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2014 IL App (3d) 130961-U

Order filed May 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
NICHOLE IGEL, n/k/a)	Will County, Illinois.
NICHOLE COSTELLO,)	
)	
Petitioner-Appellant,)	Appeal No. 3-13-0961
)	Circuit No. 09-D-654
v.)	
)	
JEFFREY IGEL,)	Honorable
)	Brian Barrett,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* In spite of the trial court's Rule 304(a) finding, the trial court's order did not constitute a final and appealable order pursuant to Rule 304(a).
- ¶ 2 On September 24, 2013, the trial court entered an order finding respondent Jeffrey Igel satisfied the requisite conditions established by a prior court order and was entitled to begin unsupervised visitation with his minor sons. Petitioner, Nichole Igel, n/k/a Nichole Costello, filed a motion to reconsider the court's ruling allowing unsupervised visitation which the trial

court denied. On November 18, 2013, the trial court denied Nicole’s motion to reconsider and included Rule 304(a) language in the order signed by the court on that date. Nichole appeals.

We dismiss the appeal for lack of jurisdiction.

¶ 3

BACKGROUND

¶ 4

On July 22, 2010, in this bifurcated dissolution proceeding, Judge Braun, entered a written order dissolving the marriage of the parties. On January 18, 2012, after a contested hearing, Judge Polito determined Nichole would retain sole custody of the parties’ two children, presumably pending a final second-half order. The court allowed Jeffrey supervised visitation with the children for at least one hour per week. In addition, the order, signed by Judge Polito on January 18, 2012, identified two conditions precedent which would warrant a subsequent decision to eliminate supervised visitation. After January 18, 2012, the court considered multiple additional contested issues presented by the parties to the court in subsequent evidentiary hearings and other court proceedings.

¶ 5

Finally, on July 26, 2012, two years after the marriage was dissolved, Judge Polito announced his final decision on all unresolved second-half issues, including visitation. The record shows Judge Polito directed counsel for Nichole to incorporate the language of his announced rulings in open court, on that date and others, into the final order. Eventually, the final judgment order was presented to Judge Polito and signed by the court on October 1, 2012. The October 1, 2012 final order provided for Jeffrey’s supervised visitation as follows:

“[S]upervised visitation would be subject to **reconsideration** upon the submission of evidence of completion of a drug - alcohol treatment and obtainment of a full psychiatrist evaluation wherein the psychiatrist submits a report with findings. Dr.

Gardner's report and GAL report shall be submitted to and considered by said psychiatrist upon evaluating Jeffrey." (Emphasis in original.)

¶ 6 Jeffrey appealed the trial court's decision of October 1, 2012. This court affirmed the trial court's decision limiting Jeffrey's visitation privileges to one day of supervised visitation per week. *In re Marriage of Igel*, 2013 IL App (3d) 130175 (unpublished order under Supreme Court Rule 23) (*Igel I*). In *Igel I*, neither party challenged Judge Polito's decision to allow Jeffrey to submit evidence on a future date that would allow the court to revisit the necessity of ongoing supervised visitation.

¶ 7 Before our decision issued in *Igel I*, Jeffrey filed a motion entitled "Motion to Reconsider Supervised Visitation and For Other Relief," on April 23, 2013. For reasons which are not apparent of record, Judge Barrett, rather than Judge Polito conducted a hearing on this motion on June 3, 2013. On June 20, 2013, Judge Barrett found Jeffrey satisfactorily provided evidence showing he completed drug and alcohol treatment, but did not provide evidence of a full psychiatric examination as ordered by Judge Polito. Consequently, the trial court denied Jeffrey's request for unsupervised visitation. Neither party appealed this ruling.

¶ 8 Again, while the appeal in *Igel I* remained pending, Jeffrey filed a petition for rule to show cause on July 1, 2013, alleging that, since the entry of the court's October 1, 2012, order, Nichole cancelled supervised visitation "22 times in a row" and most recently cancelled visitation for June 27, 2013. Jeffrey filed a "Motion" on August 20, 2013, requesting unsupervised visitation with the children. This time, Jeffrey attached a copy of an evaluation prepared by Dr. Syed Ali, a psychiatrist, to the "Motion." In addition, Jeffrey requested the court to award him additional visitation as the court deemed appropriate.

¶ 9 On September 24, 2013, the parties appeared before Judge Barrett. Following testimony and arguments, the court stated that, after a review of Dr. Ali's report, the court found Jeffrey had now met the conditions precedent for unsupervised visitation as established by Judge Polito. Consequently, Judge Barrett removed the restriction on visitation, but did not grant additional time for unsupervised visitation. Instead, the court reserved ruling on Jeffrey's request for extended unsupervised visitation. The court noted after "45 days we will review this, and any other evidence to see how much time we are going to add into the visitation[,]” and ordered unsupervised visitation to begin “as now scheduled (1) hour per week for 45 days.” Judge Barrett scheduled a hearing on the “expansion of visitation” for November 13, 2013.

¶ 10 Three days after the court ordered unsupervised visitation to begin, on September 27, 2013, Jeffrey filed an “Emergency Petition for Rule to Show Cause and Motion to Enforce Visitation.” Jeffrey's emergency petition alleged that, on September 24, 2013, visitation did not take place as ordered by the court after Nichole told Jeffrey the “ ‘children were not going with him’ ” when he arrived for scheduled visitation. Jeffrey filed a second “Emergency Petition for Rule to Show Cause and Motion to Enforce Visitation,” on October 4, 2013, alleging that, for a second consecutive week, Nichole refused to allow the children to go with Jeffrey for their scheduled weekly unsupervised visitation. On October 17, 2013, Jeffrey filed his first formal request seeking a written order allowing him a full visitation schedule, including overnight visitation, weekend visitation, and extended holiday visitation, pursuant to the local guidelines applicable in Will County. Several days later, on October 24, 2013, Nichole filed a motion to reconsider the court's ruling of September 24, 2013, allowing unsupervised visitation.

¶ 11 On November 8, 2013, Jeffrey filed a “Motion to Modify Visitation,” alleging Jeffrey had been unable to enjoy visitation with his children due to Nichole's interference since September

24, 2013. On the same date, November 8, 2013, Jeffrey filed a fourth petition for rule to show cause, alleging Nichole interfered with unsupervised visitation on September 27, 2013, and throughout the month of October, 2013, such that he was not able to be alone with the children after September 24, 2013, as ordered by the court. On November 13, 2013, Jeffrey filed a fifth petition for rule to show cause, alleging Nichole continued to interfere with Jeffrey's scheduled unsupervised visitation.

¶ 12 On November 13, 2013, the court conducted a hearing and first addressed Nichole's motion to reconsider his ruling issued on September 24, 2013, allowing one hour of unsupervised visitation per week. The court also permitted Nichole's counsel to present argument regarding the reappointment of a guardian *ad litem* (GAL) for purposes of the motion to reconsider. The GAL, who was present in court, informed the court that, although she believed her input would be helpful, she required a \$5,000 retainer because the parties' previously discharged \$30,000 of her fees in bankruptcy. After a short discussion with counsel, Judge Barrett informed the parties that Nichole's pending motion to reconsider the September 24, 2013, ruling did not require a GAL.

¶ 13 Judge Barrett denied Nichole's motion to reconsider his previous ruling after stating he reviewed the case law and the rules of evidence and concluded he did not commit any error. Judge Barrett emphasized Nichole was trying to "add conditions" which Judge Polito did not set forth in the October 1, 2012, judgment order, rather than focusing on newly discovered evidence, changes in the law, or Judge Barrett's errors in the court's application of existing law on September 24, 2013. Judge Barrett noted that, if Nichole had an issue with the conditions set by Judge Polito in the October 1, 2012, judgment of dissolution, Nichole should have objected to

the order or made a timely request for Judge Polito to reconsider those conditions concerning unsupervised visitation.

¶ 14 Since the November 13, 2013, hearing began with the motion to reconsider which took more time than the court's schedule had anticipated, the court continued the other pending matters for another court date. On November 18, 2013, the matter came before Judge Barrett and he entered a written order denying Nichole's October 24, 2013, motion to reconsider. The court's order stated, "[T]his is a Final [and] appealable order pursuant to S. Ct. Rule 304(a)."

¶ 15 On December 10, 2013, Nichole filed a notice of appeal, asserting she was appealing the trial court's orders of September 24, 2013, and November 18, 2013, concerning the termination of supervised visitation, at issue in the present appeal (*Igel II*). On December 16, 2013, this court issued its decision in *Igel I*. As of the date of Nichole's notice of appeal, the trial court had not resolved Jeffrey's August 20, 2013, request to expand visitation, his pending motions to modify visitation, or on the various pending rules to show cause related to unsupervised visitation.

¶ 16 ANALYSIS

¶ 17 This court has a duty to *sua sponte* consider the issue of jurisdiction even if the parties fail to raise the issue. *In re Marriage of Carr*, 323 Ill. App. 3d 481, 483 (2001). First, we turn to whether the trial court's November 18, 2013, order constituted a final and appealable order pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Rule 304(a) permits an appeal from a final order in a case involving multiple parties or claims. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The purpose of Rule 304(a) is to discourage piecemeal appeals. *Lozman v. Putnam*, 328 Ill. App. 3d 761, 767 (2002).

¶ 18 However, a Rule 304(a) finding by the trial court does not turn a nonfinal order into a final and appealable one. *In re Adoption of S.G. v. S.G.*, 401 Ill. App. 3d 775, 783 (2010). A final judgment absolutely and finally fixes the rights of the parties to the lawsuit. *Id.* Moreover, a judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *Id.* Additionally, to be final, a judgment must dispose of or terminate the litigation or some definite part of it. *Id.* If the trial court retains jurisdiction to determine future matters of substantial controversy, the order is not a final judgment. *Id.*

¶ 19 In this case, Judge Barrett did not include Rule 304(a) language in the September 24, 2013, order allowing Jeffrey's request for unsupervised visitation. Instead, the court retained jurisdiction to conduct a 45-day review, on November 13, 2014, of unsupervised visitation and to consider Jeffrey's request for an expansion of visitation. Since the court retained jurisdiction to conduct a review after 45 days from September 24, 2013, it is clear to this court that the September 24, 2013, order was not final and appealable. *S.G.*, 401 Ill. App. 3d at 783. We note, as of the date of Nichole's notice of appeal, the trial court had several pending rules to show cause related to the execution of unsupervised visitation and had yet to conduct the 45-day review on expanded unsupervised visitation or rule on Jeffrey's motions to modify visitation.

¶ 20 Although the trial court denied Nichole's motion to reconsider the September 24, 2013, order, and included Rule 304(a) language in the order denying the motion to reconsider on November 18, 2013, we conclude the 304(a) language entered by the court, related back to the September 24, 2013 order. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 50. Since the September 24, 2013, written order was not final and appealable, despite the trial court's use of Rule 304(a) language, this court lacks jurisdiction to consider Nichole's appeal.

¶ 21

CONCLUSION

¶ 22

For the foregoing reasons, we dismiss this appeal for lack of jurisdiction.

¶ 23

Appeal dismissed.