

No. 1-17-0063

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> THE MARRIAGE OF:)	Appeal from the
WENDY L.D., n/k/a WENDY L.S.,)	Circuit Court of
)	Cook County.
Petitioner-Appellant,)	
)	
and)	No. 08 D 10469
)	
GEORGE T.D., III,)	Honorable
)	Naomi H. Schuster,
Respondent-Appellee.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court lacked jurisdiction to decide appellant's two motions to modify provisions of a 2015 custody order, while an appeal from the same custody order was pending. The circuit court's rulings are therefore vacated.

¶ 2 BACKGROUND

¶ 3 Petitioner-appellant Wendy S. (Wendy) appeals from an order of the circuit court entered on December 7, 2016 which denied her motions to vacate certain provisions of an order dated December 31, 2015, relating to the custody of her three minor children and to modify the parenting time with the children that she had been awarded. For the reasons which follow, we vacate the circuit court's order for want of jurisdiction.

¶ 4 Wendy and the respondent-appellee George D. (George) were married in 2001. The parties had three children (the children) during the marriage.

¶ 5 Wendy filed for dissolution of the marriage in 2008. On September 28, 2010, the circuit court entered an order awarding Wendy sole custody of the children (the 2010 custody order) and granted Wendy ultimate decision-making authority for the children's health and education. The 2010 custody order provided that the children's primary residence would be with Wendy, subject to George's weekly parenting time. On October 19, 2010, the circuit court entered a judgment of dissolution of marriage which incorporated the 2010 custody order.

¶ 6 In October 2012, George filed a petition to modify custody pursuant to section 610 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) (750 ILCS 5/610 (West 2014)), claiming that changed circumstances warranted a modification awarding him sole custody of the three minor children. Following a hearing on George's petition, the circuit court entered an order on December 15, 2015, granting George's petition to modify custody (2015 custody order). That order granted George sole custody of the minor children subject to Wendy's designated parenting time. Section X of the 2015 custody order designated a psychiatrist, Dr. Jay Lebow, to serve as a "behavioral parenting coach" for the parties. Section X(C) specified that: "Prior to either parent filing a motion or petition in court regarding custody or visitation, the party shall submit a written report from Dr. Lebow at their expense confirming that court intervention is required to protect the health[,] safety or welfare of the child."

¶ 7 On January 13, 2016, Wendy filed her notice of appeal (No. 1-16-0098) from the 2015 custody order. While her appeal in case No. 1-16-0098 was pending, Wendy filed motions in the circuit court relating to the allocation of parental responsibilities. On September 16, 2016, Wendy filed an "emergency motion for appointment of guardian ad litem and emergency motion

for restriction of parental responsibilities pursuant to 750 ILCS 5/603.10” (emergency motion). Wendy withdrew the emergency motion after the court reminded her that section X(C) of the 2015 custody order required a report from Dr. Lebow prior to filing any motions.

¶ 8 On October 3, 2016, Wendy filed a “motion to allow [her] to file motions concerning the best interests of the children,” and seeking an order vacating section X(C) of the 2015 custody order (section X(C) motion). Among other arguments, Wendy asserted that, in entering the 2015 custody order, the circuit court had exceeded its authority under the IMDMA by creating a new procedural hurdle to obtain custody modifications. She also argued that the order denied her access to the court system, and violated her constitutional rights to due process and equal protection.

¶ 9 On November 28, 2016, while the section X(C) motion was pending, Wendy filed a “motion to modify the parenting time schedule” (parenting time motion), seeking certain revisions to the 2015 custody order relating to the allocation of parenting time. Wendy did not submit a report from Dr. Lebow in support of the parenting time motion.

¶ 10 On December 2, 2016, this court issued an opinion in appeal No. 1-16-0098, affirming the 2015 custody order.

¶ 11 The parties appeared before the circuit court on December 7, 2016, during which hearing the parties argued Wendy’s pending motions as well as matters relating to child support and discovery which are not at issue in this appeal. On that date, the trial court denied Wendy's parenting time motion because she had not consulted with Dr. Lebow before filing the motion as required by section X(C) of the 2015 custody order and also denied her section X(C) motion.

¶ 12 On January 6, 2017, Wendy filed the instant appeal, No. 1-17-0063, challenging the circuit court's order of December 7, 2016.

¶ 13 Subsequent to the issuance of our original opinion in appeal No. 1-16-0098, Wendy filed a motion in that case on December 15, 2016, requesting that we redact the parties' last names from the opinion. This court granted the motion, and as a result, our December 2, 2016 opinion was withdrawn and this court issued a modified opinion on February 10, 2017, replacing the names of the parties with initials. *In re Marriage of Wendy L.D. and George T.D.*, 2017 IL App (1st) 160098. On April 21, 2017, this court issued its mandate in appeal No. 1-16-0098.

¶ 14 ANALYSIS

¶ 15 In this appeal, Wendy argues that the circuit court erred in entering its December 7, 2016 order which denied both her section X(C) motion and her parenting time motion. In his brief, George asserts arguments addressed to this court's jurisdiction. First, he argues that we lack jurisdiction to address the substantive merits of Wendy's appeal as the pendency of appeal No. 1-16-0098 from the 2015 custody order deprived the trial court of jurisdiction to enter its order of December 7, 2016. He otherwise argues that the December 7, 2016 order denying Wendy's motions was not final or otherwise appealable under either Illinois Supreme Rule 304(b)(3) or 304(b)(6). We agree with George's argument addressed to the circuit court's jurisdiction to enter its December 7, 2016 order.

¶ 16 “The proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach and deprives the trial court of jurisdiction to modify its judgment or to rule on matters of substance which are the subject of appeal.” (Internal quotation marks omitted.) *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 431 (2005). Pending the appeal, the circuit court is “restrained from entering any order which would change or modify the judgment or its scope, and from entering any order which would have the effect of interfering with the review of the judgment.” (Internal quotation marks omitted.) *Id.* The circuit court “retains jurisdiction only to

decide matters independent of and collateral to” the judgment being appealed. *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 926 (2009).

¶ 17 “[A]ny order entered while the circuit court is divested of jurisdiction during the pendency of an appeal *** is void. [Citations.]” *Id.* The circuit court is revested with jurisdiction by the mandate of the reviewing court. *Bank of Viola v. Nestick*, 94 Ill. App. 3d 511, 514 (1981). “If the circuit court attempts to act after the notice of appeal is filed, but before the reviewing court’s mandate is returned, such actions are void. [Citation.]” *Butler v. Illinois State Board of Elections*, 188 Ill. App. 3d 1098, 1100 (1989).

¶ 18 “The lack of jurisdiction in the circuit court, in turn, affects our own [appellate] jurisdiction in that we are then limited to considering only the lack of jurisdiction below, and we may not consider the substantive merit of the circuit court’s unauthorized actions. [Citation.]” *Kyles*, 359 Ill. App. 3d at 431-32; *Wierzbicki*, 388 Ill. App. 3d at 931.

¶ 19 Our modified opinion in appeal no. 1-16-0098 was issued on February 10, 2017, and the mandate was not issued by this court until April 2017. Thus, appeal No. 1-16-0098 remained pending on December 7, 2016, when the circuit court denied Wendy’s section X(C) motion and her parenting time motion. Further, those motions were not independent of or collateral to the pending appeal, but explicitly sought to modify the 2015 custody order that was on review in appeal No. 1-16-0098. As a result, the circuit court lacked jurisdiction to enter its order of December 7, 2016, and we, therefore, vacate that order.

¶ 20 Vacated and remanded.