

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 21-0284

P. Mars Scott
Jason M. Scott
P. Mars Scott Law Offices
P.O. Box 5988
Missoula, MT 59806
Tel: (406) 327-0600
Fax: (406) 728-0948
Email: pleadings@pmarsscott.com
Attorneys for the Appellant/Respondent

BRIDGET J. KELLY, Appellee\Petitioner, vs. JOSEPH S. CAMP III, Appellant/Respondent.	RESPONSE TO MOTION TO DISMISS
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COMES NOW the Appellant/Respondent Joseph S. Camp III (hereinafter "Joe"), by and through his attorneys of record, P. Mars Scott and Jason M. Scott of P. Mars Scott Law Offices, and hereby responds to the Appellee/Petitioner's Bridget J. Kelly (hereinafter "Bridget") July 30, 2021 *Motion to Dismiss*.

Introduction

This Court should deny Bridget's *Motion to Dismiss* because Joe's appeal is timely under the Montana Rules of Appellate Procedure.

The general rules concerning appeal times are found in Rule 4 of the Montana Rules of Appellate Procedure which prescribe the time to appeal as thirty days from the notice of entry of the judgment or order from which the appeal is taken. M.R.App.P Rule 4, 5(a)(i). In this matter, Joe filed a *Notice of Entry of Order* on May 27, 2021, and a *Notice of Appeal* on June 6, 2021; twenty days before the time to appeal expired. Nonetheless, Bridget argues that Joe's appeal is both untimely and moot. Neither of her arguments are compelling.

Background

Due to the complicated procedural history of this case, it is worth establishing some significant dates related to this appeal.

1. On December 6, 2018, the District Court issued its *Final Decree*.
2. On December 12, 2018, Bridget filed a *Notice of Entry of Final Judgment*. Neither party appealed.
3. On July 31, 2019, Joe filed a *Motion to Modify Decree of Dissolution of Marriage and Brief in Support*.
4. On September 27, 2019, Bridget filed a *Verified Motion to Enforce Orders and for Contempt of Court, Request for Order to Show Cause and Request for Attorney Fees*.
5. On March 25, 2020, Joe filed a *Combined Motion to Modify Support and to Stay and Brief in Support*.
6. On April 1, 2020, Bridget filed a *Motion for Sanctions*.
7. A hearing was held on May 12, 2020, regarding the four post-decree motions that were filed.
8. On July 20, 2020, the District Court issued its *Findings of Fact, Conclusions of Law and Interim Order* regarding a

hearing that included four separate motions. The Order states that it was an “interim order” and the court would later enter a final, appealable order. Pg. 30, ¶ 3.

9. On August 18, 2020, the District Court issued its *Supplemental Judgment and Order* which incorporated the July 20, 2020 *Findings of Fact, Conclusions of Law and Interim Order*.
10. On September 27, 2020, Joe filed a *Notice of Appeal*.
11. On October 20, 2020, this Court dismissed Joe’s appeal because the amount of reasonable attorneys’ fees awarded to Bridget in the July 20, 2020 *Findings of Fact, Conclusions of Law and Interim Order*, had not yet been resolved. Thus, the appeal was premature because there was no final judgment. DA 20-0449 October 20, 2020, *Order*.
12. On March 26, 2021, the District Court issued its *Order Regarding Petitioners Motion for Contempt and Reasonableness of Attorney Fees*.
13. On March 26, 2021, the District Court issued its *Order Adopting Stipulation Regarding Attorneys’ Fees*.
14. Joe filed a *Notice of Entry of Decree* on May 27, 2021.
15. Joe filed his *Notice of Appeal* on June 6, 2021.

Argument

- I. **Joe’s Notice of Appeal sufficiently identifies the order being appealed.**

In part, Bridget bases her arguments on the assertion that the appeal time has run for December 6, 2018 *Final Decree*. That is true. But the same is not true for the subsequent orders in this case. While Joe's *Notice of Appeal* states that he is appealing "the December 6, 2018 *Final Decree* and subsequent proceedings," he intended that language to be all-encompassing due to the confusing procedural history in this matter and to include all orders for the appeal as to not miss anything.

This Court has set a standard that a technical defect in the notice of appeal "should not bar a party from access to the courts." *Tefft v. Tefft* (Mont. 1981), 192 Mont. 456, 628 P.2d 1094, 1097, (overruled on other grounds). See also *Wilhelm v. Owens Enters.*, (Mont. 1990) 242 Mont. 285, 288, 790 P.2d 467, 469, where this Court declined to dismiss an appeal when Notice of Appeal referenced a different order. Further, one aspect of Joe's appeal is the District Court's decisions on *Joe's Motion for Modification of Decree of Dissolution* and his *Respondent's Combined Motion to Modify Support and Motion to Stay Execution* and this Court has also held that an amending order and an original judgment cannot be viewed as separate and distinct or divisible. *Tefft v. Tefft*, 192 Mont. at 461.

Here, Joe's appeal concerns the July 20, 2020, *Findings of Fact, Conclusions of Law and Interim Order*, which was brought to a Final Order on March 26, 2021, when the Court adopted the parties' stipulation regarding attorneys' fees. And, in that regard, Joe's appeal is timely. The *Findings of Fact, Conclusions of Law, and Interim Order* concerned four separate motions:

1. The Respondent's Motion for Modification of Decree of Dissolution;
2. The Petitioner's Verified Motion to Enforce Orders, for Contempt of Court, and for Attorney's Fees;
3. The Petitioner's Motion for Sanctions; and
4. The Respondent's Motion to Modify Support and Motion to Stay Execution.

Previously, Joe attempted to appeal this same order but the appeal was dismissed because this Court determined "the subject judgment will not be final until the District Court determines and enters judgment on the included award of attorney fees and costs." October 20, 2020, *Order*, DA 20-0449. The award of attorneys' fees was not resolved until March 26, 2021, when the Court issued both its *Order Regarding Petitioners Motion for Contempt and Reasonableness of Attorney Fees* and its *Order Adopting Stipulation Regarding Attorneys' Fees*. And pursuant to Rule 5(a)(i) of the Rules of Appellate Procedure, the appeal time did not begin to run until a notice of entry of those orders was issued.

Importantly, Joe's Notice of Appeal *Decree* references the Final Decree and "subsequent proceedings." And so long as this Court adheres to the precedent set in *Tefft v. Tefft*, Joe's *Notice of Appeal* appropriately identifies the orders from which he is appealing.

II. Joe stipulating to the reasonableness of Bridget's attorneys' fees award does not prevent an appeal of all issues in the judgment.

Bridget argues that because Joe eventually entered into a stipulation regarding the amount of Bridget's reasonable attorneys'

fees, he waived his right to appeal all aspects of the *Final Order*. Instead, she asserts that in order to preserve his appeal rights for all the issues contained in the *Final Order*, that Joe “should have gone through the hearing, allowed the district court to affirmatively determine the fee amount, and then appealed.” Effectively, Bridget argues that Montana law requires Joe to waste everyone’s time and money fighting an issue that the parties can otherwise resolve. Bridget cites no law to support her position.

Rule 4 of the Montana Rules of Appellate Procedure is clear that an appeal can be taken from a final judgment. And nothing in Montana law precludes an appeal based on the fact that one portion of the final judgment materialized through a stipulation of the parties. True, if Joe intended to appeal the reasonableness of the attorneys’ fees awarded to Bridget under the Stipulation, he would have little chance of prevailing on his argument. But that is not what Joe is appealing; he is appealing the July 20, 2020 *Findings of Fact, Conclusions of Law, and Interim Order*, which addressed four separate motions, only one aspect of which was the award of Bridget’s attorneys’ fees. Joe is now appealing the same *Order* that he previously tried to appeal and which this Court determined “will not be final until the District Court determines and enters judgment on the included award of attorney fees and costs.” DA 20-0449 October 20, 2020, *Order*.

Thus, under this Court’s analysis and the Montana Rules of Appellate Procedure, Joe could not appeal until the amount of attorney’s fees was resolved, whether by stipulation or by hearing, because the Order was not a final judgment until March 26, 2021.

III. Under Rule 77 of the Montana Rules of Civil Procedure, a Notice of Entry of Judgment is required to toll the appeal time.

Next, without citing legal authority, Bridget argues that this Court “must realize” that no notice of entry of judgment was required in this situation. But the law does not support Bridget’s contention. Rather, Rule 77 of the Montana Rules of Civil Procedure states:

(d) Notice of Entry of Judgment or Order Served. Within 14 days after entry of judgment or an order in an action in which an appearance has been made, notice of such entry, together with a copy of such judgment or order or general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon all parties who have made an appearance, but any other party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Title 25, Ch. 20, Pt. X, Rule 77, MCA

Here, both parties made appearances, the result of the hearing was a judgment that required Joe to pay Bridget money, and fourteen (14) days had passed since the order was entered. Thus, Bridget should have filed a notice of entry of that judgment. She failed to do so, and Joe took it upon himself to file the notice.

Generally, according to Rule 77, M.R.Civ.P., when a judgment is entered, a notice of entry of an order is required to start the appeal time for the judgment. Rule 4, (5)(a)(iv) of the Rules of Appellate Procedure provides five exceptions to that requirement where the appeal time instead begins when the order is issued, but none of those exceptions prevent the current appeal. Again, Joe is seeking relief from the *Final*

Order, which encompassed four separate motions. And while the Court's decision on one of the motions - Joe's *Motion for Modification of Decree* - would not require a Notice of Entry under Rule 4, (5)(a)(iv)(C), the inclusion of the other motions, together with the fact that the Court entered an attorneys' fees award which was not finalized until March 26, 2021, means that the present circumstances do not fit into a Rule 4(5)(a)(iv) exception. Bridget's assertion that no Notice of Entry is required in this instance is therefore misguided.

According to this Court's analysis, the final judgment in this case, was not entered until Joe filed his May 27, 2021 *Notice of Entry of Final Decree* officially notifying Bridget that the District Court's March 26, 2021 *Order Regarding Petitioner's Motion for Contempt and Reasonableness of Attorney Fees* created a "final judgment" of the Court's December 6, 2018 *Final Decree*.

IV. The Issues are not Moot

Bridget also asserts the issues brought to appeal are now moot because Joe made his payments for Bridget's attorneys' fees. But again, Joe's appeal concerns the July 20, 2020, *Findings of Fact, Conclusions of Law and Interim Order*, which was brought to a Final Order on March 26, 2021. And even though the attorney's fees issue was resolved by stipulation, other issues and obligations are still an existing controversy and are the subject of Joe's appeal. As one example, Joe is still ordered to pay Bridget maintenance despite various health concerns with him continuing on his work schedule that he presented to the Court at the May 12, 2020 hearing and his preceding motions.

CONCLUSION

By filing a motion to dismiss Bridget is attempting to take advantage of the convoluted and confusing procedural nature in this case. But Joe has complied with the Montana Rules of Appellate Procedure, and under Montana law, his appeal is timely. Moreover, the issues are not otherwise moot because his obligations to Bridget remain ongoing after the Court denied his motion to modify the decree. Thus, Bridget's *Motion to Dismiss* Joe's appeal should be denied, and Joe should be afforded access to the courts pursuant to this Court's holding in *Tefft v. Tefft* (Mont. 1981), 192 Mont. 456, 628 P.2d 1094, 109.

DATED this 23 day of July, 2021.

P. Mars Scott Law Offices

By: P. Mars Scott
P. Mars Scott
Attorneys for the
Appellant/Respondent

DATED this 23 day of July, 2021.

P. Mars Scott Law Offices

By: Jason M. Scott
Jason M. Scott
Attorneys for the
Appellant/Respondent

CERTIFICATE OF SERVICE

Kevin S. Brown
PAOLI & BROWN, P.C.
116 West Callender St.
Livingston, MT 59047
Attorney for the Appellee

Clerk of Montana Supreme
Court
Bowen Greenwood
Room 323 Justice Building
215 N Sanders
P.O. Box 203003
Helena, MT 59620-3003

Clerk of District Court
Park County Courthouse
414 East Callender St.
Livingston, MT 59047

DATED this 23rd day of July, 2021.

By: 

CERTIFICATE OF SERVICE

I, P. Mars Scott, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 07-23-2021:

Kevin S. Brown (Attorney)
116 West Callender Street
Livingston MT 59047
Representing: Bridget Kelly
Service Method: eService

Jason M. Scott (Attorney)
PO Box 5988
Missoula MT 59806
Representing: Joseph S. Camp
Service Method: eService

Electronically signed by Simon T. Fickinger on behalf of P. Mars Scott
Dated: 07-23-2021