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SIXTH DIVISION
October 20, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
EDGAR PALACIOS,)	Cook County.
)	
Petitioner-Appellant,)	
)	
v.)	No. 08 D3 30585
)	
HEIDI WOLFE-PALACIOS,)	Honorable
)	Patrick T. Murphy,
Respondent-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶1 *Held:* In a postdissolution proceeding to modify custody, the appellate court lacked jurisdiction to consider the father's interlocutory appeal from the circuit court's order granting the mother's motion to reconsider and vacating an award of residential custody in favor of the father because the circuit court also ordered that the status quo regarding the father's residential custody of the child would be maintained until the custody issue was decided at a later, second custody

hearing.

¶2 Petitioner, Edgar Palacios, appeals from the circuit court's order granting the motion of respondent, Heidi Wolfe-Palacios, to reconsider an award of residential custody in favor of Edgar, vacating that custody order in favor of Edgar, and scheduling a second custody hearing while maintaining the custody status quo with Edgar until a ruling is rendered on the custody issue. We dismiss this appeal for lack of jurisdiction.

¶3 I. BACKGROUND

¶4 In October 2009, the court dissolved the marriage between Edgar Palacios and Heidi Wolfe-Palacios. They had one son, Isaac, who was born in March 2004. The judgment of dissolution provided for joint custody of Isaac in accordance with a joint parenting agreement (JPA). The JPA provided that Heidi was the primary residential parent and Edgar's scheduled parenting time with Isaac was two weeknight evenings per week and overnights every other weekend. The parties resided in LaGrange Park, Illinois during their marriage and after the divorce. Edgar remarried and continued to reside in LaGrange Park with his wife and her two children. In January 2013, Heidi became engaged and her fiancé lived in Morton, Illinois, which is approximately a 2 1/2 hour drive from LaGrange Park.

¶5 In March 2013, Heidi moved the circuit court to amend the JPA, seeking the court's permission to move to Morton with Isaac and modify Edgar's scheduled parenting time to accommodate the move. Heidi also sought to switch Edgar from his current private religious school to homeschooling once they were residing in Morton. Edgar objected, argued that moving to Morton was not in Isaac's best interests, and asserted a change of primary residential custody would be in his best interests because he would remain in his current community. The court

appointed Dr. Michael Karpowicz as a case manager to consider the issues of custody and visitation.

¶6 In April 2013, Edgar petitioned the court to modify the JPA to designate him as the primary residential parent or, alternatively, terminate joint custody and award Edgar the sole care, custody and control of Isaac. Edgar asserted that the parties were no longer able to cooperate and co-parent Isaac due to differences in their estimation of what served his best interests. Heidi filed an objection to Edgar's petition.

¶7 Dr. Karpowicz issued his case management status report on April 26, 2013. He summarized his interview with Isaac, who stated that he preferred to remain living in his home area with Edgar. Dr. Karpowicz noted that although Isaac embraced the possibility of being homeschooled, he did not seem to fully understand the trade-offs between homeschooling and a more formal school setting. Isaac also indicated that he did not want to miss out on his interactions with Edgar's extended family or lose his ability to participate in extracurricular activities with his familiar peers. Dr. Karpowicz recommended that Heidi should retain primary residential status over Isaac if she remained near her current residence, but Isaac should be placed with Edgar if Heidi chose to move to Morton. Furthermore, if the parties continued to dispute the matter, an expedited custody evaluation, pursuant to section 604(b) of the Illinois Marriage and Dissolution of Marriage Act ("Act") (750 ILCS 5/604(b) (West 2012)), should be ordered and a child representative should be appointed for Isaac.

¶8 Thereafter, the trial judge interviewed Isaac *in camera* in the presence of the parties' attorneys, and Heidi remarried on June 8, 2013.

¶9 On June 28, 2013, a custody hearing was held on Heidi's motion and Edgar's petition. Heidi testified at the hearing, and Edgar's counsel made offers of proof concerning the testimony

of Edgar and his family. The trial court also considered the *in camera* interviews of Isaac and his therapist, and Dr. Karpowicz's report. The court ruled that it was in Isaac's best interests to remain in Cook County with Edgar. The court cited the interview with Isaac and Dr. Karpowicz's report as the basis of its ruling. The court granted Edgar primary residential custody of Isaac and ordered that joint custody would continue. Heidi was granted parenting time during the school year every first, third, and fifth weekend, and during the summer in alternating two-week blocks of time. The parties would drive Isaac to a halfway point between LaGrange Park and Morton at the conclusion of their parenting times. The court divided holidays between the parties, provided that Isaac would attend public school, terminated Edgar's obligation to pay child support to Heidi, and held in reserve Heidi's obligation to pay child support.

¶10 On July 26, 2013, Heidi filed a motion for reconsideration, seeking to vacate the June 28 order pursuant to section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203) (West 2012)). Heidi argued the court's decision to grant Edgar residential custody of Isaac was premised on a misapplication of relevant law and should be reversed. She argued that clear and convincing evidence did not support the change of residential custody as serving Isaac's best interests. Specifically, she argued the court improperly placed great weight on 9-year-old Isaac's immature stated preference to live with Edgar where the record indicated that Edgar attempted to influence Isaac with prodding and promises. Heidi also argued the court ignored several relevant factors that weighed in favor of her remaining the residential parent, *i.e.*, she had been Isaac's primary caregiver and disciplinarian since his birth; Isaac had sparse interaction with either Heidi's or Edgar's extended family; it was unknown how Isaac would adjust to a new public school as a fourth-grader and, given his learning style, homeschooling with Heidi would be in his best interests; Isaac would suffer anxiety if the status quo was not maintained and was mimicking

Edgar's anti-social tendencies; and, notwithstanding Heidi's demonstrated flexibility and desire to foster a strong father and son relationship, Edgar had no desire to foster a strong mother and son relationship where Edgar had already unilaterally enrolled Isaac in sport activities that interfered with Heidi's parenting time.

¶11 On October 29, 2013, the trial court heard argument on the motion to reconsider. During oral argument, Heidi's counsel made a post-decree oral motion for an evaluation pursuant to section 604(b) of the Act (hereinafter 604(b) evaluation) based on a change in circumstances and evidence of imminent harm to Isaac. The court indicated that it would deny Heidi's motion to reconsider, and a brief break was taken. However, after the break, the trial judge stated that he was "rethinking everything," decided to enter and continue Heidi's motion to reconsider, and *sua sponte* ordered an expedited 604(b) evaluation by Dr. Teresa Risolo. Thereafter, the trial court issued written orders that entered and continued Heidi's motion to reconsider, scheduled the parties' holiday parenting time, appointed Dr. Risolo to perform a custody evaluation on an expedited basis, and assessed all costs associated with the evaluation against Heidi.

¶12 On November 26, 2013, Edgar moved the court to vacate the October 29 order for an expedited 604(b) custody evaluation. Edgar argued, *inter alia*, that Heidi's motion to reconsider was limited to the issue of misapplication of the law; Heidi's counsel's oral motion for a 604(b) evaluation was a pretrial motion that had occurred in the posttrial phase of litigation; and the trial court lacked statutory authority and subject matter jurisdiction to order a 604(b) evaluation because Heidi had no pending petition to modify visitation.

¶13 On December 19, 2013, the trial court denied Edgar's motion to vacate, finding that the court's jurisdiction was properly invoked by Edgar's petition seeking custody and Heidi's timely motion to reconsider, which was still pending. The trial court also vacated and declared null and

void a December 16, 2013 order that was drafted by Edgar's counsel and incorrectly stated the court had denied Heidi's motion to reconsider. The court ruled there was no reason to delay enforcement of the December 19 order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶14 On January 15, 2014, Edgar appealed, pursuant to Rule 304(a), the December 19 and October 29, 2013 orders, and the appeal was assigned case No. 1-14-0237.

¶15 On May 13, 2014, after the trial court had received Dr. Risolo's 604(b) report and heard argument on Heidi's motion to reconsider, the court issued a written order finding that the status quo regarding custody would be maintained. On that same day, the court issued another written order that granted Heidi's motion to reconsider; vacated the June 28, 2013 custody order; ordered the parties to keep the 604(b) report confidential; referred the parties to Dr. Karpowicz for additional interviews; and scheduled the trial on the issue of custody for July 23 and 24, 2014. The court ruled there was no just reason to delay appeal of the May 13 order as an expedited interlocutory appeal pursuant to Illinois Supreme Court Rule 304(b)(6) (eff. Feb. 26, 2010). The court also denied Edgar's oral motions to stay enforcement of the May 13 order and file a supplemental response to the motion to reconsider.

¶16 On May 19, 2014, Edgar moved the court to enter an order, *nunc pro tunc*, to correct the May 13 order to reflect the basis of the expedited interlocutory appeal as pursuant to Illinois Supreme Court Rule 306(a)(5) (eff. Feb 16, 2011). The trial court entered the agreed *nunc pro tunc* order on May 21, 2014.

¶17 On May 21, 2014, Edgar appealed the May 13, 2014 order, citing Illinois Supreme Court Rules 306(a)(5) and 311(b) (eff. Feb. 26, 2010) as the basis of jurisdiction for his interlocutory expedited appeal. However, on June 4, 2014, Edgar amended his notice of appeal to, *inter alia*,

No. 1-14-1626

cite Rules 304(b)(6) and 311(b) as the basis of jurisdiction. This appeal was assigned case No. 1-14-1626. In July 2014, Edgar moved this court to consolidate case No. 1-14-0237 with this appeal and expedite both cases, but this court denied that motion.

¶18 This court takes judicial notice that the second custody hearing was held in this matter and the parties and Drs. Risolo and Karpowicz testified at that proceeding. See *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶37 (an appellate court may take judicial notice of readily verifiable facts when it aids the efficient disposition of a case). On July 28, 2014, the trial court ordered that: Heidi would be Isaac's residential parent and joint custody would continue; Edgar would have parenting time three out of every 5 weekends; Isaac would spend every Thanksgiving holiday and six weeks every summer with Edgar; and the parties and attorneys must work together to determine if they can abide by Dr. Risolo's recommendations on page 26 of her report. In support of its ruling, the trial court noted that both Heidi and Edgar were excellent and loving parents. The trial court noted that Dr. Risolo testified that Heidi provided more structure and limits for Isaac whereas Edgar acted more like Isaac's friend and permitted him to have his own way. However, Dr. Karpowicz testified that Edgar had provided effective parenting over the past year and there was no reason to change custody to Heidi. The trial court found that it was in 10-year-old Isaac's best interests to reside over the next few years with Heidi, who provided discipline and limits with love, instead of Edgar, who provided less structure but unquestioning love and support.

¶19 Edgar appealed the July 28 order on August 27, 2014, and that appeal was assigned case No. 1-14-2759. In that appeal, Edgar seeks relief from the trial court's October 29, 2013, December 19, 2013, May 13, 2014, and July 28, 2014 orders. Edgar also filed on August 27,

2014, a motion to reconsider, asking the trial court to modify the holiday vacation provisions of the July 28, 2014 order.

¶20 II. ANALYSIS

¶21 This case before us is Edgar's interlocutory and expedited appeal of the trial court's May 13, 2014 order, which granted Heidi's motion to reconsider, vacated the June 28, 2013 order that had granted residential custody to Edgar, scheduled a second custody hearing for July 2014, referred the parties to Dr. Karpowicz for additional interviews, and denied Edgar's oral motions to stay enforcement of the order or file a response to the motion to reconsider. On appeal, Edgar argues the trial court lacked subject matter jurisdiction to order the 604(b) evaluation and vacate the June 28, 2013 order, and erred by relying on an opinion as the basis for vacating the June 28, 2013 order. However, before we can reach the merits of Edgar's argument, we must decide whether we have jurisdiction over the matter. See *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994).

¶22 In his jurisdictional statement and amended notice of appeal, Edgar states that we have jurisdiction over this appeal pursuant to Rule 304(b)(6) and because the May 13, 2014 order was void for lack of subject matter jurisdiction. We disagree.

¶23 Rule 304 governs appeals from final judgments that do not dispose of an entire proceeding. Rule 304(b)(6) provides that orders modifying custody pursuant to section 610 of the Act (750 ILCS 5/610 (West 2012)) are immediately appealable without the trial court's express written finding that there is no just reason to delay enforcement, appeal, or both. In this case, however, the trial court's May 13, 2014 order did not modify custody even though it vacated the June 28, 2013 order that had given Edgar residential custody of Isaac. We note that the trial court, in a separate written order also dated May 13, 2014, ordered that the custody status quo with Edgar

would be maintained while the court expedited the scheduling of the second custody hearing for July 2014 so that the court could rule on the custody issue before the school year commenced.

We find that Rule 304(b)(6) does not apply under the particular facts and circumstances in this case.

¶24 Rule 306(a)(5) allows a party to petition this court for leave to appeal from “interlocutory orders affecting the care and custody of unemancipated minors, if the appeal of such orders is not otherwise specifically provided for elsewhere in these rules.” Yet in order to request an interlocutory appeal, the party requesting such an appeal must file the petition for leave to appeal, the authenticated supporting record, and any legal memorandum in the appellate court within 14 days of the entry of the order from which review is being sought and serve a copy of the petition on the trial court judge. Ill. S. Ct. R. 306(b)(1) (eff. Feb. 16, 2011). Therefore, in order to vest this court with jurisdiction, Edgar would have had to file a petition for leave to appeal the May 13, 2014 order in this court, as well as a copy of the petition in the circuit court, by May 27, 2014, which was 14 days after May 13, 2014. Edgar did not do so. Instead, he filed in the circuit court on May 21, 2014 a “Notice of Appeal” pursuant to Rules 306(a)(5) and 311(b), and later, on June 4, 2014, an “Amended Notice of Appeal” pursuant to Rules 304(b)(6) and 311(b).

¶25 A reviewing court may excuse the failure to file a petition for leave to appeal (see *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 111-114 (2005)), but in the present case, the record does not indicate that Edgar was confused by the court rules in seeking review of the May 13, 2014 order because he amended his notice of appeal on June 4, 2014, and invoked Rule 304(b)(6) instead of Rule 306(a)(5), indicating that he was abandoning any request for an interlocutory appeal by permission. Nevertheless, even if a reviewing court excuses the failure to file a petition for leave to appeal, it still must determine whether to grant the petition for leave to appeal, and that

decision rests within the discretion of the reviewing court. *In re Alexis H.*, 335 Ill. App. 3d 1009, 1014 (2002). We would not grant the petition here because, after the challenged May 13, 2014 order, the trial court quickly and efficiently conducted the second custody hearing, Edgar's expedited appeal of that July 2014 custody order is currently pending before this court, and events may have transpired since the May 13 order that could affect the status of the case or the best interests of the child.

¶26 Finally, Edgar argues that this court has jurisdiction to review the May 13 order because it is void and a void order may be attacked at any time or in any court, either directly or collaterally. Edgar suggests that the May 13 order is void because the trial court ruled on issues that were not properly before the court. This argument lacks merit.

¶27 The appellate court is not vested with authority to consider the merits of a case merely because the dispute involves an allegedly void order or judgment. *People v. Flowers*, 208 Ill. 2d 291, 308 (2003). Although a void order may be attacked at any time, either directly or collaterally, the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts. *Id.* In the absence of our jurisdiction over an appeal, any order this court might direct against a void judgment would itself be void and of no effect. See *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 383 (2007).

“Compliance with the rules governing appeals is necessary before a reviewing court may properly consider an appeal from a judgment or order that is, or is asserted to be, void.” *Id.*

¶28 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 Mitchel*, 181 Ill. 2d 169, 174 (1998). The trial court's subject matter jurisdiction over the proceedings is an issue of law which we review *de novo*. *Cardona v. Del Granado*, 377 Ill. App.

3d 379, 382 (2007). There is no dispute that Heidi's posttrial motion was filed within 30 days of the June 28, 2013 custody order, as specified by section 2-1203 of the Code. 735 ILCS 5/2-1203 (West 2012) (any party may, within 30 days after the entry of judgment, file "a motion for rehearing, or retrial, or modification of the judgment or to vacate the judgment or for other relief"). The purpose of such posttrial motions is to alert the trial court to errors it has committed and thereby afford it an opportunity for their correction. *In re Marriage of Stuart*, 141 Ill. App. 3d 314, 317 (1986). The power to grant the motion rests in the sole discretion of the trial court. *In re Marriage of Parello*, 87 Ill. App. 3d 926, 931 (1980).

¶29 Edgar argues the trial court should not have granted Heidi's motion to reconsider because her motion re-vested the court with jurisdiction only on the matter specifically raised in her motion. Edgar contends that Heidi's motion challenged only the trial court's application of the law in the award of custody to Edgar and the trial court had no jurisdiction to take any action outside of that limited issue. According to Edgar, Heidi did not bring her motion on the basis of newly-discovered evidence, so the trial court had no jurisdiction on October 29, 2013 to *sua sponte* order a 604(b) evaluation more than 30 days after the June 28, 2013 custody order had been entered. Edgar reasons that the trial court also lacked jurisdiction to then use the 604(b) evaluation report as the sole basis to vacate the June 28, 2013 custody order.

¶30 To support his argument, Edgar cites *In re Marriage of Fox*, 191 Ill. App. 3d 514, 520 (1989), which held that the trial court in a dissolution proceeding could not *sua sponte* make a child custody decision where the parties had only filed a petition for contempt with respect to the issue of visitation because that type of pleading did not present the trial court with a justiciable matter sufficient to permit the court to address the issue of custody. *Fox*, however, has nothing to do with facts of this case and does not support Edgar's contention that the trial court lacked

jurisdiction. Here, there can be no dispute that Heidi's motion to amend the JPA and Edgar's petition to modify the JPA properly invoked the trial court's jurisdiction to address the custody issue.

¶31 The trial court in this case retained jurisdiction over Edgar's petition to modify and Heidi's motion to amend the JPA because Heidi timely filed a posttrial motion challenging the court's judgment on Edgar's petition and her motion. Accordingly, the trial court retained jurisdiction over the matter until the disposition of the pending posttrial motion. *Parello v. Parello*, 87 Ill. App. 3d 926, 932 (1980). Although we do not agree with Edgar's characterization of Heidi's motion to reconsider as merely challenging the trial court's application of the law, even if that characterization was correct, the fact that a litigant sought reconsideration on that limited issue has nothing to do with the trial court's jurisdiction over the entire case. "The trial court may act on those points specifically raised in the post-trial motion or on any error which the court perceives must be remedied in order to do justice between the parties." *Parello*, 87 Ill. App. 3d at 932. See also *People v. Mink*, 141 Ill. 2d 163, 171 (1990) (a court has the inherent authority to reconsider and correct its rulings, and this power extends to interlocutory rulings as well as to final judgments).

¶32 Here, once Heidi filed a timely posttrial motion, the trial court retained jurisdiction over the matter until the disposition of any pending posttrial motions and also had the jurisdiction to act on any error which the court perceived had to be remedied in order to do justice between the parties. See *Welch v. Ro-Mark, Inc.*, 79 Ill. App. 3d 652, 657 (1979). Accordingly, we reject Edgar's contention that this court has jurisdiction to review the May 13, 2014 order because it was a void order based on the trial court's lack of jurisdiction to enter it.

¶33 III. CONCLUSION

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

¶35 Appeal dismissed.