Cite as 2023 Ark. App. 584

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-23-107

KATHRYN LOSURDO APPELLANT	Opinion Delivered December 13, 2023
	APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT [NO. 03DR-18-338]
V.	HONORABLE ANDREW S. BAILEY, JUDGE
BRIAN LOSURDO APPELLEE	REVERSED AND REMANDED

RITA W. GRUBER, Judge

Kathryn Losurdo appeals an "Agreed Order" (order) entered by the Baxter County Circuit Court related to the custody of her and appellee Brian Losurdo's two children and the denial of her motion to vacate that order. She asserts two points on appeal: (1) the circuit court erred in entering the order modifying custody because there was no agreement, and (2) there is no evidence of any material change in circumstances to justify modifying custody. We reverse the denial of the motion to vacate and remand for further proceedings.

I. *Factual and Procedural History*

Kathryn and Brian were married on September 18, 2009, and two children were born during the marriage—MC1 and MC2. On April 16, 2021, a divorce decree was entered. In relevant part, the decree awards joint custody of the children to the parties on an alternating weekly basis but provides that when Brian travels for work during his custodial time, the

children will be with Kathryn. The decree also orders Brian to pay $1000 in monthly child support because Brian "travels frequently for his job and will necessarily be unable to exercise all (perhaps a significant amount in some months) of his custodial time with the children." The decree further states that Kathryn homeschools MC1, does not rely on daycare for MC2, and is appropriately meeting the children's educational needs. The decree continues that arrangement, with the parties following the local public-school calendar, and the children being in Kathryn's care during the school day, as long as she continues to home school them. The decree gives Kathryn final decision-making authority for educational purposes but orders her to keep Brian abreast of "all educational developments with the children."

On August 9, 2021, Brian filed a petition asserting that Kathryn had not cooperated with his attempts to obtain passports or state-issued identification cards for the children, arguing that her lack of cooperation was in violation of the decree. He requested that the court order Kathryn to cooperate with him in obtaining the children's passports and identification cards and to appear before the court and show cause as to why she should not be held in contempt. Kathryn responded on September 10, denying that she had violated the decree. On March 30, 2022, Brian filed an amended petition seeking the same relief as in his initial petition as well as requesting additional relief. This included the following: that each party be granted a child for tax-deduction purposes; all transportation costs associated with exchanging the children be shared between the parties; Kathryn provide copies of lesson plans, homework assignments, and standardized testing results to him; and that he "be allowed to make up the days which he misses" with the children due to his work travel

schedule, upon proper notice to Kathryn. He further requested that the court find Kathryn in contempt, impose sanctions, and award him fees and costs.

On September 15, 2022, an order was entered. It states:

> On the 29th day of June, 2022, this matter came on to be heard, the Plaintiff, Brian A. Losurdo, appears in person and by his attorney, Roger L. Morgan and the Defendant, Kathryn A. Losurdo, appears in person and by her attorney Westin Meyer; and from the stipulations of the parties and other facts and matters before the Court, the Court enters its Agreed Order as follows[.]

The order requires (1) each party to execute all documents necessary for passports to be obtained for each of the children and to cooperate to ensure that passports are issued; (2) the parties to equally share the transportation of the children to effectuate their exchange; (3) Kathryn to provide Brian access to all lesson plans, homework assignments, and testing results and with a quarterly report card that reflects the educational progress of each of the children; (4) the parties to equally share the minor children for tax purposes; and (5) Brian, whenever his travel has caused him to miss his time with the children, to receive four additional days when he returns from his travels to make up for the missed time, with all other visitation remaining as set forth in the decree. The order was electronically signed by the court and does not reflect who drafted the order or that it was signed or approved by either party.

On September 29, 2022, Kathryn filed a "Motion to Vacate Order, for an Injunction Pendente Lite, and for a New Trial" pursuant to Arkansas Rules of Civil Procedure 60 and 59(a)(1) and (6), with a supporting affidavit. She asserted that the parties—in direct contrast to what the order states—never appeared before the court on June 29; rather, Brian's attorney

and her then attorney, Westin Meyer, engaged in negotiations that day at the courthouse, with Kathryn believing that the only agreement struck was that the parties would resolve the issues outside the courtroom, and she would draft a proposal. She further asserted that she became aware of the order's existence the day it was entered when she checked the online docket at Brian's prompting. She stated that she then terminated Meyer's services and personally emailed Brian's attorney and copied the circuit court, informing them that she had never seen the order, did not approve it, did not sign it, and had never agreed to its terms. She further stated that she never authorized Meyer to agree to the order or its terms, and it was submitted to the court without her knowledge or consent. Finally, Kathryn argued that Brian had not demonstrated a material change in circumstances warranting the visitation modification contained within the order. Kathryn requested a new trial; that the order be set aside and vacated; and an injunction.

On October 7, Brian filed a response—supported by his own affidavit—to Kathryn's motion. He agreed that on the day of the scheduled June 29 hearing, the attorneys engaged in settlement negotiations; the parties never appeared in front of the court; and nothing was put on the record. Brian asserted that it was his understanding from his attorney as well as Meyer that Kathryn agreed to all the terms contained within the order, which Meyer would draft and hopefully file within the week. Brian stated that due to the passage of time and unresponsiveness from Meyer, his attorney ultimately drafted the order, submitted it to the court on August 24, and explained "the situation to the Judge who then gave the defense a five-day window to object." Brian further stated that at no point prior to entry of the order

was Brian aware that Kathryn believed negotiations were ongoing or that she objected to the order's terms. Brian argued that Kathryn had not stated grounds for relief under either Rule 59 or 60 and requested that her motion be dismissed.

On October 14, Kathryn replied that the response corroborated much of what she had alleged in her motion, and nothing in it demonstrated her acquiescence to the order's terms. She argued that if the circuit court were to permit the order to stand, it would be making a contract for the parties where the parties had failed to make one. She further argued that an attorney is not permitted to compromise a client's cause of action or judgment without permission, and there is no evidence that Kathryn authorized Meyer to enter into the agreement reflected in the order.

The court did not hold a hearing or enter an order on the motion to vacate; thus, the motion was deemed denied on October 31. Kathryn filed a notice of appeal on November 29 and an amended notice of appeal on January 11, 2023.[1]

---

[1]Kathryn's appeal is timely, and we have jurisdiction. The order was entered September 15, and her motion to vacate was filed on September 29—the tenth day when intermediate Saturdays and Sundays are excluded. *See* Ark. R. Civ. P. 6 (2022). The motion was filed pursuant to Arkansas Rules of Civil Procedure 59 (2022) and 60 (2022). Arkansas Rule of Appellate Procedure–Civil 4(b)(1) (2022) provides that upon the timely filing of a motion to vacate a judgment within ten days of the judgment, the time for filing a notice of appeal is extended. That same rule provides that the notice of appeal must be filed within thirty days from entry of the last outstanding motion, but if the motion is neither granted nor denied within thirty days of its filing, then it is deemed denied as of the thirtieth day, and a timely appeal must be filed within thirty days of the deemed denial date. *Id.* While Arkansas Rule of Civil Procedure 60 does not contain the same "deemed denied" language found in either Arkansas Rule of Civil Procedure 59 or Arkansas Rule of Appellate Procedure–Civil 4(b)(1), our courts have held that the appeal deadlines for a Rule 60 motion filed within ten days of the order being challenged proceed in accordance with Arkansas

II. *Standard of Review*

We review child-modification cases de novo. *Grindstaff v. Strickland*, 2017 Ark. App. 634, at 3, 535 S.W.3d 661, 664. "De novo review" means the whole case is open for review, which permits a complete review of the record to determine whether the circuit court clearly erred in either "making a finding of fact or *in failing to do so*." *See Stehle v. Zimmerebner*, 375 Ark. 446, 455–56, 291 S.W.3d 573, 580 (2009) (emphasis added). Whether to grant or deny a motion to vacate a judgment under Rule 60 lies within the circuit court's discretion and will not be reversed unless the circuit court has abused that discretion. *Toombs v. Toombs*, 2010 Ark. App. 858, at 2–3. The decision to grant or deny a new trial under Rule 59(a) is within the discretion of the circuit court, and that decision will not be reversed absent a manifest abuse of discretion, that is, discretion exercised thoughtlessly and without due consideration. *Horton v. Horton*, 2011 Ark. App. 361, at 8, 384 S.W.3d 61, 67. When a decision is within the discretion of the circuit court, the circuit court abuses that discretion by failing to exercise it. *Lawrence v. Barnes*, 2010 Ark. App. 231, at 13, 374 S.W.3d 224, 232.

III. *Discussion*

Kathryn argues that she neither agreed to the order—or any terms contained therein—nor authorized her attorney to do so, and the circuit court erred by not vacating it. She argues further that the order is facially erroneous because it stated that the parties appeared before

---

Rule of Appellate Procedure–Civil 4(b) and the extensions permitted thereunder. *See Murchison v. Safeco Ins. Co. of Ill.*, 367 Ark. 166, 168, 238 S.W.3d 11, 13 (2006); *Brinkley Sch. Dist. v. Terminix Int'l Co., L.P.*, 2019 Ark. App. 445, at 9, 586 S.W.3d 694, 699.

the court in person, and it is undisputed that they did not; thus, nothing was recited into the record by either party or their counsel. Kathryn is correct that other than the order itself, the record does not contain any writing that evidences that she personally agreed to the terms contained within the order. She is also correct that the order is facially incorrect because no one appeared before the court on June 29, and nothing was read into the record by any party or attorney.[2] Kathryn analogizes the order to a contract, arguing that it fails because there was no meeting of the minds to support the existence of an agreement. She further argues that to find a meeting of the minds, both parties must assent to the particular terms, which cannot be so vague as to be unenforceable. She contends that there was no mutual assent, and the terms within the order are "hopelessly vague and unenforceable."

Brian responds that this court should affirm because it can be inferred that Kathryn's attorney had the authority to consent on her behalf to the order and did so; thus, she is bound. Both in anticipation of that argument and in reply to it, Kathryn argues that Brian's affidavit makes no claim that she personally consented to any settlement; there is no allegation that her former counsel had authority to do so; and black-letter law requires her express authority for her attorney to make any agreement on her behalf. She further replied that when there is no agreement to support an "Agreed Order," the refusal to set aside an order premised on such an agreement is clearly erroneous.

[2]There is no transcript found in the record, nor is there an allegation that one is available.

Contract principles are applicable to "agreed orders." *See, e.g.*, *Emis v. Emis*, 2017 Ark. App. 372, at 4–5, 524 S.W.3d 444, 448 (applying contract principles to an agreed order in a custody-modification case). A court cannot make the parties' contract but, instead, can only construe and enforce that contract the parties have made. *Terra Land Servs., Inc. v. McIntyre*, 2019 Ark. App. 118, at 12, 572 S.W.3d 424, 432. To have a valid contract there must be a meeting of the minds as to all terms, using objective indicators. *Freeman Holdings of Ark., LLC v. FNBC Bancorp, Inc.*, 2019 Ark. App. 165, at 6, 574 S.W.3d 181, 185. Whether there is a meeting of the minds is a question of fact. *Terra Land Servs.*, 2019 Ark. App. 118, at 12–13, 572 S.W.3d at 432.

An attorney is not permitted to compromise her client's cause of action or judgment without permission. *Id.* at 15, 572 S.W.3d at 433. An attorney has no implied authority to enter into a compromise agreement. *Id*. When a client gives her attorney specific authority to enter into a compromise agreement, such an agreement, if entered by the attorney, is valid and binding. *Id*. Whether an agent is acting within the scope of her authority is a question of fact. *Id*.

With these standards in mind, we conclude that the denial of the motion to vacate must be reversed and this matter remanded. Whether there is a meeting of the minds and whether an agent is acting within the scope of her authority are both questions of fact. *Terra Land Servs.*, *supra*. Those necessary findings of fact are lacking here, and the record is insufficient for us to determine whether any of the elements necessary to support an agreement are present. The existence of an agreement is of particular import because absent

agreement, precedent requires the party seeking modification to show that a material change of circumstances has occurred since the last order of visitation—a requirement that exists to promote stability and continuity for a child. *Bell v. Bell*, 2022 Ark. App. 279, at 4, 646 S.W.3d 678, 683. Assuming the party seeking modification can do so, the circuit court must then consider whether the modification is in the best interest of the child, with all other considerations being secondary. *Id.*

We cannot act as a fact-finder, *Workman v. Ark. Dep't of Hum. Servs.*, 2023 Ark. App. 294, at 12, 668 S.W.3d 545, 552; no record was made regarding whether an agreement existed between the parties, and no discretion was exercised regarding the motion to vacate. Accordingly, we reverse and remand this case to make findings and for further proceedings consistent with this opinion. *See, e.g.*, *Skokos v. Skokos*, 332 Ark. 520, 525, 968 S.W.2d 26, 28, *reh'g granted in part*, *Skokos v. Skokos*, 333 Ark. 396, 968 S.W.2d 26 (1998) (following entry of the final decree, Ms. Skokos filed a Rule 60 motion to vacate but was unable to obtain a hearing or ruling. On appeal, her request that the case be remanded for the adjudication of that motion was granted in *Skokos v. Skokos*, 322 Ark. 563, 909 S.W.2d 653 (1995)).

Reversed and remanded.

VIRDEN and BROWN, JJ., agree.

Cullen & Co., PLLC, by: *Tim Cullen*, for appellant.

Sanders, Morgan, Clarke & Floyd PLLC, by: *Roger L. Morgan*, for appellee.