

RENDERED: SEPTEMBER 25, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000227-ME

TRAVIS JOHN NORMILE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON S. FLEMING, JUDGE
ACTION NO. 06-CI-00322

BOBBIE MARIE WILSON,
(FORMERLY NORMILE)

APPELLEE

OPINION
DISMISSING

** ** * * * * *

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,¹ SENIOR
JUDGE.

LAMBERT, JUDGE: Travis John Normile appeals from the Christian Circuit
Court's denial of his Kentucky Rules of Civil Procedure (CR) 59.05 motion to
alter, amend, or vacate previous orders modifying custody of the parties' children.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Bobbie Marie Wilson requests this Court to dismiss the appeal on grounds that it was not timely filed. After careful review, we agree that this appeal is untimely and thus, we hereby grant the motion to dismiss this appeal.

Travis John Normile (Normile) and Bobbie Marie Wilson (Wilson) were divorced by a final decree of dissolution of marriage entered by the Christian Circuit Court on May 31, 2006, which incorporated by reference a settlement agreement dated May 8, 2006. In the settlement agreement, the parties agreed to have joint custody of their two minor children, with Wilson being the primary physical custodian of the children and Normile having visitation every other weekend and two evenings each week.

After the divorce decree was entered, both parties re-married, and since that time there has been constant tension. Normile began filing *pro se* motions seeking additional visitation and other custody rights with the children. On or about July 11, 2006, Normile filed a motion for more definite visitation, and the parties entered into an agreed order dated August 29, 2006, which addressed some of the visitation issues. After several other subsequent motions, court-ordered counseling, and a two-day hearing in 2007, Normile filed a motion to modify custody of the minor children on January 11, 2008. He then filed a renewed motion to modify custody on February 6, 2008, and a motion to modify custody on June 3, 2008. Wilson also filed a motion to modify custody on June 6, 2008.

The final evidentiary hearing on the cross-motions to modify custody was held on July 23, 2008, and July 24, 2008. Normile assured the trial court several times that he understood the risks of proceeding without the assistance of legal counsel, despite the trial court's advice to Normile to obtain counsel. The trial court issued its ruling in a final order dated August 25, 2008, which overruled Normile's motion to modify custody and granted Wilson's motion to modify custody. The judge ordered that Wilson shall be the sole custodian and primary residential custodian of the minor children, and Normile received standard visitation and other rights outlined in the final order.

The trial court specifically found that the parties' children deserve stability and less contentious attitudes between their parents. Since the parents could not communicate or make joint decisions, the trial court concluded that it had no alternative but to modify custody to a sole custodian situation and determined that the evidence in the case strongly supported Wilson being the sole custodian of the children. The trial court issued an extremely thorough order outlining each and every statutory factor for modifying custody and addressed each factor accordingly.

Normile filed a CR 59.05 motion to alter, amend, or vacate on September 2, 2008, which addressed only the issue of the child support computation made by the trial court in the final order. Wilson filed a CR 59.05 motion to alter, amend, or vacate on September 4, 2008, which requested the trial court to make certain revisions regarding Normile's visitation with the children.

After a hearing on those motions, the trial court issued amended findings of fact, conclusions of law, and a final order on the cross-motions to modify custody on November 7, 2008. This order did not change any of the previous rulings regarding custody of the children and only addressed child support and visitation.

On November 17, 2008, Normile filed another CR 59.05 motion to alter, amend, or vacate, which again addressed only child support issues. Attached to this motion was a certificate of service that stated that a copy of the motion was served on Wilson's counsel by mail or hand delivery on November 17, 2008, however the envelope in which Normile mailed a copy of the motion to Wilson's counsel shows that it was postmarked on November 21, 2008, and was received by Wilson's counsel on November 24, 2008.

Wilson filed a motion requesting that the trial court deny the relief sought in Normile's second motion to alter, amend, or vacate because it did not comply with CR 59.05. On January 7, 2009, the court entered an order denying the November 17, 2008, motion to alter, amend, or vacate because it was not timely served in accordance with CR 59.05.

Normile filed a notice of appeal on February 4, 2009, in which he appealed from the final order entered on August 25, 2008, the amended order entered on November 7, 2008, and the order denying his second motion to alter, amend, or vacate entered on January 7, 2009. In response, Wilson filed a motion to dismiss the appeal on the ground that the notice of appeal was not timely filed in accordance with CR 73.02. By order entered April 9, 2009, this Court held that a

decision on the motion to dismiss the appeal would be passed to this panel. After careful review, we agree with Wilson and therefore dismiss the appeal.

Rule 59.05 of the Kentucky Civil Rules of Procedure (CR 59.05) mandates that a motion to alter, amend, or vacate must be *served* not later than ten days after the entry of the final judgment. (Emphasis added). In the instant case, the final amended order was entered on November 7, 2008. Since the copy of the final order was mailed to Normile, three additional days should be added to the time frame allotted in CR 59.05 pursuant to CR 6.05. Thus, Normile's motion had to be served by November 20, 2008.

“The requirements for timeliness of a motion for new trial under CR 59.02, and to alter, amend, or vacate a judgment under CR 59.05, is [sic] that they be *served* not later than ten days from the entry of the final judgment.” (Emphasis added). *Huddleston v. Murley*, 757 S.W.2d 216, 217 (Ky. App. 1988). Further, “a trial court loses control of a judgment ten (10) days after the entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made.” *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 718 (Ky. App. 1979).

Although Normile's motion to alter, amend, or vacate was filed on November 17, 2008, the date stamp on the envelope Normile used to mail a copy of the motion to Wilson's attorney indicates that it was not mailed until November 21, 2008.

Service by mail is complete upon mailing. CR 5.02, *Huddleston*, 757 S.W.2d at 217. Thus, service was not complete until Normile mailed a copy of the motion to alter, amend, or vacate to Wilson's counsel on November 21, 2008, and the motion

was not served within the ten-day period mandated under CR 59.05, even with the three-day extension permitted under CR 6.05. Accordingly, the Christian Circuit Court properly denied the motion to alter, amend, or vacate as the motion was not timely filed.

CR 73.02(1)(a) provides that a notice of appeal shall be filed within thirty days after the date of notation of service of the judgment or order under Rule 77.04(2). The running of the time for appeal is suspended only by a *timely* motion made pursuant to any of the rules enumerated therein. CR 73.02(1)(e). (Emphasis added). Normile's failure to timely serve the CR 59.05 motion to alter, amend, or vacate deems that the thirty-day period in which Normile had to file a notice of appeal from the November 7, 2008, judgment was not tolled and consequently expired well before the notice of appeal was filed on February 4, 2009. *See* CR 73.02(1)(e); *Marrs Elec. Co. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006); *Merrick v. Commonwealth*, 132 S.W.3d 220, 222 (Ky. App. 2004).

Because Normile failed to serve his CR 59.05 motion to amend, alter, or vacate within the requisite ten-day period, the thirty-day appeal period under CR 73.02 could not be tolled. Normile failed to file his appeal within thirty days of the November 7, 2008, judgment. Accordingly, the appeal is hereby dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Travis J. Normile, *Pro Se*
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Julia T. Crenshaw
Hopkinsville, Kentucky