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SUPREME COURT OF ARKANSAS

No. 09-603

JEFFREY HARDY APPELLANT V. DIANA HARDY APPELLEE	**Opinion Delivered** January 28, 2010 APPEAL FROM THE FAULKNER COUNTY COURT, [NO. DR-2002-590] HON. DAVID CLARK, JUDGE DISMISSED WITHOUT PREJUDICE.

ROBERT L. BROWN, Associate Justice

Appellant Jeffrey J. Hardy appeals from an order of the Faulkner County Circuit Court denying his motion for declaratory judgment and his motion for reconsideration of his discovery requests for the medical records of appellee Diana Hardy. Because this order is not a final, appealable order under Arkansas Rule of Civil Procedure 54(b) and Arkansas Rule of Appellate Procedure–Civ. (2)(a)(1), we dismiss this appeal without prejudice.

Jeffrey Hardy and Diana Hardy were married on April 15, 1995. Diana filed for divorce on July 11, 2002, and alleged that two sons were born of their union, T.H. on May 21, 1995, and W.H. on July 17, 1996. In his answer, Jeffrey denied that two children had been born of their union, and, on February 3, 2003, he moved for a paternity test relating to T.H. Diana filed a response to Jeffrey's motion for paternity testing in which she asserted that he did not have substantial reason to believe that he was not T.H.'s father.

On March 4, 2003, a divorce decree was entered. Although the decree awarded custody of the two minor children to Diana and ordered Jeffrey to pay child support for them, it made no express finding regarding the paternity of T.H. On March 12, 2003, the circuit judge entered an order denying Jeffrey's motion for paternity testing and stated that it was not in T.H.'s best interest.

On November 8, 2007, Diana filed a petition for contempt against Jeffrey, who had begun paying a reduced amount of monthly child support. Jeffrey answered that he had obtained a paternity test confirming that he was not the biological father of T.H. and moved to set aside the establishment of paternity under Arkansas Code Annotated section 9-10-115(f)(1) (Repl. 2009). On January 8, 2008, Jeffrey served Diana with discovery requests, including interrogatories and requests for admissions, regarding the paternity of T.H. Diana objected to the discovery requests and moved for a protective order, arguing that the discovery requests were made for purposes of embarrassment and harassment.

Jeffrey next filed a motion to compel Diana to respond to his discovery requests. On February 13, 2008, he served Diana's prenatal-care physician, Dr. Paul McChristian, and the custodian of records of Conway Regional Medical Center with subpoenas requesting that they appear for depositions and produce Diana's prenatal records. Diana moved to quash the subpoenas on the same day.

Following a hearing, the circuit judge entered orders on February 15, 2008, quashing the subpoenas issued to Dr. McChristian and the custodian of records and denying Jeffrey's

motion to compel responses to his discovery requests. Jeffrey then filed an amended response to Diana's motion for contempt and moved for acknowledgment of the paternity test of T.H. and to set aside the 2003 divorce decree under Arkansas Rule of Civil Procedure 60(c)(4). Jeffrey asserted that he was entitled to relief from the divorce decree under Rule 60(c)(4) because Diana had committed fraud upon the court by misrepresenting that there was no substantial reason to believe that he was not the father of T.H.

After receiving notice that Jeffrey intended to depose an expert regarding his paternity test of T.H., Diana filed a motion to quash the deposition on February 20, 2008. On February 21, 2008, the circuit judge quashed the deposition and ordered that "[n]o depositions shall be taken regarding the issue of paternity without approval of the Court." On February 28, 2008, following a hearing on the matter, the circuit judge entered an order finding Jeffrey in willful contempt for his failure to pay child support as ordered by the divorce decree. On March 11, 2008, Diana filed a second petition for contempt alleging that Jeffrey was harassing her by submitting child-support checks marked "Pmt under protest due to PATERNITY FRAUD."

On July 16, 2008, Jeffrey moved for declaratory judgment and sought a declaration that the common-law presumption that a child born to a married couple is the child of the husband was unconstitutional as well as several paternity statutes. He also moved the circuit judge to reconsider the order denying his discovery request for Diana's prenatal records and asserted that there was a likelihood that he would succeed on the merits of his claim to set

aside the divorce decree under Rule 60(c)(4), if his request for the records was granted. Diana responded that Jeffrey's motion for declaratory judgment was untimely because the issues it raised were addressed in the 2003 orders from which he had not appealed.

On November 17, 2008, Jeffrey filed an amended motion for declaratory judgment that added two statutes to the list of paternity statutes he wished to be declared unconstitutional. After hearing arguments from the parties, the circuit judge entered an order on February 18, 2009, denying Jeffrey's motion for declaratory judgment. The circuit judge found that Jeffrey lacked standing to challenge the paternity statutes based on his failure to appeal from the March 12, 2003 order denying his request for a paternity test and that, in the alternative, the statutes were not unconstitutional. In addition, the circuit judge denied Jeffrey's motion for reconsideration of his discovery request for Diana's prenatal records. Jeffrey now brings this appeal.

A review of the record reveals that Jeffrey never obtained a ruling from the circuit judge on his motion to set aside the divorce decree on grounds of fraud. Accordingly, it remains pending before the circuit court.[1] Although neither party has raised this issue in their briefs before this court, the question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise on its own motion. *See, e.g.*, *Schubert v. Target Stores, Inc.*, 2009 Ark. 89, 302 S.W.3d 33.

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[1]Jeffrey concedes in his reply brief that "he did not get a ruling on his Motion for Acknowledgment of DNA Test and Set Aside, Vacate or Modify Prior Decree."

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil provides that an appeal may be taken only from a final judgment or decree entered by the circuit court. Rule 54(b) of the Arkansas Rules of Civil Procedure provides that, when more than one claim for relief is presented in an action, or when multiple parties are involved, an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not a final, appealable order. *See also S. Farm Bureau Cas. Ins. Co. v. Easter*, 369 Ark. 101, 251 S.W.3d 251 (2007). Under Rule 54(b), the circuit judge may direct the entry of a final judgment as to one or more but fewer than all the claims or parties by making an express determination, supported by specific factual findings, that there is no just reason for delaying an appeal. *See Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432. Without this required certification, an order that adjudicates fewer that all the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the claims or parties. *See* Ark. R. Civ. P. 54(b)(2).

In the case at hand, Jeffrey's motion to set aside the divorce decree is a claim for relief that is still pending in the circuit court. *See Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005) (holding that, although a motion to set aside a divorce decree is a new or additional claim for relief under Rule 5(a), service of an accompanying summons was not required where the circuit court had reserved continuing jurisdiction). Because a claim for relief remains outstanding and there is no Rule 54(b) certification from the circuit judge, this court is without jurisdiction to hear this appeal due to lack of a final, appealable order. *See, e.g.*,

Chapman v. Wal-Mart Stores, Inc., 351 Ark. 1, 89 S.W.3d 906 (2002). Accordingly, we must dismiss this appeal.

Dismissed without prejudice.

Friday, Eldredge & Clark, by: *Betty J. Hardy*, for appellant.

Pamela S. Osment, for appellee.