

IN THE COURT OF APPEALS OF IOWA

No. 3-094 / 11-1724
Filed April 10, 2013

**IN RE MARRIAGE OF SHANNON LEA WILSON
AND JOHN ARTHUR WILSON**

**Upon the Petition of
SHANNON LEA WILSON,**
Petitioner-Appellee,

**And Concerning
JOHN ARTHUR WILSON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis and Brad McCall, Judges.

John Arthur Wilson appeals from the decree dissolving his marriage to Shannon Wilson (Armstrong). He contends the district court erred in denying his motion for new trial. **AFFIRMED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

John Wilson, Des Moines, appellant pro se.

Michelle Mackel-Wiederanders of Iowa Legal Aid, Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

John Arthur Wilson appeals from the decree dissolving his marriage to Shannon Wilson (Armstrong). He contends the district court erred in denying his motion for new trial. Because the issue was not properly preserved for appeal, we affirm.

I. Background Facts and Proceedings

The underlying issue in this appeal was John's failure to personally appear for trial. Trial was set for two days.¹ On day one, April 27, 2011, John failed to appear due to a medical emergency. Having received verification of John's medical condition, the court decided to resume the trial the following day, stating "If we do proceed with evidence and he's unable to be present, we will provide a transcript of the relevant portions of the testimony for him to review. But we are going to proceed with this. We're going to finish this trial by tomorrow."

John remained absent when trial resumed the following morning. Despite receiving a note from the treating physician, indicating John was unable to participate in the trial, the court personally contacted the hospital to inquire about John's status before deciding to proceed. In deciding to continue without John, the court made the following record:

And just for a reviewing Court, to put that matter into perspective, this is not the first time that this person, Mr. Wilson, has failed to show up for court or has somehow suddenly become ill when it's time for court. The deputies in the courthouse, before trial was ready to start yesterday, informed me that they were prepared for Mr. Wilson in case he had another fake heart attack in the courthouse, as they have witnessed him do this several times. This is not an isolated incident.

¹ Proceedings in this case had been continued multiple times before trial.

Following this statement, Shannon was allowed to testify.² At the close of Shannon's case, the court once again expressed skepticism about the true nature of John's condition and indicated an unwillingness to provide a transcript of the proceedings. Despite John's absence from the courtroom, his counsel cross-examined Shannon.

Trial reconvened on May 3, 2011. After arriving late, John presented several pro se motions in spite of being represented by counsel.³ Following John's testimony, the court left the record open so that deposition testimony could be presented.⁴ Before concluding the day's proceedings, the court dictated the following ruling into the record:

However, I have grave concerns about these children in the meantime and about the safety of the petitioner. I'm going to issue a written order, but I'll tell you part of what that order is going to say. This court has grave concerns about the respondent. His demeanor and testimony lead the court to question whether he has had a break with reality or whether he is a pathological liar. The vast weight of the evidence, which is convincing to the Court—including the respondent's denial of abuse, his denial of having made Internet postings, his denial that he was involved in horrible mailings to others about the petitioner—lead the Court to doubt all the testimony by the respondent. In addition, the respondent was convicted of theft, although his case is on appeal. And he falsely claimed both children in his 2010 taxes. The court finds that there is a history of domestic abuse by the respondent under Iowa Code Section 598.41B(1) and 598.41(3)(j). The petitioner's testimony establishes this abuse, including choking her, hog-tying her, and

² During Shannon's testimony, the court expressed concern regarding a proposed visitation schedule in light of serious accusations that John had a history of abuse within the home.

³ John's attorney also made a motion to withdraw.

⁴ In response to significant delays in the case, the district court limited the parties' opportunity to present witnesses at trial but allowed for witness testimony to be provided by deposition.

calling her filthy names. For all the above reasons, the Court is temporarily suspending visitation.

Shannon was then granted sole temporary custody of the children. The court further suggested that John include a psychological evaluation with any additional testimony. The record was left open until May 17, 2011, to provide an opportunity for deposition testimony.

The initial ruling of the court was incorporated into a written order issued on May 5, 2011. In addition to offering various findings of fact and conclusions of law, the court reaffirmed that the record would remain open until May 17, 2011. John responded to the order by filing, through his attorney, a motion to reconsider.⁵

Soon thereafter John filed a pro se motion requesting that Judge Reis recuse herself. John accused the judge of having spoken publicly about various child custody issues and having been a party to improper ex parte communications with courthouse staff which he believed violated the Iowa Code of Judicial Conduct. Denying the allegations in the motion, Judge Reis recused herself a short time later. In the order Judge Reis acknowledged having heard a number of unsolicited comments about John's conduct and history within the courthouse. Importantly, Judge Reis refused to rescind her May 5, 2011 order.

⁵ John's attorney, at approximately the same time, filed a motion to withdraw citing a breakdown in communication with her client, as well as alleging that John had improperly filed a motion with her name on it after she had decided not to file the motion.

John then filed a pro se motion to reconsider the May 5, 2011 order, as a result of Judge Reis's recusal.⁶

The case was then specially assigned to Judge Brad McCall who set a hearing on all pending motions. The motions were denied on July 1, 2011. John filed a pro se motion to reconsider which was also denied. In so doing, the court further ordered John to pay the cost of the trial transcript.⁷

The decree of dissolution was filed on October 5, 2011.⁸ Taking notice of the fact that John had found himself in additional legal trouble since the trial, and that John was then incarcerated, the court awarded Shannon sole custody of the children, in addition to other relief.

On October 18, 2011, John filed a "Motion to Reconsider; Motion to Vacate, Recind (sic) and Strike Ruling and Decree; Motion for New Trial".⁹ John then filed his Notice of Appeal on October 20, 2011.¹⁰ The district court denied

⁶ John filed a number of additional pro se motions throughout the pendency of this case. Most notably, he filed a motion to disqualify Shannon's counsel, alleging he had previously consulted with her firm on this matter.

⁷ The court specifically noted that John had, in the past, ordered transcripts from previous hearings and failed to pay for the costs of transcription. In response, the court ordered that he pay the costs in advance, and that if he failed to do so, the court would issue the final decree without consulting a transcript.

⁸ Prior to issuing the decree of dissolution of marriage in this case, the district court entered an order, on September 21, 2011, granting all parties a period of seven additional days to provide any additional evidence, argument, or testimony they might wish the court consider. In so doing, John was provided an opportunity to present any additional evidence he believed the district court improperly excluded, failed to consider, or that he was unable to present during trial. The district court in effect gave John an opportunity to present unlimited evidence in the case and cure any problems he believes existed during trial. The order further gave John an additional opportunity to properly renew his motion for new trial. John failed to avail himself of either of these opportunities.

⁹ The certificate of service attached to the motion is dated October 14, 2011.

¹⁰ The certificate of service attached to the notice is dated October 15, 2011.

John's motions on December 22, 2012, finding that it lacked jurisdiction over the matters due to the notice of appeal.

II. Scope of Review

Dissolution of marriage decrees are generally reviewed de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012). Review of a motion for new trial, however, depends upon the grounds raised. *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). Discretionary grounds are reviewed for abuse of discretion, while legal grounds are reviewed for error at law. *Id.*

III. Discussion

John argues the district court erred in failing to grant him a new trial. Shannon responds, first, with a challenge to the court's jurisdiction over the question.¹¹

John concedes that the district court did not rule on his motion for new trial. The initial motion was not addressed in the July 1, 2011 order, and the renewed motion remained outstanding at the time of the decree.¹² John filed his

¹¹ From the outset, it should be noted that a lack of clarity flows throughout John's submissions in this matter. The notice of appeal specifically appeals only the decree of dissolution, though all of John's arguments are on a motion for a new trial, which was not addressed in the decree; however he fails to specify which motion for a new trial he takes exception with. Because John's arguments are confined exclusively to the motions for a new trial, and because Shannon has been able to adequately respond to those arguments, it is upon that basis that we will proceed.

¹² Even if the motion for new trial could be said to have been effectively denied by the entry of the decree, we note that before entry of the decree the district court entered an order permitting both parties to present any additional evidence they wished to present. This, in effect, afforded John relief akin to a new trial.

notice of appeal while the motion for new trial was pending. It is upon this basis that Shannon contends this court lacks jurisdiction.

The timing of a motion and a notice of appeal control the outcome of the question. Generally, perfection of an appeal vests jurisdiction in the appellate court and strips the trial court of jurisdiction. *IBP Inc., v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000). The trial court then loses power to consider any post-trial motions which were filed after the notice of appeal. *Id.* The question of this court's power to consider pending motions is, however, more complicated.

A motion pending before appeal is often interlocutory until ruled upon, and the appeal is considered premature. *Id.* At one time, the rules of appellate procedure required dismissal of such appeals. Today, the rules state that such cases shall not be dismissed, but rather shall be regarded as if the proper form of review had been sought. Iowa R. App. P. 6.108. Whether the appeal is granted is a jurisdictional issue. *Al-Gharib*, 604 N.W.2d at 628. When the party who filed the post-trial motion, however, is the party who appeals, the jurisdictional issues are cleared and the appeal is considered having been taken as a matter of right. *Id.* "However, in these circumstances, the appellant is deemed to have waived and abandoned the post-trial motion." *Id.*; see also *Hoelt v. Fleetguard, Inc.*, 772 N.W.2d 15, n.4 (Iowa Ct. App. 2009) ("If a party who has filed a post-trial motion appeals, the party is deemed to have waived the motion. When an appeal is filed by a party when another party's post-trial motion is pending, the appeal is considered interlocutory" (internal citations omitted)).

John filed his notice of appeal while his motion for new trial was pending. No final ruling was obtained, on either the first or second motion for new trial. The issue, therefore, was not properly preserved for appeal. See *State Farm Mut. Auto. Ins. Co. v. Pfilbsen*, 350 N.W.2d 202, 206 (Iowa 1984) (“It is well settled that a . . . motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication.”); *Peters v. Burlington Northern R. Co.*, 492 N.W.2d 399, 401–02 (Iowa 1992) (“Ordinarily, issues must be raised and decided by the trial court before they may be raised and decided on appeal.”). Having filed his notice of appeal prematurely, John waived the issue and it cannot be addressed by this court.¹³

AFFIRMED.

¹³ John’s notice of appeal addresses the decree, not a ruling on the motion for new trial. Issues in the decree would not be waived under the above analysis, however John has not presented any arguments on the decree, nor has Shannon been provided with sufficient notice to address any arguments her ex-husband might have with regard to the decree.