NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 5, 2017

Rachele Valente
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Julia Boone
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3927 Old Lee Highway, #102C
Fairfax, VA 22030

Re: [redacted], JA 2016-294 and JA 2016-298

Dear Ms. Valente and Ms. Boone:

This matter is before the court on the motions of Mother ([redacted]) to dismiss Father's ([redacted]) appeals on the ground that the circuit court lacks jurisdiction pursuant to Code § 16.1-296(A).[1] JA 2016-294 is an appeal from [redacted] (JA 394531-03-00) and JA 2016-298 is an appeal from [redacted] (JA 411262-02-00). For the reasons that follow, Mother's motions are DENIED.

PROCEEDINGS BELOW

In JA 394531-03-00, the J&DR court entered an order on October 29, 2010 requiring Father to pay child support to Mother (who had sole custody based upon a written agreement of the parties), based upon a Petition for Support filed by Mother on January 26, 2010. On or about May 27, 2015, the J&DR court entered an order modifying custody so that Father was granted primary physical custody and set the matter for final hearing on October 28, 2015.

On June 3, 2015, Father filed a Motion To Modify Child Support and a

[1] Code § 16.1-296(A) provides in pertinent part:

From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken to the circuit court within 10 days from the entry of a final judgment, order or conviction and shall be heard de novo.



OPINION LETTER

*Pendente Lite* Motion To Modify Child Support in JA 394531-03-00. Also on June 3, 2015, Father instituted a new case, JA 411262-02-00, in which he filed a Petition for Child Support and a *Pendente Lite* Motion For Child Support.[2] On June 10, 2015, the J&DR court entered a *Pendente Lite* Child Support Order, applying to both cases, suspending Father's child support obligation and granting Father child support from Mother; that order was effective "until further order of this Court . . . ." A subsequent order of October 28, 2015 (which denied motions to remove a GAL and to impose sanctions), applying to both cases, continued the final hearing "due to time until March 8, 2016 and March 15, 2016." By order of March 15, 2016, both cases were "continued for status hearing on the support issue" to April 18, 2016. By order of April 18, 2016, both cases were "continued" to September 6, 2016 "for 60 minute trial."[3] Finally, on September 6, 2016, the J&DR court ordered: "Case is dismissed w/o prejudice all parties fail to appear"; the order applied to both cases. Father timely appealed both cases to this court on September 7, 2016.

ANALYSIS

At issue in Mother's motion is whether the September 6, 2016 order was a "final order . . . affecting the rights or interests of any person" within the meaning of Code § 16.1-296(A). Mother asserts that it is not.

For purposes of deciding the issue, this court will assume (as the parties have implicitly done) that, when the J&DR court's September 6, 2016 order refers to the "case" being dismissed without prejudice, it is referring to Father's Motion To Modify Child Support in JA 394531-03-00 and to his Petition for Child Support in JA 411262-02-00, as his *Pendente Lite* Motion To Modify Child Support in JA 394531-03-00 and his *Pendente Lite* Motion For Child Support in JA 411262-02-00 were resolved by the J&DR court's *Pendente Lite* Child Support Order of June 10, 2015. That is, what was dismissed, without prejudice, was Father's Motion To Modify Child Support in JA 394531-03-00 and his Petition for Child Support in JA 411262-02-00.

The Effect Of Dismissal Without Prejudice

The court must first consider the effect of the language in the J&DR court's September 6, 2016 order dismissing Father's motion and petition "without prejudice." In *Concrete Co. v. Board of Supervisors,* 197 Va. 821, 91 S.E.2d 415 (1956), the Court noted that, where a suit is "dismissed involuntarily for reasons not affecting the merits of the case, the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such further suits concerning the same matter as he may be advised,' in order to avoid a plea of *res judicata* in future litigation." 197 Va. at 829, n.*. Thus, the effect of dismissal "without prejudice" is that Father may "avoid a plea of *res judicata* in future litigation" if he were to have refiled either his motion or his petition in the J&DR court. Because he did not refile his motion or his

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[2] In Mother's *Motion To Dismiss Father's De Novo Appeal*, Mother does not mention Father's *Petition for Child Support* and *Pendente Lite Motion For Child Support* in JA 411262-02-00. In Father's *Response To Plaintiff's Motion To Dismiss*, when reciting the history of the cases in the J&DR Court, Father does not make reference to his *Pendente Lite* Motion For Child Support in JA 411262-02-00.

[3] Mother's *Motion To Dismiss Father's De Novo Appeal* erroneously states that the date of the order was April 4, 2016.

petition in the J&DR court, electing instead to appeal to this court, the dismissal "without prejudice" is no different than if his motion or his petition in the J&DR court had been dismissed with prejudice.

Dismissal Without Prejudice Is Not Equivalent To A Nonsuit

The court rejects Mother's argument that the dismissal without prejudice was effectively a nonsuit by Father. While the "*mere* dismissal of a case . . . stands on the same footing as a nonsuit and does not bar further action for the same cause," *Concrete Co. v. Board of Supervisors,* 197 Va. at 826, a nonsuit and a dismissal are substantively distinguishable.

In the first place, a nonsuit is a voluntary action by a plaintiff, resulting in a dismissal without prejudice by the court. Further, Code § 8.01-229(E)(3)[4] expressly permits a nonsuited matter to be refiled within six (6) months, notwithstanding a statute of limitations, whereas, after a involuntary dismissal by the court, the time to refile would be controlled by the statute of limitations. In addition, Code § 8.01-229(D) bars a nonsuit "without the consent of the adverse party who has filed a counterclaim, cross claim or third-party claim which arises out of the same transaction or occurrence as the claim of the party desiring to nonsuit unless the counterclaim, cross claim or third-party claim can remain pending for independent adjudication by the court." Finally, a nonsuit is not a final action in a case because, once a nonsuit is granted, "it was as if the [nonsuited] action had never been filed . . . ." *Temple v. Mary Washington Hospital,* 288 Va. 134, 140, 762 S.E.2d 751, ___(2014).[5] Taken together, these differences sufficiently distinguish a nonsuit from a dismissal such that the dismissal here cannot be considered tantamount to a nonsuit.

Effect On The *Pendente Lite* Order

The court must also consider the effect of the dismissal of Father's motion and petition on the J&DR court's *Pendente Lite* Child Support Order of June 10,

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[4] "If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, regardless of whether the statute of limitations is statutory or contractual, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer."

[5] Father relies, in part, on the holding of *INOVA Health Care v. Kebaish,* 284 Va. 336, 346, 732 S.E.2d 703, ___ (2012) -- that a "nonsuit is only the functional equivalent to a voluntary dismissal to the extent that both a nonsuit and a voluntary dismissal provide a plaintiff with a method to voluntarily dismiss the suit up until a specified time in the proceeding . . . ." *INOVA Health Care v. Kebaish* is not applicable because the "voluntary dismissal" to which the Court was referring was a voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). Father and Mother both refer to *Lewis v. Culpeper Co. DSS,* although Father does not provide the citation. Assuming Father is referring to the same case as Mother, *Lewis v. Culpeper County Dept. of Social Services,* 50 Va. App. 160, S.E.2d 511 (2007), that case has been overruled by *Davis v. County of Fairfax,* 282 Va. 23, 31-32, 710 S.E.2d 466, ___ (2011) ("To the extent that *Lewis v. Culpeper County Dept. of Social Services,* 50 Va. App. 160, 647 S.E.2d 511 (2007), is inconsistent with this opinion, it is expressly overruled."). Thus, in *Lewis,* the Court of Appeals should have held that the circuit court, not the J&DR court, was the only court which had jurisdiction.

2015. In *Smith v. Smith,* 4 Va. App. 148, 354 S.E.2d 816 (1987), the Court of Appeals held:

> Code § 20-103 provides authority for the court to provide for spousal [and child][6] support "during the pendency of the suit." We interpret this grant of authority to be limited to the right to make such award only for the period the action is pending, notwithstanding the wording of the pendente lite decree in this case which provided that the award should continue until "further order of the court."

4 Va. App. at 151.

See also *Ipsen v. Moxley,* 49 Va. App. 555, 565, 642 S.E.2d 798, (2007) (upon taking a nonsuit, "the *pendente lite* support decree also terminated as it was only temporary – a decree made for the period the action was pending without adjudicating the underlying cause"). Accordingly, upon entry of the J&DR court's September 6, 2016 order dismissing Father's motion and petition, the J&DR court's *Pendente Lite* Child Support Order of June 10, 2015 was of no force and effect, leaving the order of October 29, 2010 (requiring Father to pay child support to Mother) in effect.

Effect Of An Appeal

Code § 16.1-298 provides in pertinent part:

> [A] petition for or the pendency of an appeal or writ of error shall not suspend any judgment, order or decree of the juvenile court . . . .

In *Walker v. Dept. of Public Welfare,* 223 Va. 557, 561, 290 S.E.2d 887, ___ (1982), the Court explained that Code § 16.1-298 was "enacted to provide continuity and stability in cases of children who are the subjects of litigation . . . ." 223 Va. at 561. Thus, the filing of the notices of appeal did not suspend the J&DR court's order of September 6, 2016. See, *e.g., Sasson v. Shenhar,* 276 Va. 611, 625, 667 S.E.2d 555, (2008) ("Shenhar's appeal of the J&DR court's judgment transferring custody of Ilan to Sasson did not result in that judgment being suspended during the pendency of her appeal in the circuit

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[6] Code § 20-103(A) provides in pertinent part:

> [I]n proceedings arising under subdivision A 3 . . . of § 16.1-241, the court having jurisdiction of the matter may, at any time pending a suit pursuant to this chapter, in the discretion of such court, make any order that may be proper . . . (iv) to provide for the custody and maintenance of the *minor children* of the parties . . . . (emphasis added).

Code § 16.1-241(A)(3) provides in pertinent part:

> [E]ach juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases, matters and proceedings involving: A. The custody, visitation, *support,* control or disposition *of a child*: . . . 3. Whose custody, visitation or support is a subject of controversy or requires determination. In such cases jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, except as provided in § 16.1-24 . . . . (emphasis added).

court. *See* Code § 16.1-298.").[7] As a result, because the J&DR court's order of September 6, 2016 was to void the J&DR court's *Pendente Lite* Child Support Order of June 10, 2015, the J&DR court's *Pendente Lite* Child Support Order of June 10, 2015 is of no force and effect in this court; only the J&DR court's order of October 29, 2010 in JA 394531-03-00 (requiring Father to pay child support to Mother) remains in effect.

The Dismissal Is Appealable

Turning to whether the J&DR court's dismissal in JA 394531-03-00 was a "final order . . . affecting the rights or interests of any person," the court must consider Code § 20-112, which provides:

> Except as provided by § 20-110, no support order may be retroactively modified, but may be modified with respect to any period during which there is a pending petition for modification in any court, but only from the date that notice of such petition has been given to the responding party.

Accordingly, if Father refiled a motion to modify child support in the J&DR court (which he was entitled to do because the dismissal was "without prejudice"), he could only seek modification from the date that notice of the new motion was given to Mother. By appealing, Father may seek modification from the date that notice of that motion in the J&DR court was given to Mother. As a result, the J&DR court's dismissal "affect[ed his] rights or interests . . . ." And, because the order was a dismissal, it was final. See *Ragan* v. *Woodcroft Village Apartments*, 255 Va. 322, 327, 497 S.E.2d 740, ___ (1998) ("A final order or judgment is one that disposes of the whole subject of the case and gives all relief contemplated."). As in *Director v. Kozich,* 290 Va. 502, 779 S.E.2d 555 (2015):

> No provision of the orders suspended the execution of the court's judgment, stayed its enforcement, continued the case for further proceedings, or in any way suggested that the orders were non-appealable, non-final orders. In short, nothing "appears upon the face of the judgments]" stating "that further action in the cause is necessary to give completely the relief contemplated by the court." *Turner v. Holloway*, 146 Va. 827, 832, 132 S.E. 685, 686 (1926) (citation omitted).

290 Va. at 512.[8]

In that the dismissal of Father's Motion To Modify Child Support in JA 394531-03-00 was a "final order . . . affecting the rights or interests of any person," Mother's motion to dismiss that appeal must be DENIED.

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[7] The hearing in this court is *de novo*. See, *e.g.*, *Peple v. Peple,* 5 Va. App. 414, 419, 364 S.E.2d 232, ___ (1988) ("the circuit court must conduct a *de novo* hearing in custody cases on appeal from the juvenile courts. Code §§ 16.1-136, 16.1-296.").

[8] Thus, the "relief contemplated" is the relief contemplated by the court in its order, not by the parties. See also *Brooks v. Sanitation Authority,* 201 Va. 934, 936, 114 S.E.2d 758, ___ (1960) ("Where further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree is not final but interlocutory.").

With respect to the dismissal of Father's Petition for Child Support in JA 411262-02-00, that dismissal too "affect[ed his] rights or interests" because it deprived him of the opportunity to obtain child support from Mother. While it is true that Father could have refiled the petition because the dismissal was without prejudice, he could only have obtained relief from the time the refiled petition was filed. As explained in *Hur v. Va. Dept. of Social Services,* 13 Va. App. 54, 409 S.E.2d 454 (1991):

> Our Supreme Court "adopted the rule 'that the time permanent alimony shall commence is within the sound discretion of the court and *may* be made effective as of the date of the commencement of the suit.'" *Young v. Young*, 215 Va. 125, 126, 207 S.E.2d 825, 825 (1974) (per curiam) (emphasis in original) (quoting *Lawrence v. Lawrence*, 212 Va. 44, 47, 181 S.E.2d 640, 642 (1971)). We find no reason why this same rule should not apply to child support orders. Thus, it was within the trial court's sound discretion to award child support effective the date Hur received notice. We find no abuse of that discretion.

13 Va. App. at 62.

By appealing, Father may seek relief from the time he filed his Petition in the J&DR court. And, because the order was a dismissal, it was final. See *Ragan* v. *Woodcroft Village Apartments*, 255 Va. at 327. Accordingly, the dismissal of Father's Motion To Modify Child Support in JA 394531-03-00 was a "final order . . . affecting the rights or interests of any person" and Mother's motion to dismiss that appeal must be DENIED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

**V I R G I N I A :**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

[redacted] )
)
Plaintiff )
)
v. ) CL 2016-294, 298
)
[redacted] )
)
Defendant )

ORDER

THIS MATTER came before the court on Plaintiff's motion to dismiss Defendant's appeals from the Juvenile & Domestic Relations District Court.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiff's motion to dismiss Defendant's appeals from the Juvenile & Domestic Relations District Court.

ENTERED this 6th day of April, 2017.

[redacted]
Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA**

Copies to:

Julia Boone
Counsel for Plaintiff

Rachele Valente
Counsel for Defendant