SIXTH DIVISION
JUNE 30, 2011

No. 1-10-2639

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF: KIM MATSON O'MALLEY, n/k/a GODFREY,	)	Appeal from the Circuit Court of Cook County.
Petitioner-Appellee,	)	
and	)	No. 01 D 14530
PAUL R. O'MALLEY,	)	Honorable Leida Santiago,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justice Cahill concurred in the judgment.
Presiding Justice Garcia dissented.

ORDER

Held: Where a party moved for clarification of a prior order and the opposing party suggested that the trial court enter the clarification order as a *nunc pro tunc* order and

> failed to object to its entry as a *nunc pro tunc* order, the *nunc pro tunc* order did not toll appellant's time to appeal and we now lack jurisdiction to hear his untimely appeal.

This is an interlocutory appeal pursuant to Supreme Court Rule 306 (eff. Feb. 26, 2010) by respondent Paul R. O'Malley (Paul). Paul asks this court to reverse the trial court's disqualification of his attorneys, Steven and Susan Polachek.

The underlying case involves a post-divorce petition for rule to show cause. Kim alleged that Paul failed either to complete the sale of their former marital home or buy out her interest pursuant to the divorce property settlement agreement.

On this appeal, Paul claims that the trial court abused its discretion in disqualifying his attorneys, in failing to conduct an evidentiary hearing, and in failing to set out specific findings of fact or conclusions of law. Kim claims, first, that this court lacks jurisdiction pursuant to Supreme Court Rule 306 (eff. Feb. 26, 2010) to review the disqualification of Paul's attorneys and, second, that the trial court did not abuse its discretion in disqualifying them.

For the reasons discussed below, we find that we do not have jurisdiction

and we dismiss this interlocutory appeal on that basis.

BACKGROUND

I. Kim's Motion to Disqualify Paul's Attorney

On November 16, 2009, Kim filed a petition for rule to show cause, to modify the judgement for dissolution of marriage, and for other relief. On December 9, 2009, Steven Polachek filed his appearance as counsel for Paul. On December 10, 2009, Paul filed his own appearance as an attorney of record.

On December 17, 2009, Kim filed a motion to "disqualify R. Steven Polachek from representing Respondent Paul R. O'Malley ('Paul') in the instant litigation." She sought an order disqualifying Steven Polachek and directing Paul to secure new counsel in 21 days. Specifically, she claimed:

> "The subject of the Petition is the botched sale of the former marital residence. Attorney Polachek was heavily involved in negotiating the failed contract with the buyers' realtors. In fact, in Paul's response, Mr. Polachek's activities during the negotiation period which underlie the Petition are evident and well-documented."

In her motion, Kim also claimed that she would call Steven Polachek "as an

adverse witness regarding the negotiation and demise of the contract for sale of the marital residence."

In his response to Kim's motion to disqualify, Paul stated his attorneys were "Polachek & Polachek."

II. March 29th Hearing and Order

On March 29, 2010, after a hearing on the disqualification motion, the trial court entered a written order disqualifying attorney Steven Polachek as Paul's attorney. At a subsequent hearing held on August 12, 2010, the trial court observed that no court reporter had been present on March 29, 2010, and thus no transcript for the March 29th hearing was available. In addition, neither side provided a bystander's report of the March 29th hearing either to the trial court or to this court. The written order, entered on March 29, 2010, stated in relevant part:

> "IT IS HEREBY ORDERED:
>
> 1) Attorney R. Steven Polachek is hereby disqualified from representing Respondent in the instant litigation.

2) Paul R. O'Malley shall have twenty-one (21) days to file an additional appearance/seek alternate counsel.

3) The matter is set for status on all issues on May 5, 2010, 9:45 a.m."

III. Paul's Motion to Reconsider

On April 28, 2010, Paul filed a motion to reconsider the order, suppprted by an affidavit from Steven Polachek. In his affidavit, Polachek stated the following facts. Polachek was retained by Paul to represent him at the closing of a real estate contract. Polachek first received the contract on September 17, 2008, when he was requested by Paul to contact the buyers' attorney to clarify the closing date and its effect on the proration credits. During the evening of September 17, 2008, Polachek attempted to contact the buyers' attorney by e-mail, telephone and telefax, and received no response. On the next day, Polachek spoke with the buyers' attorney in Kansas City who informed Polachek that the attorney had no authority to discuss or to modify the contract. Polachek stated that he had no further contact with the buyers' attorney or the buyers.

On June 14, 2010, at a hearing on Paul's reconsideration motion, Steven Polachek stated that he was asking for reconsideration because he believed that, at the March 29th hearing, the trial court had wrongly applied Rule 3.7 of the Illinois Rules of Professional Conduct. Ill. S.Ct. R. Prof'l. Conduct R. 3.7 (eff. Jan. 1, 2010). Explaining the rule, Steven Polachek apparently asked the trial court to reconsider whether, even if he was disqualified, his firm could still represent Paul at any subsequent trial:

> "And, in fact, the rule's been expanded, apparently, so that even if I was disqualified, or any lawyer – it's not me. Any lawyer was disqualified, his firm could handle the trial or her firm could handle the trial.
>
> That's what the rule seems to be now. And that is somewhat of a substantial change."[1]

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[1]Rule 3.7 states: "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Ill. S.Ct. R. Prof'l. Conduct R. 3.7(b) (eff. Jan. 1, 2010).

On June 14th, the trial court denied Paul's motion for reconsideration, and granted him an additional 21 days to seek new counsel, if he wished. The trial court observed that Paul was also a counsel of record, since he had also filed an appearance. Apparently responding to Steven Polachek's argument to reconsider the disqualification of his firm, the trial court ruled: "I don't know if Mr. O'Malley wishes to get other representation, which he is perfectly entitled and has a right to do. *** If he does, wonderful. *** If he hasn't then, obviously, he will be representing himself [.]"

IV. Kim's Motion for Clarification

On July 2, 2010, attorney Susan Polachek filed an appearance on behalf of Paul. Susan Polachek is a member of the firm of Polachek & Polachek, and the wife of Steven Polachek.[2]

On July 27, 2010, Kim filed a motion "for clarification of [the] March 29,

[2]At the hearing on August 12, 2010, Kim's attorney stated that Susan Polachek was the wife of Steven Polachek, and Susan Polachek, who was present at the hearing, did not correct that statement. Kim's attorney had argued in court: "I will mention to you that this is Mr. Polachek's wife. So that we would now be in a situation where his wife would be vouching for his credibility, Judge."

2010 order." The motion asked the court for an order "clarifying/correcting the March 29, 2010 order to specifically disqualify the law firm of Polachek and Polachek as well as R. Steven Polachek as of the March 29, 2010, ruling." It was the position of Kim that the firm had already been disqualified at the March 29th hearing, but that the order her attorney prepared omitted Susan Polachek. The record on the motion for reconsideration supported Kim's recollection as will be discussed below. The motion argued that:

> "During oral argument in March 2010, which was lengthy and spirited, Mr. Polachek specifically raised the issue of another member of his firm serving as counsel. His arguments were met with counter-arguments. The issue was fully litigated; the Court's grant of the Motion to Disqualify validated both positions."

On August 12, 2010, at the hearing on Kim's motion to clarify, Kim's attorney argued that, at the hearing on March 29, 2010, "Mr. Polachek said, 'Anybody from my firm can step in,' and we said, 'No, they can't.' " The trial court observed that they "did not have a court reporter that first day," and Kim's attorney also observed that no bystander's report had been filed for the March 29th

hearing. However, the trial court stated: "I do recall that a request was made for the firm to be disqualified. And it might not have been incorporated into the order but that's the Court's holding." When the trial court made that statement, the court confirmed that it already had disqualified the firm at the March 29, 2010, hearing. The dissent characterizes the trial court's statement as "I remember *now* what I meant to say *then*" (Order at 28), but we find that the trial court merely corrected a court order that did not reflect the court's findings.

Kim's attorney said "[t]hank you," and the trial court replied "[t]hank you," and the hearing seemed about to conclude, when Susan Polachek interjected: "I'm sorry, Your Honor. Is that order a *nunc pro tunc* back to March 29th?" The trial court replied that it was, and Ms. Polachek said: "Thank you, Judge." At which point, the hearing ended.

The trial court then entered a *nunc pro tunc* order on August 12, 2010, disqualifying both Steven Polachek and the Polachek law firm. The written order stated in relevant part:

> 'IT IS HEREBY ORDERED:
>
> 1) The March 29, 2010 order is amended *nunc pro tunc*
>
> and the law firm of Polachek & Polachek and attorney

R.Steven Polachk are disqualified from representing

Respondent in the instant litigation."

Even though the order had a section "1)" there was neither a second section nor any further sections.

On August 12, 2010, the trial court also entered an order recusing herself pursuant to Supreme Court Rule 63 (eff. April 1, 2007)[3], and the case was submitted for reassignment to another trial judge.

V. Paul's Petition for Leave to Appeal

On September 10, 2010, Paul filed a petition for leave to appeal. The petition was filed less than 30 days after the entry of the *nunc pro tunc* order, but more than 30 days after both the March 29th disqualification order and the June 14th order denying the motion for reconsideration.

The petition requested leave to appeal only from the *nunc pro tunc* order. However, as part of the requested relief, it also asked the appellate court to vacate the earlier disqualification order. On October 6, 2010, the appellate court granted

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[3]Section C of Supreme Court Rule 63 provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned [.]" Ill. S.Ct. R. 63 (eff. April 1, 2007).

Paul's petition for leave to appeal.

ANALYSIS

On this appeal, Paul seeks to reverse the disqualification of both Steven and Susan Polachek as his attorneys. Kim claims, first, that this court does not even have subject matter jurisdiction to hear this appeal. For the following reasons, we agree and dismiss this appeal for lack of jurisdiction.

I. Motion Panel's Grant of Leave to Appeal

Although a motion panel of this court granted Paul's petition for leave to appeal, we must always consider whether we have subject matter jurisdiction to hear an appeal; and our jurisdiction is always a matter that we must consider first. *R.W. Dunteman Co. v. C?G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998) ("A reviewing court must be certain of its jurisdiction prior to proceeding to a cause of action"); *Estate of Gagliardo*, 391 Ill. App. 3d 343, 349 (2009) ("It is axiomatic that the appellate court must first consider its jurisdiction to hear an appeal before reaching the merits."); *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 57 (1999) ("the question of our jurisdiction to hear a case may be revisited at any time before final disposition of the appeal").

A motion panel's grant or denial of a motion is not final and may be revised at any time before the disposition of the appeal. *Gagliardo*, 391 Ill. App. 3d at 348-49 (citing *In re Marriage of Waddick,* 373 Ill. App. 3d 703, 705 (2007)); *Breslow*, 306 Ill. App. 3d at 57. "The panel that hears the appeal has an independent duty to determine whether it has jurisdiction and to dismiss the appeal if it does not." *Gagliardo*, 391 Ill. App. 3d at 349 (citing *In re Marriage of Waddick,* 373 Ill. App. 3d at 705); *Breslow*, 306 Ill. App. 3d at 57-58. A motion panel's grant or denial of an earlier motion has no bearing on our authority and duty to review our own jurisdiction. *Gagliardo*, 391 Ill. App. 3d at 349; *Breslow*, 306 Ill. App. 3d at 57-58.

II. No Jurisdiction to Review Steven's Disqualification

We initially allowed this interlocutory appeal pursuant to Supreme Court Rule 306, which permits an appeal from "an order of the circuit court granting a motion to disqualify the attorney for any party." Ill. S.Ct. R. 306(a) (eff. Feb. 26, 2010).

Kim claims that we lack jurisdiction because Paul did not petition this court within 30 days of the circuit court's March 29th order, as Supreme Court Rule 306(a) requires. Supreme Court Rule 306(a) requires the petition to be filed

within 30 days after the entry of the circuit court's order. Ill. S.Ct. R. 306(a) (eff. Feb. 26, 2010). The 30-day time limit for filing a notice of appeal is jurisdictional. If a notice of appeal is not timely filed, the appellate court lacks jurisdiction to consider the merits of the case. *Keener v. City of Herrin*, 235 Ill. 2d 338, 348 (2009); *Dunteman*, 181 Ill. 2d at 159 ("The timely filing of a notice of appeal is both jurisdictional and mandatory"). The subsequent motion to reconsider and motion for clarification have no bearing on this rule, as we explain below.

Paul failed to file a timely notice of appeal from the order which expressly disqualified Steven Polachek. On March 29, 2010, the trial court entered a written order expressly disqualifying Steven Polachek. Paul's time to appeal Steven's disqualification expired 30 days after the filing of ths order. *CE Design, Ltd. v. The Mortgage Exchange*, 375 Ill. App. 3d 379, 383 (2007) (the time to file a petition under Rule 306 expires 30 days after the entry of the original order). Thus, we are without jurisdiction to consider Steven's disqualification.

Paul did file a motion to reconsider which the trial court denied on June 14, 2010. However, the motion to reconsider had no effect on Paul's time to appeal. *Eg. CE Design*, 375 Ill. App. 3d at 384 (plaintiffs' motion to reconsider "did not toll the time to petition for leave to appeal the original order"). There is nothing in

Rule 306 that allows a motion to reconsider to extend the time for filing a petition for leave to appeal. *CE Design*, 375 Ill. App. 3d at 383; *Leet v. Louisville & Nashville R.R. Co.*, 131 Ill. App. 3d 763, 764 (1985). As a result, Illinois courts have consistently held that motions to reconsider, which are directed at interlocutory orders identified by certain subsections of Rule 306(a), do not toll the running of the 30-day deadline to petition for leave to appeal those orders. *CE Design*, 375 Ill. App. 3d at 383-84; *In re Leonard R.*, 351 Ill. App. 3d 172, 174 (2004); *Law Offices of Jeffrey M. Leving, Ltd. v. Cotting*, 345 Ill. App. 3d 495, 499 (2003); *National Seal Co. v. Greenblatt*, 321 Ill. App. 3d 306,308 (2001); *Odom v. Bowman*, 159 Ill. App. 3d 568, 570-71 (1987). Since a party may file multiple motions to reconsider a non-final interlocutory order, it makes sense that Rule 306 measures the time to appeal from the date of the original order. *Castro v. Chicago Rock Island and Pacific Railroad Co.*, 83 Ill. 2d 358, 362-63 (1980) (an interlocutory order is not final and may be revised at any time, and thus the trial court had jurisdiction to hear plaintiff's second motion to reconsider).

However, even if we measured Paul's time to appeal from the date that the trial court denied Paul's motion to reconsider, his petition would still not be within the 30-day time limit. Thus, no matter which way you measure Paul's time to

appeal Steven's disqualification, it had expired long before the trial court's entry of the *nunc pro tunc* clarification order on August 12th. Since the time limit expired, we simply do not have jurisdiction to review this issue.[4]

III. No Jurisdiction to Review Susan's Disqualification

With respect to the disqualification of Susan Polachek, Paul claims (1) that the August 12, 2010, order was not properly entered as a *nunc pro tunc* order because it made a significant change to the prior order and (2) that, whether or not it was proper as a *nunc pro tunc* order, it is still properly treated as an appealable order since it made a significant material change to what was previously decided on March 29th. *Breslow*, 306 Ill. App. 3d at 51 (*nunc pro tunc* may properly be treated as an appealable order itself, if otherwise a party would have no means to challenge the propriety of the *nunc pro tunc* order itself). We will address the

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[4]It appears that the dissent is actually concurring with this part of the opinion. It seems that the dissent is concurring in part, and dissenting in part: concurring in the dismissal of the appeal of Steven's disqualification; and dissenting to the dismissal of the appeal of Susan's disqualification. Thus, it seems that we are all in agreement that Paul's time to appeal Steven's disqualification expired long before the *nunc pro tunc* order was entered.

second argument, first.

A. Not a Significant Change

Although we do not have the benefit of either a transcript or a bystander's report, we do have the trial court's factual finding that the issue of disqualifying the Polachek firm was argued and decided at the March 29th hearing. If Paul had prepared a bystander's report, any disputed issues of fact would have been submitted to the trial court for its "settlement and approval." Ill. S.Ct. R. 306(c) (eff. Dec. 13, 2005). Thus, the historical fact of what was argued and decided at the March 29th hearing would have been up to the trial court to resolve.

For a trial court to find that a judgment was previously made at a prior time and enter a *nunc pro tunc* order, there must be evidence in the record to " 'clearly demonstrate' " that such a judgment was " 'actually rendered.' " *Breslow*, 306 Ill. App. 3d at 53 (quoting *Beck v. Stepp*, 144 Ill. 2d 232, 238-39 (1991)); *Kooyenga*, 79 Ill. App. 3d at 1056. The supporting evidence may consist of "anything in the record before the court," so long as the order is not relying "on the judge's memory alone." *Kooyenga*, 79 Ill. App. 3d at 1056. Thus, the order may be supported by the judge's memory, as long as it is not supported by that alone.

In the case at bar, the evidence of the prior ruling consists of the trial

court's statement of its own memory, as well as other evidence. The evidence includes Steven Polachek's argument on June 14th that the trial court had previously misapplied Rule 3.7 on March 29th, and specifically that part of the rule which permitted a firm to represent a client even if one of its attorneys was serving as a witness at trial. Additional evidence includes: the trial court's statement on June 14th, apparently in response to Steven Polachek's argument, that Paul could either seek additional counsel or represent himself; and Paul's statement, in his response to the disqualification motion, that his attorneys were "Polachek & Polachek."

Further evidence includes the transcript of the August 12th hearing, in which Kim's attorney summarized what had happened at the March 29th hearing, to the very same judge who had been there. Neither the trial judge nor Paul's attorney corrected her statements. Susan Polachek was Paul's attorney at the August 12th hearing, and she had not even been present at the March 29th hearing. As a result, Susan crafted her arguments from other parts of the record, but not from what had actually transpired at the March 29th hearing.

Kim's attorney asked the trial court to "recall" that she had argued on March 29th that "the propriety of the very actions that Mr. Polachek undertook in this

case are at issue," and that disqualification of the firm was necessary because of "the joint and several liability of their partners" and because otherwise "[w]e will also have a member of his firm vouching for what – the actions that he undertook." Kim's attorney stated that she understood why Susan Polachek was confused since she did not have the benefit of either having a bystander's report or having been present. However, Kim's attorney observed that both she and the trial judge had been present for all the hearings and arguments; and thus they could recall what Susan Polachek could not. [5]

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[5]In essence, the dissent does not accept the trial court's factual finding that Susan was disqualified at the earlier hearing. In essence, the dissent states that he does not understand how Paul could have appealed Susan's disqualification before the *nunc pro tunc* order (Order at 28 ("not *** a 'second chance' to appeal")). The answer to that question is right in the case which the dissent quoted: "Had Febel perfected an appeal at the time it would have discovered the omission of the entry of judgment when preparing the record for appeal and could have called the trial court's attention to it." *Kooyenga*, 79 Ill. App. 3d at 1059-60. The only way the *Kooyenga* solution would not have worked is if we find that the trial court was factually wrong when she explained what she had previously ruled.

All this evidence in the record clearly demonstrates that a judgment was actually rendered.

For these reasons, we must affirm the trial court's factual finding that the disqualification of the Polachek law firm was argued and decided at the March 29th hearing. The dissent says that the majority never really explains how the disqualification of Susan could ever have been raised. We disagree. It was raised in the March 29th hearing as we have indicated and the record supports our finding.

In addition, we observe that Paul's failure to file a bystander's report rendered the record incomplete, and that we could have presumed the validity of the trial court's order on that basis alone. Both parties argue on this appeal about what was argued at the March 29th hearing and what was decided there. However, the appellant failed to file a bystander's report, even though the lack of a transcript and a bystander's report was raised and discussed in the court below.

When a transcript is not available, as was the case here, Supreme Court Rule 323(c) permits the appellant to file a bystander's report instead. Ill. S.Ct. R. 306(c) (eff. Dec. 13, 2005). This section provides in full:

"(c) *Procedure If No Verbatim Transcript Is Available*

(Bystander's Report). If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. In any trial court, a party may request from the court official any audiotape, videotape or other recording of the proceedings. The court official or any person who prepared and kept, in accordance with these rules, any audiotape, videotape, or other report of the proceedings shall produce a copy of such materials to be provided at the party's expense. Such material may be transcribed for use in preparation of a bystander's report. The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed

> report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal." Ill. S.Ct. R. 306(c) (eff. Dec. 13, 2005).

The time limits for filing a bystander's report, as specified in the above rule, have already expired.

As the appellant, it was Paul's burden to file the bystander's report. "This court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record." *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009)(citing *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432, (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). To determine whether the trial court made the error which the appellant is claiming, a court of review must have before it the record of the proceedings where the error was allegedly made. *Gulla*, 234 Ill. 2d at 422 (citing *Foutch*, 99 Ill. 2d at 391). Paul argues that Susan was not disqualified at

the hearing on March 29, 2010. Kim and the trial court say that she was. Paul fails to file a bystander's report to support his position. That failure is a separate and independent ground for rejecting Paul's claim of error with respect to Susan's disqualification.

For these reasons, we must reject Paul's argument that the August 12th order rendered a significant change to what was previously decided.

B. Validity of the *Nunc Pro Tunc* Order

Now we turn to Paul's other argument that the August 12th order was not validly entered as a *nunc pro tunc* order.

Paul cannot be heard now to complain that the trial court's order was not a valid *nunc pro tunc* order when it was his attorney who invited the trial court to hold that it was. Kim filed a "motion for clarification of [the] March 29, 2010 order," and her motion did not use the phrase '*nunc pro tunc*' once. At the hearing on August 12, Kim's attorney did not raise the issue of entering a *nunc pro tunc* order. Instead, it was Paul's attorney who raised the issue, and the trial court agreed with her. A party cannot complain later of an action that it invited. *People v. Bush*, 214 Ill. 2d 318, 332 (2005) (when a party "procures, invites or acquiesces" to a ruling, even if the ruling is improper, he cannot contest the ruling

on appeal); *People v. Harvey*, 211 Ill. 2d 368, 386 (2004); *People v. Caffey,* 205 Ill. 2d 52, 114 (2001).

The dissent rejects the idea that Paul is seeking "a 'second chance' to appeal." (Order at 28.) Implicitly, the dissent rejects the suggestion that Paul sought to take advantage of a clerical error as a means of perfecting an appeal from a judgment he had previously made a conscious determination not to appeal. But that is exactly what Paul is doing. He asked the trial judge to enter the second order as a *nunc pro tunc* order, so that he could try to appeal the prior order – which he had already made a conscious determination not to appeal If we let his appeal go forward, we're letting him play games with our jurisdictional time limits.

The dissent appears to reject the idea that the entry of the second order as a *nunc pro tunc* order is attributable to Paul. If Paul wanted to appeal just the disqualification of Susan, he would not have asked for the order to be entered as a *nunc pro tunc* order. However, by having the second order classified as a *nunc pro tunc* order, he could try to use it as a vehicle to reopen Steven's disqualification. We know that is what he intended to do – because that is exactly what he did do on this appeal.

At the very least, Paul failed to object at the August 12th hearing to the trial court's entry of the order as a *nunc pro tunc* order, and thus that issue is now waived on appeal. *In re Marriage of Saheb*, 377 Ill. App. 3d 615 (2007) (since the husband "failed to object in the court below, he has waived consideration of these issues on appeal") (citing *Lange v. Freund*, 367 Ill. App. 3d 641, 648-49 (2006)).

CONCLUSION

We find that we lack subject matter jurisdiction to hear this appeal because Paul's petition was not timely.

Paul failed to file a timely notice of appeal from the order which expressly disqualified Steven Polachek. On March 29, 2010, the trial court entered a written order expressly disqualifying Steven Polachek; and on June 14, 2010, the trial court denied Paul's motion to reconsider this order. Paul's time to appeal Steven's disqualification expired long before the filing of the August 12th *nunc pro tunc.* order. Thus, we are without jurisdiction to consider Steven's disqualification.

With respect to the disqualification of Susan Polachek, Paul claims (1) that the August 12, 2010, order was not properly entered as a *nunc pro tunc* order because it made a significant change to the prior order and (2) that, whether or not it was proper as a *nunc pro tunc* order, it is still properly treated as an appealable

order since it made a significant material change to what was previously decided on March 29th.

First, we affirm the trial court's finding of historical fact that the issue of disqualifying the Polachek firm was raised and decided at the March 29th hearing and thus the August 12th order did not render a significant or material change to what was previously decided. In addition, we observe that Paul's failure to file a bystander's report rendered the record incomplete, and that we could have presumed the validity of the trial court's order on that basis alone.

Second, we find that Paul cannot now complain that the trial court entered the order as a *nunc pro tunc* order when his counsel invited the error and, at the very least, failed to object, thus waiving the issue for appeal.

For the foregoing reasons, we dismiss this interlocutory appeal.

Interlocutory appeal dismissed.

PRESIDING JUSTICE GARCIA, dissenting:

On March 29, 2010, the circuit court entered an order disqualifying attorney R. Steven Polachek from representing the respondent. The order was entered based on the petitioner's motion titled, "Motion to Disqualify Attorney." The motion references Illinois Rule of Professional Conduct (RPC) 3.7 and asks "to disqualify attorney R. Steven Polachek from

representing Respondent PAUL R. O'MALLEY ('Paul') in the instant litigation." The motion alleged that "Mr. Polachek will be called by [the petitioner] to testify as an adverse witness regarding the negotiation and demise of the contract for sale of the marital residence that forms the basis of the Petition [for a Rule to Show Cause.]" The March 29, 2010, order expressly states: "Attorney R. Steven Polachek is hereby disqualified from representing Respondent in the instant litigation." The order grants respondent 21 days "to file an additional appearance / seek alternate counsel." The order also sets a status date. The order states nothing more.

On June 14, 2010, a hearing was held on the respondent's motion to reconsider "the Court's granting of Petitioner's motion to Disqualify Attorney R. Steven Polachek." At the hearing, the attorney for petitioner argued: "We filed our motion to disqualify almost instantaneously after having received Mr. Polachek's appearance." In denying the motion to reconsider, the circuit court judge stated: "I have notes of all the pleadings, I have notes of the case law, and motion to reconsider is denied." The court observed that counsel for the petitioner is "a very seasoned attorney." The order entered on June 14, 2010, states nothing more than the motion was denied, the respondent had 21 days to seek alternate counsel and a status date was set for July 21, 2010.

In early July 2010, attorney Susan S. Polachek filed her appearance on behalf of the respondent.

On July 10, 2010, counsel for petitioner filed a motion titled "Motion for Clarification of March 29, 2010 Order." In the motion, she asserted that the petitioner "filed a Motion to Disqualify both Mr. Polachek and his firm from representing Paul in the instant litigation."

However, the original motion to disqualify does not allege that "his firm" should be disqualified as well. Counsel for petitioner also asserted, "Both Sections 3.7 and 1.7 of the RPC were cited in the Motion to Disqualify." However, the motion to disqualify does not contain a single reference to RPC 1.7.

On August 12, 2010, the circuit court purportedly clarified its ruling of March 29, 2010. "I do recall that a request was made for the firm to be disqualified. And it might not have been incorporated into the order but that's the Court's holding." The circuit court then entered a "*nunc pro tunc*" order disqualifying Susan Polachek and the Polachek law firm. It is this "now for then" order the respondent asks this court to review.

I submit that based on the facts fully borne out by the record, counsel's motion for clarification did not seek "clarification" of the March 29, 2010, order, but rather sought an enlargement of the order to disqualify Attorney Susan S. Polachek, who was never mentioned, much less disqualified, by the circuit court's order of March 29, 2010.

I submit counsel for petitioner was required to file a separate disqualification motion, grounded on RPC 1.7, to disqualify those attorneys associated with Attorney R. Steven Polachek, who was the only one disqualified by the March 29, 2010 order. If counsel for petitioner believed that the entire "firm" should be disqualified on a "conflict of interest" basis under RPC 1.7, fairness requires that she file such a motion.

I submit the "*nunc pro tunc*" order that petitioner's counsel contends we should uphold goes far beyond the fiction permitted by such an order. The order of August 12, 2010, is a substantive order masquerading as a *nunc pro tunc* order. The facts of this case fall well within

the caution against applying the fiction *nunc pro tunc* where substantive rights of the party are curtailed, as this court expressed in *Kooynega v. Febel*, 79 Ill. App. 3d 1051, 1059-60 (1979).

> "To apply the fiction that the *nunc pro tunc* judgment takes effect as of the January 3, 1977 date would, at first glance, seem to foreclose all rights Febel had to appeal the judgment on its merits. However, the record in this case indicates that Febel believed judgment had been entered against it on January 3, 1977, filed post-trial motions in which the issue Febel now raises against the judgment on its merits was not mentioned, and upon the denial of these motions decided not to appeal. Had Febel perfected an appeal at that time it would have discovered the omission of the entry of judgment when preparing the record for appeal and could have called the trial court's attention to it.
>
> ———While this court will exercise all proper means to preserve a party's valuable right to appeal, to do so here would be to allow Febel to take advantage of a clerical error as a means for perfecting an appeal from a judgment it had previously made a conscious determination not to appeal. Such would violate the spirit of Rule 303(a) which contemplates the prompt and orderly prosecution of an appeal. Under these circumstances, Febel waived its right to appeal and should not be allowed a 'second chance' to appeal."

The respondent in this case does not ask for a "second chance" to appeal from the order of August 12, 2010. He contends the order of August 12, 2010, was improperly entered as a *nunc pro tunc* order, which disqualified his then attorney. He contends the circuit court gave no consideration to the question of whether there is a conflict of interest under RPC 1.7. Rather, the court *ipso facto* ruled her order of March 29, 2010, should have disqualified respondent's subsequent attorney and amended it accordingly. That I submit, under any standard of review, is an erroneous ruling. I reject the suggestion that the order entered on March 29, 2010, can be expanded to include a disqualification that was never addressed in the pleadings or memorialized in the court order entered on that day based on some sort of "factual finding" that is made nearly five months later. A "factual finding" in a court of law should be based on more than the equivalent of "I remember *now* what I meant to say *then*."

On the record before us, there is no disqualification motion filed against or even naming Susan S. Polachek. The original motion to disqualify did not cite RPC 1.7 or contend the entire Polachek "firm" should be disqualified. The characterization of the August 12, 2010, order as *nunc pro tunc* to March 29, 2010, is a nullity.[6]

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[6] If I read the majority decision correctly, the holding of this case is that we have no jurisdiction to hear this appeal. *Supra*, at 1. The majority rules that we have "no jurisdiction to review Steven's disqualification." *Supra*, at 11. The majority holds the time to "appeal Steven's disqualification *** expired long before the trial court's entry of the *nunc pro tunc* clarification order on August 12th." *Supra*, at 14. The majority then rules we have "no jurisdiction to review Susan's disqualification." *Supra*, at 14. The majority holds Susan's disqualification is not subject

to review by this court because "the disqualification of [Susan] *** was decided at the March 29th hearing." *Supra*, at 18.

That last statement embodies my disagreement with the majority's position.

We granted leave to appeal, at least in part, to consider the appropriateness of the *nunc pro tunc* order. *Supra*, at 10. The majority's analysis begs the question: Could we have granted leave to appeal the disqualification of Susan based on the March 29th proceedings? I submit the chances of that are zero to none where neither the pleadings nor the order of March 29th mentioned Susan. Rule 306(a)(7), under which this appeal was granted, does not grant us the prescience to know that the order of March 29th expressly disqualifying "attorney R. Steven Polachek from representing Respondent PAUL R. O'MALLEY" would be read on August 12, 2010, as disqualifying Susan as well.

That is the rub in the majority's decision. The majority never really explains how the disqualification of Susan could ever have been raised. That predicament places this case precisely within the admonishment of this court: "[T]his court will exercise all proper means to preserve a party's valuable right to appeal." *Febel*, 79 Ill. App. 3d at 1060. The case the majority cites in its decision also supports our review of the *nunc pro tunc* order here. "*Breslow*, 306 Ill. App. 3d at 51 (*nunc pro tunc* order may properly be treated as an appealable order itself, if otherwise a party would have no means to challenge the propriety of the *nunc pro tunc* order itself)." *Supra*, at 14-15. We can correct the unfairness of this order under Supreme Court Rule 366(a)(5) (Revised July 1, 1971) (the reviewing court may, in its discretion, "grant any relief,

I would reverse the August 12, 2010, order. If counsel for petitioner believes she has good grounds to disqualify Susan S. Polachek and the rest of the Polachek law firm, she should seek to do so by proper motion in further proceedings below.

I dissent because the outcome in this case is fundamentally unfair.

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including a remandment *** that the case may require").