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JACQUELINE CRAWFORD, APPELLEE AND CROSS-APPELLANT, V. SAMUEL CRAWFORD, APPELLANT AND CROSS-APPELLEE.

794 N.W.2d 198

Filed February 22, 2011. Nos. A-09-652, A-09-754.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Pleadings: Judgments: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912(3) (Reissue 2008), a motion to alter or amend timely filed terminates the running of the time for filing a notice of appeal as to all parties.
5. **Pleadings: Judgments: Time.** Neb. Rev. Stat. § 25-1329 (Reissue 2008) provides for the filing of a motion to alter or amend no later than 10 days after the entry of the judgment.
6. **Pleadings: Judgments: Time: Appeal and Error.** A district court's order substantively altering a prior decree creates a new judgment and Neb. Rev. Stat. § 25-1329 (Reissue 2008) provides the parties with a statutory right to timely seek alteration or amendment of that new judgment and that a timely filed motion to alter or amend tolls the time for filing a notice of appeal until 30 days after the motion to alter or amend is disposed of.

Appeals from the District Court for Douglas County: W. MARK ASHFORD, Judge. Appeals dismissed.

David L. Herzog, of Herzog & Herzog, P.C., for appellant.

Virginia A. Albers and Jesse S. Krause, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Samuel Crawford appeals from an amended decree dissolving his marriage to Jacqueline Crawford. We do not reach the merits of Samuel's appeals, because we conclude that

Samuel filed a timely motion for new trial after the district court for Douglas County, Nebraska, entered the amended decree of dissolution and that the motion for new trial was not yet disposed of at the time Samuel brought the present appeals. Accordingly, we dismiss these appeals for lack of jurisdiction.

II. BACKGROUND

The relevant factual background of this case, for purposes of these appeals and our disposition, is limited to procedural history. Samuel has actually brought two separate appeals in this dissolution of marriage proceeding, and the two appeals have been consolidated.

1. Appeal No. A-09-652

On May 4, 2009, the district court for Douglas County signed a decree dissolving the parties' marriage, although the decree was not file stamped until May 6. On May 5, Samuel filed a motion for new trial in which Samuel challenged, among other matters, the court's findings and award regarding an equalization payment, the court's findings and award regarding pensions of the parties, and the court's findings and award regarding a parcel of real property. On June 1, a docket entry was made, but no signed order was filed, in which the district court purported to deny the motion for new trial.

On June 26, 2009, the district court entered an order denying Samuel's motion for new trial, except that the court indicated that the original decree would be modified with regard to the parties' pensions. Also on June 26, the court entered an amended decree of dissolution of marriage, in which the court amended the original decree with regard to the parties' pensions.

In addition to the two orders entered by the district court on June 26, 2009, Samuel made three filings on June 26. Samuel first filed a motion to vacate the June 1 docket entry; the record presented to us does not reveal whether the motion was ever ruled on. Samuel filed a motion for new trial, in which he "cite[d] each and every grounds, assignment of error

and paragraph in his [May 5] Motion for New Trial," as well as challenging the court's failure to provide adequate notice of the June 1 docket entry and the court's failure to enter the amended decree prior to adjudicating the May 5 motion for new trial. Samuel also filed a notice of appeal, purporting to appeal from the court's order of June 1. According to the file stamps on the June 26 motion for new trial and the June 26 notice of appeal, both were filed at 3:36 p.m., and it is not apparent from the record presented to us which was actually filed first.

2. Appeal No. A-09-754

On June 30, 2009, Samuel filed another motion to vacate, this time seeking to have the district court vacate both the original decree and the amended decree. Samuel again asserted that vacation was appropriate, because of the timing of the court's orders amending the decree and denying the motion for new trial, and also asserted that fraud on the part of Jacqueline concerning the parcel of real property referenced in the first motion for new trial required vacation of the decrees. The record presented to us does not include any ruling on this motion to vacate.

On July 23, 2009, Samuel filed a second notice of appeal. In the notice of appeal, Samuel asserts that "[t]he Trial Court refused to rule on the Second Motion for New Trial . . . . Hence, this appeal."

3. Appellate History

As noted, the two separately docketed appeals in this case have been consolidated. On February 1, 2010, Jacqueline filed a motion seeking summary dismissal of the consolidated appeals pursuant to Neb. Ct. R. App. P. § 2-107(B)(1) (rev. 2008). Jacqueline asserted that the district court's failure to rule on Samuel's June 26, 2009, motion for new trial, as well as the court's failure to rule on Samuel's motions to vacate, demonstrated that the district court had not yet entered an appealable, final order in the case. We denied the motion for summary dismissal to address the jurisdictional issues at oral argument and in this opinion.

III. ANALYSIS

The issue we address in this opinion is the issue of jurisdiction. Specifically, we address the impact that Samuel's motion for new trial filed after the district court entered an amended decree of dissolution of marriage had on the time for Samuel to properly file his notices of appeal and the impact of the district court's having not yet entered a final order ruling on Samuel's second motion for new trial. We conclude that the second motion for new trial is properly considered a motion which tolls the time to perfect an appeal, that the proper time for filing a notice of appeal is within 30 days after the lower court's ruling on the tolling motion, and that the lower court's having not yet entered a final order ruling on the tolling motion precludes this court from having jurisdiction over these consolidated appeals.

[1-3] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court. *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009). Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.*; *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Gebhardt v. Gebhardt, supra*.

[4] Prior to April 16, 2004, the law in Nebraska had been firmly established to be that successive motions for new trial in a single case did not extend the time in which to appeal a judgment. See *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994). April 16, 2004, however, was the operative date of the statute providing for the filing of a motion to alter or amend, Neb. Rev. Stat. § 25-1329 (Reissue 2008), which provides for the filing of a motion seeking substantive alteration of the judgment no later than 10 days after the entry of the judgment. See *Gebhardt v. Gebhardt, supra*. Under Neb. Rev. Stat. § 25-1912(3) (Reissue 2008), such a motion timely filed

terminates the running of the time for filing a notice of appeal as to all parties. See *Gebhardt v. Gebhardt, supra*.

In *Mason v. Cannon, supra*, the Nebraska Supreme Court addressed a procedural situation wherein a case was dismissed for want of prosecution. The plaintiff did not appeal the dismissal to the appellate courts, but, rather, filed a motion to vacate the order of dismissal. The motion to vacate was overruled. The plaintiff again did not appeal to the appellate courts, but, rather, filed a motion for new trial in the district court. On appeal, the Nebraska Supreme Court held that the initial motion to vacate was the equivalent of a motion for new trial and tolled the time to appeal the district court's dismissal order. However, the district court's order denying the motion to vacate was a final order, and the successive motion for new trial did not extend the appeal time. As a result, the plaintiff's notice of appeal filed after the district court denied her successive motion for new trial was considered untimely and the appeal was dismissed.

In *Gebhardt v. Gebhardt, supra*, this court addressed the effect of § 25-1329 on the timeliness of notices of appeal and also addressed the effect on appeal times of the trial court's responding to a motion to alter or amend by entering a new judgment that substantively alters the initial judgment. In *Gebhardt*, the district court entered a decree dissolving the parties' marriage. The wife then filed a motion for new trial, in which she raised issues with respect to property division, alimony, and attorney fees. In response, the district court entered an order denying the motion for new trial, but modifying the initial decree solely with respect to property division. The husband then filed a motion to alter or amend the order modifying the initial decree, in which he challenged only the effect of the court's amendment with respect to property division. In response, the district court entered an order modifying its prior order modifying the decree solely with respect to property division. The wife then filed another motion to alter or amend, which was denied by the district court.

On appeal, this court first noted the distinctions between the factual scenario in *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008), and the factual scenario in *Mason v.*

Cannon, supra. First, *Mason* did not involve a motion to alter or amend, because it predated the operative date of § 25-1329. More important, the trial court in *Mason* took no action which altered or changed the judgment between the filing of the two motions for new trial filed by the plaintiff. As such, the successive motion for new trial did not seek substantive alteration of any new judgment entered subsequent to the filing of the first motion for new trial.

[5] This court concluded that the appeal in *Gebhardt v. Gebhardt, supra*, was timely. In so doing, this court emphasized that § 25-1329 provides for the filing of a motion to alter or amend no later than "'ten days after the entry of the judgment.'" 16 Neb. App. at 570, 746 N.W.2d at 712. We noted that the trial court in *Gebhardt* had, in response to the wife's first motion for new trial, entered an order substantively altering the initial decree of dissolution of marriage; this resulted in a "'new judgment'" giving rise to the statutory right in § 25-1329 to seek an alteration or amendment within 10 days. 16 Neb. App. at 572, 746 N.W.2d at 713. This court concluded that the husband's motion to alter or amend the new judgment was a tolling motion which had to be disposed of before the 30 days in which to appeal to this court began to run. *Id.* When the district court granted the relief sought by the husband, it entered what became the third judgment in the case, giving rise again to the right under § 25-1329 to seek an alteration or amendment within 10 days. *Gebhardt v. Gebhardt, supra.* The district court's ruling denying the wife's timely motion to alter or amend made the third judgment final and appealable. *Id.*

This court noted that if the wife, instead of filing a notice of appeal at that time, had filed another motion to alter or amend, where the district court had not made any substantive change to the most recent judgment entered, the principles of *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994), would have applied and her motions would have been considered successive motions to alter or amend the same judgment. *Gebhardt v. Gebhardt, supra*. We concluded that the motions filed in *Gebhardt* were not successive motions, because they were timely filed after the court substantially altered the previous

judgment, giving the parties a statutory right to seek alteration or amendment of the new judgment prior to appealing to this court.

The present case presents a substantially similar procedural pattern as *Gebhardt v. Gebhardt, supra*. As in that case, the district court in the present case entered a decree dissolving the parties' marriage and one of the parties timely filed a motion for new trial seeking to alter or amend the decree. As in that case, the district court in the present case entered an order denying new trial but substantively altering the initial decree. As in that case, one of the parties then timely filed a motion for new trial seeking to alter or amend the new judgment.

[6] We note that the present case does differ from *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008), in that the second motion for new trial did not solely attack the substance of the district court's amendment to the initial decree and, instead, asserted grounds contained in the initial motion for new trial. We conclude that this factual distinction, however, is without consequence. As in *Gebhardt*, the district court's order substantively altering the initial decree created a new judgment and § 25-1329 provides the parties with a statutory right to timely seek alteration or amendment of that new judgment. When Samuel filed his June 26, 2009, motion for new trial, he filed a timely motion that constitutes a motion to alter or amend pursuant to § 25-1329. That motion thus tolled the time for filing a notice of appeal until 30 days after the motion to alter or amend was disposed of. See *Gebhardt v. Gebhardt, supra*.

As noted above, the record presented to us does not include any ruling by the district court on Samuel's June 26, 2009, motion for new trial. Indeed, in the notice of appeal Samuel filed in appeal No. A-09-754, Samuel specifically asserted to this court that the district court had not entered an order ruling on his motion. As a result of the court's having not entered an order ruling on Samuel's motion for new trial, the judgment of the district court has not yet become final and appealable, and we are without jurisdiction to address the merits of Samuel's consolidated appeals.

IV. CONCLUSION

We find that there was no final, appealable order entered by the district court, because it had not yet entered an order ruling on Samuel's motion for new trial. As such, the consolidated appeals are dismissed for lack of jurisdiction.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
KAPIER R. REYES, APPELLANT.
794 N.W.2d 886

Filed February 22, 2011. Nos. A-10-391, A-10-392.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
4. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
5. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
7. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires procedures that will warn a suspect in custody of his right to