

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LYNN M. GALLAGHER-MCCARTHY,

Plaintiff-Appellee,

v

PATRICK M. MCCARTHY,

Defendant-Appellant.

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UNPUBLISHED

October 15, 2009

No. 292514

Oakland Circuit Court

Family Division

LC No. 1998-605074-DM

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right the order denying his motion to quash a September 13, 2004, order suspending his legal custody of his two minor children. We affirm.

Plaintiff and defendant married in 1991. They had two children, Jobi, born in 1993, and Taylor, born in 1994. Plaintiff filed a divorce complaint in 1998, and the trial court subsequently entered a judgment of divorce in 1999.

In 2004, defendant was accused of emotional abuse and “inappropriate sexual touching” of his children. These accusations resulted in a petition to terminate defendant’s parental rights pursuant to MCL 712A.19 in Lower Court Docket No. 2004-697367-NA. The accusations also resulted in criminal proceedings in which defendant was charged with second-degree criminal sexual conduct in Lower Court Docket No. 2004-198432-FH. On September 1, 2004, defendant filed an objection to the petition to terminate his parental rights. He claimed that the accusations were “heinous falsities.” On September 13, 2004, the trial court entered an order suspending defendant’s joint legal custody rights until further order. It noted the pending petition in Lower Court Docket No. 2004-697367-NA and stated that a no contact order had been issued in that case. Later in 2004, the proceedings in Lower Court Docket Nos. 2004-697367-NA and 2004-198432-FH were dismissed. Defendant filed a motion to reinstate legal custody on February 4, 2005, but subsequently withdrew that motion.

On June 3, 2009, defendant filed a motion to quash the trial court’s September 13, 2004, order suspending joint legal custody. He asserted that the trial court’s September 13, 2004, order was “without merit” in light of the dismissal of Lower Court Docket Nos. 2004-697367-NA and 2004-198432-FH. On the record, defendant explained that he did not appeal the order or request

reconsideration earlier because he had “just found out about [the September 13, 2004, order] last week.” The trial court denied the motion to quash on the ground that it was untimely.

On appeal, defendant first makes several arguments for the vacation of the September 13, 2004, order suspending his legal custody. For example, defendant argues that the trial court clearly erred when it revisited custody and entered the temporary order suspending legal custody sua sponte. Defendant also argues that the trial court clearly erred when it failed to hold an evidentiary hearing to analyze the best interest factors before modifying legal custody. However, the September 13, 2004, order suspending defendant’s legal custody was a postjudgment order affecting the custody of minors. *Surman v Surman*, 277 Mich App 287, 293-294; 745 NW2d 802 (2007). Defendant could have filed a timely claim of appeal from the order, but he failed to do so. *Id.*, p 294. Defendant could not wait until the entry of a subsequent final order, such as the order denying his motion to quash, to appeal the earlier order suspending his legal custody. *Id.* Thus, even if defendant’s arguments regarding the trial court’s sua sponte order and failure to hold an evidentiary hearing have merit, they are not properly before this Court.

Defendant also urges this Court to reverse the trial court’s order denying his motion to quash the order suspending his legal custody. Although defendant does not cite MCR 2.612(C), this Court will treat defendant’s in pro per motion to quash as a motion for relief from an order under this court rule. See *Bachor v Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973).

MCR 2.612 provides in relevant part:

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

The trial court denied defendant’s motion to quash because it was untimely. Pursuant to MCR 2.612(C)(2):

The motion must be made within a reasonable time, and, for the grounds stated in [MCR 2.612](C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

The trial court entered the temporary order suspending defendant's legal custody on September 13, 2004. The petition to terminate defendant's parental rights, which was the basis of the temporary order suspending legal custody, was dismissed by the end of 2004. However, defendant failed to file the motion to quash the order suspending legal custody until June 3, 2009. At a hearing on this motion, defendant explained that he failed to file the motion earlier because he had just learned of the order. This explanation lacks credibility in light of defendant's February 4, 2005, motion to reinstate joint legal custody. Because defendant failed to offer any credible explanation for the delay, defendant's approximately four and one-half year delay in filing the motion to quash was unreasonable in this case. See *Roth v Roth*, 201 Mich App 563, 570; 506 NW2d 900 (1993). Consequently, the trial court did not abuse its discretion when it concluded that defendant's motion to quash was untimely.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald