IN THE COURT OF APPEALS OF IOWA

No. 3-669 / 12-1225
Filed August 7, 2013

MEGAN T. PIECHOWSKI,
Petitioner-Appellee,

vs.

RUSSELL A. SHUFRO,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Russell Shufro appeals the district court's order on Megan Piechowski's application to temporarily modify visitation. **APPEAL DISMISSED.**

Michael J. Galvin, Rock Island, Illinois, for appellant.

Timothy J. Tupper, Davenport, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Megan Piechowski and Russell Shufro are the parents of a child, born in 2009. Megan filed an application for child custody and support which was resolved by stipulation in September 2011. Under the terms of the stipulation, Megan exercised physical care and Russell participated in visitation every other weekend and on two weekdays.

Megan later filed an application to temporarily modify visitation based on what she characterized as Russell's "very unusual and concerning behaviors." The district court considered the application in the presence of Megan, her attorney, and Russell's attorney, but in the absence of Russell, who had yet to be served. The court reached the following conclusion:

> [T]o protect the safety and wellbeing of [the child], the Respondent's current visitation schedule under the order filed September 14, 2011 shall be temporarily suspended, and during such time the Respondent's visitation with the child shall be restricted to a [supervised] visit between 1:00 p.m. and 4:00 p.m. each Wednesday and Sunday of every week. . . .
>
> This temporary visitation order shall remain in full force and effect until modified by a later order, however the Court contemplates that if the Respondent so chooses, this matter shall be set for hearing on the earliest practicable date after the Respondent has been personally served with an application to modify the current, permanent custodial and visitation order.[1]

[1] Russell raised a challenge based on the absence of personal jurisdiction over him. The district court did not specifically address this issue beyond affording Russell the opportunity to challenge the order after he was served with the application. On appeal, Russell argues that the order should be vacated because the district court lacked personal jurisdiction. In *Bartsch v. Bartsch*, 636 N.W.2d 3, 5 (Iowa 2001), the court held that "personal jurisdiction over a nonresident defendant is not required for a court to enter an order preserving the protected status afforded Iowa residents under [the domestic abuse statute]". The court reasoned, "[i]f a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did here—enter an order protecting a resident Iowa family from abuse." *Bartsch*, 636 N.W.2d at 10. We need not definitively resolve this issue at this stage, given our conclusion regarding the finality of the order.

Russell appealed the order. The Iowa Supreme Court directed Russell to address (1) whether his appeal was from a final order, and if not, (2) whether the order was subject to interlocutory review. We begin and end with these questions.

A party may file a notice of appeal from "[a]ll final orders or judgments of the district court involving the merits or materially affecting the final decision." Iowa R. App. P. 6.103(1); *In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999) ("[A] final judgment or decision is one that finally adjudicates the rights of the parties."). "Temporary custody orders are subsumed in the final custody determination and are not judgments that can be separately enforced." *Denly*, 590 N.W.2d at 50.

For purposes of determining whether an order is final, we see no material distinction between temporary custody orders and temporary visitation orders. Visitation orders go hand in hand with custody orders and inhere in final determinations of custody.

In an effort to avoid this rule, Russell points to the district court's statement that the visitation order would "remain in full force and effect until modified by a later order." He argues the order "was, for all intents and purposes, permanent." We disagree. The application to which the order pertained sought a "temporary" modification of visitation and the district court's order only "temporarily suspended" the prior stipulation on visitation. By its terms, the order was subject to modification; it was not a final, appealable order. *See Bartsch*, 636 N.W.2d at 10 (finding entry of permanent order rendered temporary order "ineffective").

This does not end our analysis because we may treat the notice of appeal from a mom-final order as an application for interlocutory appeal. *See* Iowa R. App. P. 6.108. The pertinent factors for deciding whether such an application should be granted are as follows: "(1) that the court's order involves substantial rights; (2) the order will materially affect the final decision; and (3) that a determination of the order's correctness before trial on the merits will better serve the interests of justice." *Denly*, 590 N.W.2d at 51. We will focus on the second prong—whether the court's order "materially affect[s] the final decision." To answer that question, we must ask another question: "'Will the party aggrieved thereby be deprived of some right which cannot be protected by an appeal from the final judgment?'" *Lerdall Constr. Co., Inc. v. City of Ossian*, 318 N.W.2d 172, 175 (Iowa 1982) (citation omitted). "'If the ruling or order complained of is inherent in the final judgment and may be presented on appeal therefrom, this is the procedure that must be followed.'" *Id.* (citation omitted).

The district court's temporary suspension of visitation was subject to being superseded by an order reaffirming the permanent, stipulated visitation provisions or by an order permanently modifying those provisions. Trial court developments following the entry of the order underscore this fact. Specifically, Russell asked to revisit the order less than one month after it was entered and the district court scheduled a hearing on his request. The hearing would have taken place but for Russell's filing of a notice of appeal, which, the court found, divested it of jurisdiction to proceed.

We conclude the temporary visitation order is not an appealable final order and is not subject to interlocutory review. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.