2017 IL App (1st) 153293-U

No. 1-15-3293

Order filed June 23, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re MARRIAGE OF MONICA ROBERTSON,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
and	)	No. 08 D 10131
	)	
ERIC HAWKINS,	)	Honorable
	)	Mark J. Lopez,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Presiding Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: This court lacks jurisdiction to hear an appeal from an order denying relief from judgment where the judgment or order at issue is not final.

¶ 2 This case arises out of a judgment dissolving the marriage of petitioner Monica Robertson and respondent Eric Hawkins and addressing child custody and visitation in relevant part. Subsequently, the court suspended respondent's visitation under the judgment until he

attended parenting coaching classes. Respondent appeals from an order denying his petition for relief from judgment (735 ILCS 5/2-1401 (West 2014)) challenging that suspension and related orders. For the reasons stated below, we dismiss for lack of jurisdiction.

¶ 3 The dissolution action was filed in 2008, and respondent appeared and responded to the petition that year. Both parties sought dissolution and agreed[1] that they married in June 2000 and had one child ("the minor") in November 2001, that each was employed and able to provide for himself or herself, and that they had acquired marital property including joint bank accounts. The parties disputed custody of the minor: petitioner sought sole custody, with child support including educational expenses from respondent, while respondent sought joint custody.

¶ 4 An agreed judgment of dissolution (the Judgment) was entered in April 2011. The Judgment recited as the court's findings and the parties' agreement that: it was in the minor's best interest that petitioner receive sole custody of the minor, both parties were employed, respondent was earning $1,046.97 "net" every two weeks, petitioner was earning $2,267 "net" monthly, the parties had already divided their household goods and personal property, the parties incurred at least $19,000 of marital debt, each party was "fully informed of the wealth, property, estate and income of the other," and their agreement was voluntary and not unconscionable.

¶ 5 The Judgment awarded custody of the minor to petitioner, with visitation for respondent upon a detailed schedule and conditions set forth therein. The Judgment required respondent to pay child support of $210 every two weeks and required equal division of the minor's uninsured medical expenses, therapy expenses, and "summer activities" not exceeding $150 weekly. Respondent and the minor were required to attend family therapy together at respondent's expense. Petitioner would provide the minor's medical insurance, respondent would provide his

[1] That is, petitioner so alleged in her petition and respondent so admitted in his response.

dental insurance, and each party would name the other parent (as the minor's trustee) as a life insurance beneficiary on existing policies until the minor reaches 25 years old. The credit card debt was divided, and each party waived any interest in the other's pension or retirement accounts. The Judgment terminated an existing order of protection. As to attorney fees, the Judgment noted an earlier order that respondent pay $1,200 of petitioner's fees "as a sanction," with $800 still owed as of the Judgment, and granted petitioner leave to file a petition for contribution towards attorney fees.

¶ 6 In December 2012, the minor – through petitioner – filed a petition for an order of protection against respondent, alleging that respondent whipped the minor with a belt in July 2012, left him in a car on a 100-degree day in August 2012, and had the minor sit "in a specific uncomfortable position for over 8 hours" with little water and food on another occasion in August 2012. On December 21, 2012, with respondent absent from court, the court denied an emergency order of protection on the grounds that petitioner presented insufficient evidence. Respondent was personally served with process regarding the petition in December 2012.

¶ 7 In April 2013, petitioner filed a petition for an order of protection for herself and the minor. She alleged that respondent beat the minor with a rod, despite the minor's illness, on April 7, 2013. She alleged that he threatened the minor with further physical discipline, which caused her to fear for the minor's health. She also alleged that respondent "has a history of violence against me and the" minor and had harassed her by coming to her home and phoning when no visitation was scheduled. Respondent was personally served with process regarding the petition in April 2013.

¶ 8 On April 10, 2013, the court issued an emergency order of protection against respondent. However, the court vacated the order of protection on April 26, finding that petitioner "failed to

meet her burden of proof." The April 26 order also "suspended, temporarily" respondent's visitation pending an interview of the minor and the parties by a child representative, appointed in the order, and an investigation by the Department of Children and Family Services (DCFS).

¶ 9 In May 2013, respondent filed a motion for substitution of judge for cause, alleging that the judge interfered with his parental rights and denied him due process in suspending his visitation. He sought vacatur of the April 26 order as well as substitution. The court – presided over by a different judge for the motion – denied the motion for substitution of judge on May 20, finding that respondent failed to allege facts demonstrating the bias or prejudice of the judge in question.

¶ 10 In May and November 2013, respondent filed notice of appeals from the April 26 and May 20 orders. However, both appeals were dismissed. *Robertson v. Hawkins*, Nos. 1-13-1708 (2013); 1-13-3632 (2014). In November 2013, the trial court issued an order regarding the preparation of the record for these appeals, reciting in relevant part that the court held an evidentiary hearing on April 26 and suspended respondent's visitation due to its "concerns" over his "excessive use of corporal punishment."

¶ 11 On March 12, 2014, the court issued an order stating that the case was before it on the child representative's interviews of the parties. The court found that respondent had attended two parenting classes but "there are still continued allegations of corporal punishment and other abuse of the minor." The court thus ordered – over respondent's objection, and concurring with the child representative – that the suspension of respondent's visitation would continue until he had attended "parenting coaching classes with Gail Grossman."

¶ 12 In August 2014, respondent filed another motion for substitution of judge for cause, alleging that the judge denied him due process by issuing the March 2014 order without evidence

beyond the child representative's report, and despite DCFS closing its investigation in a May 2013 letter due to insufficient evidence. The court, presided over by a different judge for the motion, denied the motion on August 14.

¶ 13 In October 2014, respondent filed a motion to have his visitation reinstated. He argued that he had a right to the care and companionship of the minor and had been deprived of that right on "false allegations of abuse" unsupported by "evidence of excessive corporal punishment." Attached to the motion was a copy of DCFS's May 2013 letter closing its investigation. Petitioner responded to the motion, arguing that respondent had not complied with the March 2014 order suspending his visitation until he attended parenting coaching classes.

¶ 14 In January 2015, respondent filed a motion for the judge to recuse himself, reiterating the claims in his earlier motions for substitution of judge that the judge had exceeded his authority and violated respondent's rights in his earlier orders.

¶ 15 On January 21, 2015, the court heard respondent's motion to reinstate visitation and issued an order reiterating that he had to "attend and successfully complete parenting classes" before reinstatement of visitation would be considered. The order also denied the recusal motion.

¶ 16 In February 2015, respondent filed a motion to vacate the January 21 order. He argued that the March 2014 order that he attend parenting classes was based on the testimony of the child representative, while statute (750 ILCS 5/506 (West 2014)) provides that a "child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments." Petitioner filed a motion for sanctions "in lieu of answer" to the vacatur motion, arguing that respondent's repeated substitution and recusal motions, and his failure to comply with the March 2014 order to attend parenting classes, merited sanctions that his vacatur motion should be stricken and he should be

ordered to pay petitioner's costs and attorney fees. In May 2015, respondent filed a response to petitioner's sanction motion, raising his previous arguments that the court's orders on visitation were unsupported by evidence or law and praying that the court deny sanctions.

¶ 17 In March 2015, respondent filed another motion for the judge to recuse himself, reiterating his claim that the judge had exceeded his authority and violated respondent's rights in his earlier orders.

¶ 18 On April 21, 2015, the court issued an order denying respondent's motions for vacatur and recusal, finding that he failed to state a *prima facie* case for substitution of judge. On May 8, 2015, the court issued an order granting petitioner's sanctions motion and continuing the matter "for entry of a more comprehensive order" to May 15. On that day, the court issued an order reciting that respondent was not present in court and finding that: his motions were duplicative and addressed issues already resolved, he had not complied with the order to attend parenting classes, and his actions were willful. The court thus ordered respondent to pay $1,500 for frivolous and duplicative pleadings by July 1, found him in contempt of court, and authorized petitioner to file a fee petition.

¶ 19 In May 2015, respondent filed a petition for relief from judgment, specifically the April 21 order denying his vacatur and recusal motions. The petition reiterated his previous arguments that the court's orders were unsupported by evidence or law. Respondent sought the reinstatement of his visitation and the disqualification of the judge. Attached to the petition was respondent's affidavit that the allegations in the petition were true to the best of his knowledge.

¶ 20 In July 2015, petitioner filed a motion for rule to show cause, claiming that respondent had not paid the $1,500 ordered on May 15 to be paid by July 1.

¶ 21 On July 15, 2015, the court denied respondent's petition for relief from judgment, finding that "it does not state a cause of action."

¶ 22 Also in July 2015, respondent filed a motion to reinstate visitation. In addition to reiterating his argument that there was no evidence supporting the suspension of visitation, he alleged that he completed a parenting class in May 2015. Attached to the motion was a copy of a May 2015 certificate by the "Center for Divorce Education's Children In Between" that respondent "successfully completed" an online parenting course of four to five hours by passing five quizzes and a final examination. Petitioner filed a motion for sanctions "in lieu of answer" to the motion to reinstate visitation, arguing that the online parenting course was insufficient to comply with the March 2014 order requiring that respondent attend parenting coaching classes.

¶ 23 In September 2015, respondent filed a petition for relief from judgment, specifically the April 2013 order suspending visitation. He argued that the judgment was void because it was unsupported by evidence and the court exceeded its authority in issuing it, and also argued that the two-year limitation period for petitions for relief did not apply to his petition. Attached to the petition was his affidavit that the allegations therein were true to the best of his knowledge.

¶ 24 On October 14, 2015, the court heard petitioner's motion for rule to show cause and respondent's motion to reinstate visitation and petition for relief from judgment. At the hearing, after the parties discussed which motions were pending, the court and respondent agreed that he had repeatedly raised the issues in his motion to reinstate visitation. The court found that that his petition for relief from judgment was untimely and lacked due diligence. Against the $1,500 sanction for frivolous and duplicative pleadings, respondent argued that his motions were not frivolous and that he did not fail to attend court on May 15 (when the sanction was imposed) but was merely 10 minutes late. Noting that respondent was not denying that he failed to pay the

$1,500 sanction, the court found that respondent's duplicative unsuccessful motions were indeed frivolous.

¶ 25 As to the motion to reinstate visitation, petitioner argued that respondent had not attended parenting coaching with Gail Grossman as ordered in March 2014. Respondent argued that he completed parenting classes, but the court found that the online parenting class he completed was not parenting coaching with Gail Grossman as ordered. He also argued that the March 2014 order was improperly based on the child representative's report. The court noted that respondent's earlier appeals were dismissed, but he replied that his earlier appeals did not encompass the March 2014 order. The court maintained that the time for respondent to challenge the March 2014 order had long passed. The court found that its March 2014 order was "my order" rather than the child representative's order as respondent argued, and noted that "the court on its own motion can order this." While the case had been before the court on an order of protection, the court was "free on my own motion to rule on issues that a record presented to me." When respondent asked "what did I do wrong" to merit the March 2014 order, the court replied that "the law doesn't require me to find that you committed a crime or broke the law to have your visits suspended." Respondent argued that "you have to prove that the visitation seriously endangered the child," and that the court should have made "specific findings" of abuse so that he could refute them. The court replied that "the information I received, that was my finding" and "I found [petitioner] more credible than you. You don't agree with that? So be it." When respondent argued that "it's not the court's job to tell a parent how to discipline their child," the court replied "it is my job to draw the line of what is reasonable punishment and what becomes abusive." Petitioner argued that respondent was not deprived of visitation by the court but by his own failure to attend the parenting coaching class.

¶ 26 Upon the foregoing proceedings, the court issued an October 14 order granting petitioner's rule to show cause and finding respondent in indirect civil contempt. The order recited that respondent immediately purged his contempt, and obviated the need for a fee petition, by paying $1,400 to petitioner and her counsel. The order also struck respondent's July motion to reinstate visitation as *res judicata*, denied his September petition for relief, and removed this case from the court's call.

¶ 27 On November 13, 2015, respondent filed his notice of appeal from the October 14 order.

¶ 28 On appeal, respondent contends that the court erred in denying his petition for relief from judgment, contending that the suspension of his visitation was erroneous.

¶ 29 However, we conclude that we lack jurisdiction over this appeal. This court has the power and duty to consider our jurisdiction *sua sponte*, and must dismiss an appeal where we lack jurisdiction. *In re Estate of York*, 2015 IL App (1st) 132830, ¶ 19, citing *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). This case is before us on appeal from the October 2015 denial of a petition for relief from judgment. Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016)(providing for appeals from the disposition of section 2-1401 petitions). However, section 2-1401 of the Code of Civil Procedure, governing such petitions, provides that "[r]elief from *final* orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." (Emphasis added.) 735 ILCS 5/2-1401(a) (West 2014). As our supreme court has stated, "relief under section 2-1401 is available only from final orders and judgments. If an order is not final, section 2-1401 is inapplicable and cannot be the basis for vacating that order." *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998); see also *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 10.

¶ 30 However, the orders respondent is challenging – the April 2013 order *suspending* his visitation pending a DCFS investigation and an interview of the minor and the parties by a child representative, and the March 2014 order requiring that he attend parenting coaching classes as a *prerequisite* to a reinstatement of visitation – are inherently not final. In the April 2013 order, the court suspended visitation "temporarily" pending its receipt of more information, while the March 2014 order set a precondition for considering the reinstatement of his visitation. In both orders, the court expressly contemplated the reinstatement of visitation, and in neither was it making an ultimate decision fixing respondent's rights on the merits. See *Estate of York*, ¶¶ 21-22 (a final order is one that disposes of the rights of the parties, and in particular determines the ultimate right). Thus, respondent's petition for relief from judgment, as he styled it, was merely another motion for reconsideration or vacatur of the orders in question. The trial court had authority to hear the motion (see 735 ILCS 5/2-1301(e) (West 2014)) but its disposition was not a final and appealable order under section 2-1401 and Rule 304(b)(3).

¶ 31 We find no alternative source of jurisdiction over this appeal. The October 2015 order being appealed is clearly not a final order disposing of all matters in the case. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Supreme Court Rule 304 provides for appeals from orders that make a final disposition of one or more of the issues in a case, but none of the orders at issue – April 2013, March 2014, or October 2015 – are final dispositions. In particular, Supreme Court Rule 304(b)(6) provides that appeals from "a custody judgment entered pursuant to the Illinois Marriage and Dissolution of Marriage Act *** or a modification of custody entered pursuant to section 610 of the Illinois Marriage and Dissolution of Marriage Act" (750 ILCS 5/101 *et seq*. (West 2014) may be appealed without an express written finding of appealability, but this provision merely carves out an exception to the written-finding requirement in Rule 304(a): "[i]f

multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from *a final judgment as to one or more but fewer than all of the parties or claims* 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." (Emphasis added.) Ill. S. Ct. R. 304 (eff. Feb. 26, 2010).

¶ 32 The Supreme Court Rules also provide for interlocutory appeals, but we find no such Rule applicable to this appeal. Rule 307(a)(6) provides for interlocutory appeals by right from orders "terminating parental rights," but no order in this case terminates respondent's parental rights. Ill. S. Ct. R. 307 (eff. Nov. 1, 2016). Rule 306(a)(5) provides for appeals by permission "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," but Rule 306(b)(1) provides that a party must seek such permission by filing a petition in this court. Ill. S. Ct. R. 306 (eff. Jan. 1, 2016). Respondent has not done so, but merely filed a notice of appeal in the circuit court.

¶ 33 Accordingly, this appeal is dismissed for lack of jurisdiction.

¶ 34 Dismissed.

¶ 35 PRESIDING JUSTICE GORDON, specially concurring.

¶ 36 I agree with the majority opinion that this court lacks jurisdiction to hear an appeal from an order denying relief from judgment where the judgment or order at issue is not final, but I must write separately on the contempt issue.

¶ 37 Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010) allows appeals from nonfinal orders when a person is found in contempt of court when the trial court imposes a monetary or other penalty. In the case at bar, respondent was held in civil contempt, which was purged in the same order when he paid the sanctions of $1,400 to petitioner. The order of contempt did not impose a

monetary or other penalty, and thus it was not subject to Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010). The $1,400 sanction was not a penalty for the contempt. The civil contempt was a remedy to force respondent to pay the sanctions.