NOT DESIGNATED FOR PUBLICATION

D.P. Marshall Jr., JUDGE
28 November 2007

DIVISION III

CA07-523

28 November 2007

SUSAN D. BRUNETTI,
APPELLANT

v.

TIMMY D. BRUNETTI,
APPELLEE

AN APPEAL FROM ARKANSAS COUNTY CIRCUIT COURT
[NO. DR-2006-123]

THE HONORABLE DAVID G. HENRY, CIRCUIT JUDGE

AFFIRMED

After a custody hearing in October 2006, the circuit court changed custody of the Brunettis' two children to Timmy Brunetti. Susan Brunetti did not appear at the hearing. She appeals, arguing that she was denied due process because she had no notice of the hearing. She also argues that the appearance of partiality by the circuit court requires that this case be transferred on remand. We affirm.

I.

Susan and Timmy Brunetti divorced in 2002. The Pulaski County Circuit Court awarded the Brunettis joint custody of their two children, with Susan receiving primary physical custody. The court did not order child support.

In August 2005, the Office of Child Support Enforcement moved to set child support.

Timmy answered OSCE's motion and counterclaimed seeking custody of the two children. He also asked to have the case transferred to Arkansas County, where all the parties were then living. Over Susan's objection, the Pulaski County Circuit Court transferred the case. In his mid-July letter opinion, the circuit judge stated that the case coordinator in Arkansas County was holding two dates open for a hearing and that the parties should contact her "as soon as possible."

About a month later, Timmy's attorney sent a letter to the Arkansas County case coordinator with a copy to Susan's attorney. This August 14th letter recited that the case had been set for a hearing on 24 October 2006 and confirmed the date.

The custody hearing was held on that date. Neither Susan nor her attorney appeared. The circuit court found that Susan was sent notice of the hearing (by way of the copy of Timmy's counsel's mid-August letter). The circuit court proceeded with the hearing, and then ruled from the bench that the best interests of the children required a change of custody to Timmy. Susan petitioned the supreme court for mandamus, arguing in part that the circuit court violated her due-process rights by holding the hearing. The court denied her petition. *Brunetti v. Honorable David G. Henry*, No. 06-1373 (Ark. January 4, 2007).

In January 2007, the circuit court entered its order changing custody to Timmy. The record discloses no reason for the court's delay in filing the order. Susan moved under Rule of Civil Procedure 60 to vacate the order. A few days later, and before the court addressed her motion, she filed a notice of appeal from the January 2007 order. The court then held a telephone conference with both parties, during which the court offered to re-open the

record to allow Susan to present evidence. The court, however, refused to vacate its January order or change custody pending a second hearing. Susan declined this opportunity and decided instead to proceed with her appeal. The circuit court later filed an order denying Susan's motion to vacate the January 2007 order.

II.

As a preliminary matter, Timmy argues that Susan did not preserve her due-process argument for appeal because she did not move for a new trial under Rule of Civil Procedure 59 within ten days after the circuit court entered its order. We disagree. Susan filed a timely motion to vacate the circuit court's judgment under Rule of Civil Procedure 60(a). The Rule states:

> To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

If, as Susan alleged, the circuit court removed her children without notice of the hearing, then a miscarriage of justice may have occurred. Her Rule 60 motion thus preserved her due-process argument for appellate review.

Susan, however, cannot press her due-process point for another reason. She did not file a notice of appeal from the denial of her motion to vacate the judgment. She did not make her due-process argument to the circuit court until she filed that motion. And the record contains no notice of appeal from the denial of that motion; it contains only a notice appealing from the January 2007 order. A notice of appeal must state the order appealed

from with specificity, and orders not mentioned in the notice of appeal are not properly before this court. *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209, 209 S.W.3d 393, 407 (2005). We therefore lack jurisdiction to review the denial of Susan's due-process-based motion to vacate the order.

This court recently carved out an exception to the general rule that no argument, including one about notice, can be raised for the first time on appeal. In *Jones v. Vowell*, 93 Ark. App. 193, __, __ S.W.3d __, __ (June 6, 2007), we held that a party could argue lack of notice of a hearing for the first time on appeal where the circuit court dismissed a case under Ark. R. Civ. P. 41(b) without first inquiring whether the absent party had notice of the hearing. *Jones* dealt with a Rule 41(b) dismissal, which requires the court to notify the parties by mail before dismissing a case. Here, the circuit court inquired about notice, was assured that Susan had been sent notice of the hearing, and made a finding about notice in its order. And this case did not involve a Rule 41(b) dismissal.

III.

We are left with one question: was the circuit court's finding that Susan was sent notice of the hearing clearly against the preponderance of the evidence? *Burkett v. Burkett*, 95 Ark. App. 314, 321, __ S.W.3d __, __ (2006). It was not.

Susan claims that she never received notice of the October 24th custody hearing. She points out that her attorney called and sent a letter to the case coordinator in early October, asking that the case be set for a hearing. That request is inconsistent with her attorney having notice of a hearing date. (The circuit court's case coordinator was on medical leave when

the letter was received, so no one saw this red flag before the hearing date.) At the custody hearing, Timmy's attorney—as an officer of the court—assured the judge that she sent Susan's attorney a copy of her August letter to the case coordinator confirming the October 24th hearing. Susan's attorney (or his staff, the record is unclear about that) told the court by telephone on the morning of the hearing that they never received the letter. The circuit court thus had before it two different versions of the events and had to make a determination about notice. The court found that Susan was mailed notice and then proceeded with the hearing. We cannot say that the circuit court's credibility-based decision about the facts on notice was clearly against the preponderance of the evidence. *Burkett*, *supra*.

IV.

Though we affirm, we are troubled by how the circuit court handled the notice of this important hearing. Our law makes provision for every circuit judge to have an administrative assistant "to perform secretarial, docketing, and management services." Ark. Code Ann. § 16-10-133(a) (Supp. 2007). The better practice, and what should have happened here, is for the administrative assistant to send notice of all hearings to all counsel (and pro se parties) and require a written confirmation that the notice was received. Following this procedure, and then filing all these papers with the circuit clerk, would avoid the uncertainties exemplified by this case. And it would make sure that notice occurs. No rule requires the circuit courts to follow this practice, though many do. We therefore ask the supreme court's committee on civil practice to consider whether to recommend a rule change to address this issue.

V.

Finally, Susan argues that this case should be transferred back to Pulaski County because it appears to her that the Arkansas County Circuit Court is partial to Timmy. The Pulaski County Circuit Court articulated specific reasons for transferring the case—both parties and their children now reside in Arkansas County. It is the more appropriate venue. The law presumes that the Arkansas County Circuit Court is impartial, and its ruling against Susan does not show bias, lack of impartiality, or the appearance of partiality. *Turner v. Northwest Arkansas Neurosurgery Clinic, P.A.*, 91 Ark. App. 290, 299–300, 210 S.W.3d 126, 134 (2005). We have examined the record, and we hold that Susan has failed to overcome the presumption of impartiality. *Ibid.*

Affirmed.

PITTMAN, C.J., concurs.

GRIFFEN, J., agrees.

PITTMAN, J., concurring. I agree with the majority's analysis and result obtained with regard to the issues presented on appeal, but I express no opinion regarding the proposal advanced in part IV.