2018 IL App (1st) 181700-U

No. 1-18-1700

Order filed December 21, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
JUDI L. JOHNSON,	)	Cook County.
	)	
Petitioner-Appellee,	)	No. 17 D3 30404
	)	
and	)	Honorable
	)	Alfred Levinson,
RICHARD A. JOHNSON,	)	Judge, presiding.
	)	
Respondent-Appellant.	)	

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Interlocutory appeal dismissed for lack of jurisdiction.

¶ 2 This is an expedited appeal under the provisions of Illinois Supreme Court Rule 311(a) (eff. Mar. 8, 2016). Respondent Richard A. Johnson filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 304(b)(6) (eff. Mar. 8, 2016), from an order of the circuit court of

Cook County designating Dawn G., the respondent's sister, the custodian of the minor child, S.K.J. (the minor), and allowing the removal of the minor to Portage, Indiana, where Dawn G. resided.

¶ 3 On appeal, respondent contends that: (1) he was denied due process, (2) the circuit court lacked jurisdiction to modify his parenting rights, and (3) the circuit court erred when it allowed the minor to be relocated to Indiana. For reasons explained below, we dismiss the appeal for lack of jurisdiction.

¶ 4 BACKGROUND

¶ 5 Respondent and petitioner Judi L. Johnson were married in 2005. At the time of the marriage, petitioner had a daughter, C.R. One child, the minor, was born to the parties. At the time of these proceedings, the minor was 13 years-of-age, and C.R. was 19 years-of-age.

¶ 6 On April 21, 2017, respondent sought an emergency order of protection for himself, C.R. and the minor against petitioner based on her alcohol use. The circuit court granted the order which was ultimately extended to May 15, 2017. On that date, the circuit court awarded physical possession of the minor to respondent with petitioner allowed supervised visitation. On May 17, 2017, petitioner filed a petition for dissolution of the parties' marriage, and respondent filed his response. Both parties sought to be named the minor's primary residential parent. An order was entered consolidating the dissolution and order of protection cases. The circuit court appointed a guardian *ad litem* (the GAL) for the minor.

¶ 7 On March 13, 2018, respondent filed a petition for temporary custody and child support. On May 18, 2018, the circuit court set respondent's petition for child support for hearing on July 17, 2018, and for status of all other matters on that date. Respondent was ordered to make an

appointment for the minor with a psychiatrist recommended by Dr. Ron Dachman, the therapist who was providing unification therapy for petitioner and the minor. The court further ordered that the minor was not to be removed from her school for the 2018-2019 school year.

¶ 8 On July 17, 2018, the circuit court heard testimony *in camera* from C.R. The GAL questioned C.R. about the minor's suicide attempts, hospitalization, and incidents in which the minor cut herself. C.R. further testified about the various living situations the minor was exposed to and the lack of attention and parental concern respondent displayed toward the minor. C.R. told the court that the minor needed to placed somewhere else for her safety and that Dawn G., respondent's sister, would be the best person since she would always act in the minor's best interests.

¶ 9 Respondent's attorney was present for C.R.'s testimony but made no objections and did not cross-examine C.R. When the circuit court asked what the respondent's objection was to sending the minor to live with his sister, his attorney explained that the minor would not know anyone else except her aunt and uncle. In addition, since the minor has just moved to a new location, respondent did not think she should be relocated again. Respondent felt that, as her father, he knew what was best for the minor.

¶ 10 The circuit court entered an order finding that it was in the best interests of the minor that Dawn G. be designated as the "permanent custodian of the minor child pursuant to [*sic*] 735 ILCS 606.10 and to allow her removal to Portage Indiana, effective immediately." The order further stated that the custody portion was final and appealable pursuant to Illinois Supreme Court Rule 304. The court reserved its decision on parenting time until the GAL, Dr. Dachman and Dawn G. believed it was in the best interests of the minor to address that issue. The court

ordered the parties to pay child support to Dawn G. pursuant to the statutory child support percentages. The court ordered a copy of the transcript to be prepared prior to July 31, 2018, and sealed until further order of court and continued the case to August 28, 2018, for status on child support, parenting time and the GAL's fees. The court granted respondent's attorney leave to withdraw.

¶ 11 Through new counsel, respondent filed an emergency motion to modify the July 17, 2018, order and to stay enforcement. At the July 30, 2018, proceeding on respondent's emergency motion, the circuit court modified the July 17, 2018, order to provide that it was final and appealable pursuant to Rule 304(b)(6) and denied respondent's request to stay enforcement.[1] The court then set forth the basis of its July 17, 2018, ruling, stating as follows:

> "I have found and am finding, of course, that the conduct of the parents in not doing what had to be done seriously endangered the child and that will deal with the restriction on parenting time. And all that needs to be done is by a preponderance of the evidence.
>
> What I am saying here, is that I am going to bring the parents back in as the doctor says it is okay to bring them back in."

¶ 12 After referencing section 603.10 of the Act (750 ILCS 5/603.10 (West 2016)), the circuit court continued as follows:

> "If I find by a preponderance in the evidence that a parent engaged in any conduct that seriously endangered the child's mental, moral or physical health or that significantly impaired the child's emotional development, the Court shall enter orders as necessary to protect the child. Where a court finds a parent's conduct has seriously endangered the

[1] The circuit court also corrected the citation error in its July 17, 2018, order, *i.e.*, to 750 ILCS 5/606.10.

> child, it lists several restrictions that I can impose on parental decision-making and parental time including, quote, any other constraints or conditions that provide for the child's safety or welfare. So I am finding that there is serious endangerment.
>
> * * *
>
> [T]hat by designating a custodian via 606.10, I am not impacting the parents' rights and responsibilities under the parenting plan. So even though I use the paternal aunt as the minor's custodian, it is - - I am not in itself impairing or impinging the right of mom or dad."

¶ 13 At the request of respondent's attorney, the circuit court ordered the transcript of the July 17, 2018, *in camera* hearing unsealed and made a part of the appellate record.

¶ 14 This expedited appeal followed.

¶ 15 ANALYSIS

¶ 16 A reviewing court has a duty to consider, *sua sponte*, its jurisdiction and to dismiss an appeal if jurisdiction is lacking. *Revolution Portfolio, LLC, v. Beale*, 341 Ill. App. 3d 1021, 1024-25 (2003). The order appealed from is not one contemplated by Rule 304(b)(6), which respondent asserts is the basis of our jurisdiction of this appeal. Therefore, appellate jurisdiction is lacking in this case.

¶ 17 With certain exceptions, appeals from judgments in the circuit court are limited to final judgments. Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). To be final, a judgment must dispose of or terminate the litigation or some definite part of it. *In re Adoption of Ginnell*, 316 Ill. App. 3d 789, 793 (2000).Where jurisdiction is retained for the future matters of substantial controversy, the order is not final. *Grinnell*, 316 Ill. App. 3d at 793.

¶ 18 Rule 304(b)(6) provides for an interlocutory appeal from a "custody or allocation of parental responsibilities judgment or modification of such judgment entered pursuant to the [Act] or Illinois Parentage Act of 2015 [citation]." Ill. S. Ct. R. 304(b)(6) (eff. Mar. 8, 2016). The Committee Comments to Rule 306 provide in pertinent part as follows:

> "The term 'custody judgment" comes from section 610 of the [Act] [citation], where it is used to refer to the trial court's permanent determination of custody entered incident to the dissolution of marriage, as distinguished from any temporary or interim orders of custody entered pursuant to section 603 of the Act [citation] and any orders modifying child custody subsequent to the dissolution of marriage pursuant to section 610 of the Act [citation]." Ill. S. Ct. R. 304(b)(6), Committee Comments (rev. Feb. 26, 2010).

The Committee Comments explained that the adoption of Rule 304(b)(6) was to allow a child custody judgment to be treated as a distinct claim even when it is entered prior to the resolution of other matters involved in a dissolution proceeding and thus could be appealed without a special finding. Ill. S. Ct. R. 304(b)(6), Committee Comments (rev. Feb. 26, 2010).

¶ 19 The circuit court's July 17, 2018, order was neither a permanent determination of the allocation of parental responsibilities (formerly custody)[2] entered in the course of dissolution of marriage proceedings nor was it a modification of a custody judgment subsequent to the entry of a judgment for dissolution of the parties' marriage. The latter does not apply since a judgment for dissolution of the parties' marriage has not yet been entered.

[2] While the Act has changed the term "custody" to "allocation of parental responsibility," the supreme court rules still utilize both terms since some legislative enactments covered by the rules utilize the term "custody." Ill. S. Ct. R. 304(b)(6), Committee Comments (rev. Mar. 8, 2016).

¶ 20 The circuit court's order placing the minor with Dawn G. was pursuant to section 606.10 of the Act, which provides as follows:

> "Solely for the purposes of all State and federal statutes that require a designation or determination of custody or a custodian, a parenting plan shall designate the parent who is allotted the majority of parenting time. This designation shall not affect parents' rights and responsibilities under the parenting plan." 750 ILCS 5/606.10 (West 2016).

¶ 21 The July 17, 2018, order designated Dawn G. as the "permanent custodian" of the minor under section 606.10, which specifically provides that such designation does not affect the parents' rights. The case was continued to August 28, 2018, for status on the parenting time and child support. Moreover, at the proceeding on July 30, 2018, the circuit court clarified the basis for its July 17, 2018, ruling placing the minor with Dawn G., and continuing the case to August 28, 2018, stating as follows:

> "I wanted you back in court in six weeks to see how everything was working. And, if possible, to gradually let everyone back. This is the reason for that status date at the end of August, to make sure that the child is doing well.
>
> * * *
>
> And what I did was, I moved to do something for this period of time in the - - what I believe to be for the safety of the child."

¶ 22 The circuit court's statements that the placing the minor with Dawn G. was to secure the minor's safety for the time being and the continuance of the case for status six weeks later indicate that the July 17, 2018, order was not a permanent determination of parental responsibilities such that it could be appealed pursuant to Rule 304(b)(6).

¶ 23 We note that in support of his contention that the circuit court lacked jurisdiction to enter the orders of July 17 and 30, 2018, respondent maintains that those orders are void since the issue of custody was not raised by a pleading before the court. See *Suriano v. Lafeber*, 386 Ill. App. 3d 490 (2008) (the trial court lacked jurisdiction to *sua sponte* terminate the parties' joint custody agreement without a pleading requesting such relief). Assuming, *arguendo*, the orders were void, that fact does not aid respondent's contention.

¶ 24 " '[A] void order can be attacked at any time by a person affected by it. [Citation.] This legal proposition, however, by itself, does not act to confer appellate jurisdiction on a reviewing court if such jurisdiction is otherwise absent. [Citation.] Rather, the rule allows a party the ability to always raise the issue of whether an order is void in an appeal where appellate jurisdiction exists and the case is properly before the court of review. [Citation.]' " *In Re Jamari R.*, 2017 IL App (1st) 160850, ¶ 40 (quoting *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 15, citing *People v. Flowers*, 208 Ill. 2d 291, 308 (2003)).Unlike the present case, in *Suriano* there were no challenges to the jurisdiction of the reviewing court and no impediment to the reviewing court's ability to address the issues raised on appeal.

¶ 25 Accordingly, we do not find jurisdiction proper under Rule 304(b)(6).

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

¶ 28 Dismissed.