ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA08-168

October 29 , 2008

DAVID W. STARKEY
APPELLANT

V.

CATHY F. STARKEY
APPELLEE

AN APPEAL FROM BAXTER COUNTY CIRCUIT COURT
[DR2002-426-4]

HON. GORDON WEBB, JUDGE

AFFIRMED IN PART; DISMISSED IN PART

The Baxter County Circuit Court ordered David Starkey to pay his former wife, appellee Cathy Starkey, alimony of $1700 per month until June 2012 and $7000 in attorney's fees. He appeals from the order, contending that the circuit court abused its discretion with respect to both awards. While neither of the parties raised the issue, we dismiss the portion of the appeal relating to the alimony award because appellant failed to file a timely notice of appeal on that issue. We affirm the award of attorney's fees because the award was proper given the length of the case and the economic position of the parties.

Facts

Appellee filed for separate maintenance on October 10, 2002, after more than fifteen years of marriage. Appellant counterclaimed for divorce on April 2, 2003. Soon after the counterclaim was filed the court entered a temporary order that awarded appellee $1200 per month in alimony. From the filing of the initial complaint until the entry of the September 18, 2007 order, appellee filed eight petitions for contempt of court, most of them alleging that

appellant was not paying alimony as ordered or that appellant was interfering with appellee's right to live in the marital residence.

A hearing was held on October 5, 2004, and both parties testified. Appellee, age forty-nine at the time of the hearing, testified about previous medical problems, including five ulcers in her stomach and back problems that required surgery. Appellee stated that she had not been able to find substantial work for the previous three or four years and that her only income, other than alimony, was $750 per month in social-security disability. She acknowledged that no doctor had forbidden her from working and that, and at one time, she worked for her husband's insurance agency. She stated, however, that she would work if she could. The court also heard testimony from appellee's friend, Robert Stewart, who also testified about appellee's stomach problems.

Appellant stated that he had been an insurance agent for the previous twenty-six years. According to tax forms, his business made $135,928 in 2002. In 2001, he and appellee in a joint return reported income totaling $179,300. In 2003, he and appellee reported income of $184,586. Appellant testified that over the previous five years there had been occasions where he made less than $100,000 a year, but he acknowledged that his income was significant. He opined that appellee could work, and he insinuated that appellee had an alcohol problem. When recalled to testify, appellee denied having an alcohol problem. She stated that she only drank two or three beers every three or four days.

The court also heard testimony from Stacy Krugg. She and her two children were residing with appellant at the time of the hearing. She admitted that she took trips with appellant, including a trip to Jamaica, and that appellant had given her gifts, including jewelry for Christmas and a platinum diamond ring insured for $17,000.

By decree of the circuit court, appellant was granted a divorce from appellee on December 13, 2004, but the distribution of assets remained unresolved at that time. By letter

opinion dated July 13, 2005, the court addressed several property issues. With respect to health issues and alimony, the court wrote:

> The Court has substantial problems with awarding on-going health care to Mrs. Starkey anyway. Now that the parties are divorced, this Court feels that health care is the individual responsibility of each of the parties and does not continue to be an obligation of the other spouse. To some degree, it is apparent to the Court that Mrs. Starkey's on-going health problems are as a result of her personal life-style choices and not in any way Mr. Starkey's fault. Furthermore, the Court is not entirely convinced that Mrs. Starkey cannot work. The testimony on this point came from herself and her friend, Mr. Stuart. There was no medical evidence presented and Mrs. Starkey conceded during her testimony that she had no medical finding from a doctor indicating that she could not be employed.
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> The final issue to be resolved is on-going support or alimony. Mr. Cooper makes a strong argument based on case law for Mr. Starkey having to continue to support far into the future or for the rest of Mrs. Starkey's life. He bases this primarily on an argument that Mr. Starkey is totally responsible for the breakdown of the marriage. While the Court would acknowledge that the evidence shows that Mr. Starkey may have been somewhat more responsible for leaving the marital relationship [than] Mrs. Starkey was, the Court finds it difficult to believe that it is entirely his fault. Furthermore, the Court finds it difficult to give credibility to the self-righteous tone of Mrs. Starkey's claims. The evidence shows that both parties appear to have gone on with their lives and established new relationships with persons with whom they have traveled and lived with over the period of this separation. In fact, it would appear that Mrs. Starkey has done reasonably well during the period of the separation, particularly in light of the extensive payments that the evidence shows have been made by Mr. Starkey to support her. Not only has he paid agreed upon alimony payments but also he has paid her car payments, paid the mortgage payments on the home while she was living in it, paid for repairs to various items of personal property and generally supported her to the [tune] of $4,500.00 per month throughout the period of this separation. The evidence shows that there were occasions that he fell behind on his obligations, but as of this dictation, all of those obligations have been brought up to date.
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> Considering all of the circumstances set out in the above paragraphs, the Court is going to award Mrs. Starkey on-going support in the amount of $2,000.00 per month. However, this support is awarded for the period of July 1, 2005 through June 30, 2012, a period of seven years. This should allow Mrs. Starkey sufficient income over this period of time to readjust her lifestyle and to cover her own medical insurance needs. The award is based on the Court's assessment of Mr. Starkey's income and assets and, therefore, his ability to pay as well as the fair assessment of the needs and ability to derive income on the part of Mrs. Starkey.

On October 6, 2005, the court entered an order incorporating the findings in its letter opinion, including the award of alimony. In addition, the court ordered appellant to pay

appellee's attorney's fees. Soon after the entry of the order, appellee's counsel filed an affidavit showing that appellee had $7000 in fees. At some point, appellant filed a motion for reconsideration, and appellee responded to that motion on October 11, 2005. By letter dated September 4, 2007, the court issued a second letter opinion. A page is missing from the court's four-page letter, but the portion of the letter included in the record provides in relevant part:

> The Court understands that Mr. Starkey's Motion for Reconsideration is based on his total dissatisfaction with the amount of alimony. The amount of alimony that the Court set was based on the Court's assessment of Mr. Starkey's resources and the relative lack of resources on the part of Ms. Starkey, the length of the party's marriage, the standard of living to which the parties were accustomed during the marriage, and the needs of Ms. Starkey after the marriage was over. While the Court agrees that there is no significant evidence that Ms. Starkey cannot be gainfully employed, there was also virtually no evidence of her past meaningful employment or any particular job qualification that she held. Furthermore, there was some evidence produced in court as to her physical illnesses that she suffered during the marriage and the Court is convinced that she is not likely to be in a position to embark on a significant employment career at this time. Therefore, it would appear to the Court that her need for support continues at least until she reaches the age where she can qualify for social security.
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> It is clear from the tax records and other exhibits that were introduced that Mr. Starkey enjoys a substantial income, one that afforded him the opportunity to live in a comfortable manner, both during their marriage and following their marriage, including taking trips with new friends, after their separation. Throughout the pendency of the divorce proceedings, Mr. Starkey, by agreement, was obligated to pay $1,200.00 in spousal support. He was able to do this but had to be required to do it by the filing of contempt proceedings on multiple occasions. In the end, the Court based [its] determination of the amount of alimony at $2,000.00 based upon the fact that once the divorce was finalized and the parties were completely separated, he would no longer be paying for health insurance, paying for the marital home, paying for a car and other matters on behalf of Ms. Starkey.

The page following the above is missing from the record, but in the subsequent order, entered September 18, 2007, the court modified alimony from $2000 to $1700, to be paid through June 2012. It also ordered appellant to pay $7000 in attorney's fees. Appellant filed a notice of appeal on September 24, 2007.

Jurisdiction

We begin by addressing whether we have jurisdiction. While neither party raises the issue, the issue of this court's subject-matter jurisdiction is one that we are obligated to raise on our motion. *See*, *e.g.*, *Seay v. C.A.R. Transp. Brokerage Co., Inc.*, 366 Ark. 527, 237 S.W.3d 48 (2006). The failure to file a timely notice of appeal deprives us of jurisdiction. *See*, *e.g.*, *Harold Ives Trucking Co. v. Pro Transp., Inc.*, 341 Ark. 735, 19 S.W.3d 600 (2000).

We must determine whether appellant has filed a timely notice of appeal. With exceptions not applicable to this case, we may only hear an appeal from a final order. *See* Ark. R. App. P.—Civ. 2(a)(1); *Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998). An order is not final and appealable merely because it settles the issue as a matter of law; to be final, the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Morton*, *supra*. However, matters that are collateral to the circuit court's judgment are left within the circuit court's jurisdiction even though an appeal has been docketed. *Holloway v. Riley's Oak Hill Manor, Inc.*, 84 Ark. App. 301, 139 S.W.3d 144 (2003). An award of attorney's fees is considered a collateral matter. *Id.*

Under Rule 4(a) of the Arkansas Rules of Appellate Procedure—Civil, a notice of appeal generally must be filed within thirty days from the entry of the final decree. However, Rule 4(b)(1) provides that, if a party files a motion to vacate, alter, or amend the judgment within ten days after the entry of the judgment, the time for filing the notice of appeal is extended to thirty days after the entry of the order disposing of the last motion outstanding. If the circuit court does not grant the motion within thirty days, it is deemed denied on the thirtieth day, and the notice of appeal is due within thirty days of that date. Once a motion is deemed denied by operation of law, the circuit court loses jurisdiction to decide the motion, and any order that purports to grant the post-trial motion is void and of no effect. *See Farm Bureau Mut. Ins. Co. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

Here, the October 6, 2005 order was a final order, as it resolved all of the issues

pertaining to the divorce except for the collateral issue of attorney's fees. Thus, appellant was obligated to file a notice of appeal within thirty days of that date unless he filed a motion that would operate to postpone that date. In this case, appellant filed a motion for reconsideration. While the Arkansas Rules of Civil Procedure do not formally recognize a "motion for reconsideration," the motion is regularly used in Arkansas trial practice. Generally, such motions can be viewed as a motion for judgment notwithstanding the verdict under Ark. R. Civ. P. 50, a motion for additional findings under Ark. R. Civ. P. 52, a motion for new trial under Ark. R. Civ. P. 59, or a motion to correct or modify a judgment under Ark. R. Civ. P. 60. Regardless of how the motion is viewed, appellant's notice of appeal is still untimely.

In *Guthrie v. Twin City Bank*, 51 Ark. App. 201, 913 S.W.2d 792 (1995) (per curiam), the appellant's action was dismissed by motion for summary judgment on April 13, 1994. The appellant filed a motion for reconsideration on April 25, 1994. The trial court did not deny the motion until December 5, 1994, and the notice of appeal was filed within thirty days of that date. Appellee filed a motion to dismiss. We first analyzed the motion for reconsideration as a motion for new trial. The motion for reconsideration was deemed denied no later than June 8, 1994, thirty days after an amendment to the motion was filed (citing Ark. R. App. P.—Civ. 4). Because appellant failed to file his notice of appeal within thirty days of that date, the notice of appeal was held untimely. Alternatively, we analyzed the motion for reconsideration as a motion to correct an error in the judgment under Ark. R. Civ. P. 60. In that case, the trial court lost jurisdiction to grant the motion ninety days from the filing of the April 13, 1994 order and this court did not have jurisdiction to consider the order denying the motion for reconsideration.

We have a similar problem here. While the motion for reconsideration is not in the record, we presume that it was filed within the ten-day window because appellee filed a response to the motion on October 11, 2005. Under that scenario, the motion was deemed

denied by operation of law on November 10, 2005, and the notice of appeal was due by December 10, 2005.[1] The notice of appeal was filed approximately twenty months after this date and is therefore untimely. Because we cannot acquire jurisdiction without a timely-filed notice of appeal, we are without jurisdiction to hear this case. *See Harold Ives Trucking*, *supra*.

Alternatively, if we view the motion for reconsideration as a motion under Rule 60, the circuit court lost the jurisdiction to modify the October 6, 2005 order ninety days after entry of that order. *See*, *e.g.*, *Seidenstricker Farms v. Doss*, ___ Ark. ___, ___ S.W.3d ___ (June 26, 2008); *New Holland Credit Co., LLC v. Hill*, 362 Ark. 328, 208 S.W.3d 191 (2005). The September 18, 2007 order would be one that the circuit court was without jurisdiction to enter, and the notice of appeal in this case would be from an order in which the circuit court lacked the jurisdiction to enter. Again, we lack jurisdiction to hear the merits of the appeal from the alimony award.

It is possible that the motion for reconsideration was not one of the aforementioned post-trial motions, but a petition to modify the award of alimony. Alimony can be modified upon a showing of a change in circumstances. *See*, *e.g.*, *Bettis v. Bettis*, 100 Ark. App. 295, ___ S.W.3d ____ (2007). However, we decline to so hold. Because the motion for reconsideration is absent from the record, we cannot determine whether appellant was seeking a modification or a true reconsideration of the October 6, 2005 order; however, it is more likely that appellant was seeking a true reconsideration of the issue, as he filed the motion no more than five days after entry of the order and as no additional evidence as to any changed circumstances was considered by the circuit court.

Out of the multiple ways to analyze the jurisdictional issue with respect to the alimony

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[1]If any of these dates fell on a weekend, then the due dates would shift to the following Monday. Because the notice of appeal was filed well beyond the date it was due, a precise calculation is unnecessary.

award, none of them would confer jurisdiction upon this court. Appellant either failed to file a timely notice of appeal or appealed from an order that the circuit court had no jurisdiction to enter. Regardless, we must dismiss the portion of the appeal that pertains to the alimony award.

We cannot say the same, however, about the award of attorney's fees. While the court awarded alimony in its October 6, 2005 order, it did not award attorney's fees until September 18, 2007. As previously stated, while the October 6, 2005 order was a final order, the circuit court retained jurisdiction to consider the collateral matter of attorney's fees. *See Holloway*, *supra*. The September 18, 2007 order finalized the award of attorney's fees, and appellant's notice of appeal is timely with respect to that issue. Accordingly, we consider whether the award of attorney's fees was proper.

Attorney's Fees

Appellant argues that the circuit court erred in awarding attorney's fees without considering the reasonableness of the fees. While he acknowledges that Ark. Code Ann. § 9-12-309 (Repl. 2008) authorizes an award of attorney's fees in divorce cases, he argues that the circuit court erred in not making specific findings as to whether the fee was reasonable.

A circuit court has considerable discretion in awarding attorney's fees, and we will not reverse an award absent an abuse of that discretion. *See Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). In determining whether to award attorney's fees, the court must consider the relative financial abilities of the parties. *Id.*; *see also Paulson v. Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983). The court may also consider the attorney's judgment, learning, ability, skill, experience, professional standing, the relationship between the parties and the importance of the subject matter of the case, the nature, extent and difficulties of services, the research, anticipation of defenses and means of meeting them, and receiving of confidential information and giving of confidential advice before any pleadings are filed or other visual

steps are taken. *Paulson*, *supra*.

The circuit court based its award in part due to the numerous contempt filings by appellee, necessitated by appellant's failure to make those payments until "encouraged" to do so by the threat of contempt sanctions. Further, appellee's counsel's affidavit stated that he customarily billed $125 for this type of litigation. A bill for $7000 reflects that counsel spent fifty-six hours on this case. This appears reasonable, as the case was not resolved until five years after the filing of the initial petition. Finally, the financial positions of the parties warrant the award. Appellee's disability and alimony are her sole sources of income, while appellant has a six-figure income. Given the temporal length of the case, the number of contempt filings, and the parties' relative financial positions, we hold that the circuit court did not abuse its discretion in awarding the $7000 fee.

Affirmed in part, dismissed in part.

BIRD and GLOVER, JJ., agree.