SUMMARY
July 22, 2021

2021COA99

No. 19CA2343, *In re Marriage of Vega* — Family Law — Uniform Dissolution of Marriage Act — Commencement of a Proceeding — Response; Colorado Rules for Magistrates — Functions in Civil Cases — Consent Necessary

In this dissolution of marriage case, a division of the court of appeals considers whether a district court magistrate had jurisdiction to preside over and enter permanent orders. Because husband did not file a response to wife's petition for dissolution of marriage, the magistrate entered default against him, precluded him from participating in the permanent orders hearing, and entered default permanent orders in the form requested by wife. But because the plain language of section 14-10-107(4)(a), C.R.S. 2020, permits but does not require the filing of a response, and because husband appeared at the initial status conference as C.R.C.P. 16.2(c)(1)(B) requires, the division concludes that the

magistrate erred by entering default against husband under C.R.C.P. 55(a). The division also concludes that, because husband was not in default, the permanent orders hearing was contested and the parties' consent for the magistrate to preside was required by C.R.M. 6(b)(2). And because the parties did not give the required consent, the division further concludes that the magistrate lacked jurisdiction to preside over and enter permanent orders in this case. Consequently, the division reverses the entry of default against husband and the default permanent orders judgment and remands the case for further proceedings.

COLORADO COURT OF APPEALS **2021COA99**

Court of Appeals No. 19CA2343
Larimer County District Court No. 19DR30104
Honorable Stephen E. Howard, Judge
Honorable Allen R. Schwartz, Magistrate

In re the Marriage of

Nancy Lynn Vega,

Appellee,

and

Abelardo Vega,

Appellant.

ORDER AND JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE BROWN
Navarro and Casebolt*, JJ., concur

Announced July 22, 2021

Polidori, Franklin, Monahan & Beattie, LLC, Robin Lutz Beattie, Lakewood, Colorado, for Appellee

Donald E. Janklow, Greeley, Colorado, for Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Abelardo Vega (husband) appeals the default permanent orders entered by a district court magistrate in connection with the dissolution of his marriage to Nancy Lynn Vega (wife). Husband contends that the magistrate lacked jurisdiction to enter permanent orders because C.R.M. 6(b)(2) required that the parties consent to the magistrate presiding over their contested hearing and no such consent was given.

¶ 2 To resolve this contention, we must first determine whether the magistrate erred by entering default against husband under C.R.C.P. 55(a) based on husband's failure to file a response to the petition for dissolution of marriage. Because the plain language of section 14-10-107(4)(a), C.R.S. 2020, permits but does not require the filing of a response to a petition for dissolution of marriage, and because husband appeared at the initial status conference as C.R.C.P. 16.2(c)(1)(B) requires, we conclude that the magistrate erred by entering default against him under C.R.C.P. 55(a).

¶ 3 We further conclude that, because husband was not in default, the permanent orders hearing was contested and the parties' consent for the magistrate to preside was required by C.R.M. 6(b)(2). Because the parties did not give the required

consent, the magistrate lacked jurisdiction to preside over and enter permanent orders in this case. *See Andrews v. Miller*, 2019 COA 185, ¶¶ 1-2. Consequently, we reverse the entry of default against husband and the default permanent orders judgment and remand the case for further proceedings.[1]

I. Background

¶ 4 Wife petitioned in 2019 to end the parties' thirty-five-year marriage. She served husband personally with the petition for dissolution of marriage and summons. In relevant part, the summons provided as follows: "If you were served in the State of

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[1] On appeal, husband raises seven contentions: (1) the magistrate erred by not appointing an interpreter for husband at the permanent orders hearing; (2) the magistrate violated husband's due process rights by not allowing him to participate in the hearing; (3) the magistrate abused his discretion by not granting a continuance of the hearing for husband to retain counsel; (4) the magistrate erred under C.R.C.P. 55(b) by entering a default judgment when wife had failed to provide husband her proposed permanent orders before the hearing; (5) the magistrate erred by distributing property that the parties did not own; (6) the magistrate abused his discretion by distributing the property inequitably and in determining the parties' incomes for purposes of awarding child support and maintenance; and (7) the parties' consent to the magistrate hearing the permanent orders was required and was not given. Because we reverse and remand based on the last contention, we do not address the remainder. However, if husband believes he needs an interpreter at the hearing on remand, he should request that one be appointed.

Colorado, you must file your Response with the clerk of this Court within 21 days after this Summons is served on you to participate in this action." The summons tracked the language of the form summons available on the Colorado Judicial Branch website: JDF 1102, titled "Summons for Dissolution of Marriage or Legal Separation" (revised June 2018).[2]

¶ 5 Wife served husband by mail with the case management order and notice of initial status conference. The case management order informed the parties that all domestic relations cases are assigned to a district court magistrate.

¶ 6 Husband did not file a response to the dissolution petition, but he appeared at the initial status conference, which was conducted by a family court facilitator. Despite husband's appearance, the district court magistrate assigned to the case entered default against him. In the default order, below the word "APPEARANCES" and next to the word "Respondent" (here, husband), the "yes" box was marked. But, immediately below that, the order stated that

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[2] Other form summonses available on the Colorado Judicial Branch website, such as JDF 1251, titled "Summons for Dissolution of Civil Union or Legal Separation of Civil Union" (revised Aug. 2014), contain the same language regarding the filing of a response.

there had been "no entry of appearance or response filed" by husband and therefore the case would proceed to a default permanent orders hearing.

¶ 7 The magistrate ordered wife to file proposed permanent orders at least ten days before the hearing. The record reflects that wife filed a proposed decree, property spreadsheet, child support worksheet, exhibit list, and sworn financial statement with the court ten days before the permanent orders hearing but did not provide these documents to husband. Wife's proposed property spreadsheet reflected that the parties owned assets exceeding $10 million, including at least twenty-seven residential and commercial properties.

¶ 8 Both parties appeared at the permanent orders hearing, over which the magistrate presided. Wife appeared with counsel, and husband appeared pro se. The magistrate did not allow husband to participate in the hearing, however, finding that although he was present, he remained in default. Husband stated in response, "Then, I need to hire a lawyer."

¶ 9 The magistrate asked wife's attorney whether he had sent the proposed permanent orders to husband before the hearing. Wife's

attorney responded that he had not, and the magistrate recessed the hearing for husband to review the documents "so that he's aware of at least what's being asked." When the hearing resumed, wife's attorney stated that, after speaking to husband, "there seems to be a lot of confusion," but "I would prefer to move forward today with the default hearing. Sorry." Husband again requested that the magistrate "give me a chance to get a lawyer," stating that he had thought wife would be fair, but her proposed permanent orders, which he was seeing for the first time at the hearing, listed properties to be divided that the parties did not own.

¶ 10 The magistrate denied husband's request, took evidence by offer of proof from wife, and admitted wife's exhibits. He gave husband no opportunity to cross-examine wife or rebut her evidence. Then the magistrate made oral findings on the record, dissolved the parties' marriage, and entered default permanent orders in the form wife requested. The permanent orders did not include the required C.R.M. 7 notice of the parties' appeal rights for cases that are heard by a magistrate. *See* C.R.M. 7(a), (b) (a magistrate "shall include . . . a written notice that the order or

judgment" was entered with or without consent and how an appeal must be taken).

¶ 11 Thirteen days after the magistrate entered the written permanent orders, husband, by then represented by counsel, moved to extend the time to petition for district court review of the orders, and the court granted his request. Instead of filing a petition for review, however, husband moved for post-trial relief under C.R.C.P. 59(a) and C.R.C.P. 60(b), noting the magistrate's failure to include appeal notification language in the permanent orders and arguing that his right to appeal the permanent orders fell under C.R.M. 7(b).

¶ 12 The district court determined that husband should have petitioned for review of the default permanent orders under C.R.M. 7(a) because a default hearing is uncontested and does not require the parties' consent to a magistrate. In any event, the district court considered and denied husband's post-trial motion.

II. Standard of Review and Applicable Law

¶ 13 Husband's argument that he did not consent to the magistrate raises a jurisdictional issue concerning the magistrate's authority to preside over the permanent orders, which we review de novo. *See*

Andrews, ¶ 8. We also review the district court's interpretation of statutes and rules of civil procedure de novo. *In re Marriage of Blaine*, 2021 CO 13, ¶ 14; *Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 32.

¶ 14 We always look first to the plain language of the statute or rule and interpret that language according to its commonly understood and accepted meaning. *Blaine*, ¶ 14; *Schaden*, ¶ 32. If the statute or rule is clear, we apply it as written and need not resort to other rules of statutory construction. *Blaine*, ¶ 14.

¶ 15 We also construe the civil rules "liberally to effectuate their objective to secure the just, speedy, and inexpensive determination of every case and their truth-seeking purpose." *Maslak v. Town of Vail*, 2015 COA 2, ¶ 10 (quoting *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 24); *see also* C.R.C.P. 1.

III. Analysis

¶ 16 Pursuant to C.R.M. 6(b)(2), "a district court magistrate may preside over contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities" only with "the consent of the parties." So, to determine whether consent to the magistrate was

required, we must determine whether the permanent orders hearing in this case was contested. And to determine whether the hearing was contested, we must first determine whether the magistrate properly entered default against husband.

A. The Magistrate Erred by Finding Husband in Default

¶ 17 Because husband was not required to file a response to wife's petition for dissolution of marriage, and because husband appeared at the initial status conference, we conclude that the magistrate erred by finding him in default.

¶ 18 Section 14-10-107(4)(a) provides that, "[u]pon the commencement of a proceeding by one of the parties . . . , the other party shall be personally served in the manner provided by the Colorado rules of civil procedure, and he or she *may* file a response in accordance with such rules." (Emphasis added.) The legislature's use of the word "may" is permissive; it is "generally indicative of a grant of discretion or choice among alternatives." *A.S. v. People*, 2013 CO 63, ¶ 21; *see also People v. Dist. Ct.*, 713 P.2d 918, 922 n.7 (Colo. 1986) ("[T]he word 'may' will not be treated as a word of command . . . ." (quoting Black's Law Dictionary 883 (5th ed. 1979))); *AA Wholesale Storage, LLC v. Swinyard*, 2021 COA

46, ¶ 29. The legislature's choice of the term "may" with respect to the filing of a response stands in stark contrast to its use of the word "shall" in the same sentence to mandate personal service of a petition for dissolution of marriage. "Where a legislature uses both mandatory and directory verbs in the same . . . sentence, it is fair to assume it was aware of the difference and intended each verb to carry its ordinary meaning." 3 Shambie Singer, *Sutherland Statutory Construction* § 57:11, Westlaw (8th ed. database updated Nov. 2020). "The presumption especially is reasonable where disparate verbs such as 'shall' and 'may' are in close juxtaposition . . . ." *Id.*; *see also A.S.*, ¶ 21; *Swinyard*, ¶ 31.

¶ 19 Thus, we conclude that the plain language of section 14-10-107(4)(a) permits, but does not require, a party to file a response to a petition for dissolution of marriage. And although C.R.C.P. 12(a) typically requires a defendant in a civil case to file an answer or other response within twenty-one days after service of the summons and complaint, the rules of civil procedure do not apply in a dissolution of marriage action "insofar as they may be inconsistent with or in conflict with the procedure and practice provided by the applicable statutes." C.R.C.P. 81(b); *see also* § 14-10-105(1), C.R.S.

2020 ("The Colorado rules of civil procedure apply to all proceedings under this article, except as otherwise specifically provided in this article."); *Bacher v. Dist. Ct.*, 186 Colo. 314, 318, 527 P.2d 56, 58 (1974) ("The rules of civil procedure apply to a divorce action, unless a contrary rule appears in the divorce statutes."). We therefore conclude that, despite the language of the summons served on husband in this case, husband was not required to file a response to participate in the proceedings.

¶ 20 Our conclusion is buttressed by C.R.C.P. 16.2, the rule governing case management in domestic relations cases. The rule says nothing about filing a response to the petition for dissolution of marriage. It does, however, require the parties to appear at an initial case management conference: "All parties and counsel, if any, *shall* attend the initial status conference . . . ." C.R.C.P. 16.2(c)(1)(B) (emphasis added).

¶ 21 Under C.R.C.P. 55(a), a party who fails "to plead *or otherwise defend*" the action is subject to an entry of default. (Emphasis added.) *See also Ferraro v. Frias Drywall, LLC*, 2019 COA 123, ¶ 11 (noting that C.R.C.P. 55(a) allows for entry of default when "the party against whom relief is sought fails to respond or otherwise

defend the action"). The order entering default against husband in this case inexplicably states that there had been "no entry of appearance or response filed" by husband immediately below language indicating that husband appeared at the initial status conference. It is undisputed that, although husband did not file a response to the petition, he appeared at the initial status conference. That was all that was required of him to participate in the action. *See* C.R.C.P. 16.2(c)(1)(B); § 14-10-107(4)(a); *cf. In re Marriage of Eisenhuth*, 976 P.2d 896, 898-99 (Colo. App. 1999) (upholding default permanent orders entered on only one party's evidence when the other party was served yet failed to appear in the case).

¶ 22 We conclude that the magistrate erred by entering default against husband under C.R.C.P. 55(a). We next consider whether consent was required for the magistrate to preside over the permanent orders hearing in this case.

B. The Parties' Consent to the Magistrate Was Required

¶ 23 The Colorado Rules for Magistrates govern a magistrate's authority to perform particular functions in different types of cases. *See* § 13-5-201(3), C.R.S. 2020; C.R.M. 1, 2, 6; *Medina v. Williams*,

2021 CO 24, ¶ 5; *Andrews*, ¶ 6. A magistrate's powers are limited to those provided by statute or court rule. *Andrews*, ¶ 6; *In re Parental Responsibilities Concerning M.B.-M.*, 252 P.3d 506, 509 (Colo. App. 2011).

¶ 24 As to dissolution of marriage cases, the rules distinguish between functions that a magistrate can perform only with the parties' consent and those that the magistrate can perform without consent. *See* C.R.M. 6(b)(1), (b)(2). Under C.R.M. 6(b)(1)(A), a magistrate has the power to preside without the parties' consent over all proceedings arising under Title 14 except as provided in C.R.M. 6(b)(2). Under C.R.M. 6(b)(2), consent is required for a magistrate to preside over "contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities."

¶ 25 The district court ruled, in response to husband's post-trial motion, that a default permanent orders hearing "is, by definition, not a contested hearing," and therefore the magistrate could preside over the hearing without the parties' consent. *See* C.R.M. 6(b)(1). But husband appeared in his dissolution case — at the initial status conference and at the permanent orders hearing — and tried

to participate. At the hearing, he contested not only going forward with the hearing but also the merits of wife's proposed property division.

¶ 26 We have already concluded that the magistrate erred by defaulting husband. We further conclude that the permanent orders hearing was "contested" within the meaning of C.R.M. 6(b)(2), regardless of whether the magistrate termed it a "default" hearing, and that the parties' consent was required for the magistrate to preside. We next determine whether consent was given and, consequently, whether the magistrate had jurisdiction to enter permanent orders in this case.

C. The Parties Did Not Consent to the Magistrate

¶ 27 Pursuant to C.R.M. 3(f)(1)(A), where consent is necessary,

> a party is deemed to have consented to a proceeding before a magistrate if:
>
> (i) [t]he party has affirmatively consented in writing or on the record; or
>
> (ii) [t]he party has been provided notice of the referral, setting, or hearing of a proceeding before a magistrate and failed to file a written objection within 14 days of such notice; or
>
> (iii) [t]he party failed to appear at a proceeding after having been provided notice of that proceeding.

¶ 28 It is undisputed that the parties did not consent in writing or orally on the record at a hearing. *See* C.R.M. 3(f)(1)(A)(i). It is also undisputed that husband did not fail to appear at the permanent orders hearing. *See* C.R.M. 3(f)(1)(A)(iii). Wife argues, however, that husband failed to object to the magistrate and is therefore deemed to have consented under C.R.M. 3(f)(1)(A)(ii). We are not persuaded.

¶ 29 The mandatory "notice" in proceedings for which consent is required under C.R.M. 6 "shall state that all parties must consent to the function being performed by the magistrate." C.R.M. 5(g); *see also* C.R.M. 6(f) ("A district court magistrate shall not perform any function for which consent is required . . . unless the oral or written notice complied with Rule 5(g)."). The notice here did not comply with this standard — it did not inform the parties that their consent was required for the magistrate to preside over the permanent orders if the hearing was contested.

¶ 30 The notice given to the parties is similar to the notice at issue in *Andrews*. There, a delay reduction order informed the parties simply that a magistrate "may perform any function" in the case. *Andrews*, ¶ 1. A division of this court held that such notice fell short under the magistrate rules because it did not (1) inform the

parties that their consent would be necessary for certain functions or (2) identify the specific functions that the magistrate would perform. *Id.* at ¶¶ 16-21; *see also* C.R.M. 5(g), 6(f).

¶ 31 The same is true here. Recall that the case management order only informed the parties that "[a]ll domestic relations cases are assigned" to a particular district court magistrate. It advised that "some hearings . . . are held before another magistrate or a district judge and some conferences [are] held with the Family Court Facilitator." And it explained that "[f]urther details not otherwise set forth in this order as to which hearings or proceedings are held by which judicial officer . . . may be obtained in written form" from the court clerk's office. The case management order did not tell the parties that their consent was necessary for the magistrate to preside over a contested permanent orders hearing, nor did it tell them that they had a right to object to the magistrate presiding over their hearing or set forth the timeframe within which they must object. *See* C.R.M. 3(f)(1)(A)(ii); C.R.M. 5(g)(2); *Andrews*, ¶ 25.

¶ 32 Pursuant to *Andrews*, proper written notice to the parties under the magistrate rules should be either

- notice that their entire case is being referred to, is being set with, or will be heard by a magistrate and that any party who fails to file a written objection within fourteen days shall be deemed to have consented; or
- notice that a magistrate will be performing a specifically described function in their case for which consent is required and that any party who fails to file a written objection within seven days shall be deemed to have consented.

Andrews, ¶ 25.

¶ 33 As the *Andrews* division explained, providing either type of notice does "not put an onerous burden on the district courts" given the significance of the parties' consent, which means that they are forgoing district court review of the judgment entered by the magistrate, who is not constitutionally appointed or retained. *Id.* at ¶ 26; *cf. Koch v. Dist. Ct.*, 948 P.2d 4, 8-9 (Colo. 1997) (noting that permanent orders in dissolution cases "have an enormous impact on the lives of the parties" and the issues involved are "interrelated, emotionally charged, and sometimes difficult to decide").

¶ 34 The notice here did not comply with either option outlined in *Andrews*. Therefore, husband cannot be deemed to have consented based on his failure to object to the magistrate. *See Andrews*, ¶ 27 (holding that party who did not receive proper notice under C.R.M. 5(g) cannot be deemed to have consented to the magistrate based on a failure to object). And, in the absence of the parties' consent, the district court magistrate lacked jurisdiction to preside over the contested permanent orders hearing. C.R.M. 6(b)(2); *see also Medina*, ¶ 9; *Andrews*, ¶ 15. Accordingly, we reverse the entry of default against husband and the default permanent orders judgment and remand the case for a new hearing — before a district court judge or before a magistrate after proper notice and consent — and for the entry of new permanent orders.

IV. Conclusion

¶ 35 The order entering default against husband is reversed, the default permanent orders judgment is reversed, and the case is remanded for further proceedings.

JUDGE NAVARRO and JUDGE CASEBOLT concur.