FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JAMES W. PHILIPSEN AND TRACY L. PHILIPSEN

Upon the Petition of)
JAMES W. PHILIPSEN,) Filed August 26, 1980
Petitioner-Appellee,)
And Concerning)
TRACY L. PHILIPSEN,) 0-129
2-63953
Respondent-Appellant.)

Appeal from Polk District Court - A. B. Crouch, Judge.

Respondent appeals modification of parties' dissolution decree, asserting her incarceration in the women's reformatory does not justify denying her visitation rights. APPEAL DISMISSED.

Diane L. Dornburg, Des Moines, for respondent-appellant.

Sidney Levine, Des Moines, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Respondent, Tracy L. Philipsen, appeals modification of parties' dissolution decree, asserting her incarceration in the women's reformatory does not justify denying her visitation rights. We hold respondent's untimely motion to reconsider did not toll the running of the thirty-day period for taking appeals and we are without jurisdiction to entertain respondent's appeal. Respondent's appeal is dismissed.

I.

The parties' 1977 dissolution decree awarded custody of their daughter, now age 3, to the wife. The husband sought modification of the decree following the wife's arrest on various felony charges. She was convicted on two counts of first degree robbery and was sentenced to two concurrent twenty-five year prison terms with a mandatory minimum sentence of five years before she would be eligible for parole. Her convictions were affirmed by this court. Upon the husband's application, the court modified the decree, transferring custody to the father and providing the wife's visitation rights will be determined when she is paroled or discharged. In a motion to reconsider, the wife urged she be granted visitation rights during the period of her incarceration. In overruling the motion the court stated its feeling that it would not be appropriate for the child to visit her mother at the women's reformatory.

The procedural schedule of this action is critical to our determination. The court entered its findings of fact and conclusions of law on March 26, 1979, and filed its order modifying the dissolution decree on April 5, 1979. Respondent filed a motion to reconsider on April 9, 1979. The court overruled the motion to reconsider on June 28, 1979. Respondent filed a notice of appeal on July 17, 1979.

In an order dated October 9, 1979, Justice Harris overruled the husband's motion to dismiss the appeal. The issue presented was whether a motion to reconsider tolled the time limit for filing a notice of appeal when it followed a trial of factual issues. Citing Sykes v. Iowa Power & Light Co., 263 N.W.2d 551 (Iowa 1978), the order found there had been a trial of factual issues and a motion to reconsider might therefore be deemed a motion to enlarge or amend pursuant to Iowa R. Civ. P. 179(b). In a subsequent order Justice Larson directed the parties to consider the issue of whether or not the wife's motion to reconsider was in substance a motion to enlarge or amend, and also to consider whether Justice Harris' order should be reviewed.

II.

An issue presented at the outset is whether this court has jurisdiction to hear this appeal when respondent's motion to reconsider was not filed within ten days of the court's filing of its fact-findings and conclusions of law. Petitioner's challenge to this court's jurisdiction is based on Iowa R. App. P. 5(a), Iowa R. Civ. P. 179(b), and Iowa R. Civ. P. 247. We hold the appeal was not timely and we lack jurisdiction to hear it.

Appeals to the supreme court must be taken by filing a notice of appeal within thirty days from the entry of the order, judgment, or decree, unless a motion for a new trial or a motion as provided in Iowa R. Civ. P. 179(b) is filed, and then within thirty days after the entry of the ruling on such motion. Iowa R. App. P. 5(a). Respondent's notice of appeal was filed on July 17, 1979, more than thirty days after the entry of the court's order on April 5, 1979, so that if we possess jurisdiction, we must find respondent properly filed a motion for new trial or a motion as provided in Iowa R. Civ. P. 179(b). We assume without deciding respondent's motion to reconsider is in effect a motion to enlarge or amend the fact-findings or conclusions of law in accordance with Iowa R. Civ. P. 179(b). If we were to decide that question, our answer would most likely be the same. See Kagin's Numismatic Auctions v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979); Sykes, 263 N.W.2d at 553.

The time for filing an Iowa R. Civ. P. 179(b) motion is the same as that for a motion for a new trial under Iowa R. Civ. P. 244. Iowa R. Civ. P. 179(b). A motion for new trial under Iowa R. Civ. P. 244 and an Iowa R. Civ. P. 179(b) motion must be filed "within ten days after the verdict, report or decision." Iowa R. Civ. P. 247. The phrase "verdict, report or decision" has been interpreted to mean a verdict rendered by a jury, directed or otherwise, a report by a master, or a trial court's fact-findings and conclusions of law. Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 470-71 (Iowa 1978). The timeliness of respondent's motion is thus judged from the date the court filed its fact-findings and conclusion of law. Respondent's motion to reconsider was filed April 9, 1979, fourteen days after the court's fact-findings and conclusions of law were filed on March 26, 1979, and was not timely.

III.

Respondent contends petitioner waived the untimeliness of her motion by failing to object to the motion on this ground. While it is true that objections to post-trial motions may in certain cases be waived by a failure to raise the objection, this

argument is inapposite in a consideration of this court's appellate jurisdiction. The requirement that notice of appeal be filed within thirty days from entry of the order, judgment, or decree is mandatory and jurisdictional and cannot be extended by the filing of an improper motion for new trial. Union Trust & Savings Bank v. Stanwood Feed & Grain, Inc., 158 N.W.2d 1, 3 (Iowa 1968). This same rule applies to a motion for enlarged or amended findings and conclusions on an issue of fact tried to the court without a jury, whether by equitable or ordinary proceedings. Qualley, 261 N.W.2d at 471, quoted in Hogan v. Chesterman, 279 N.W.2d 12, 14 (Iowa 1979). Jurisdictional matters may never be waived and will be raised on our own motion when appropriate. Hogan, 279 N.W.2d at 14; Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978).

We are compelled to hold respondent's motion to reconsider was not timely. A defective Iowa R. Civ. P. 179(b) motion does not toll the running of the thirty-day period after final judgment, within which an appeal must be taken under Iowa R. App. P. 5. Qualley, 261 N.W.2d at 471. Accordingly, respondent's notice of appeal, which was filed more than thirty days after the entry of the trial court's order, was not timely and her appeal must be and is dismissed.

APPEAL DISMISSED.