COURT OF APPEALS OF VIRGINIA

UNPUBLISHED

Present: Judges Elder, Alston and Senior Judge Willis

SARAH CAITLIN ANDERSON

v. Record No. 2187-12-4

AARON ANDERSON

MEMORANDUM OPINION*
PER CURIAM
MARCH 12, 2013

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
R. Terrence Ney, Judge

(Jonathan A. Nelson; Day & Johns, PLLC, on brief), for appellant.

No brief for appellee.

Sarah Caitlin Anderson, mother, appeals the trial court's decision awarding primary physical custody of the parties' minor child to Aaron Anderson, father, and ordering that the child shall attend school in Prince William County. On appeal, mother argues the trial court erred in modifying the parties' custody agreement in violation of her due process rights where the only matter before the trial court was mother's motion for a determination as to where the child would attend school. Upon reviewing the record and brief of mother, we conclude that this appeal is without merit. Accordingly, we summarily affirm the decision of the trial court. Rule 5A:27.

The parties were divorced by final decree entered on September 15, 2011. They had one child during the marriage. On August 10, 2011, the trial court entered a custody order reflecting the parties' agreement concerning custody and visitation arrangements for the child. The parties agreed to have joint legal custody and shared physical custody of the child, who was then of pre-school age. The parties each had physical custody of the child on alternate weeks. The custody order

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

further provided that if the parties could not agree on where the child would attend school, then either party could submit the issue to the trial court to make such a determination.

On July 17, 2012, prior to the start of the child's kindergarten year, mother filed, *pro se*, a "Motion to Decide School Placement." At that time, mother resided in Fairfax County and father resided in Prince William County. The trial court held a hearing on the matter on August 21, 2012 and heard evidence from both parties. At the conclusion of the hearing, the trial court modified the parties' child custody arrangement and ordered that father would have primary physical custody of the child and that the child would attend school in Prince William County.

On August 30, 2012, mother, by counsel, filed a "Motion to Reconsider," requesting that the trial court reconsider its ruling of August 21, 2012. In this motion, mother asserted that in her "Motion to Decide School Placement," she had only requested the trial court to render a decision as to where the child would attend school. Mother contended that if she had known custody would be at issue at the August 21, 2012 hearing, she would have made significantly different preparations for the hearing. She averred she lacked notice that the trial court would consider custody at the August 21, 2012 hearing. Mother asked the trial court to enter an order addressing only the school placement or, in the alternative, stay its order as to the modification of custody and set a trial date for a full custody hearing.

Under Rule 1:1, a trial court is divested of jurisdiction over a matter twenty-one days after the entry of a final order unless within the twenty-one-day period it enters an order modifying, suspending or vacating the final order. Rule 1:1. Mother's "Motion to Reconsider" was filed within twenty-one days of the entry of the August 21, 2012 final judgment order. However, prior to the expiration of the twenty-one-day period, the trial court did not vacate, modify or suspend its judgment in order to retain jurisdiction. In School Bd. of Lynchburg v. Caudill Rowlett Scott, Inc., 237 Va. 550, 379 S.E.2d 319 (1989), the Supreme Court of Virginia held:

> Neither the filing of post-trial or post-judgment motions, nor the court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the 21-day period prescribed by Rule 1:1 . . . . The running of time under [Rule 1:1] may be interrupted only by the entry, within the 21-day period after final judgment, of an order suspending or vacating the final order.

Id. at 556, 379 S.E.2d at 323. See In re Commonwealth Dep't of Corrections, 222 Va. 454, 464, 281 S.E.2d 857, 862-63 (1981) ("[U]nless an order vacating or modifying a final judgment is entered before the expiration of 21 days, the final judgment is no longer under the control of the trial court.").

Accordingly, in this case, the trial court, pursuant to Rule 1:1, was divested of jurisdiction after September 11, 2012. However, on September 12, 2012, twenty-two days after entry of the August 21, 2012 order, the trial court entered an order denying mother's "Motion to Reconsider." Once the twenty-one-day period of Rule 1:1 has expired without an intervening order tolling the running of the time period, every action taken by a court thereafter to alter or vacate the final order is a nullity unless one of the limited exceptions to the preclusive effect of Rule 1:1 applies. Vokes v. Vokes, 28 Va. App. 349, 357-58, 504 S.E.2d 865, 869 (1998). No exception to Rule 1:1 is applicable here. Therefore, the trial court lacked jurisdiction to enter the September 12, 2012 order.

We note that mother's notice of appeal states she is appealing both the September 12, 2012 order denying her "Motion to Reconsider" and the August 21, 2012 final order in the case. As addressed above, mother failed to obtain a timely ruling from the trial court concerning her "Motion to Reconsider." The record reflects that the only time the issue raised on appeal was presented to the trial court was in the "Motion to Reconsider."[1] Because the trial court lacked jurisdiction to consider that motion after the twenty-one-day period expired, its ruling on the motion was a nullity

[1] Mother did not present to the trial court the argument she raises on appeal at either the August 21, 2012 hearing or on the August 21, 2012 final order which she signed. See Rule 5A:18.

and review by this Court is barred on the issue flowing from its denial of the motion. See Lewis v. Commonwealth, 18 Va. App. 5, 9, 441 S.E.2d 47, 49 (1994).

For these reasons, we summarily affirm the decision of the trial court. Rule 5A:27.

Affirmed.