

AGUIAR-DAFFRON V. AGUIAR

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**KELLY AGUIAR-DAFFRON,
Petitioner-Appellee,
v.
ROGER AGUIAR,
Respondent-Appellant.**

No. A-1-CA-36405

COURT OF APPEALS OF NEW MEXICO

December 26, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Deborah Davis
Walker, District Judge

COUNSEL

Kelly Aguiar-Daffron, Albuquerque, NM, Pro Se Appellee

Roger Aguiar, Albuquerque, NM, Pro Se Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, JULIE J. VARGAS, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Respondent Roger Aguiar, a self-represented litigant, appeals from the April 14, 2017 order of the district court [DS 1] that, among other things, denied Respondent's motion to set aside the March 30, 2017 order of the district court that adopted the March 14, 2017 hearing officer's report and findings and recommendations. [2 RP 331-32 (¶

4), (¶ 9)] In response to Respondent’s docketing statement, we proposed dismissal for lack of a final, appealable order. Respondent has filed a memorandum in opposition. After due consideration, we are unpersuaded and dismiss for lack of a final, appealable order.

{2} We will attempt to avoid unnecessary repetition of our notice of proposed summary disposition and instead focus on the content of the memorandum in opposition. Our notice explained that the order from which Respondent seeks to appeal was rendered non-final by his as yet unadjudicated challenge to that order and, in any case, the order is itself non-final because it explicitly contemplates further proceedings. Respondent does not persuasively rebut either reason for dismissal. Respondent has not addressed our authorities indicating that his April 24, 2017 motion attacking the April 14, 2017 order of the district court should be construed as a timely Rule 1-059(E) NMRA motion to reconsider that must be expressly adjudicated before this Court can acquire jurisdiction. *See Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 10, 142 N.M. 527, 168 P.3d 99 (stating that when the appellate courts determine which rule supports a motion, “[n]omenclature is not controlling” but, instead, the courts look to the timing of the motion and that when a timely motion challenges a judgment, it is deemed a Rule 1-059(E) motion (internal quotation marks and citation omitted)); *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶ 6, 147 N.M. 303, 222 P.3d 675 (stating that “when a Rule 1-059(E) motion, or other motion that challenges the district court’s determination of the rights of the parties, is pending in the district court, the judgment or order entered by the district court remains non-final”).

{3} Moreover, the April 14, 2017 order is itself non-final because it explicitly contemplates further proceedings. Although Respondent points out that Respondent and Petitioner went to the district court’s clinic program in an attempt to resolve the ongoing dispute about the religious upbringing of the children, as ordered, but failed to reach agreement [MIO 3], the parties did not have the hearing on the matter contemplated in the order of the district court. [See 2 RP 332 (¶ 5) (4/14/2017 order) (“The parties will have an opportunity to reach agreement through the [c]ourt [c]linic process. If the parents cannot agree, the [c]ourt will set a hearing.”)] For this reason also, we conclude that the order being appealed from is non-final. *See Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 14, 113 N.M. 231, 824 P.2d 1033 (“The general rule in New Mexico for determining the finality of a judgment is that an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.” (internal quotation marks and citation omitted))

{4} Respondent’s appeal will not be ripe until, at the least, the district court issues an order adjudicating Respondent’s motion to reconsider and the hearing contemplated in the April 14, 2017 order is held. Accordingly, for the reasons stated in our notice of proposed summary disposition and in this opinion, we dismiss.

{5} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

JULIE J. VARGAS, Judge