

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 120097-U

Filed 6/27/12

NO. 4-12-0097

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of	)	Appeal from
TASHA C. PRICE,	)	Circuit Court of
Petitioner-Appellee,	)	Jersey County
and	)	No. 09D77
JERRY L. PRICE, JR.,	)	
Respondent-Appellant.	)	Honorable
	)	Eric S. Pistorius,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) Petitioner's notice of appeal was timely filed under Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009).

(2) The trial court did not err in denying the imprisoned petitioner's motion to modify visitation to allow visits to occur at the correctional center.

¶ 2 In December 2011, the trial court denied a request to modify visitation filed by Jerry L. Price, father of E.P. (born March 15, 2007) and J.P. (born May 15, 2009). In his petition, Jerry asked the court to allow his grandmother, the great-grandmother of Jerry's two children, to transport his children to the Jacksonville Correctional Center, where he was imprisoned, for visitation. Jerry appeals the court's denial, arguing it was an abuse of discretion. Tasha C. Price, the mother of E.P. and J.P., responds arguing (1) the notice of appeal was untimely, and (2) the court's decision was proper. We find Jerry's appeal was timely filed and affirm.

¶ 3

## I. BACKGROUND

¶ 4

Tasha petitioned for the dissolution of her marriage to Jerry in December 2009. E.P. and J.P. were born to the parties during the marriage. Both resided with Tasha, who was the primary caregiver for the children. According to the dissolution petition, an emergency order of protection was entered between the parties in November 2009. Tasha further alleged Jerry was guilty of extreme and repeated mental and physical cruelty toward her and, in the alternative, irreconcilable differences had arisen between the parties. Tasha asked for sole custody of the children.

¶ 5

In March 2010, a default hearing on the petition for dissolution was held. Defendant was found in default. The court concluded irreconcilable differences caused the irretrievable breakdown of the parties' marriage and granted dissolution. The court ordered the plenary order of protection that was entered in Madison County shall remain in full force and effect. Tasha's brief notes the order of protection expired January 6, 2012. Tasha was granted full custody of the children. The court held "[d]ue to the incarceration of [Jerry], the issue of visitation is reserved."

¶ 6

On December 27, 2011, Jerry filed a *pro se* petition for visitation rights. Jerry alleged he was denied any opportunity to have contact with his children. Jerry alleged, because of the order of protection, he was not permitted to write the children letters. Jerry maintained it was in his children's best interests for him to be granted visits with his children by allowing the children's paternal great-grandmother to transport the children to visits at the prison. Jerry alleged neither he nor his grandmother knew his children's location. Jerry alleged the prison had a visiting area to allow children to visit their imprisoned parents.

¶ 7 That same date, the trial court denied Jerry's petition. The court held Jerry failed to provide any Illinois case authority that required the custodial parent to transport children to a correctional facility for visitation purposes.

¶ 8 On January 30, 2012, Jerry filed a notice of appeal. An affidavit attached to the notice of appeal and signed by Jerry indicates he placed the notice of appeal in the United States mailbox located in the correctional center in which he resided on January 26, 2012.

¶ 9 II. ANALYSIS

¶ 10 Tasha first contends Jerry's notice of appeal was untimely filed and this court lacks jurisdiction over the appeal. The order from which Jerry appeals is dated December 27, 2011, and the notice of appeal was filed on January 30, 2012, after the 30-day deadline passed. In response, Jerry contends his appeal is timely because he is a prisoner, and he placed his appeal within the correctional-center mailbox on January 26, 2012. We agree with Jerry.

¶ 11 In civil cases, notice of appeal must be filed within 30 days of the entry of final judgment. See Ill. S. Ct. Rule 303(a) (eff. Jun. 4, 2008). Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009) provides if filing papers are received by the reviewing court "after the due date, the time of mailing \*\*\* shall be deemed the time of filing." Illinois Supreme Court Rule 12(b)(3) (eff. Dec. 29, 2009) states proof of service by mail may be provided by "affidavit of a person other than the attorney, who deposited the paper in the mail \*\*\* stating the time and place of mailing \*\*\*, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid."

¶ 12 To be timely filed, Jerry's notice of appeal must have been dated January 26, 2012, or earlier. The file stamp is dated January 30, 2012. Under Rules 373 and 12(b)(3), we

look to the certificate of service for proof of the mailing date. The certificate of service and the affidavit indicate Jerry filed the notice of appeal with the clerk of Jersey County, by placing the document in the mail on January 26, 2012. The address to which the document was sent and the location of the United States mailbox is provided. This court has jurisdiction over Jerry's appeal.

¶ 13 Jerry argues the trial court abused its discretion in denying his petition for visitation rights. Jerry maintains Illinois law permits visitation rights to incarcerated parents and cites statistics regarding children from fatherless homes. Jerry contends his grandmother was supportive and stable and would provide care for the children. Jerry further maintains only 29 months remained on his sentence, at which time he could be part of their lives.

¶ 14 "When a noncustodial parent seeks to modify visitation rights, that parent has the burden of showing the modification is in the best interest of the child." *In re Parentage of Sims*, 308 Ill. App. 3d 311, 312, 719 N.E.2d 1166, 1167 (1999). The fact a parent is imprisoned need not result in prohibited or restricted visitation. See *Sims*, 308 Ill. App. 3d at 313, 719 N.E.2d at 1167. Imprisonment of a parent, however, does not give that parent "an automatic right to visitation at a prison." *Sims*, 308 Ill. App. 3d at 313, 719 N.E.2d at 1167.

¶ 15 Little evidence is in the record to aid in our review of Jerry's appeal. This is largely due to Jerry's failure to participate in the dissolution proceedings and to include any evidence related to his petition for visitation. In addition, the record contains little information regarding the order of protection. It is plenary and, according to Jerry's petition, prevents him from contacting his children by mail or telephone.

¶ 16 We find no error in the trial court's decision. According to Jerry's petition, he had been denied all attempts at visitation, including communication by mail, since November 18,

2009, the date of the protection order. At that time, his children were 2 1/2 years old and 6 months old. By the time Jerry filed his petition, he had no communication with his children for over two years. Nothing in this record supports a finding these young children, likely too young to remember their father, must visit their father in prison. The court properly found such an order would be against these children's best interests.

¶ 17 Jerry's cases are distinguishable and unconvincing. In *Frail v. Frail*, 54 Ill. App. 3d 1013, 1014-15, 370 N.E.2d 303, 304-05 (1977), the mother of the children was the custodial parent until the time of her arrest and a strong parent-child relationship was established. No such relationship exists between Jerry and his children. A reasonable conclusion from the existence of a plenary order of protection is these children must be protected from him. On this record, we must affirm.

¶ 18 III. CONCLUSION

¶ 19 We affirm the trial court's judgment.

¶ 20 Affirmed.