NO. COA11-1476
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

TIMOTHY B. MCKYER,
Plaintiff,

v.

Mecklenburg County
No. 00 CVD 9237

FONTELLA D. MCKYER,
Defendant.

Appeal by defendant from order entered 21 April 2011 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 5 April 2012.

Marnite Shuford for plaintiff-appellee.

Billie R. Ellerbe for defendant-appellant.

GEER, Judge.

Defendant Fontella D. McKyer appeals from the trial court's order granting plaintiff Timothy B. McKyer's motion to set aside the trial court's two 29 May 2009 orders modifying custody of the couple's minor children. We hold that the trial court properly concluded that it lacked jurisdiction at the time it

purported to enter the 29 May 2009 orders because the custody case was on appeal to this Court. We, therefore, affirm.

Facts

This case is the latest in a series of appeals to this Court between these parties. The facts relevant to the current appeal follow. During Mr. McKyer and Ms. McKyer's marriage, they had two sons, one in 1995 and the other in 1998. The couple separated in May 2000. Mr. McKyer filed for custody of the couple's two children in June 2000. The trial court entered an order for custody, child support, and alimony on 13 April 2001 granting custody to Mr. McKyer and visitation to Ms. McKyer. The trial court revisited child custody in an order entered 2 August 2004. That order found that there had been a substantial change in circumstances affecting the welfare of the minor children and gave Ms. McKyer primary custody of the children.

Mr. McKyer filed a motion to modify custody on 10 July 2007, alleging that as a result of the granting of custody to Ms. McKyer, the older child was having academic and behavioral problems. Mr. McKyer sought sole custody of the children. Ms. McKyer denied Mr. McKyer's allegations, but included her own motion for modification of the custody order, seeking a

limitation on Mr. McKyer's visitation. The trial court held a three-day hearing on that motion on 29, 30, and 31 January 2008 and entered an order on 11 December 2008 denying Mr. McKyer's motion for modification of the child custody order. The court did not address Ms. McKyer's request for modification.

Mr. McKyer filed a notice of appeal to this Court from the 11 December 2008 order on 8 January 2009. On 23 January 2009, the trial court entered an order denying Mr. McKyer's motion for emergency custody and a temporary parenting order. Mr. McKyer filed a notice of appeal from that order as well on 4 February 2009. The record on appeal for the two appeals was filed with the Court of Appeals on 27 May 2009.

Two days later, on 29 May 2009, the trial court entered two orders further modifying the custody order. Among other provisions, the orders suspended Mr. McKyer's visitation with one of his sons, ordered that Mr. McKyer and that son attend counseling, and continued Mr. McKyer's visitation with the other son in accordance with the trial court's order of 2 August 2004. On 12 June 2009, Mr. McKyer filed two motions with the trial court pursuant to North Carolina Rules of Civil Procedure 59(a)(7), 59(a)(9), 59(e), 60(b)(4), and 60(b)(6) to set aside the trial court's orders of 29 May 2009 on the grounds that the

orders were void because the appeal in the case had deprived the trial court of jurisdiction to modify custody.

This Court issued its opinion with regard to Mr. McKyer's appeal on 2 March 2010. *McKyer v. McKyer*, 202 N.C. App. 771, 691 S.E.2d 767, 2010 WL 697336, 2010 N.C. App. LEXIS 458 (2010) (unpublished). The Supreme Court denied certiorari on 16 June 2010. *McKyer v. McKyer*, 364 N.C. 241, 698 S.E.2d 400 (2010).

On 1 November 2010, Ms. McKyer filed a motion to hold Mr. McKyer in contempt of the 29 May 2009 orders. On 15 November 2010, Mr. McKyer filed a motion to dismiss the motion for contempt on the grounds that the 29 May 2009 orders were void.

On 4 April 2011, the trial court held a hearing on Mr. McKyer's Rule 59 and Rule 60 motions, Ms. McKyer's motion for contempt, and Mr. McKyer's motion to dismiss. On 21 April 2011, *nunc pro tunc* 29 May 2009, the trial court entered an order (1) setting aside the two orders filed 29 May 2009 as void, (2) dismissing Ms. McKyer's motion for contempt filed 1 November 2010 alleging that Mr. McKyer had violated the 29 May 2009 orders, (3) clarifying that the visitation and custody rights of the parties were governed by the trial court's 2 August 2004 visitation and custody order, and (4) clarifying that Mr. McKyer's visitation rights with his son were not suspended.

Specifically, the trial court concluded:

> The two (2) May 29, 2009 orders affected visitation rights of the Plaintiff and, specifically, in suspending Plaintiff's visitation rights, both orders further modified the December 11, 2008 orders that had been appealed to the North Carolina Court of Appeals. The Court finds that for good cause shown, the two (2) orders entered on May 29, 2009 should be set aside as void for lack of jurisdiction by the district court at the time they were entered.

The court further found that since the contempt motion was based on violation of orders that had been declared void, no legal basis existed for the contempt motion. Ms. McKyer timely appealed to this Court.

Discussion

Ms. McKyer contends that the trial court abused its discretion in setting aside its 29 May 2009 orders as void. It is apparent from the trial court's 21 April 2011 findings of fact that the court determined it no longer had jurisdiction at the time it entered the 29 May 2009 orders because of Mr. McKyer's appeal.

N.C. Gen. Stat. § 1-294 (2011) provides: "When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." An appeal is perfected

when "it is actually docketed in the appellate division," and, once perfected, an appeal "relates back to the time of the giving of the notice of appeal, ***rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction***." ***Swilling v. Swilling,*** 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991) (emphasis added).

This Court pointed out in a prior appeal of this case that "[t]his Court has held, based on N.C. Gen. Stat. § 1-294, that 'once a custody order is appealed, the trial court is divested of jurisdiction over all matters ***specifically affecting custody***.'" ***McKyer v. McKyer***, 179 N.C. App. 132, 139, 632 S.E.2d 828, 832 (2006) (quoting ***Rosero v. Blake***, 150 N.C. App. 250, 252-53, 563 S.E.2d 248, 251 (2002), ***rev'd on other grounds***, 357 N.C. 193, 581 S.E.2d 41 (2003)). Here, the 11 December 2008 order on appeal addressed custody, and the 29 May 2009 orders, suspending Mr. McKyer's visitation, also specifically affected custody. ***See Clark v. Clark,*** 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978) (noting "[v]isitation privileges are but a lesser degree of custody").

Consequently, once Mr. McKyer appealed the 11 December 2008 custody order and perfected that appeal, the trial court was stripped of jurisdiction to enter any orders affecting custody, including the 29 May 2009 orders relating to visitation. Since

the trial court lacked subject matter jurisdiction to enter the 29 May 2009 orders, those orders were, as the trial court concluded, void. *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (holding that judgment is void when, among other causes, trial court lacks subject matter jurisdiction).

Ms. McKyer argues, however, that because the orders recited that they were entered *nunc pro tunc* 31 January 2008 and 21 November 2008, they in fact predated Mr. McKyer's notice of appeal and, therefore, were not void. Ms. McKyer cites no authority justifying the use of *nunc pro tunc* under the circumstances of this case and no authority suggesting that the trial court's entry of an order labeled *nunc pro tunc*, without more, avoids the jurisdictional bar of N.C. Gen. Stat. § 1-294.

Almost every order entered in this case is labeled *nunc pro tunc*. Such routine use disregards the fact that

> "[a] nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court[']s record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However,

> a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done."

Rockingham Cnty. DSS v. Tate, 202 N.C. App. 747, 752, 689 S.E.2d 913, 917 (2010) (quoting *Walton v. N.C. State Treasurer*, 176 N.C. App. 273, 276, 625 S.E.2d 883, 885 (2006)) (holding that order was not properly entered *nunc pro tunc* when there was no previous written memorandum signed by trial court setting forth terms of order and no order was dictated into record at time of hearing).

Ms. McKyer also asserts that "the trial court committed reversible error by granting plaintiff's motion to set aside the 29 May 2009 order suspending the plaintiff's visitation on 04 April 2011 because of the plaintiff's criminal indictment for violation of the 29 May 2009 order in Union County." (Capital letters and bolding omitted). Mr. McKyer was arrested in Union County (evidently with the assistance of Ms. McKyer) for violation of the May 2009 orders.

Ms. McKyer argues that the trial court actually granted the Rule 60 motion because the court was upset with Ms. McKyer's having caused Mr. McKyer to be arrested and, therefore, abused its discretion. Because the trial court properly concluded as a question of law, which we review de novo, that it lacked subject

matter jurisdiction when entering the 29 May 2009 orders, this argument is beside the point.

Regardless, the record contains no evidence of the statements of the trial court relied upon by Ms. McKyer and, not surprisingly, Mr. McKyer has provided a very different description of the conversation.[1] As this Court has previously observed, "[w]ithout evidence in the record of error by a trial judge, the appellate court is not required to and should not assume error on the part of the trial judge." *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 430, 610 S.E.2d 237, 239 (2005). Consequently, we affirm the trial court's order.

Affirmed.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).

[1]We are troubled by Ms. McKyer's counsel's use of quotation marks around purported statements for which there is no record evidence. On the other hand, we are equally troubled by Mr. McKyer's counsel's decision to include in the appendix to appellee's brief materials that are not part of the record and were not presented to the trial court. Both of the attorneys have ignored the Rules of Appellate Procedure when it suited them.