



IN RE THE MARRIAGE OF KENNETH EUGENE WERNER AND EDDIE JEAN WERNER

00241

**UPON THE PETITION OF
KENNETH EUGENE WERNER,**

Petitioner-Appellee,

**AND CONCERNING
EDDIE JEAN WERNER,**

Respondent-Appellant.

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) Filed January 26, 1983

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Appeal from Polk District Court, Thomas S. Bown, Judge.

Respondent-wife appeals from decree dissolving the parties' marriage and awarding custody of the parties' minor child to petitioner-husband. She contends that the trial court should have granted her motion for a new trial based on her counsel's withdrawal from the case on the day of trial without prior notice.
REVERSED AND REMANDED FOR A NEW TRIAL.

Ronald L. Anderson and James M. Peters of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for respondent-appellant.

Joseph A. Nugent, Des Moines, for petitioner-appellee.

Considered en banc.

PER CURIAM

On August 4, 1981, Kenneth Eugene Werner filed a petition for dissolution of marriage. Respondent Eddie Jean Werner filed her answer on December 2, 1981. Both parties requested custody of their minor child, who remained in the custody of his mother pending trial. Trial was scheduled for December 9, 1981. On November 10, 1981, Eddie Jean informed her attorney that she planned to leave for Georgia around November 15 to visit her mother, who was ill, but would return in time for trial. Despite her attorney's advice that it would be a bad time to leave in terms of trial preparation, Eddie Jean left for Georgia. Upon learning of Eddie Jean's departure from the state, her attorney sent her a letter dated December 1, 1981, stating that "I will appear at the hearing, but in all fairness, I feel I must advise you that the court will not look favorably on your failure to appear."

On the date set for trial, Eddie Jean's attorney appeared, but Eddie Jean failed to appear. He requested and was granted permission by the trial court to withdraw as her counsel and was permitted to leave the courthouse before the proceedings commenced. Evidence was then presented by the father, Kenneth, in the absence of Eddie Jean or her attorney, and the court entered a decree dissolving the marriage and awarding custody to Kenneth.

Subsequently, Eddie Jean filed a motion for a new trial, which was summarily denied, and her notice of appeal. On appeal she sets forth several points in support of her contention that the trial court abused its discretion in denying the motion for a new trial. In the event that the trial court's decision is affirmed, she also requests the entry of an order establishing her visitation rights.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Initially we note that Iowa Rule of Civil Procedure 236 (setting aside default), and the cases construing that section, are not directly applicable to our resolution of

the situation presented on appeal because the court below did not enter a default judgment but proceeded to the merits. The decision of whether to enter a default is largely within the discretion of the trial court, Avery v. Peterson, 243 N.W.2d 630, 631-32 (Iowa 1976), and where the decree does not specifically state that it was entered on default, as the decree in the instant case did not, it is presumed to be entered on appearance. Campbell v. Ayres, 6 Iowa 339, 345 (1858). Accordingly we will treat it as such.

We proceed to address Eddie Jean's contention that she is entitled to a new trial pursuant to Iowa Rule of Civil Procedure 244(a). This rule provides that a new trial may be granted upon motion of the aggrieved party if "[i]rregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial" and which "materially affected his substantial rights." The "irregularity" which Eddie Jean alleges in this case was the withdrawal of her attorney on the day of trial, without prior notice and time to secure new counsel.

The Iowa Supreme Court has previously determined that an attorney cannot withdraw from a case without giving his client notice of withdrawal in time for the client to procure other counsel to represent him, In re Estate of Coffin, 189 Iowa 862, 864-67, 179 N.W. 123, 124-25 (1920), and that such withdrawal may be grounds for granting a new trial. White v. Gray, 92 Iowa 525, 526-27, 61 N.W. 173, 173-74 (1894). Other jurisdictions have proceeded to grant a new trial when the circumstances surrounding the withdrawal were similar to those in the instant case. See e.g., Sherman v. Heiser, 85 Wis. 2d 246, 250-56, 270 N.W.2d 397, 399-400 (1978). This result is consistent with Disciplinary Rule 2-110(A)(2) of the Code of Professional Responsibility:

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

It also comports with Local Rule 5 of the Fifth Judicial District of Iowa:

The appearance of an attorney in any case, civil or criminal, may be withdrawn only upon application to the Court with notice of opportunity for hearing mailed or delivered to the client and on subsequent order of the Court with copy mailed or delivered to the client.

We are of the opinion that the trial court abused its discretion in permitting Eddie Jean's attorney to withdraw on the day of trial without notice. She had no prior indication that she would not be represented at the hearing if she failed to appear; in fact, her attorney wrote her that he would appear at the hearing and never warned her that he was considering withdrawing. Under these circumstances, the trial court had two options consistent with due process guarantees:

[W]here the court permits an attorney to withdraw from employment on the day of trial without notice to the client, due process requires that the trial court let the answer stand and set a new trial date upon such terms as appear appropriate under the circumstances. In the alternative, the trial court may deny the attorney permission to withdraw and order him to try the case as best he can.

Sherman, 85 Wis. 2d at 255-56, 270 N.W.2d at 401. By permitting withdrawal and adjudicating the case on the basis of evidence presented by appellee, in the absence of appellant or her attorney, the trial court abused its discretion as a matter of law.

Because of our disposition of this issue, we find it unnecessary to reach appellant's other contentions. The decision of the trial court is reversed, and the case is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.