STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1535

In re the Marriage of:
Ariel Theresa Bedner, n/k/a Ariel Theresa Wright,
Appellant,

vs.

Todd David Bedner,
Respondent.

Filed June 15, 2020
Appeal dismissed
Bratvold, Judge

Hennepin County District Court
File No. 27-FA-16-149

Ariel Wright, Stillwater, Minnesota (pro se appellant)

Bradley S. Almen, Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

S Y L L A B U S

When an appeal is taken from a nonappealable order, it may not be construed to be from an appealable order or judgment if appellant served and filed the notice of appeal after the deadline to appeal from the appealable order or judgment.

O P I N I O N

BRATVOLD, Judge

In post-decree child-custody modification proceedings between appellant Ariel Theresa Bedner n/k/a Ariel Theresa Wright and respondent Todd David Bedner, the district

court modified custody of the parties' child, granting sole legal and sole physical custody to Bedner. Wright then moved for a new trial, and the district court denied her motion as untimely. Wright appeals the order denying her motion for a new trial. We dismiss this appeal for two reasons. First, an order denying a motion for a new trial in a post-decree custody-modification proceeding is not appealable. Second, we cannot construe Wright's appeal to be from the order modifying custody because Wright served and filed her notice of appeal after the time to appeal had expired.

FACTS

The parties stipulated to a judgment dissolving their marriage in February 2016, and the judgment awarded Wright sole legal and sole physical custody of the parties' minor child. The parties later stipulated to an order granting them joint legal and joint physical custody. In March 2018, Bedner asked the district court to grant him sole legal and sole physical custody. The district court held a two-day evidentiary hearing and, by order filed June 12, 2019, granted Bedner's motion.

On June 13, 2019, Bedner electronically served (e-served) Wright with written notice of filing of the order modifying custody. On July 12, 2019, Wright tried to electronically file (e-file) a notice of motion and motion for a new trial. The e-filing system recorded Wright's attempt, stating that "[o]ne or more documents could not be processed."

On July 16, 2019, Wright successfully e-filed her new-trial motion. By order filed July 26, 2019, the district court denied Wright's motion for a new trial as untimely. The

district court noted that Wright's July 12 effort to e-file appeared to be a "failed attempt." The district court also stated that, "[r]egardless of the reason for [Wright's] failure to timely serve her motion, it was not in fact served until July 16, 2019."

Wright served and filed a notice of appeal on September 24, 2019, seeking review of the district court's order denying her motion for a new trial.

ISSUE

Does the court have jurisdiction over this appeal?

ANALYSIS

Wright's brief to this court asks us to reverse the order modifying custody, which is an appealable order. *See* Minn. R. Civ. App. P. 103.03(h). But because Wright appealed from the order denying her motion for a new trial, we question our jurisdiction. Jurisdiction "is a threshold question" that "may be raised at any time by the parties or sua sponte by the court." *Dead Lake Ass'n, Inc. v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005). "Jurisdiction refers to a court's power to hear and decide disputes." *McCullough & Sons, Inc. v. City of Vadnais Heights*, 883 N.W.2d 580, 584 (Minn. 2016) (quotation omitted). We review our appellate jurisdiction de novo. *Howard v. Svoboda*, 890 N.W.2d 111, 114 (Minn. 2017).

This court has jurisdiction over appeals that are timely served and filed from an appealable judgment or order.[1] *See Petersen v. Petersen*, 352 N.W.2d 797, 797 (Minn.

[1] The supreme court has observed that, "[w]hile the rules do not expressly state that failure to timely file is a jurisdictional defect, the 1998 advisory committee comment to rule 103.01 of the Rules of Civil Appellate Procedure provides that 'timely filing the notice of

App. 1984) (holding court of appeals lacked jurisdiction over an untimely appeal); *see also* Minn. R. Civ. App. P. 103.03 (listing appealable judgments and orders); Minn. R. Civ. App. P. 104.01, subd. 1 (providing the time for filing and service of appeal). Thus, we begin our analysis by asking whether Wright takes an appeal from an appealable order. Because we conclude that Wright's notice of appeal did not seek review of an appealable order, we consider whether we may construe Wright's appeal to be from an appealable order or judgment.

Before beginning our analysis, we recognize that "procedural rules should be construed to preserve the right to an appeal." *In re Welfare of Child of R.K.*, 901 N.W.2d 156, 161 (Minn. 2017). At bottom, the "Rules of Civil Procedure reflect a preference that actions be determined on the merits," and "are to be liberally construed so as to serve the interests of justice." *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 512 (Minn. 2006) (quotations omitted).

A. The order denying Wright's new-trial motion is not appealable.

Generally, an order denying a motion for a new trial is appealable. Minn. R. Civ. App. P. 103.03(d) (providing an appeal may be taken from an order granting or denying modification of custody). But we have held on similar facts that an order denying a

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appeal with the clerk of the appellate courts and timely service on the adverse party are the jurisdictional steps required to initiate an appeal.'" *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003). The supreme court has also stated that, in rare cases, it may take jurisdiction over an untimely appeal. *Id.* at 4. In contrast, the court of appeals has generally declined to do so. *See, e.g.*, *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. App. 1994) ("[W]e conclude that this court lacks authority to accept the untimely certiorari appeal from the county board's decision in the interests of justice."), *review denied* (Minn. Sept. 16, 1994).

new-trial motion in post-decree custody-modification proceedings is not appealable because the motion "is not authorized." *Huso v. Huso*, 465 N.W.2d 719, 721 (Minn. App. 1991). Indeed, a motion for a new trial "is an anomaly where there has been no trial, and few post-decree proceedings will constitute a 'trial.'" *Id.* (citing *Erickson v. Erickson*, 430 N.W.2d 499, 500 n.1 (Minn. App. 1988)).

The reason for this is straightforward: A motion to modify custody arises under Minn. Stat. § 518.18 (2018), which is a special proceeding. *See Angelos v. Angelos*, 367 N.W.2d 518, 520 n.2 (Minn. 1985) (defining special proceeding as "commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief"). "Generally, in special proceedings, the proper appeal is from the original order or judgment granting or denying relief," and an order denying a motion for a new trial "is not independently appealable." *Huso*, 465 N.W.2d at 721; *see also* Minn. R. Civ. App. P. 103.03(g) (allowing an appeal to be taken from a final order in a special proceeding).[2] That is the case here. Wright's new-trial motion was not authorized because

[2] *Huso* recognized an exception to this general rule about special proceedings when the legislature "has indicated that a special proceeding proceed as other civil cases." 465 N.W.2d at 721. But *Huso* concluded that the legislature did not indicate that proceedings to modify custody under Minn. Stat. § 518.18 are to proceed as other civil cases. *Id.* In doing so, *Huso* noted that the legislature has indicated that some types of special proceedings may proceed as "other civil proceedings" and, in those cases, an order denying a motion for new trial is appealable. *Id.* (citing caselaw recognizing orders denying new-trial motions are appealable for commitment and mandamus proceedings based on statutory language). After examining the statutes authorizing motions to modify custody, *Huso* held that the legislature did "not provide that these matters are to be tried or appealed as in other civil cases." *Id.*

it followed a special proceeding to modify custody under section 518.18. *See id.*[3] Thus, the order denying Wright's motion for a new trial is not appealable.[4]

B. Wright's appeal cannot be construed to be from the order modifying custody.

We may construe an appeal from a nonappealable order to be from an appealable order or judgment. *See Huso*, 465 N.W.2d at 721; *see also Contractors Edge, Inc. v. City of Mankato*, 863 N.W.2d 765, 767 n.1 (Minn. 2015) (holding appeal from a nonappealable order to be taken from an appealable judgment because appellate courts will construe "notices of appeal liberally in favor of their sufficiency"). But we cannot do so if the time to appeal from the appealable order or judgment expired before the notice of appeal was served and filed. *See Huso*, 465 N.W.2d at 721 (concluding that time to appeal from an appealable order had expired before notice of appeal was filed and dismissing appeal); *see generally T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 790 (Minn. 2009) ("[T]his court and the court of appeals have construed appeals from orders for

[3] It is well-recognized that motions for new trial are not allowed in custody-modification proceedings, as discussed by attorneys in *Minnesota Practice* and the state bar journal. *See* 14 Michael P. Boulette, *Minnesota Practice* § 5.58 (3d ed. Nov. 2019 update); Joseph Trojack, *Getting Your Appellate Ducks in a Row: Preserving Issues Subsequent to Trial*, 67 Bench & Bar of Minn., Jan. 2010, at 45.

[4] This court decided *Huso* before the supreme court amended rule 103.03 in 2000 to include Minn. R. Civ. App. P. 103.03(h), which states that appealable rulings include "an order that grants or denies modification of custody." The advisory committee comment associated with the 2000 amendment states that "[t]his change is not intended to expand appealability of otherwise unappealable orders, but rather, is meant to have the rule correctly identify these orders as appealable." Minn. R. Civ. App. P. 103.03 2000 advisory comm. cmt. Because the 2000 amendment of rule 103.03 did not make any previously nonappealable orders appealable, the amendment is not relevant to our analysis.

judgment as being taken from judgments entered pursuant to the order, where the judgment is entered before the notice of appeal is filed."). In determining whether we may construe Wright's appeal to be from the order modifying custody, we first determine the deadline to appeal from that order.

The time to appeal from an appealable order is "within 60 days after service by any party of written notice of its filing" unless a statute provides a different time. Minn. R. Civ. App. P. 104.01, subd. 1. No statute provides a different time to appeal from orders modifying custody. Some post-decision motions, however, toll the time to appeal. *See* Minn. R. Civ. App. P. 104.01, subd. 2. If a party serves and files a "proper and timely" post-decision motion, "the time for appeal of the order or judgment that is the subject of such motion runs for all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding." *Id.* Only post-decision motions of "a type specified" in rule 104.01 may toll the time to appeal. *Id.* Rule 104.01 specifies that a motion for new trial under Minn. R. Civ. P. 59 is a tolling motion. *Id.*, subd. 2(d).

Because Wright filed a new-trial motion, we consider whether her motion tolled the time to appeal. To do so, it must have been both timely and proper. *See id.*, subd. 2; *see also Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 171 (Minn. 2000) (holding time to appeal from summary judgment was tolled by appellant's motion to vacate under rule 60). To be timely, a notice of motion for a new trial must be served within 30 days after service by a party of notice of filing of the decision. Minn. R. Civ. P. 59.03. Bedner served notice of filing of the order modifying custody on June 13, 2019. Wright, however,

did not serve her motion for new trial until July 16, 2019, more than 30 days after June 13, 2019. Thus, Wright's new-trial motion was not timely.

Wright's unsuccessful attempt to e-file the new-trial motion on July 12 does not alter our analysis. "Service is complete upon completion of the electronic transmission of the document to the E-Filing System notwithstanding whether the document is subsequently rejected for filing by the court administrator." Minn. R. Gen. Prac. 14.03(e). The district court found that Wright failed in her attempt to e-file the new-trial motion on July 12 and did not e-serve Bedner until July 16. Wright does not challenge these findings on appeal and they are supported by the record.

In her brief to this court, Wright refers to a "technical 'glitch' of the E-filing system" and mentions rule 14.01(c)(1), which authorizes a district court to deem a document filed on "the date and time it was first attempted to be transmitted electronically." Minn. R. Gen. Prac. 14.01(c)(1). This rule allows a party to file a motion and show that e-filing or e-service was not completed because of, among other things, "technical problems experienced by the sending party or E-Filing System." *Id.* Relief is available "[u]pon motion." *Id.* But Wright did not move for relief under this rule in district court and we cannot decide the issue for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate courts "generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it" (quotation omitted)).

For these reasons, Wright's untimely new-trial motion did not toll the time to appeal from the order modifying custody.[5] We next consider whether Wright served and filed her notice of appeal before the deadline to appeal from the order modifying custody.

As mentioned above, Bedner e-served Wright with notice of filing of the order modifying custody on June 13, 2019. Bedner's e-service became effective upon transmission, *see* Minn. R. Gen. Prac. 14.03(e), meaning that Wright had to serve and file her notice of appeal no later than August 12, 2019. *See* Minn. R. Civ. App. P. 104.01, subd. 1. Wright, however, served and filed her notice of appeal on September 24, 2019. Thus, Wright failed to serve and file her notice of appeal before the deadline to appeal from the order modifying custody. And this court cannot extend the time to appeal. Minn. R. Civ. App. P. 126.02; *Township of Honner*, 518 N.W.2d at 641. Thus, Wright's appeal is not timely.

Before closing, we observe that Wright is a self-represented litigant and may find the appellate rules difficult to understand. While we do not know the financial circumstances of these parties, we recognize that the ability to pay for private legal counsel

[5] As a result, we need not determine whether Wright's new-trial motion was proper. The supreme court has held that "[i]n order to be 'proper,' the posttrial motion must also be 'authorized.'" *Madson*, 612 N.W.2d at 172. In *Huso*, we held that a new-trial motion is "not authorized" in post-decree modification proceedings. 465 N.W.2d at 721. But the applicability of *Huso*'s ruling for tolling motions is unclear for two reasons. First, this court decided *Huso* in 1991, before the supreme court adopted the tolling rule in 1998 amendments. *See* Minn. R. Civ. App. P. 104.01 1998 advisory comm. cmt. Second, *Madson* held that "the test for determining whether a motion is authorized, and therefore proper, is to determine whether on the face of the document the party has filed a motion that is expressly allowed under subdivision 2." 612 N.W.2d at 172. In applying this test to the appeal before it in *Madson*, the supreme court held that appellant's motion was proper because it was of a type specified in rule 104.01, subdivision 2. *Id.*

is beyond the reach of many who, therefore, have no practical alternative to representing themselves. Yet we hold self-represented litigants to the same rules and standards as attorneys. *Davis v. Danielson*, 558 N.W.2d 286, 287 (Minn. App. 1997), *review denied* (Minn. Mar. 18, 1997).

With full appreciation of the importance of the right to appeal, the supreme court sought to eliminate procedural traps when amending the appellate rules to include tolling motions. *Huntsman v. Huntsman*, 633 N.W.2d 852, 856 (Minn. 2001). But litigants must follow the appellate rules in a timely manner to avail themselves of the right to appeal. We conclude that Wright did not succumb to a procedural trap; rather, she failed to timely serve and file both her new-trial motion and her notice of appeal and has therefore forfeited her right to appeal.

D E C I S I O N

The order denying Wright's motion for a new trial is not appealable because she filed it in a post-decree modification proceeding. Because Wright attempted to appeal from the order denying her new-trial motion, we consider whether we may construe her appeal to be taken from the order modifying custody, which was appealable. But the time to appeal from the order modifying custody expired before Wright served and filed her notice of appeal, and therefore we cannot construe her appeal to be from an appealable order. Thus, we must dismiss this appeal.

Appeal dismissed.