entitled to attorney's fees for defending the appeal.

HOLDINGS

1. The property distribution is affirmed because the appellant failed to provide a transcript or an approved statement of the evidence sufficient to demonstrate that the district court abused its discretion.
2. The district court did not violate the Wyoming Rules of Civil Procedure because the appellant was allowed more than thirty days after service to respond before default was entered.
3. The request for appellate attorney's fees is denied because the appellant generally presented cogent argument and pertinent legal authority, notwithstanding his failure to provide a sufficient record.

KEY QUOTATIONS

“Without either a transcript or an approved statement of the hearing we cannot assume that the court's findings were unsupported. We cannot find an abuse of discretion.” (92 P.3d at 827)

“The record clearly demonstrates that the appellant was allowed more than the required thirty days to respond, which he did not do.” (92 P.3d at 828)

FACTUAL BACKGROUND

Agnes Marie Vernier filed for divorce while Gilbert Paul Vernier was incarcerated at Crowley Correctional Facility in Colorado. He was personally served with the complaint and summons on March 31, 2003, but did not plead or otherwise defend before the clerk entered default. The district court held a hearing at which Gilbert participated pro se by telephone, granted the divorce, and divided the parties' property and debts.

PROCEDURAL HISTORY

The appellee filed a verified complaint for divorce and personally served the appellant while he was incarcerated in Colorado. After the appellant failed to plead or otherwise defend, the clerk entered default; the district court then held a hearing at which the appellant participated by telephone, granted the divorce, and divided the marital property and debts. The appellant appealed, challenging the property division and the timing and procedure of the default.

DISPOSITION

affirmed

CASES CITED

- Erhart v. Evans, 2001 WY 79, ¶ 18, 30 P.3d 542, 547 (Wyo. 2001)

- Wood v. Wood, 865 P.2d 616, 617 (Wyo. 1993)
- Smith v. Smith, 2003 WY 87, ¶ 11, 72 P.3d 1158, 1161 (Wyo. 2003)
- Williams v. Dietz, 999 P.2d 642, 645 (Wyo. 2000)
- Weiss v. Pedersen, 933 P.2d 495, 498 (Wyo. 1997)
- White v. Allen, 2003 WY 39, 65 P.3d 395 (Wyo. 2003)
- Willowbrook Ranch, Inc. v. Nugget Exploration, Inc., 896 P.2d 769, ¶¶ 71-72 (Wyo. 1995)
- Stadtfeld v. Stadtfeld, 920 P.2d 662, 664 (Wyo. 1996)
- Sweat v. Sweat, 2003 WY 82, ¶ 6, 72 P.3d 276, 278 (Wyo. 2003)
- Feaster v. Feaster, 721 P.2d 1095, 1097 (Wyo. 1986)
- Dorsett v. Moore, 2003 WY 7, ¶ 14, 61 P.3d 1221, 1225 (Wyo. 2003)
- Barnes v. Barnes, 998 P.2d 942, 946 (Wyo. 2000)
- Meyer v. Rodabaugh, 982 P.2d 1242, 1245 (Wyo. 1999)
- Stonham v. Widiastuti, 2003 WY 157, ¶ 31, 79 P.3d 1188, 1198 (Wyo. 2003)
- Amen, Inc. v. Barnard, 938 P.2d 855, 858 (Wyo. 1997)
- Phifer v. Phifer, 845 P.2d 384, 387 (Wyo. 1993)

OPINION

VOIGT, J.

VOIGT, Justice. [T1] The appellant, Gilbert Paul Vernier, was incarcerated in Colorado when his wife filed for divorcee. The divorcee was granted, and the appellant now claims that the district court erred in dividing the parties' property and in not allowing him the requisite thirty days to answer the complaint.

We affirm. ISSUES [T2] The appellant presents two issues for our review: 1. Was the division of marital property equitable? 2. Were the Wyoming Rules of Civil Procedure violated? FACTS [T3] The appellee, Agnes Marie Vernier, filed a Verified Complaint for Divorce on March 28, 2008. When she filed the complaint, her husband, the appellant, was incarcerated at Crowley Correctional Facility in Olney Springs, Colorado.

He was personally served there with a copy of the complaint *827and summons on March 31, 2003. The appel-lee filed an Application for Entry of Default on April 24, 2003, accompanied by supporting affidavits, and on May 7, 2008, after the appellant failed to plead or otherwise defend, the Clerk of the District Court entered a default. Despite the entry of default, the matter was heard on May 20, 2003, with the appellant appearing pro se by telephone.

The district court ultimately granted the divorce and divided the parties' property and debts. The appellant filed a notice of appeal on June 9, 2003. DISCUSSION {{4] The appellant first claims that the district court's property division was inequitable. He contends that a "review of the record will convinced [sic] this Court that the trial judge did not carefully and conscientiously considered

[sic] all of the factors that should have entered into the deliberations and subsequent decision pursuant to the division of property."

(Emphasis in original.) [T5] We note, at the outset, that the appellant failed to provide this Court a transcript of the proceeding pursuant to WRAP. 3.02,1 or a statement of the evidence as allowed by W.R.AP. 3.03.2 The appellant has the burden of providing this Court a complete record. Erhart v. Evans, 2001 WY 79, ¶ 18, 30 P.3d 542, 547 (Wyo.2001); Wood v. Wood, 865 P.2d 616, 617 (Wyo.1993).

Without a sufficient record, we must " ' "accept the 'trial court's findings as being the only basis for deciding the issues which pertain to the evidence." '"" Smith v. Smith, 2003 WY 87, ¶ 11, 72 P.3d 1158, 1161 (Wyo.2003) (quoting Williams v. Dietz, 999 P.2d 642, 645 (Wyo.2000) and Weiss v. Pedersen, 933 P.2d 495, 498 (Wyo.1997), abrogated on other grounds by White v. Allen, 2003 WY 39, 65 P.3d 395 (Wyo.2003)).

"In the absence of anything to refute them, we will sustain the trial court's findings, and we assume that the evidence presented was sufficient to support those findings." Willowbrook Ranch, Inc. v. Nugget Exploration, Inc., 896 P.2d 769, T71-72 (Wyo.1995). Where a proper record is not provided, an appeal may be dismissed or review may be limited to those issues not requiring inspection of the record.

Stadtfeld v. Stadtfeld, 920 P.2d 662, 664 (Wyo.1996). [16] The division of marital property is within the sound discretion of the district court. Sweat v. Sweat, 2003 WY 82, ¶ 6, 72 P.3d 276, 278 (Wyo.2003). " 'Without either a transcript or an approved statement of the hearing we cannot assume that the court's findings were unsupported.

We cannot find an abuse of discretion.'"" Stadtfeld, 920 P.2d at 664 (quoting Feaster v. Feaster, 721 P.2d 1095, 1097 (Wyo.1986)). According ly, we will affirm the property distribution set out in the divorce decree.

[17] The appellant next requests that we nullify the district court's order, *828arguing that "Wyoming Rules of Civil Procedures were violated by the [appellee]...." While the appellant does not specify which rules were violated, he claims that the "[alp-pellee failed to wait the required 30 days before filing an Application For Entry of Default and Request for Setting."

(Emphasis in original.) From this statement, we presume that the appellant is arguing that a default was entered, pursuant to W.R.C.P. 55,3 before the thirty-day time period allowed by W.R.C.P. 12(2).4 [T8] The record clearly demonstrates that the appellant was allowed more than the required thirty days to respond, which he did not do.

The appellant was served on March 31, 2003, and on May 7, 20083, thirty-seven days later, the clerk of the district court entered the appellant's default. Furthermore, the matter does not appear

to have been treated as a default. A hearing was held in which the appellant participated.

We find no procedural violation. [19] As a final matter, the appellee requests that we "award her attorney's fees for the necessity of responding to Appellant's meritless appeal." Such a sanction, pursuant to W.R.A.P. 10.05, is not generally available where, as here, a discretionary ruling is challenged. *Dorsett v. Moore*, 2003 WY 7, ¶ 14, 61 P.3d 1221, 1225 (Wyo.2003).

We acknowledge that we have departed from this rule in the past. See *Barnes v. Barnes*, 998 P.2d 942, 946 (Wyo.2000); *Meyer v. Rodabaugh*, 982 P.2d 1242, 1245 (Wyo.1999); and *Stadtfeld*, 920 P.2d at 664. However, we find that although the appellant failed to meet the burden of providing a sufficient record, he generally presented cogent argument and cited pertinent legal authority in support of his claims of error.

Stonham v. Widiastuti, 2003 WY 157, ¶ 31, 79 P.3d 1188, 1198 (Wyo.2003) (quoting *Amen, Inc. v. Barnard*, 938 P.2d 855, 858 (Wyo.1997)); *Phifer v. Phifer*, 845 P.2d 384, 387 (Wyo.1993). We deny the appellee's request for attorney's fees.

[110] The district court's decision is affirmed.. WRAP. 3.02(b) provides: In all cases other than criminal and juvenile matters, if the proceedings in the trial court were stenographically reported by an official court reporter, appellant shall, contemporaneously with the filing of the notice of appeal, file and serve on appellee a description of the parts of the transcript which appellant intends to include in the record and unless the entire transcript is to be included, a statement of the issues appellant intends to present on appeal.

If an appellant intends to assert on appeal that a finding or conclusion is unsupported by the evidence or contrary to the evidence, appellant 'shall include in the record a transcript of all evidence relevant to such finding or conclusion. If appellee deems a transcript of other parts of the proceedings to be necessary appellee shall, within 15 days after service of the designation of the partial transcript by appellant, order such parts from the reporter or procure an order from the trial court directing appellant to do so.

At the time of ordering, a party must make arrangements satisfactory to the reporter for payment of the cost of the transcript.. W.R.A.P. 3.03 provides: If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means including appellant's recollection.

The statement shall be served on appellee, who may serve objections or propose amendments within 15 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included by the clerk of the trial court in the record on appeal.. W.R.C.P. 55(a) provides: Entry.- When a party against whom a judgment for affirmative relief is sought has failed to plead or

otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default., W.R.C.P.

12(a) provides, in pertinent part: When Presented.-A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, or if service be made without the state, or by publication, within 30 days after such service or within 30 days after the last day of publication.... (Emphasis added.)