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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re the Marriage of MELISSA M. and  
STEVE M. TAUSAN.

H036163  
(Santa Clara County  
Super. Ct. No. FL110458)

MELISSA M. TAUSAN,

Appellant,

v.

STEVE M. TAUSAN,

Respondent.

Appellant Melissa M. Tausan, petitioner in the dissolution action, appeals a number of interlocutory custody orders awarding temporary custody of her two minor children to their father, respondent Steve M. Tausan. Respondent claims that the appeal is taken from a nonappealable order and is untimely. During the pendency of the appeal, respondent was killed in a fatal shooting. For the reasons discussed herein, we dismiss the appeal as untimely filed and moot.

**FACTUAL AND PROCEDURAL BACKGROUND**

Appellant filed an action for dissolution of marriage in 2002. At the time she instituted these proceedings, appellant sought and received a restraining order against

respondent, as well as an order granting her full custody of their two minor children.<sup>1</sup> Appellant claimed that respondent, who was a bail bond agent with a volatile personality had been verbally abusive to her and had, on a number of occasions, destroyed her personal property. Despite these allegations, by the middle of 2003, the parties had reconciled.

Neither party proceeded with the action until March 10, 2008, when respondent filed a motion to bifurcate the issue of termination of marital status. The court granted the bifurcation motion and on April 15, 2008, entered judgment as to status only.

On March 22, 2008, appellant again sought an emergency protective order, alleging that respondent had made death threats against her. After the family court granted the temporary protective order, respondent applied for an order for an emergency screening and change of custody. In his declaration, respondent alleged, among other things, that appellant was the one who had made death threats against him, abused alcohol and drugs and kept a loaded gun in her home where their children lived. The court ordered the matter to an emergency screening, and subsequently adopted the emergency screening recommendation, leaving custody of the children with appellant. The court again issued a restraining order against respondent in favor of appellant.

In August 2008, respondent again sought to modify temporary custody, alleging that appellant had a serious drug problem, was neglecting the children and was alienating the children from respondent. The court again ordered the matter to an emergency screening and, on October 17, 2008, adopted the screening recommendations, removing the children from appellant's care and awarding temporary physical custody to respondent. The order also prohibited appellant from having contact with the children for 30 days and ordered her to participate in intensive individual therapy. However, the court

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<sup>1</sup> On its own motion, in an order dated October 28, 2011, this court took judicial notice of the Santa Clara County Superior Court file in the matter of *Melissa M. Tausan v. Steve M. Tausan* No. 1-02FL110458.

continued to maintain restraining orders against respondent in appellant's favor. By December, the court authorized supervised visitation between appellant and the children, but ordered her to pay for these visits. Shortly thereafter, respondent applied for a restraining order against appellant alleging she was violating the custody order by visiting the children's school and leaving them notes. On January 13, 2009, the parties entered into a stipulation wherein appellant agreed to stay away from the children's school and only contact them through supervised visitation. This time, the court denied appellant's request for a new restraining order against respondent, and allowed respondent to change the children's school from a school near appellant's home to a school near his home. Sometime during 2009, appellant was hospitalized for psychiatric issues.

In July 2010, appellant filed an order to show cause and request to modify child custody. In support of her request, appellant alleged that respondent was a murderer, that she had seen him commit murder, that he had admitted to being a "hit-man," and that he had threatened to kill her on several occasions. She claimed respondent belonged to the Hell's Angels gang and was a drug dealer who had previously been incarcerated. In support of her contention that respondent was a dangerous man who posed a risk to the children, she provided documentation regarding the murder charges which had been brought against respondent, of which he was acquitted. Appellant also listed a litany of instances in which she characterized respondent's conduct as abusive toward the children. On August 24, 2010, the Family court denied appellant's request for modification, finding that she had failed to comply with previous court orders.

On October 20, 2010, appellant filed the instant notice of appeal, purporting to appeal from the August 24, 2010 order denying her request for modification as well as the October 17, 2008 order awarding temporary custody to respondent. As of the date of the appeal, the trial court had not entered a judgment as to the final disposition of assets and property or as to child custody and support. While this appeal was pending, but after respondent filed his respondent's brief, this court was notified that respondent was fatally

wounded in a shooting incident while attending a funeral for a fellow Hell's Angel member.<sup>2</sup>

## DISCUSSION

On appeal, appellant challenges all of the family court's orders awarding custody to respondent and claims that the family court erred in concluding that there was no change in circumstances warranting a modification in child custody. Respondent contends that the orders appealed from are not appealable and are untimely.

### *Timeliness*

California Rules of Court, rule 8.104 sets forth the time limits for filing a notice of appeal. This rule provides that "a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled 'Notice of Entry' of judgment . . . ; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document

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<sup>2</sup> On its own motion this court takes judicial notice of "Certificate of Death," number 3201143007822, issued on October 21, 2011, for Steve Martin Tausan, as recorded by the Public Health Department Vital Records and Registration for the County of Santa Clara, submitted by respondent's counsel on October 26, 2011 at the court's request.

"A sergeant-at-arms for the motorcycling Hells Angels was shot to death this weekend at a San Jose, Calif., graveyard where thousands were witnessing the burial of another Hells Angels member, gunned down last month at a Nevada casino. (Gray, *Hells Angels Officer Steve Tausan Killed at Biking Friend's Funeral* (Oct. 16, 2011) ABCNews.com <<http://abcnews.go.com/US/hells-angels-officer-steve-tausan-killed-biking-friends/story?id=14747824>> [as of Feb. 15, 2012].)

"Police, who on Monday identified Tausan, a former Marine, ex-boxer and San Jose bail bondsman, as the victim in the case, have said nothing about what they suspect was a motive. . . . [¶] . . . [¶] . . . Tausan, was a popular member of the Santa Cruz chapter of the Hells Angels who was also known as Mr. 187, after the [P]enal [C]ode for murder. Tausan was prosecuted 14 years ago on suspicion of killing Kevin Sullivan for drunkenly badgering a dancer at the Pink Poodle strip club in San Jose and then insulting the motorcycle club. [¶] He was acquitted." (Webby, *Sources: 38-year-old San Jose biker is suspect in cemetery slaying* (Oct. 17, 2011) Mercury News.com <[http://www.mercurynews.com/breaking-news/ci\\_19134556-](http://www.mercurynews.com/breaking-news/ci_19134556-)> [as of Feb. 15, 2012].)

entitled ‘Notice of Entry’ . . . ; or [¶] (3) 180 days after entry of judgment.” (Cal. Rules of Court, rule 8.104(a)(1)-(3).) It does not appear from the record or the trial court file that either the court or the parties served a notice of entry of judgment as to any of the orders which are the subject of this appeal. Therefore, pursuant to rule 8.104(a)(3), appellant had 180 days to file a notice of appeal. The appeal herein was filed on October 20, 2010.

The appeal from the August 24, 2010 order denying modification is timely as it was filed well within the 180 day time limit. However, the appeal is untimely from the October 17, 2008 order which was entered more than two years before appellant filed her notice of appeal.

In her opening brief, appellant also claims to appeal from the December 1, 2008 and the January 13, 2009 orders, even though those orders were not listed in her notice of appeal. Even if those orders were properly on appeal, any appeal there from would also be untimely as it would have been filed more than 180 days from the date those order were entered. Therefore, we must dismiss the appeal from the October 17, 2008, December 1, 2008 and the January 13, 2009 orders as untimely filed.

### ***Appealability***

Respondent contends that the appeal from the August 24, 2010 order, while timely, is not an appealable order because it is interlocutory. Respondent is correct. While orders modifying or refusing to modify custody *after* a final judgment on custody are appealable as post judgment orders (see generally: *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 956), and orders regarding temporary spousal or child support are appealable as “order[s] dispositive of the rights of the parties in relation to a collateral matter, or directing payment of money or performance of an act” (*In re Marriage of Campbell* (2006) 136 Cal.App.4th 502, 505), temporary custody orders are not. “A temporary custody order is interlocutory by definition, since it is made pendente lite with the intent that it will be superseded by an award of custody after trial. [Citation.]

Code of Civil Procedure section 904.1 bars appeal from interlocutory judgments or orders ‘other than as provided in paragraphs (8), (9), and (11). . . .’ [Citation.] Temporary custody orders are not listed in any of those paragraphs. Therefore this statute precludes the appealability of such orders.” (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559-560, fn. omitted.) While there was a judgment as to marital status, the court has never entered a final judgment as to custody. All of the custody orders through the date of appeal were temporary in nature, and the August 24, 2010 order denying appellant’s request to modify the custody related to those temporary orders. Therefore, the August 24, 2010 temporary custody order is not appealable.

### ***Mootness***

Even if the order were appealable, the underlying custody orders are no longer enforceable because the family court has lost jurisdiction to make further findings regarding custody rights between the parties to the divorce. Therefore any appeal from the custody orders is moot.

Whatever may be the terms of an order awarding the custody of a minor child to either of the parents in a divorce proceeding, it is well settled that so long as the child involved continues to be a minor, there is no such thing as a final order pertaining to the custody of such child. While the family court has jurisdiction to inquire into the care and custody of the minor child at any time, the court’s jurisdiction continues only as long as the child continues to be a child of the divorced parents. If, by any legal proceeding, this relationship is extinguished, the jurisdiction and power of the family court terminates immediately. (*In re Marriage of Jenkins* (1981) 116 Cal.App.3d 767, 772-773.) “The child is not a permanent ward of the divorce court, but rather the court’s interest is in determining the right to custody *between* the parents.” (*Ibid.*) Death of one of the parties to the divorce extinguishes this interest.

As in the case before us in *Guardianship of Donaldson* (1986) 178 Cal.App.3d 477 (*Guardianship of Donaldson*), the court had only entered interlocutory orders when

the father, who had temporary custody, died. In determining the status of the custody orders, the court held that, “Prior to the father's death he was awarded temporary physical custody of the two children pursuant to a marital dissolution order. Upon his death, the custody order terminated. ‘Divorce is a personal action that does not survive the death of a party.’ [Citation.] As stated in *In re Marriage of Shayman* (1973) 35 Cal.App.3d 648, 651: ‘[T]he death of a party to a dissolution proceeding abates the cause of action, as the status of the parties is no before the court, and . . . the court thus loses jurisdiction to make any *further determination* of . . . rights . . . .’ (Italics in original.)” (*Id.* at pp. 485-486, fn. omitted.) “ ‘When the parent to whom the custody of a child in a divorce proceeding is awarded dies, the order of award becomes immediately of no force or effect, for the simple reason there is no one upon whom it can operate or anyone in existence capable of asserting any rights thereunder.’ [Italics added.]” (*In re Marriage of Jenkins, supra*, 116 Cal.App.3d at pp. 772-773.) The respondent here was awarded temporary custody of the minor children and died after the appeal was filed. Because of his death, the underlying temporary custody orders awarding him temporary custody are now of no effect. Therefore, determining, on appeal, the validity of an order denying modification of those orders would be a futile endeavor.

We note that when *Guardianship of Donaldson* was decided, former Civil Code section 197 provided that “[e]ven in the case of an intervening divorce, upon the death of one natural parent the custody of the legitimate children of the marriage is automatically reposed in the surviving natural parent. [Citation.]” (*In re Estate of Barassi* (1968) 265 Cal.App.2d 282, 287-288.) Civil Code section 197, now repealed, was superseded by Family Code section 3040 which establishes an order of priority regarding the award of child custody. Automatic reversion to the surviving parent is no longer the law in California. Whether appellant is able to successfully regain custody of her children will be a matter for the courts to decide in another venue. However, it cannot and will not be decided within the action currently before this court entitled *Tausan v. Tausan*, as that

action is now abated and the custody orders made therein are of no force or effect.<sup>3</sup> Any determination by this court regarding the merits of the appeal would serve no purpose because the trial court has lost jurisdiction to effectuate any decision by this court regarding the child custody order on appeal. While there was an actual and existing controversy regarding the custody order at the time the appeal was filed, we conclude that the respondent's death extinguished that controversy. We, therefore, find the appeal to be moot.

**DISPOSITION**

The appeal from the order filed on October 17, 2008 is dismissed as untimely. The appeal from the order filed on August 24, 2010 is dismissed as moot.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

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<sup>3</sup> In fact a new proceeding regarding the appellant's minor children has been filed in the Superior Court of Santa Clara County entitled *In re Guardianship of Steve J. Tausan*, Case Number 1-11-PR169737.