2013 IL App (5th) 130021-U

NO. 5-13-0021

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ERIC SHAFFNER, Petitioner-Appellant, v. GINA SHAFFNER, n/k/a Gina Anderson, Respondent-Appellee.	)	Appeal from the Circuit Court of Crawford County. No. 01-D-144 Honorable Kimbara G. Harrell, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Wexstten and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: An order modifying child custody is void where one of the parents did not receive notice of hearing of the petition to modify custody as required by 750 ILCS 5/601(d) (West 2010) and was thereby denied her fundamental due process right to be heard at a meaningful time and in a meaningful manner.

¶ 2 On November 9, 2011, Eric Shaffner filed a petition for modification of child custody. Gina Shaffner received a copy of the petition by certified mail. She did not receive a summons or a notice of hearing. She failed to respond. On December 13, 2011, a default judgment was entered transferring primary physical custody of the parties' daughter to Eric. On May 29, 2012, Gina filed a motion to vacate the default judgment. On January 8, 2013, the trial court found that the December 13, 2011, default judgment was void and vacated the default judgment. Eric filed a timely notice of appeal.

¶ 3 BACKGROUND

¶ 4 Eric Shaffner and Gina Shaffner were married on February 14, 1992. On March 26,

1996, their daughter MaKayla Shaffner was born. A judgment of dissolution of marriage was entered on December 7, 2001. Eric and Gina were awarded joint care, custody, control, and education of MaKayla. Gina was awarded primary physical custody and Eric was ordered to pay child support.

¶ 5 On November 9, 2011, Eric filed a petition for modification of custody. He alleged changes in circumstances that placed MaKayla under an undue amount of stress. He identified the changes in circumstances as Gina's remarriage, numerous verbal arguments between Gina and MaKayla, verbal arguments between MaKayla and Gina's new husband, MaKayla's desire to live with Eric, and MaKayla's declining grades. He requested that MaKayla be placed in his permanent care and custody, and that Gina be ordered to pay child support. On the same day Eric filed an emergency petition for temporary custody and other relief. Copies of both petitions were served on Gina by certified mail. Gina was not sent a notice of hearing or served with a summons.

¶ 6 Gina did not respond to the petitions. On December 13, 2011, Eric and his attorney appeared for a hearing on the petition for modification of custody. Gina, having not received notice of the hearing, failed to appear. The record does not contain a transcript from the hearing, and the record sheet does not indicate whether testimony or evidence was presented. The trial court entered a default judgment. The court found that a substantial change of circumstances had occurred which warranted modification of the previous child custody order. It further found that it was in the best interests of MaKayla for Eric to have primary residential physical custody. The court terminated Eric's child support obligation and ordered Gina to pay $50 per week in child support. A copy of the custody judgment was served on Gina by certified mail.

¶ 7 On April 17, 2012, Eric filed a petition for rule to show cause alleging that Gina had failed to pay child support. A rule to show cause was entered ordering Gina to appear on

May 8, 2012, to show cause why she should not be punished for failing to comply with the child support order. On April 19, 2012, Gina filed a notice of payment stating that she mailed a cashier's check in the amount of $1,870 payable to Eric to the Illinois State Disbursement Unit. On May 7, 2012, Eric filed an acknowledgment of compliance. He stated that, since the entry of the rule to show cause, Gina had fully complied with the child support order and that he no longer wished to pursue the issue of the rule to show cause. He asked that it be dismissed.

¶ 8 On May 29, 2012, Gina filed a motion to vacate the default judgment. She argued that because she was not notified of the hearing on the petition to modify custody or of her obligation to file a response, the default judgment entered on December 13, 2011, was void and should be vacated.

¶ 9 On July 18, 2012, Eric filed a motion to dismiss Gina's petition to vacate default judgment. He argued that Gina's motion was actually a petition to vacate default judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) and that she was required to allege and prove the existence of a meritorious defense, as well as due diligence in both the presentation of the defense and the filing of the petition to vacate. He asserted that because a litigant has a duty to follow up on a case, failure to be notified does not constitute an excuse for failure to appear, and, therefore, failure to receive notice is not a meritorious defense. He further argued that Gina did not exercise due diligence in bringing forward her alleged meritorious defense as she had been served with a copy of the petition and had not filed a response. He asserted that she did not exercise due diligence in bringing her section 2-1401 petition because she was given notice of the custody judgment on December 13, 2011, she paid child support, and she did not bring her petition to vacate until six months after the custody judgment was entered.

¶ 10 On September 4, 2012, the court heard Eric's motion to dismiss Gina's petition to

vacate default judgment. Arguments were made and no testimony was presented. Even though Gina's petition to vacate the default judgment was not before the court, on September 10, 2012, the trial court entered an order granting the petition to vacate judgment. The court found that the failure to give Gina notice pursuant to section 601(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(d) (West 2010)) deprived the court of jurisdiction to modify custody. The court held that the December 13, 2011, custody judgment was void and vacated it. The court also denied Eric's motion to dismiss the petition to vacate.

¶ 11 On September 18, 2012, Eric filed a motion to vacate the order of September 10, 2012. He argued that no hearing was ever held on the merits of the petition to vacate default judgment. He further alleged that the order granting the petition to vacate judgment included findings of fact that were inconsistent with the record. On the same day, Eric also filed a motion to reconsider the denial of his motion to dismiss.

¶ 12 As noted in a docket entry on November 13, 2012, Eric and Gina appeared before the court, and Gina agreed that the motion to vacate the order of September 10, 2012, should be granted. The court vacated the September 10, 2012, order. The court continued Eric's motion to reconsider and Gina's petition to vacate default judgment to December 18, 2012.

¶ 13 On December 18, 2012, the trial court heard Eric's motion to reconsider and Gina's petition to vacate default judgment. Eric argued that because Gina did not allege a meritorious defense or due diligence in the bringing of that defense or in the bringing of her petition to vacate, there was no circumstance that would allow her the relief she desired; therefore, he requested that the court reconsider his motion to dismiss and grant it. Gina argued that while she filed the motion pursuant to section 2-1401, the order modifying child custody was void because the court lacked jurisdiction to enter it. Gina argued that void judgments can be attacked at any time. She further asserted that because the judgment was

void, she did not have to allege a meritorious defense. The court denied the motion to reconsider. The parties then addressed the motion to vacate.

¶ 14 Gina testified that she received copies of the petition for modification of custody and the emergency petition for temporary relief. She never received a notice of hearing and was never served with a summons. She did not file a response to either petition.

¶ 15 Gina testified that she received a copy of the December 13, 2011, order modifying custody on December 14, 2011. In February 2012, she received a copy of an order for support and an order and notice to withhold her income to pay child support to Eric. She believed her income would be withheld, but her employer did not withhold her income at that time. On April 17, 2012, a rule to show cause was entered requiring Gina to appear in court. She contacted her attorney upon receipt of the rule to show cause. Gina paid $1,870 to the Illinois State Disbursement Unit for past child support. Gina testified that on May 29, 2012, she took the first step to challenge the December 13, 2011, judgment and filed a petition to vacate default judgment.

¶ 16 Eric's attorney questioned Gina about Eric's allegations of changed circumstances. Gina admitted that at the time the petition to modify was filed, MaKayla was under stress about her grades and that she wanted to live with Eric. Gina testified that MaKayla's chemistry grade had dropped and she "got onto her about that." She stated that MaKayla and her new husband did not have many verbal arguments because "[t]hey don't talk a whole lot." Gina testified that MaKayla went to live with Eric after the petition was filed and returned to live with Gina in April or May of 2012. She stated that she continued to pay child support to Eric even after MaKayla returned to live with her.

¶ 17 Eric testified that he filed the petition to modify custody "[b]ecause my daughter asked to get out of that household." He stated that after the order modifying custody and the order terminating his child support were entered, Gina never contacted him to discuss the orders.

He stated that MaKayla returned to Gina's house around May 15, 2012. The court took the case under advisement.

¶ 18 On January 2, 2013, the trial court denied Eric's motion to reconsider. On January 8, 2013, the trial court granted the petition to vacate default judgment and vacated the December 13, 2011, order. Eric filed a timely notice of appeal.

¶ 19 On June 4, 2013, Eric filed a motion to strike all portions of Gina's brief identified as "Issue III" dealing with whether he proved by clear and convincing evidence that a modification of custody was necessary to serve the best interests of MaKayla. Gina filed a response. This court ordered that the motion be taken with the case.

¶ 20 ANALYSIS

¶ 21 The issue before this court is whether the trial court had personal jurisdiction over Gina to enter the December 13, 2011, order modifying child custody. The court must have both subject matter and personal jurisdiction in order for a judgment to be valid. *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910 (2008). "Absent waiver, personal jurisdiction can only be had if the party is served with process in a manner prescribed by statute." *Id.* "Where a trial court does not have personal jurisdiction over a party, any order entered against him is void *ab initio* and subject to direct or collateral attack at any time." *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 367 (2001). "We review *de novo* whether personal jurisdiction was conferred." *C.T.A.S.S.&U. Federal Credit Union*, 383 Ill. App. 3d at 910.

¶ 22 Eric argues that the trial court erred in determining that the December 13, 2011, order was void. "The question of whether a judgment is void or voidable depends on whether the court entering the challenged order possessed jurisdiction over the parties and the subject matter." *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998). If jurisdiction is lacking as to subject matter or as to the parties, any subsequent judgment of the court is rendered void

and may be attacked collaterally. *Id*. A voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack. *Id*.

¶ 23 Section 610 of the Illinois Marriage and Dissolution of Marriage Act provides that notice of modification of a custody judgment shall be given as provided in subsections (c) and (d) of section 601. 750 ILCS 5/610 (West 2010). Section 601(d) provides in pertinent part that:

> "Proceedings for modification of a previous custody order commenced more than 30 days following the entry of a previous custody order must be initiated by serving a written notice and a copy of the petition for modification upon the child's parent, guardian and custodian at least 30 days prior to the hearing on the petition." 750 ILCS 5/601(d) (West 2010).

Eric failed to comply with the statutory notice requirement in that he did not serve written notice upon Gina at least 30 days prior to the hearing on the petition for modification of child custody. The lack of notice to Gina of the court proceeding date and time deprived the court of jurisdiction to modify custody at the December 13, 2011, hearing and rendered that judgment void.

¶ 24 Eric argues that the trial court had proper, continuing jurisdiction over the parties and the subject matter pursuant to the terms of the Uniform Child-Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act (Family Support Act). The Uniform Child-Custody Jurisdiction and Enforcement Act was preceded by the Uniform Child Custody Jurisdiction Act. The Uniform Child Custody Jurisdiction Act was aimed at resolving conflicts arising out of interstate custody disputes. Ill. Rev. Stat. 1987, ch. 40, ¶¶ 2101 to 2126. The general purpose of that act was to avoid jurisdictional competition and conflict with courts of other states in matters of child custody, to promote cooperation with the courts of other states so that a custody judgment was rendered in the state which could

best decide the case in the interest of the child, and to assure that litigation concerning the custody of a child takes place in the state with which the child and his family have the closest connection. Ill. Rev. Stat. 1987, ch. 40, ¶ 2102(a). On January 1, 2004, the Uniform Child Custody Jurisdiction Act was repealed and replaced by the Uniform Child-Custody Jurisdiction and Enforcement Act. 750 ILCS 36/101 to 403 (West 2010). The Uniform Child-Custody Jurisdiction and Enforcement Act provides state trial courts with a method to resolve jurisdictional questions that arise in interstate child custody disputes. 750 ILCS 36/101 to 403 (West 2010). Section 201(a) of the Uniform Child-Custody Jurisdiction and Enforcement Act sets out the contacts necessary with the state for a state to have jurisdiction to make an initial child custody determination. 750 ILCS 36/201(a) (West 2010).

¶ 25 Eric argues that under section 202 of the Uniform Child-Custody Jurisdiction and Enforcement Act, the trial court exercised continuing, exclusive jurisdiction over the parties and the subject matter for the purposes of enforcement and modification of the same. Section 202 provides that a court of the state which has made a child custody determination consistent with section 201 has exclusive, continuing jurisdiction over the determination until a court of the state determines that there is no longer a significant connection with the state and that substantial evidence is no longer available in the state concerning the child's care, protection, training, and personal relationships, or a court of this state or another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the state. 750 ILCS 36/202 (West 2010). The Uniform Child-Custody Jurisdiction and Enforcement Act does not apply because Eric, Gina, and MaKayla all resided in Illinois at all relevant times and there is no jurisdictional question arising out of an interstate child custody dispute. Instead the Illinois Marriage and Dissolution of Marriage Act applies with respect to the trial court's jurisdiction to modify its previous child custody order.

¶ 26 Eric argues that, with respect to the issue of child support, the Family Support Act provides a trial court with continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and, at the time of the filing of a request for modification, Illinois is the residence of the obligor, the obligee, or the child for whose benefit the support is being issued. 750 ILCS 22/205(a) (West 2010). He asserts that the trial court had continuing jurisdiction under the Family Support Act because the judgment of dissolution of marriage was the prior controlling child support order and that on December 13, 2011, when the order was modified, he, Gina, and MaKayla lived in Crawford County, Illinois.

¶ 27 The Family Support Act was drafted by the National Conference of Commissioners on Uniform State Laws and was first promulgated in 1992. See Uniform Interstate Family Support Act, Prefatory note, 9 U.L.A. 161 (2001). "In 1996, Congress mandated adoption of [the Family Support Act] by all states as a condition of receiving federal funds for child support enforcement (42 U.S.C. §666 (2000)), and by 1998, it had been enacted in every state." *In re Marriage of Vailas*, 406 Ill. App. 3d 32, 35 (2010). Personal jurisdiction under the Family Support Act is controlled by section 201 which sets out the bases for jurisdiction over a nonresident. 750 ILCS 22/201 (West 2010). In the instant case, all parties were residents of Illinois at all relevant times, so the Family Support Act does not apply and instead the Illinois Marriage and Dissolution of Marriage Act applies with respect to the trial court's jurisdiction to modify its child support order.

¶ 28 Not only did Eric fail to give Gina notice as required by section 601(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(d) (West 2010)), but his failure to notify Gina of the hearing violated her due process rights. Due process of law requires that a party be accorded procedural fairness and be given notice and an opportunity to be heard. *In re Custody of Ayala*, 344 Ill. App. 3d 574, 586 (2003). An individual whose interest is at stake must be given notice reasonably calculated to apprise interested parties of

the pendency of the action and afford them an opportunity to present any objections. *People ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 274 (1988). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id*. at 274-75. "The linchpin of due process analysis is the recognition of the flexibility of the doctrine in light of the demands of the particular situation." *Id*. at 275.

¶ 29 In *In re Custody of Ayala*, 344 Ill. App. 3d 574 (2003), the court addressed the issue of whether the trial court's custody order violated the mother's due process rights where she did not have notice that custody would be decided at the hearing. In *In re Custody of Ayala* the unmarried parents were engaged in a custody battle over their daughter. *In re Custody of Ayala*, 344 Ill. App. 3d at 577. The court awarded temporary custody of the child to the father. *Id*. A couple of years later he was arrested for conspiracy to sell drugs. *Id*. The mother filed a *pro se* motion for modification of custody due to the significant change in circumstances occasioned by the father's imminent incarceration. *Id*. at 578. The father filed a petition for diverse relief requesting leave to join his wife and parents as additional parties to the proceedings, that the court *sua sponte* declare Illinois as his daughter's home state, and that the mother be required to pay child support. *Id*. The court granted the mother 28 days to respond to the joinder petition and continued the joinder issue. *Id*. The father was convicted and sentenced to 80 months' incarceration. *Id*. That same month the mother took the child to her home in Iowa for a visit. *Id*. She did not return the child on the agreed date and requested that she be allowed to stay in Iowa for a few more days. *Id*. The father filed an emergency petition for an order of default for the mother's failure to respond to his petition for diverse relief and joinder petition, a petition for rule to show cause for visitation abuse, and a petition for a finding of indirect civil contempt. *Id*.

¶ 30 The court ordered the mother to return the daughter that day, made the rule to show cause returnable *instanter*, ordered the mother to appear before the court for a hearing on

indirect civil contempt and sanctions, enjoined the mother from removing the daughter from Illinois without a specific court order, and continued all other matters pertaining to the father's emergency petition to June 13, 2001. *Id*. at 579. Due to an issue with the availability of the court on June 13, 2001, the matters were continued to June 20, 2001, by "agreed order." *Id*.

¶ 31 On June 20, 2001, the mother did not appear at the hearing. *Id*. The court granted the father leave to join his wife and parents *instanter*, declared Illinois to be the daughter's home state, and granted joint cocustodial care of the child to the father's wife and parents until further order of the court. *Id*. at 579-80.

¶ 32 In December 2001, the mother filed a section 2-1401 motion to vacate the June 20, 2001, orders entered against her, arguing that the orders were void for lack of jurisdiction. *Id*. at 580. She claimed that she did not agree to the continued date, she did not sign the agreed order, she was unavailable that day, and that on the hearing date she called the court clerk and the father's attorney and explained she could not be present. *Id*. at 579-80. The trial court denied her motion to vacate and she appealed. *Id*. at 580-81.

¶ 33 The appellate court found that the scheduled June 20, 2001, hearing was to address the issues raised in the father's emergency petition. *Id*. at 587. The record contained no evidence that the mother was notified that custody would be considered or decided that same day. *Id*. The court held that it would be unjust, unfair, and inequitable to allow the custody order awarding cocustody to the father's wife and parents to stand where the mother had no notice that such an award was contemplated. *Id*. The court found that without notice that custody was at issue on June 20, 2001, the mother was denied the opportunity to be heard on the issue, to object to the father remaining the custodial parent and the award of shared custody, and to present her case for modification of custody in her favor. *Id*. The court held that the custody award was void and a denial of the mother's constitutional right to procedural

due process. *Id*. The court found that the court exceeded its jurisdiction in awarding shared custody to the father's wife and parents, and vacated the order awarding shared custody. *Id*.

¶ 34 In *Suriano v. Lafeber*, 386 Ill. App. 3d 490 (2008), the court examined whether the trial court's child custody order violated the father's due process rights where he did not receive notice that child custody might be determined at the hearing. In *Suriano* the parties divorced and, pursuant to a joint parenting agreement, the parties agreed to joint custody of the two minor children with the mother having primary physical custody. *Id*. at 491. On March 1, 2007, the father filed his fifth petition for rule to show cause to hold the mother in contempt for making a unilateral decision about the children's health, education, religious training, activities, or welfare in violation of the parenting agreement. *Id*. at 492. The father's prayer for relief requested that the joint parenting agreement be amended to provide that the mother could not make any unilateral decisions regarding the children's care and activities and that he receive sufficient notice of any upcoming decisions regarding their care and activities. *Id*. The court held a hearing on the petition and the parents testified. *Id*. The court issued a decision finding that there was no basis for granting the rule to show cause, stating that it would not amend the joint parenting agreement because it was "going to terminate it *sua sponte*," and awarding custody of the children to the mother. *Id*. Counsel for the father objected and the court stated that it had the right to do what was in the children's best interest and, based on the hearing, joint parenting should never have been allowed. *Id*. The court stated that if the father wanted a custody hearing, it would schedule a hearing for a future date. *Id*. The father appealed. *Id*. The appellate court found that the trial court's order violated sections 601(b) and (c) of the Illinois Marriage and Dissolution of Marriage Act, which require a child custody proceeding to be commenced by filing a petition for custody and giving notice to the child's parents. *Id*. at 493. The court found that the trial court's order violated the father's due process rights because he did not receive notice

that the court might consider or determine child custody at the conclusion of the hearing on his petition for rule to show cause. *Id*. at 494. It vacated the trial court's order terminating the joint parenting agreement and awarding custody of the children to the mother.

¶ 35 Both *Ayala* and *Suriano* are similar to the instant case. In all of the cases, one parent did not receive notice that child custody would be determined at a hearing. In the instant case, Gina received a copy of the petition for modification of custody by certified mail. She did not receive a notice of hearing nor was she served with a summons. The overarching purpose of the Illinois Marriage and Dissolution of Marriage Act is to promote the best interest of the children. *In re Marriage of Davis*, 341 Ill. App. 3d 356, 359 (2003). Section 610 of the Illinois Marriage and Dissolution of Marriage Act provides in pertinent part: "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown at the time of the entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian *** and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b) (West 2010). Because Gina was not given notice of the hearing to modify custody, she was deprived of her opportunity to be heard on the issue, to object to custody being granted to Eric, and to present evidence about MaKayla's best interests. Gina was denied her constitutional right to procedural due process. The trial court lacked personal jurisdiction over Gina, and the December 13, 2011, order modifying child custody is void.

¶ 36 Eric argues that Gina waived any objection she may have had to personal jurisdiction when she filed her responsive notice of payment and acquiesced to the terms of the December 2011 order. Eric argues that pursuant to section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2010)) if a party objecting to personal jurisdiction files a responsive pleading or a motion (other than a motion for an extension of time to answer or

otherwise appear) prior to the filing of a motion to dismiss the entire proceeding or any cause of action involved in the proceeding, that party waives all objections to the court's jurisdiction over the party's person. 735 ILCS 5/2-301(a), (a-5) (West 2010). Eric argues that when Gina filed a notice of payment in response to the rule to show cause, she filed a responsive pleading and waived all objections to jurisdiction.

¶ 37 "Civil contempt is coercive in nature rather than punitive." *Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 628 (1991). Failure to comply with child support orders is one of the most common types of misconduct included in the indirect contempt category. *Id*. at 629. A contempt proceeding may deprive a person of liberty. *Id*. at 630.

¶ 38 In the instant case, Gina filed the notice of payment in response to a rule to show cause in an effort to avoid being held in contempt of court and possibly being deprived of her liberty. She did not file the notice in response to the petition to modify custody or the December 13, 2011, order modifying custody. In our view, under the circumstances, the notice of payment was not a responsive pleading. Gina's action of filing a notice of payment in response to a rule to show cause did not constitute a waiver of her objection to personal jurisdiction regarding the modification of custody.

¶ 39 Lastly, Eric argues that because the December 2011 order is not void, Gina was required to prove a meritorious defense and due diligence in the bringing of the defense and the bringing of the subsequent action to vacate the order. Because we have determined that the order was void, we need not address this issue.

¶ 40 Eric filed a motion to strike Issue III of Gina's brief which addressed whether he proved by clear and convincing evidence that a modification of custody was necessary to serve the best interests of the minor child. Because the December 13, 2011, order is void we need not address Issue III of Gina's brief and the motion is moot.

¶ 41 Eric failed to provide Gina with notice of the hearing on his petition for modification

of child custody as required by section 601(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(d) (West 2010)). As a result, Gina was deprived of her due process right to be heard at a meaningful time and in a meaningful manner. The trial court lacked personal jurisdiction over Gina when it entered the December 13, 2011, order modifying child custody, and the order is void.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Crawford County is affirmed.

¶ 44 Affirmed.