

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
JAMES R. ALYINOVICH,)	of Du Page County.
)	
Petitioner,)	
)	
and)	No. 11-D-388
)	
DEBRA A. ALYINOVICH,)	
)	
Respondent-Appellee,)	Honorable
)	Robert Miller,
(Michael D. Canulli, Petitioner-Appellant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appeal was dismissed for lack of jurisdiction where other postdissolution matters remained pending at the time petitioner appealed from the order denying in part his petition for attorney fees, which order contained no finding pursuant to Illinois Supreme Court Rule 304(a).
- ¶ 2 This dispute over attorney fees arises in the context of postdissolution proceedings in which attorney Michael Canulli represented respondent, Debra Alyinovich. After withdrawing as Alyinovich's counsel, Canulli filed a petition for setting final fees and costs pursuant to section 508(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(c) (West 2012)). Canulli sought an award of \$24,920.60 in fees and costs, but the court awarded

him only \$6,653.70. He appeals. Because we conclude that the attorney fee award was not appealable without a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), we dismiss the appeal for lack of jurisdiction.

¶ 3

I. BACKGROUND

¶ 4 Debra and James Alyinovich were married in September 1983 and had three children, all of whom are now emancipated. In February 2011, James petitioned for dissolution. Debra was personally served with summons but never filed an appearance in the action. On James' motion, the court found Debra in default. On May 25, 2011, following a prove-up hearing, the court entered a default judgment of dissolution. At the time the judgment was entered, one of the parties' children was still a minor, and the court awarded the parties joint legal custody, designating James as the primary residential custodian. It reserved the issue of child support, finding that Debra was unemployed. The court awarded Debra the marital residence, three cars, and one-third of the marital bank, investment, and retirement accounts. The court forever barred Debra and James from receiving maintenance.

¶ 5 Debra subsequently retained Canulli as her attorney. On April 19, 2013, nearly two years after entry of the default judgment of dissolution, Canulli filed on Debra's behalf a petition to vacate the default judgment pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2012)) or, alternatively, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). The petition was divided into four counts alleging as follows: (1) the default judgment was not a final order but was an improper bifurcated judgment in violation of section 401(b) of the Act (750 ILCS 5/401(b) (West 2012)); (2) the default judgment was based upon various misrepresentations in James' testimony at the prove-up hearing; (3) the default judgment should be vacated in the interests of justice and fairness; and (4) the default

judgment should be vacated because James failed to comply with local rules requiring the filing of a comprehensive financial statement and supporting documentation.

¶ 6 On June 26, 2013, while the petition to vacate remained pending, Canulli filed on Debra's behalf a motion for partial summary judgment. He argued that there was no genuine issue of material fact and that Debra was entitled to judgment as a matter of law on her petition to vacate. In support of the motion, Canulli argued, among other things, that the default judgment of dissolution was defective in that it contained no joint parenting agreement, in violation of section 602.1 of the Act (750 ILCS 5/602.1 (West 2012)).

¶ 7 On August 5, 2013, the trial court denied the motion for partial summary judgment. On September 25, 2013, on Debra's behalf, Canulli filed a motion to reconsider the denial.

¶ 8 Meanwhile, while the motion to reconsider and the original petition to vacate remained pending, Debra retained new counsel, Eva Tameling. On November 1, 2013, Tameling filed a motion for substitution of attorneys, which the trial court granted.

¶ 9 On November 13, 2013, Canulli filed a petition for setting final fees and costs pursuant to section 508(c) of the Act. He alleged that all of the fees generated in performing work on Debra's behalf were reasonable and necessary. He alleged that Debra had paid him \$14,530.20 but that there remained an outstanding balance of \$24,920.60. Attached to the fee petition was Canulli's affidavit attesting to the reasonableness of the fees, the written engagement agreement signed by Debra, and itemized billing records.

¶ 10 In response to the petition, Debra argued that Canulli performed unauthorized and unnecessary services. She also contended that the amount billed was excessive and unreasonable and that she was financially unable to pay the fees.

¶ 11 On May 30, 2014, following an evidentiary hearing at which Canulli and Debra testified, the court granted Canulli's fee petition in part, awarding him \$6,653.70 of the \$24,920.60 in fees he requested. The court found that both the motion for partial summary judgment and the motion to reconsider were unnecessary filings, awarding no fees related to those motions. It also found that Canulli's research on the issue of maintenance was unnecessary and awarded no fees for the research. The order did not contain a finding pursuant to Rule 304(a) that there was no just reason for delaying either enforcement or appeal or both.

¶ 12 In ruling on the fee petition, the court noted that, inadvertently, no order granting Canulli leave to withdraw as counsel for Debra had been entered. Accordingly, the court entered a *nunc pro tunc* order granting Canulli leave to withdraw as of November 13, 2013, the date he filed his fee petition. On appeal, the parties do not dispute the propriety of the *nunc pro tunc* order.

¶ 13 While the petition to vacate the default judgment and the motion to reconsider remained pending, Canulli filed a notice of appeal from the May 30, 2014, order.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Canulli argues that the court erred in awarding him only \$6,653.70 of his requested fees. He argues, among other things, that the fees generated in connection with the motion for partial summary judgment, the motion to reconsider, and the research on maintenance were reasonable and necessary. He points out that the petition to vacate and the motion to reconsider are still pending in the trial court, such that Debra "may yet benefit" from his services.

¶ 16 Although neither party questions our jurisdiction over the appeal, we have an independent duty to consider the issue and to dismiss the appeal if jurisdiction is lacking. *In re Marriage of Alyassir*, 335 Ill. App. 3d 998, 999 (2003). In his jurisdictional statement, Canulli posits that this court has jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. Jan. 1,

2015), which governs appeals from final judgments in civil cases. However, Rule 303 applies only when “every right, liability or matter raised” in an action has been resolved. See *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990). When a final order disposes of fewer than all of the parties or claims in an action, then Supreme Court Rule 304(a) applies. *Marsh*, 138 Ill. 2d at 464-65. Under Rule 304(a), a final order as to one or more but fewer than all of the parties or claims in an action is appealable “only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.” Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010); *Marsh*, 138 Ill. 2d at 464-65.

¶ 17 As Canulli recognizes, when he filed his notice of appeal, Debra’s petition to vacate the judgment of dissolution remained pending, as did her motion to reconsider the denial of the motion for partial summary judgment. Indeed, in arguing that his fees were reasonable and necessary, Canulli contends that Debra “may yet benefit” from the pending motions. Based on this procedural history, it is clear that the May 30, 2014, order from which Canulli appeals did not resolve “every right, liability or matter raised” in the action. Specifically, it resolved Canulli’s fee petition but left pending Debra’s petition to vacate and motion to reconsider. One of the last orders appearing in the common law record indicates that “the case is set for pretrial on May 28, 2014 *** regarding the motion to vacate.” No subsequent orders ruling on the motion to vacate appear in the record. Therefore, the May 30, 2014, order was not appealable without a finding pursuant to Rule 304(a) that there was no just reason for delaying either enforcement or appeal or both. *Marsh*, 138 Ill. 2d at 464-65. This court lacks jurisdiction and must dismiss the appeal.

¶ 18 We recognize that our conclusion might be different were this appeal brought in the First or Third Districts of this court. A split of authority exists among the appellate districts regarding

the timing of appeals in postdissolution proceedings. The Second and Fourth Districts have held that each postdissolution petition is a new claim within a single dissolution action, such that a final order that disposes of fewer than all of the postdissolution claims is not appealable without a Rule 304(a) finding. *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 744 (2007); *In re Marriage of Gaudio*, 368 Ill. App. 3d 153, 157-58 (2006); *Alyassir*, 335 Ill. App. 3d at 999-1001. The First and Third Districts, by contrast, have held that each postdissolution petition is a new action, such that a final order disposing of a postdissolution petition is appealable without a Rule 304(a) finding even if other postdissolution claims remain pending. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶¶ 26-38; *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091, 1097-98 (2011); *In re Marriage of Carr*, 323 Ill. App. 3d 481, 484-85 (2001). Suffice it to say that we continue to follow the reasoning of the Second and Fourth Districts. Thus, because other postdissolution matters remained pending, the May 30, 2014, order was not appealable without a Rule 304(a) finding. See *Duggan*, 376 Ill. App. 3d at 744; *Alyassir*, 335 Ill. App. 3d at 999-1001.

¶ 19 We also recognize that section 508(c) of the Act, pursuant to which Canulli petitioned for fees, states that “the relief requested under a Petition for Setting Final Fees and Costs constitutes a distinct cause of action.” (Emphasis added.) 750 ILCS 5/508(c) (West 2012). One might argue that this language tends to suggest that an order disposing of a petition for fees under section 508(c) is final and appealable without a Rule 304(a) finding. However, in *In re Marriage of King*, 208 Ill. 2d 332 (2003), our supreme court explained that the phrase “distinct cause of action” in section 508(c) merely codified the holding of *In re Marriage of Kerman*, 253 Ill. App. 3d 492 (1993), that an attorney’s pending petition for fees does not render a party’s appeal from a final judgment of dissolution of marriage premature. *King*, 208 Ill. 2d at 342-43. The court

rejected the argument that the statutory language “conferred finality on judgments for attorney fees entered pursuant to section 508(c).” *King*, 208 Ill. 2d at 343-44. In other words, the *King* court held that a judgment for attorney fees pursuant to section 508(c) is not appealable when a petition for dissolution of marriage remains pending. *King*, 208 Ill. 2d at 343-45. In light of *King*’s holding, we do not believe that the phrase “distinct cause of action” in section 508(c) means that a party in postdissolution proceedings may appeal a judgment for attorney fees without a finding pursuant to Rule 304(a) when other postdissolution claims remain pending.

¶ 20

III. CONCLUSION

¶ 21 Because we conclude that the May 30, 2014, attorney fee award was not appealable without a finding pursuant to Supreme Court Rule 304(a), we dismiss the appeal for lack of jurisdiction.

¶ 22 Appeal dismissed.