NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1569

SHANNON CARTER DIEZ

VERSUS

JOSHUA THOMAS DIEZ

DATE OF JUDGMENT: FEB 10 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2008-14959, DIV. K, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARY C. DEVEREUX, JUDGE

* * * * * *

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Joshua Thomas Diez

* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: APPEAL DISMISSED.

Whipple, J. concurs.

KUHN, J.

This appeal is taken from a consent judgment awarding sole custody of two minor children to their mother, Shannon Carter Diez. The children's father, Joshua Thomas Diez, now appeals, arguing that the district court erred on several grounds in rendering the consent judgment, as well as in denying his motion for new trial. He contends his consent to the award of sole custody was vitiated by the facts that he was unrepresented by counsel at the time that he agreed to the custody award, and he failed to understand the legal implications of his consent thereto. Finding the judgment at issue to be nonappealable, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Shannon and Joshua Diez were married on March 13, 1997, and divorced pursuant to a November 1, 2008 judgment. Thereafter, a consent judgment was rendered on November 26, 2008, providing that the parties share joint custody of the two children born of the marriage, Alexandra (born September 30, 1997) and Noah (born November 22, 1999), with Ms. Diez designated as the domiciliary parent. The judgment ordered Mr. Diez to pay $500.00 in monthly child support to Ms. Diez. On September 16, 2010, Ms. Diez filed a rule for contempt against Mr. Diez, based on his alleged refusal to see the children and his failure to meet his child support obligations. She alleged that Mr. Diez's willful and intentional violations of the terms of the November 2008 consent judgment constituted a material change in circumstances that warranted a modification of the existing custody and support order. She prayed for sole custody in her favor, a modified child support award, costs, and attorney's fees.

A show cause hearing was scheduled for December 2, 2010. Prior to that date, the parties attended a hearing officer conference on November 18, 2010. Ms.

Diez was represented by counsel at the conference, but Mr. Diez appeared in proper person. During the course of the conference, the hearing officer and the parties signed a consent judgment that, among other matters, granted Ms. Diez sole custody of both children, subject to reasonable visitation in favor of Mr. Diez.

Thereafter, on November 23, 2010, a conference report was prepared by the hearing officer to address all matters that were not resolved by the consent judgment signed at the November 18, 2010 conference. The conference report contained the hearing officer's findings of fact, which stated, in pertinent part, "the parties entered into a Consent Judgment as to all pending matters except for Mother's request to modify child support.... Pursuant to the Consent Judgment which the parties signed on November 18, 2010, Mother will have sole custody of the children, and they will spend time with Father every other weekend, from Friday at 6:00 p.m. until Sunday at 6:00 p.m." The conference report also included the hearing officer's recommendations addressing issues of child support, child support arrearages, reimbursement, and tax deductions.

In addition, the conference report contained a certification informing the parties that if they did not file a written objection within seven days indicating the specific aspect of the conference report to which they objected, the recommendations of the hearing officer would become a final judgment of the court. In the event a timely objection was filed, the hearing officer's recommendations would then become a temporary order of the court pending further court order or agreement by the parties.

On November 29, 2010, Nanine McCool filed a motion to enroll as counsel of record on behalf of Mr. Diez. She also filed an objection to the hearing officer conference report objecting on several grounds to the hearing officer's calculation of child support and to the assessment of attorney's fees to Mr. Diez. No objection

was raised to Ms. Diez having sole custody of the children. Thereafter, Ms. Diez also filed a timely objection to the hearing officer conference report, wherein she also challenged certain findings and recommendations of the hearing officer concerning the calculation of child support.

On December 3, 2010, the trial court signed an order, which was attached to the November 23, 2010 hearing officer conference report, which stated that, "[t]he foregoing recommendations are temporary orders of the court until the hearing on December 2, 2010, or until such other date to which the hearing may be continued." On that same date, the trial court also signed the consent judgment that the parties had previously signed, which included the award of sole custody to Ms. Diez. Immediately preceding the parties' signatures, the consent judgment stated: "The parties further acknowledge that this constitutes a joint stipulation to the contents of this document and a *Consent Judgment* on the issues before the Court, and that **neither of them may object to or appeal from the results of this consent agreement**...." (Bolding added.)

Mr. Diez filed a motion for a new trial in which he asserted that the consent judgment was contrary to the law and the evidence because he was unrepresented by counsel during the hearing officer conference and, therefore, was unable to present all relevant facts and arguments to the hearing officer. He further argued that, while he agreed to the change to sole custody because he believed it would reduce tension between the parties, he did not fully understand the legal implications of his consent to sole custody. Following a hearing on the motion for new trial at which Mr. Diez testified as to the circumstances surrounding his consent and his understanding thereof, the trial court denied the motion.

Thereafter, Mr. Diez filed a motion and order for appeal, which was granted by the trial court. In his motion, Mr. Diez indicated that he desired to appeal from

the final judgment "signed" and "rendered" by the hearing officer on November 18, 2010, and made an order of the trial court on December 10, 2010.[1] On appeal, Mr. Diez challenges the award of sole custody to Ms. Diez, arguing that there was no evidence supporting the trial court's modification from joint to sole custody and that the trial court failed to consider the children's best interests before signing the consent judgment. Additionally, he asserts that the trial court abused its discretion in denying his motion for new trial, because he was unrepresented by counsel at the hearing officer conference and his lack of understanding of the legal implications of "sole custody" vitiated his consent.

DISCUSSION

On September 9, 2011, this Court, *ex proprio motu*, issued a rule to show cause why the instant appeal should not be dismissed, since the appealed judgment appeared to be a nonappealable ruling. In response, the parties filed briefs addressing the issue. On November 21, 2011, the Rule to Show Cause was referred to the merits.

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled; it may be interlocutory or final. La. C.C.P. art. 1841. A final judgment is one that determines the merits in whole or in part. A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment. La. C.C.P. art. 1841. Louisiana Code of Civil Procedure article 2083(A) provides that a final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under La. C.C.P. art.

[1] The December 10, 2010 date referenced in Mr. Diez's motion for appeal appears to be an error. The appeal record does not contain an order rendered on that date. The order actually was signed on December 3, 2010.

1814. By contrast, an interlocutory ruling is appealable only when expressly provided by law. La. C.C.P. art. 2083(C).

From a review of his motion and order for appeal, it is unclear whether Mr. Diez is appealing from the December 3rd temporary order of the trial court or from the Consent Judgment rendered on that same date. It appears he may be attempting to appeal the former, since he referenced the judgment rendered by the hearing officer and made no specific mention of the consent judgment in the motion for appeal. The December 3, 2010 order of the trial court is clearly an interlocutory ruling, since it declared by its own terms that it was "temporary" until such time that a subsequent hearing was held. See La. C.C.P. art. 1841. Further, this Court is not aware of any provision of law, nor has any been cited by Mr. Diez, authorizing the appeal of an interlocutory judgment under such circumstances. Thus, the December 3rd order is a nonappealable interlocutory judgment. See La. C.C.P. art. 2083(C).

In some situations where the appellant's arguments on appeal indicate that he intended to appeal the judgment on the merits, rather than the interlocutory order of the trial court, the inadvertence of misstating the judgment being appealed does not necessitate dismissal of the appeal, and "the appeal should be maintained as being taken from the judgment on the merits." ***Dural v. City of Morgan City***, 449 So.2d 1047, 1048 (La. App. 1st Cir. 1984). Factors to be considered in determining the appellant's intent include the appellant's assertion of his intent, whether the parties briefed issues on the merits of the final judgment, and the language of the order granting the appeal. ***Dural***, 449 So.2d at 1048. However, it is unnecessary to make this determination in the instant case because, even if Mr. Diez intended to appeal from the consent judgment, the appeal must be dismissed.

On appeal, Mr. Diez challenges the award of sole custody to Ms. Diez, even though he stipulated at the hearing officer conference to this exact provision. Additionally, he signed the consent judgment, which included a provision specifically stating that neither party could "appeal from the results of this consent agreement." Pursuant to La. C.C.P. art. 2085, "[a]n appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him." Nevertheless, Mr. Diez contends he has a right to appeal because his consent to the custody change was vitiated by the fact that he did not understand the legal implications of "sole custody" since he was unrepresented by counsel at the time he gave his consent.

Although a consent judgment normally is not appealable under La. C.C.P. art. 2085, it may be appealable if a party's consent is vitiated. ***Pittman v. Pittman***, 01-2528 (La. App. 1st Cir. 12/20/02), 836 So.2d 369, 372. Moreover, lack of consent may be found from a party's timely application for a new trial. See ***Polk v. Polk***, 98-1788 (La. App. 3d Cir. 3/31/99), 735 So.2d 737, 739. However, in order to determine whether or not Mr. Diez's consent was vitiated, the trial court would have to take evidence. In order to do so after a final judgment, the trial court would have to grant a motion for new trial. In the instant case, the trial court, which had an opportunity to observe Mr. Diez's testimony firsthand at the hearing on the motion for new trial, refused to grant a new trial on the basis that the judgment was contrary to the law and evidence because Mr. Diaz's did not validly consent to the judgment rendered. Based on our review, we are unable to say that the trial court erred or abused its discretion in doing so.

Accordingly, since Mr. Diaz stipulated to the consent judgment, he has no right to appeal that judgment. See ***Guidry v. Sothern***, (La. App. 1st Cir. 5/14/99),

734 So.2d 928, 930; ***Cowart v. Martin***, 358 So.2d 652, 652-53 (La. App. 1st Cir. 1978). Moreover, where there is no right to appeal, an appellate court may dismiss an appeal on its own motion. La. C.C.P. art. 2162; ***Guidry***, 734 So.2d 930.

For the above reasons, the rule to show cause issued by this Court is maintained, and the instant appeal is dismissed at Mr. Diaz's cost.

APPEAL DISMISSED.