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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i> MARRIAGE OF)	
)	
NIKOLAS WENZEL,)	Appeal from the Circuit Court
)	of Cook County.
)	
Petitioner-Appellant,)	No. 2013 D 11354
)	
and)	
)	
SARA WENZEL,)	
)	
)	
Respondent-Appellee.)	
)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* Where the parties agree that the judgment allocating parental responsibilities should be vacated due to an error made by the trial court in entering the judgment, we vacate the trial court's judgment and remand the case to provide the trial court an opportunity to assess the parties' arguments anew.

¶ 2 The instant appeal arises from the dissolution of the marriage of petitioner Nikolas Wenzel and respondent Sara Wenzel and a judgment allocating parental responsibilities¹ entered in connection with the dissolution proceedings. After a hearing concerning the issue, the trial court entered an order allocating the majority of parenting time to respondent, with petitioner being allocated only several weekends and vacation time. Petitioner appeals, arguing that the trial court’s decision was improper because the judgment was mistakenly entered and the trial court should have vacated the judgment. For the reasons that follow, we vacate the judgment of the circuit court of Cook County.

¶ 3 **BACKGROUND**

¶ 4 The following facts are undisputed by the parties. Petitioner and respondent were married on March 14, 2009, and are in the process of dissolving of their marriage in the circuit court of Cook County; the parties have one minor child, born on December 16, 2011. During the course of the dissolution proceedings, the trial court conducted a hearing to determine the allocation of parental responsibilities. After the hearing, the trial court ordered both parties, as well as the child’s representative, to submit to the court their proposals for allocation of parental responsibilities by February 14, 2017. On February 8, 2017, respondent submitted a proposed judgment for allocation of parental responsibilities; neither petitioner nor the child’s representative had submitted proposed judgments at this point. Nevertheless, the trial court entered respondent’s proposed judgment on February 8, 2017.

¶ 5 Petitioner filed an emergency motion to vacate the judgment, and the trial court held a hearing on the motion on February 14, 2017. The parties agree that the trial court “appeared

¹ The Illinois Marriage and Dissolution of Marriage Act (Act) was significantly amended effective January 1, 2016. While the prior Act referred to child custody (see 750 ILCS 5/601-611 (West 2014)), the amended Act does not use that term and instead speaks of allocation of parental responsibilities (see 750 ILCS 5/600-610.5 (West 2016)).

confused” during the hearing and admitted to committing a “ ‘snafoo’ ” with respect to entering the judgment. The parties further agree that “[t]he court made apparently conflicting statements with respect to whether the Judgment had been entered or whether the proposed judgments were still being considered.” The trial court did not enter an order on petitioner’s motion to vacate the judgment, stating that “I’m going to do my best to figure it out. And I may call you back in, and I may not.” Petitioner filed a notice of appeal the following day.²

¶ 6

ANALYSIS

¶ 7

On appeal, petitioner argues that his right to due process under the Fourteenth Amendment was violated by the trial court’s erroneously-entered judgment for allocation of parental responsibilities and further argues that the trial court was required to consider all of the statutory factors when entering such a judgment, which the trial court did not do. Petitioner also argues that the trial court erred in refusing to admit certain statements by the child that qualified as hearsay exceptions.

¶ 8

In response, respondent has filed a motion requesting this court to vacate the trial court’s judgment, noting that the trial court’s statements “indicate that [the trial court] either entered the Judgment at issue on appeal without realizing she had done so, or, at least later became confused as to whether she had in fact entered it.” Respondent states that “[u]nder these circumstances, the Judgment in effect amounts to no judgment at all” and “recognizes that under these circumstances, vacatur of the Judgment and remand for a new [hearing concerning allocation of parental responsibilities] is unfortunately inevitable.”

¶ 9

As an initial matter, we must consider whether we have jurisdiction over the instant appeal, because both parties recognize that petitioner filed his notice of appeal prior to any

² The judgment has been stayed pending appeal, meaning that the child currently resides with petitioner.

ruling on his motion to vacate the judgment. We note that, as an appellate court, we are required to consider our jurisdiction, even if the parties do not raise the issue. *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67..

¶ 10 Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015), governs the timing of appeals from judgments allocating parental responsibilities. Ill. S. Ct. R. 304(b)(6) (eff. Mar. 8, 2016). Under Rule 303(a)(2), “[w]hen a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion *** becomes effective when the order disposing of said motion *** is entered.” Ill. S. Ct. R. 303(a)(2) (eff. Jan. 1, 2015). Our supreme court has instructed that “the notice of appeal is of no effect and must be withdrawn if a timely postjudgment motion was filed before or after the date on which the notice of appeal was filed.” *In re Application of County Treasurer*, 214 Ill. 2d 253, 261 (2005). See also *Chand v. Schlimme*, 138 Ill. 2d 469, 476 (1990) (finding a notice of appeal filed on the same day as a posttrial motion “was premature and had ‘no effect’ ”). Thus, since the notice of appeal in the instant case was filed prior to the entry of an order on the motion to vacate, the notice of appeal may arguably be considered premature.

¶ 11 However, despite the existence of Rule 303, “it remains true that a party can abandon a post-judgment motion.” *Chand*, 138 Ill. 2d at 478. “[T]o do so there must be a more affirmative indication of abandonment than the mere filing of a notice of appeal before the disposition of the post-trial motion.” *Chand*, 138 Ill. 2d at 480. In the case at bar, petitioner filed his notice of appeal after a hearing before the trial court in which he characterized the trial court as “deeply confused” and pointed out several exchanges with the trial court that were “unusual” and reflected conflicting statements over the trial court’s understanding of

whether the initial judgment had even been entered. Respondent agrees with this characterization of the trial court's conduct in her pending motion to vacate before this court. Petitioner also relies on the trial court's comments during the hearing in support of his arguments on appeal. Thus, it is apparent that petitioner no longer seeks a ruling from the trial court on the matter and, after hearing the trial court's comments at the hearing, immediately sought appellate review. We find this to be sufficient evidence of abandonment under the circumstances of this case and conclude that we have jurisdiction over the appeal.

¶ 12 In the case at bar, however, we have no need to reach the merits of petitioner's arguments on appeal because, as noted, respondent has filed a motion asking for us to grant petitioner the relief he seeks, namely, vacating the judgment and remanding for a new hearing on the issue of allocation of parental responsibilities. Respondent's motion also claims that the original trial judge in the matter has since retired and the dissolution proceedings have been assigned to a different judge. Accordingly, we grant the relief requested by both parties and vacate the trial court's judgment, remanding the case to the new trial judge, who will have the opportunity to conduct an entirely new hearing concerning allocation of parental responsibilities.

¶ 13 **CONCLUSION**

¶ 14 Where the parties agree that the trial court's judgment allocating parental responsibilities should be vacated due to the trial court's error, we vacate the judgment and remand the case to the trial court for a new hearing.

¶ 15 Vacated and remanded with instructions.