

2012 IL App (2d) 110671-U  
No. 2-11-0671  
Order filed August 22, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
JAMES D. PALMATIER,	)	of Du Page County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 06-D-2401
	)	
	)	
SHARON PALMATIER,	)	Honorable
	)	Linda E. Davenport,
Respondent-Appellee.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

*Held:* We dismissed petitioner's appeal, as petitioner could not, after the dismissal of a direct appeal, use a section 2-1401 petition to obtain a new appeal: such an appeal amounted to an untimely direct appeal.

¶ 1 At issue in this cause is whether this court has jurisdiction over this appeal. For the reasons that follow, we conclude that we do not. Thus, we must dismiss this appeal.

¶ 2 After over 20 years of marriage, petitioner, James D. Palmatier, petitioned to dissolve his marriage to respondent, Sharon Palmatier. On October 23, 2007, the trial court entered an order

dissolving the marriage, incorporating into that judgment the parties' marital settlement agreement (MSA). The MSA provided, among other things, that petitioner would pay respondent permanent maintenance of \$700 per month and an additional \$150 per month to pay off respondent's outstanding car loan. Underneath the paragraph delineating this obligation, there is a handwritten notation, which is initialed by both parties, indicating that "[t]hese payments shall be made until the marital residence is sold."<sup>1</sup> The record does not reflect when this handwritten modification to the MSA was made. That is, the record does not establish that the notation was made before or after the prove-up hearing. The MSA then provided that, beginning December 1, 2007, petitioner would pay respondent \$1,280 per month.

¶ 3 When petitioner was asked about the MSA during the prove-up hearing, he testified that maintenance was to be "increased" to \$1,280 on December 1, 2007, because, at that time, he would no longer have to pay rent. Thus, the \$500 he was putting toward his rent would be used to pay respondent maintenance. Although respondent was not asked directly about the MSA terms covering maintenance, she stated that, if she were asked to answer the same questions posed to petitioner, her responses would be the same.

¶ 4 In April 2009, respondent petitioned to hold petitioner in contempt of court for, among other things, failing to pay maintenance. The trial court granted the petition on August 4, 2009, taking judicial notice of the MSA. On August 31, 2009, petitioner timely moved to vacate the August 4, 2009, order (see 735 ILCS 5/2-1203 (West 2008)). In this motion, petitioner argued that the MSA did not provide that he was required to pay petitioner two monthly maintenance awards, *i.e.*, \$700 in addition to \$1,280. Respondent moved to strike the motion, and, in January 2010, the trial court

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<sup>1</sup>Nothing in the record indicates that the marital home has been sold.

granted respondent's motion, finding that "the [o]rder of 8/4/2009 shall stand." Petitioner timely appealed from that order. However, because petitioner failed to comply with this court's order that he pay his filing fee and file a docketing statement, this court dismissed his appeal on March 11, 2010. See *In re Marriage of Palmatier*, No. 2-10-0040 (2010) (minute order).

¶ 5 On May 9, 2011, petitioner again sought to vacate the August 4, 2009, order (see 735 ILCS 5/2-1401 (West 2010)). As a basis to vacate that order, petitioner again argued that the MSA did not require that he pay both a \$700 and a \$1,280 maintenance award to respondent every month. The trial court denied that petition on June 6, 2011, and we allowed respondent to file a late notice of appeal.

¶ 6 In considering this appeal, we first observe that respondent has not filed a brief with this court. The lack of an appellee's brief does not prevent us for reviewing whether we have jurisdiction. *In re Marriage of Wilson*, 150 Ill. App. 3d 885, 886 (1986) (considering jurisdictional issue even though no appellee's brief was filed).

¶ 7 In determining whether we have jurisdiction, we are mindful of the effect that the inflexible rules governing our jurisdiction have on the parties. Specifically, "[t]he timely filing of a notice of appeal is both mandatory and jurisdictional." *Dus v. Provena St. Mary's Hospital*, 2012 IL App (3d) 091064, ¶ 10. Litigants must strictly comply with the jurisdictional rules governing appeals, and neither a circuit court nor an appellate court has the authority to excuse compliance with the filing requirements. *Id.* As a result, we have a duty to consider whether we have jurisdiction and to dismiss an appeal if jurisdiction is lacking. *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1043 (2007). This duty exists even when we initially grant a party leave to file a late notice of appeal. See *People v. DeTienne*, 17 Ill. App. 3d 708, 709-10 (1974) (holding that appellate court's prior decision

to grant the defendant's motion to file a late notice of appeal four years after the defendant was convicted did not preclude appellate court from later dismissing the appeal because the motion was untimely).

¶ 8 Here, on the issue of our jurisdiction, we find instructive *In re K.A.*, 335 Ill. App. 3d 1095 (2003). There, the trial court terminated the father's parental rights, and the father filed a posttrial motion. *Id.* at 1097. The trial court took the motion under advisement, telling the parties that it would call them back into court to issue an oral ruling. *Id.* at 1097-98. That never happened. *Id.* at 1098. Rather, the trial court denied the posttrial motion in a written order and never told the parties about that ruling. *Id.*

¶ 9 During related proceedings that took place over three months after the trial court denied the father's posttrial motion, the parties learned that the father's posttrial motion had been denied. *Id.* Realizing that the father had lost his right to appeal the denial of his posttrial motion, the court sought to extend the time the father had to appeal. *Id.* That attempt ultimately proved to be fruitless, as the reviewing court dismissed the appeal as untimely. *Id.* Sixteen months after the appeal was dismissed, the father filed a petition to vacate the order denying his posttrial motion. *Id.* This petition was brought pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2000)). *KA*, 335 Ill. App. 3d at 1098. The trial court granted the petition to vacate the order denying the father's posttrial motion and then reentered the same order. *Id.*

¶ 10 The father appealed, and the reviewing court dismissed the appeal. *Id.* at 1098, 1101. In doing so, the court noted that appeals in civil cases are governed by Illinois Supreme Court Rule 303(a)(1) (eff. Feb. 1, 1994), which provides that "notice[s] of appeal from final judgments in civil cases must be filed with the clerk of the circuit court within 30 days after entry of final judgment."

*KA*, 335 Ill. App. 3d at 1100. However, that rule is not absolute. *Id.* Rather, pursuant to Illinois Supreme Court Rule 303(d) (eff. Feb. 1, 1994)), a party may seek a 30-day extension in which to file a notice of appeal “ ‘[o]n motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time.’ ” *KA*, 335 Ill. App. 3d at 1100 (quoting Ill. S. Ct. R. 303(d) (eff. Feb. 1, 1994)). If a party seeks to circumvent these requirements by filing a petition to vacate under section 2-1401 of the Code in the hopes of receiving a new 30-day period in which to file an appeal, the reviewing court must dismiss the appeal, regardless of the hardships such dismissal may create, because “section 2-1401 petitions may not be used as a means of obtaining a new time period in which to appeal from a trial court order.” *Id.* at 1099-1100.

¶ 11 Here, petitioner deliberately sought to do what the father in *K.A.* attempted more innocently to accomplish. That is, in contrast to *K.A.*, where the trial court’s mistake ultimately caused the father to lose his ability to challenge on appeal the order terminating his parental rights, petitioner here brought a section 2-1401 petition, reiterating his claim that the August 4, 2009, order should be vacated, only after this court dismissed his first appeal challenging that same order. Because a section 2-1401 petition may not be used as a vehicle to obtain a new period of time in which to file an appeal, we, like the court in *K.A.*, must dismiss petitioner’s appeal.

¶ 12 For these reasons, we dismiss this appeal from the circuit court of Du Page County.

¶ 13 Appeal dismissed.