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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

IN RE THE CUSTODY OF G.L.)	Appeal from the
(Matthew Lovell,)	Circuit Court of
)	Cook County.
Petitioner-Appellee)	
)	No. 13-D-79172
v.)	
)	Honorable
Sarah Finn f/k/a Sarah Czerwinski,)	Mary C. Marubio,
)	Judge, presiding.
Respondent-Appellant).)	

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court’s order was void for lack of jurisdiction when it ruled on an issue “on remand” from the appellate court before the appellate court’s mandate had issued.

¶ 2 Respondent Sarah Finn, formerly Sarah Czerwinski, appeals from the circuit court’s order granting petitioner Matthew Lovell’s emergency motion to restrict Sarah’s parenting time with their minor-child G.L. to a location within a one-hour drive of Matthew’s home. For the following reasons, we vacate the circuit court’s order and remand the cause for further proceedings.

¶ 3

BACKGROUND

¶ 4

We briefly set forth the facts pertinent to this appeal. The parties met in 2009 and began living together. Their son, G.L., was born on September 4, 2010. They resided on the north side of Chicago until 2012 when Sarah and G.L. moved into Sarah's grandparents' house in Oak Lawn, Illinois. Subsequently, in 2013, Sarah moved with G.L. to Champaign County, Illinois, where she currently resides. Matthew currently resides in Wilmette, Illinois.

¶ 5

G.L.'s custody has been the subject of litigation by the parties. In October 2016, the circuit court held an evidentiary hearing regarding numerous parenting issues. On November 28, 2016, the court issued an order allocating parental decision making and parenting time between Matthew and Sarah. Matthew was designated the residential parent and Sarah was granted parenting time every other weekend. The order provided for Sarah to return to the Chicago area and reside within 25 miles of either Matthew's current home or the apartment originally shared by them. It further provided that Sarah may only exercise her parenting time if it is taken within a one-hour drive of Matthew's home unless visitation is for longer than 72 hours, in which case it may take place in Sarah's Champaign County home.

¶ 6

Sarah appealed the circuit court's order and in a Rule 23 order dated May 1, 2017, we affirmed in part, vacated in part, and remanded the cause to the circuit court with directions. *In re Custody of G.L.*, 2017 IL App (1st) 163171-U, ¶56. However, that Rule 23 order was withdrawn on May 19, 2017, and an opinion was filed on May 31, 2017. *In re Custody of G.L.*, 2017 IL App (1st) 163171. The substance of the opinion and Rule 23 order are the same. Specifically, this court concluded that the circuit court did not make the necessary finding that Sarah's exercise of parenting time more than a one-hour drive from Matthew's home would seriously endanger G.L.'s physical, mental, moral, or emotional health. *In re*

Custody of G.L., 2017 IL App (1st) 163171, ¶ 34. Thus, we vacated the portion of the circuit court’s order placing a restriction on Sarah’s parenting time, and remanded the cause to the court to make the necessary determination under section 602.7(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602.7(b) (West Supp. 2015)) (Marriage Act) . *Id.* at ¶¶34-35. The mandate was issued by this court on August 30, 2017.

¶ 7 Shortly after the Rule 23 order was issued, Matthew filed an emergency motion in the circuit court on May 9, 2017. The motion was entitled “Emergency Motion to Modify Parenting Time Schedule Consistent with Appellate Court Order.” The motion referenced the Rule 23 order and sought to prevent Sarah from exercising her parenting time with G.L. in Champaign County over the coming weekend.

¶ 8 Pursuant to Matthew’s motion, the circuit court held an evidentiary hearing on May 10, 2017, and issued a written order that same day. That order stated in relevant part that the matter was “before the court on remand from the Appellate Court,” and that “[p]er the directive of the Appellate Court the court held an evidentiary hearing to determine the appropriateness of restricting [Sarah’s] parenting time by limiting her location within an hour of [Matthew’s] residence.” The order concluded, “after a review of the record, the Appellate Court’s opinion and instructions, and Mr. Wasko’s credible testimony the court finds there is sufficient evidence to support the restriction. G.L.’s physical, mental, moral and emotional health would be seriously endangered without the restriction.”¹ Sarah filed a timely notice of appeal from the court’s order.

¶ 9

ANALYSIS

¹ Steven Wasko is the guardian *ad litem* for G.L.

¶ 10 On appeal, Sarah contends that the circuit court's May 10, 2017, order is void because the court lacked jurisdiction when it entered the order. Sarah maintains that since the appellate court's mandate in the original appeal was not issued until August 30, 2017, the circuit court did not have jurisdiction to rule on Matthew's emergency motion. She further argues that since Matthew's motion sought to address an issue that was included within the Rule 23 order, it was not independent of or collateral to the original appeal.

¶ 11 Matthew contends that the circuit court had jurisdiction to enter the May 10, 2017, order, and that this court should affirm that order. He argues that the court had jurisdiction because his motion was predicated on "new facts" that arose subsequent to the original appeal, namely, that Sarah planned to spend her parenting time with G.L. in Champaign County over the coming weekend. Therefore, he maintains that the court could rule on his motion because it was collateral to the original appeal. Matthew additionally argues that the court had plenary jurisdiction to consider his motion.

¶ 12 Filing a notice of appeal is the jurisdictional step that initiates appellate review. *Niccum v. Botti, Marinaccio, DeSalvo & Taming, Ltd.*, 182 Ill. 2d 6, 7 (1998). A valid notice of appeal serves to divest the lower court of jurisdiction, and appellate jurisdiction attaches *instanter*. *People v. Evans*, 2015 IL App (3d) 140753, ¶ 13. On remand from the reviewing court, the lower court does not regain jurisdiction until it files the reviewing court's mandate. *Id.* However, the circuit court does retain jurisdiction to decide matters that are independent of or collateral or incidental to the judgment. *Moening v. Union Pacific R. Co.*, 2012 IL App (1st) 101866, ¶ 22. Collateral matters include those "lying outside the issues in the appeal or arising subsequent to delivery of the judgment appealed from." *Id.*

¶ 13 Here, when Sarah filed her notice of appeal in the original appeal, No. 1-16-3171, the circuit court was divested of jurisdiction and appellate jurisdiction attached *instanter*. Though this court’s Rule 23 order was issued on May 1, 2017, the circuit court did not regain jurisdiction over the issues involved in the appeal until it filed the appellate court’s mandate, which was issued several months later. To determine whether the circuit court had jurisdiction to consider Matthew’s emergency motion, we must consider whether the issues involved in the motion are collateral to the original appeal.

¶ 14 The motion was filed in the circuit court shortly after this court’s Rule 23 order was issued. The motion clearly appears to be in response to this court’s order. Not only did the title of the motion reference the “Appellate Court’s Order,” the motion specifically sought to prevent Sarah from exercising her parenting time with G.L. for the coming weekend in Champaign County, which became permissible when the Rule 23 order vacated that restriction. The circuit court’s order issued the next day also makes clear that the motion and hearing were conducted in response to the Rule 23 order. The order stated that: the matter was before the court “on remand from the Appellate Court;” the hearing was conducted to determine whether Sarah’s parenting time should be restricted by limiting her location within an hour of Matthew’s home; and, after reviewing “the Appellate Court’s opinion and instructions,” there was sufficient evidence to support the restriction on Sarah’s parenting time. The “new facts” Matthew refers to that arose subsequent to the original appeal, were not “new” in the sense that they concerned the exact issue the parties had been and still continue to litigate.

¶ 15 We disagree with Matthew’s contention that his motion was collateral to the original appeal. The motion concerned one of the same parenting issues involved in the appeal, *i.e.*

whether Sarah could exercise her parenting time in Champaign County. The circuit court had not regained jurisdiction of the issues involved in the original appeal when it held a hearing on Matthew's motion and ruled on the motion. Thus, the circuit court's order was null and void. Any actions taken by the lower court when it has no jurisdiction are null and void. *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 43.

¶ 16 We are not persuaded by Matthew's reliance on *In re Marriage of Giammerino*, 94 Ill. App. 3d 1058 (1981) and *Moening v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶ 22. We determined in *Giammerino*, that the circuit court had jurisdiction to award attorney's fees for the defense of a pending appeal since the issue of attorney's fees for defending the appeal would be collateral to the issue on appeal and would involve a matter independent of any question raised by the appeal. *Giammerino*, 94 Ill. App. 3d at 1061. In *Moening*, we concluded that the circuit court had jurisdiction to adjudicate and enforce an attorneys lien while the plaintiff's appeal from his personal injury action was pending. *Moening*, at ¶ 29. We reasoned that the attorneys lien did not address the issues on appeal or challenge the judgment appealed from, and did not impact the issues that were then on appeal. *Id.* at ¶¶ 26, 29. Here, Matthew's motion and the circuit court's order did not involve a matter independent of the issues involved in the appeal. As stated above, Matthew's motion involved the exact parenting issue that was litigated on appeal.

¶ 17 We also point out the numerous legal quandaries that result from the circuit court's actions. Since Matthew's motion was filed after the Rule 23 order was issued, but before the mandate had been filed, this court still retained jurisdiction over the appeal, and could modify or withdraw the Rule 23 order, which is exactly what happened. Thus, both the circuit and appellate courts were considering the merits of the same issue at the same time. Also, the

appellate court was reviewing a matter where the circuit court had already made a subsequent ruling. Further, pursuant to Illinois Supreme Court Rule 367, the parties had 21 days from the date of the judgment to file a petition for rehearing in this court, which had not expired when Matthew filed his motion and when the circuit court ruled on the motion. (R. 367 (eff. Nov. 1, 2017)). Moreover, the parties could have filed a petition for leave to appeal to the supreme court within 35 days of the judgment or opinion pursuant to Illinois Supreme Court Rule 315. (eff. Nov. 1, 2017).

¶ 18 Lastly, Matthew argues that the circuit court had plenary jurisdiction to rule on his motion, relying on *In re Custody of Cannon*, 268 Ill. App. 3d 937 (1994). Trial courts have plenary jurisdiction over the persons and estates of minors. *In re Custody of Cannon*, 268 Ill. App. 3d 937, 944 (1994). This authority is derived from the common law and is independent of any authority given by the legislature. *Id.* A careful reading of *Cannon* illustrates that the court there was confronted with a factual scenario much different than that presented here. In *Cannon*, the circuit court exercised its plenary jurisdiction to award permanent custody of the children to their grandmother despite the grandmother’s lack of standing under the Marriage Act. On review, this court recognized the “dilemma” the trial judge faced based on evidence that awarding custody to the children’s mother would be inappropriate. *Id.* Evidence in the record indicated that the mother had abused and neglected the children, had been motivated to seek custody so she could use their public aid money for her own purposes, and was emotionally unstable, violent and suffered from substance abuse and mental illness. *Id.* We recognized the “compelling and exigent” circumstances that were present, and ultimately concluded that the circuit court’s exercise of plenary jurisdiction was appropriate, though the award of custody was to be temporary, not permanent. *Id.* We find the circumstances

present here quite distinguishable from *Cannon* and are not persuaded by Matthew's reliance upon it.

¶ 19

CONCLUSION

In sum, we conclude that the circuit court lacked jurisdiction to enter the May 10, 2017, order and that order was null and void. Accordingly, we vacate the judgment of the circuit court and remand the cause to the circuit court for further proceedings.

¶ 20

Judgment vacated; cause remanded.