

Dismissed and Memorandum Opinion filed December 16, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00958-CV

VANESSA NIEVES VAZQUEZ, Appellant

V.

FRANCISCO NG, Appellee

**On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2009-01506**

MEMORANDUM OPINION

This is an attempted appeal from a final decree of divorce signed March 26, 2009. Appellant filed a notice of restricted appeal on September 27, 2009. *See* Tex. R. App. P. 26.1(c) (notice of restricted appeal must be filed within six months after judgment is signed).

The right to a restricted appeal is limited to parties who did not participate —either in person or through counsel —in the hearing that resulted in the judgment complained of and who did not timely file a post-judgment motion or notice of appeal. Tex. R. App. P.

30. These requirements are jurisdictional and cut off a party's right to seek relief by way of a restricted appeal if they are not met. *See Clopton v. Pak*, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied).

The final decree contained in the clerk's record recites that appellant "appeared in person and through attorney of record" The decree is signed by appellant's attorney "Approved as to Form." The trial court's docket sheet recites the following:

1/4/10 P appeared to prove up divorce. R's atty appeared on her behalf. Per request of both parties divorce will not be granted until 3/26/10. Entry 3/26/10. All testimony has been received, just need decree.

Appellant was the respondent below. Therefore, appellant's attorney was present when the divorce was proved up. Because it appeared that appellant is not entitled to a restricted appeal because she participated, through her attorney, in the hearing that resulted in the entry of the decree, notification was transmitted to the parties of this court's intention to dismiss the appeal for want of jurisdiction unless appellant filed a response demonstrating that this court has jurisdiction over the appeal. *See* Tex. R. App. P. 42.3(a). Appellant's response fails to establish that this court has jurisdiction over the appeal.

The nature and extent of participation precluding a restricted appeal in any particular case is a matter of degree because trial courts decide cases in a myriad of procedural settings. *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 589 (Tex. 1996). The issue is whether the appellant participated in the decision-making event that results in the judgment adjudicating the appellant's rights. *Id.* The policy behind the nonparticipation requirement is to deny appeal by writ of error (now referred to as restricted appeal) to those who should reasonably resort to the quicker method of appeal. *Id.* at 590.

The decision-making event is the proceeding in which the questions of law and fact are decided. *Texaco*, 925 S.W.2d at 589. In a divorce case, the decision-making event is the hearing at which the final divorce decree is proven up. *Cox v. Cox*, 298 S.W.3d 726,

731 (Tex. App.—Austin 2009, no pet.) (husband who did not appear at hearing where divorce was proven was entitled to restricted appeal).

In her response, appellant cites *McKnight v. Trogdon-McKnight*, 132 S.W.3d 126 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In *McKnight*, this court held that although the ex-husband participated up to the point of the final divorce decree, he did not participate in the proceedings two years later that resulted in a clarification order, amended QDROs, and a stock division order that he sought to appeal. *Id.* at 129. The appellant did not participate in a subsequent clarification action in *McKnight*; therefore, *McKnight* is not similar to the fact situation here. Instead, this case is more akin to *Barnett v. Barnett*, 750 S.W.2d 881 (Tex. App.—Dallas 1988, no writ). In *Barnett*, the husband participated in the decision-making event when he was present at the hearing where the terms of the divorce decree were proven up, but not at the hearing where decree was entered. *Id.* at 883.

Appellant does not meet the requirements for a restricted appeal because she participated through her attorney in the hearing which resulted in the entry of the decree. Because appellant's counsel appeared at the hearing to prove up the terms of the divorce and signed the final decree, appellant had the ability to file an ordinary appeal. *See Texaco*, 925 S.W.2d at 590; *see also Hammond v. Hammond*, 688 S.W.2d 690, 692-93 (Tex. App.—Beaumont 1985, writ dismissed w.o.j.) (participation established through waiver of citation, execution of property settlement agreement, and approval of divorce decree by appellant and her attorney); *Blankinship v. Blankinship*, 572 S.W.2d 807, 808 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (participation established by waiver of citation, waiving making of record, and approval of divorce decree).

Appellant did not file a motion for new trial or other post-judgment motion. Therefore, her notice of appeal was due April 26, 2010. *See* Tex. R. App. P. 26.1; *see also* Tex. R. App. P. 4.1(a) (extending deadline to Monday when last day falls on Saturday or

Sunday). Appellant's notice of appeal filed September 27, 2010 is untimely. Without a timely filed notice of appeal, this court lacks jurisdiction.

Accordingly, the appeal is ordered dismissed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Yates and Jamison.