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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LETICIA V., Petitioner and Appellant, v. JONATHAN A., Respondent.	B233650 (Los Angeles County Super. Ct. No. VF007381)

APPEAL from an order of the Superior Court of Los Angeles County, Brian Gasdia, Judge. Appeal dismissed.

David S. Karton for Petitioner and Appellant.

Bruce Adelstein for Respondent.

Appellant Leticia V. appeals from the order denying her motion to reconsider: (1) an order denying a motion to vacate a stipulation she was not married to respondent Jonathan A.; and (2) a request for attorney's fees. As will be discussed, this court does not have jurisdiction to reach the merits of the issues on appeal because appellant is appealing from a non-appealable order. Accordingly, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Background

In 2004, appellant and respondent participated in a wedding ceremony in Dana Point, California. The couple obtained their marriage license in California in October, and held a ceremony in November. Only the officiating deacon signed the license; no witness at the wedding signed the document. They also failed to include the month, day, year, city or town, or country of the ceremony. On December 27, 2004, the Los Angeles County Recorder sent both parties a notice the license had not been recorded and was expiring soon. However, the marriage license was never returned and never recorded with the County Recorder.

In August 18, 2005, the parties applied for a second marriage license which they did not complete or return, and for which they did not participate in a second marriage ceremony. The parties had a child in August 2005.

The Stipulation

After disputes arose over where the couple would live and raise their child, both parties filed for dissolution of the marriage in 2007. Respondent filed for marital dissolution in Illinois, and appellant filed for dissolution in Los Angeles County. Appellant also filed a paternity action in the Los Angeles County Superior Court.

In 2008 the parties entered into a stipulation stating they were never married. The parties also agreed to dismiss their respective dissolution actions with prejudice. Pursuant to the stipulations and the request of the parties, the court in California and the court in Illinois dismissed the dissolution actions with prejudice. The paternity case remained open.

Motion to Vacate and First Motion for Reconsideration and Appeal

On February 3, 2010, two years later, appellant filed a motion to vacate the stipulation and the order of dismissal. Appellant argued that the stipulation was either void or voidable as against public policy because as a matter of law the parties could not stipulate to the legal conclusion that they were never married. After oral argument, the trial court took the motion under submission.

On April 28, 2010, the trial court denied appellant's motion to vacate the stipulation. In denying the motion, the trial court cited Family Code section 306 and *Estate of DePasse* (2002) 97 Cal.App.4th 92, in its "Statement of Decision," finding a marriage must be licensed and solemnized, with the license authenticated and returned to the county reporter. The trial court further noted that while the failure of a *nonparty* to comply with these requirements will not make the marriage void, the failure of the *parties* to the marriage will.

On May 10, 2010, appellant filed a motion for the trial court to reconsider its April 28, 2010 order. Appellant argued that the legal authority the court had relied upon to deny the order to vacate was inapplicable. At a hearing on July 20, 2010, the trial court clarified that its earlier "Statement of Decision" had been a tentative ruling. Nonetheless, the court reaffirmed its prior decision.

On September 15, 2010, appellant filed a notice of appeal from the trial court's July 20, 2010 order. This Court sent appellant a letter informing her that an order denying a motion for reconsideration was not an appealable order. On October 13, 2010, appellant abandoned her appeal.

Request for Attorney's Fees

During the 2007-2010 time period, the parties engaged in litigation regarding paternity, child support and custody issues. Appellant sought attorney's fees from respondent in connection with these matters. Specifically in September 2009, appellant was awarded $150,000 pendent lite attorney's fees. Thereafter, respondent sought to reduce or reschedule the attorney's fee payment. In June 2010, the court denied the request. Thereafter appellant filed a supplemental request for attorney's fees seeking

$350,000 in fees. On September 20, 2010 the trial court heard arguments and received respondent's income and expense declaration to determine the need for attorney's fees, their basis, the amount sought, and the necessity of the award.

On November 4, 2010, the court awarded appellant an additional $45,000 in fees.[1]

Appellant's February 2011 Motion

On February 3, 2011, appellant filed a motion in the trial court to "vacate prior denial of motion to vacate stipulation . . . ." Specifically, the motion requested that the court "review and/or reconsider" the April 28, 2010 order denying the motion to vacate the stipulation that the parties were never married, and the May 10, 2010 motion (which sought reconsideration of the April 28, 2010 decision) based on *In re Marriage of Cantarella* (2011) 191 Cal.App.4th 916. Appellant argued that *Cantarella* constituted new law regarding the legal requirements for a valid marriage. In support of her request appellant relied on Code of Civil Procedure section 1008.

Appellant's February 3, 2011 motion also sought reconsideration of the November 4, 2010 attorney's order: "[t]he Court is requested to explain more fully, in response to [appellant's] more detailed presentation below, the basis and scope of the Court's fee award of $45,000, as set forth in its 'Ruling On Submitted Matter,' entered November 4, 2010." In addition, appellant asked the court to reconsider the amount of the award and to increase the amount to $340,000 based on the evidence presented in connection with the original request.[2] In support of its motion for reconsideration of the attorney's fee order, appellant cited to Code of Civil Procedure section 1008, and in the alternative to *In*

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[1] In the November 4, 2010 order the trial court also ruled on a pending Order to Show Cause and respondent's motion to compel discovery responses and appellant's request for sanctions against respondent.

[2] Appellant also asked the court to reconsider the aspect of the November 4, 2010 order that concerned the motion to compel and her request for sanctions against respondent in connection with the motion to compel. These matters are not before us on appeal.

re Marriage of Hobdy (2004) 123 Cal.App.4th 360 [holding that Code of Civil Procedure section 1008 does not apply to renewed fee requests brought under Family Code section 2030]. In response to respondent's argument that appellant had not provided a new income and expense declaration or complied with the rules of court to support a new or renewed fee request under Family Code section 2030, appellant clarified that she had not filed a new fee request, but instead that she had simply asked the trial court to clarify, and/or review the "prior fee request. If the Court chooses to do as Leticia has requested, no further evidence (such as a 'new' Income and Expense . . . Declaration) would be proper."

During the hearing on the motion, the trial court acknowledged *Cantarella* constituted new law. Nonetheless, in the July 29, 2011 order, the trial court denied the motion, ruling that *DePasse* and not *Cantarella* controlled. The court also rejected appellant's arguments concerning the attorney's fees request and denied appellant additional fees.

Appellant timely filed an appeal of the July 29, 2011 order.

DISCUSSION

Appellant's appeal centers on two issues: (1) whether the trial court properly denied her motion to reconsider the order denying the motion to vacate the stipulation; and (2) whether the trial court properly denied her requests for attorney's fees. We address these matters in turn.

I. **Reconsideration of the Motion to Vacate Stipulation**

Code of Civil Procedure section 904.1 governs appealablity of orders and judgments. (Code Civ. Proc., § 904.1.)[3] Respondent contends that this court does not

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[3] Code of Civil Procedure section 904.1 provides, in relevant part:

"(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

"(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.

have jurisdiction to decide the merits of this appeal because the July 29, 2011 order is not an appealable order under Code of Civil Procedure section 904.1. According to respondent, under prevailing case law trial court orders denying reconsideration brought under Code of Civil Procedure 1008[4] are not appealable under any circumstance.

In general an order denying a motion for reconsideration is not appealable, even when the motion is based on new facts or law. In *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577, our colleagues in the Court of Appeal, Fourth District observed: "The majority of courts addressing the issue have concluded an order denying a motion for reconsideration is not appealable, even when based on new facts or law. [Citations.] 'These courts have concluded that orders denying reconsideration are not appealable because 'Section 904.1 of the Code of Civil Procedure does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for

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"(2) From an order made after a judgment made appealable by paragraph (1).

". . . .

"(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

". . . .

"(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)."

[4] Code of Civil Procedure section 1008 provides in part: "(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. [¶] (b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion."

every appealable decision and promote the manipulation of the time allowed for an appeal.' [Citation.]" (*Powell v. County of Orange, supra*, 197 Cal.App.4th at pp. 1576-1577.) Indeed, Division Two of the First District Court of Appeal adhered to this view in *Crotty v. Trader* (1996) 50 Cal.App.4th 765. There, the court concluded reconsideration orders are non-appealable because otherwise a "party would have two appeals from the same decision." (*Id.* at p. 769.) We agree and conclude "an order denying a motion for reconsideration is not appealable, even when based on new facts or law." (*Powell v. County of Orange, supra,* 197 Cal.App.4th at p. 1576.)

Moreover, in *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, the appellate court concluded that reconsideration orders on motions filed pursuant to section 1008, subdivision (b), like those filed pursuant to section 1008, subdivision (a), are nonappealable. The court stated: "As indicated by the text of section 1008, motions for reconsideration under section 1008, subdivision (a), and renewed motions under section 1008, subdivision (b) are closely related. [Citation.] A party filing either a motion under section 1008, subdivision (a) or (b) is seeking a new result in the trial court based upon 'new or different facts, circumstances, or law.' [Citation.]" (*Tate v. Williams, supra,* 184 Cal.App.4th at pp. 159-160.) The court further stated the policy underlying the rule that orders denying motions for reconsideration under section 1008, subdivision (a) are non-appealable—i.e., "to eliminate the possibilities that (1) a nonappealable order or judgment would be made appealable, (2) a party would have two appeals from the same decision, and (3) a party would obtain an unwarranted extension of time to appeal – apply with equal force to an order denying a renewed motion pursuant to section 1008, subdivision (b)." (*Id.* at p. 160.) "Indeed," the court noted, "the possibility that a party may obtain an unwarranted extension of time to appeal is actually more of a concern with respect to a renewed motion under section 1008, subdivision (b), in light of the fact that such a motion may be brought at any time, while a motion for reconsideration [under subdivision (a)] must be brought 'within 10 days after service upon the party of written notice of entry of the [underlying] order.' [Citation.]" (*Ibid*.) We agree with the rationale expressed in the *Tate* decision and adopt it here.

Here although labeled as a motion to "vacate prior denial of motion to vacate stipulation based on new case," appellant sought "review and/or reconsider[tion]" of the April 28, 2010 order denying of the motion to vacate the stipulation that the parties were never married, and (2) the May 10, 2010 motion to review and reconsider the April 28, 2010 decision. Appellant cited Code of Civil Procedure section 1008 as the legal basis to reconsider these orders. In view of these circumstances, and based on the authorities discussed above, we conclude the trial court's order denying appellant's motion filed pursuant to section 1008 (whether characterized a motion for reconsideration under subdivision (a) or a renewed motion under subdivision (b)[5]) is a nonappealable order. Accordingly, we lack jurisdiction to address the merits and must dismiss the appeal.[6]

In reaching this conclusion we reject appellant's argument that we should reach the merits of the motion because the lower court considered them. The court in *Tate* considered this same argument: "[w]e also reject [appellant's] argument that because the trial court considered his renewed motion on the merits, '[t]his created an appealable order in and of itself, regardless of whether an order on a motion to renew is appealable.' The fact that the trial court considered the matter on the merits does not establish that this court has appellate jurisdiction over [appellant's] appeal." We agree with this analysis.[7] Consequently, we must dismiss the appeal from the order denying the February 3, 2011 motion to vacate the stipulation.

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[5] Technically, appellant's February 3, 2011 motion constituted a "renewed" motion for reconsideration because appellant had in her May 10, 2010 motion previously sought reconsideration of the April 28, 2010 order.

[6] In view of our conclusion, we deny respondent's motion to dismiss as moot.

[7] Likewise appellant's belated efforts asserted in passing in her opposition to respondent's motion to dismiss to have this court treat her appeal as a "writ petition" are unavailing; appellant has not made a compelling argument as to why this court should treat this appeal as a "writ petition."

II. Reconsideration of Attorney's Fees Order

Respondent also asserts that appellant cannot maintain her appeal of the attorney's fees order. Respondent argues that the order denying fees was a denial of a motion for reconsideration of the November 4, 2010 order. Before this court, appellant responds that her February 3, 2011 motion for attorney's fees was not a motion for reconsideration of the prior fees order. Instead, she argues that it was an entirely separate and new motion, which is appealable under *In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360 (*Hobdy*). Under the circumstances of this case, respondent has the better argument.

Family Code section 2030, subdivision (a)(1) provides that "the court shall ensure that each party has access to legal representation to preserve each party's rights" by ordering one party to pay to the other party, "whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." Subdivision (c) of Family Code section 2030 provides, "The court shall augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded." A party may move for "a temporary order making, augmenting, or modifying an award of attorney's fees, including a reasonable retainer to hire an attorney, or costs or both" under Family Code section 2031, subdivision (a)(1). Family Code section 2031, subdivision (b)(1) allows such a motion to be made orally, without notice, "[a]t the time of the hearing of the cause on the merits."

It is clear from the statutory language that a party may bring more than one motion for attorney fees under Family Code sections 2030 and 2031. Family Code section 2031 refers to temporary orders "augmenting, or modifying" an attorney fees award, and Family Code section 2030, subdivision (c) provides that the court may augment or modify the original award "as may be reasonably necessary." What is reasonably necessary at one point may be different than what becomes reasonably necessary as the litigation progresses. Thus, the clear intent of these provisions is that a party is not limited to but one motion for fees.

In *Hobdy, supra*, 123 Cal.App.4th 360, the trial court granted the wife's second motion under Family Code section 2030 after denying the first. On appeal, the husband argued that the trial court did not have jurisdiction to rule on the second motion as it was a motion for reconsideration that did not conform to the jurisdictional requirements for reconsideration motions found in Code of Civil Procedure section 1008. (*Id.* at p. 364.) The appellate court rejected the argument, holding that Family Code section 2030 prevailed over the more general statute so that subsequent fee motions need not comply with Code of Civil Procedure section 1008. *Hobdy* did not hold that need-based attorney fees motions can never be construed as motions for reconsideration.

It is generally true that an order pertaining to a request for pendente lite attorney fees "possesses the essential elements of a final judgment," which is appealable under Code of Civil Procedure section 904.1, subdivision (a). (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) On the other hand, as discussed elsewhere here, an order denying a motion for reconsideration is not appealable.

Since Family Code section 2030 allows the court to augment or modify an order for fees as "reasonably necessary," a renewed motion seeking fees that have become reasonably necessary would not, strictly speaking, be a motion for reconsideration of a prior order so that the court's ruling as to it would be appealable for the reasons described in *In re Marriage of Skelley, supra,* 18 Cal.3d at page 368. But where a party reasserts a prior motion, under the same circumstances, merely because she is unhappy with the court's original order, the motion is, in substance and effect, a request that the court reconsider its prior ruling. (See *City & County of S.F. v. Muller* (1960) 177 Cal.App.2d 600, 603 ["The nature of a motion is determined by the nature of the relief sought, not by the label attached to it"].) Even if *Hobdy* is correct that Code of Civil Procedure section 1008 does not deprive the trial court of jurisdiction to rule upon such a motion, where the trial court refuses to reconsider and change its prior decision, the court's order is still an order denying a motion for reconsideration. Allowing the litigant to appeal the ruling would give her two appeals from the same order.

Appellant's February 3, 2011 motion for attorney fees was brought asserting the same circumstances to those under which she made the prior motion, asking the court, in effect, "to reconsider the matter and modify, amend, or revoke" the November 4, 2011 order. (Code Civ. Proc., § 1008, subd. (a).) The February 3, 2011 motion was not different from the prior motion. It was not triggered by the occurrence of a different proceeding. In fact when respondent asserted that appellant could not seek additional fees in the February 3, 2011 motion because she had not prepared the required income and expense declaration or complied with the rules of court for a fee request, appellant responded that she was not required to do so because it was not a new request for fees—the court could consider the motion based on the facts in the record at the time of the prior ruling. This argument is self-defeating because it demonstrates that, in substance, the February 3, 2011 motion for attorney fees, was a motion for reconsideration of the November 4, 2010 order. Appellant had an opportunity to appeal from that original fee order but did not do so. If the trial court's July 29, 2011 order denying the February 3, 2011 motion were appealable, appellant would, in effect, have two opportunities to appeal from the same order. We conclude, therefore, that the trial court's denial of the February 3, 2011 motion was the denial of a motion for reconsideration and is not appealable.

DISPOSITION

The appeal is dismissed. Respondent is awarded costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**