REL: May 3, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170944

Kevin E. Docen

v.

Victoria C. Docen

Appeal from Mobile Circuit Court
(DR-17-901207)

On Application for Rehearing

MOORE, Judge.

This court's no-opinion order of affirmance of March 8, 2019, is withdrawn, and the following is substituted therefor.

Kevin E. Docen ("the father") appeals from a judgment entered by the Mobile Circuit Court ("the trial court") divorcing him from Victoria C. Docen ("the mother"); specifically, he appeals the provisions of the divorce judgment regarding custody of the parties' child ("the child") and child support. We affirm the trial court's judgment.

Procedural History

The procedural history pertinent to this appeal is as follows. In a separate action before the trial court, the trial court entered, on February 17, 2017, a judgment legally separating the parties and incorporating an agreement of the parties regarding the terms of that separation. Among other things, the parties agreed that the father would pay child support to the mother in the amount of $341.18 per month.

On September 5, 2017, the father filed a series of documents seeking an uncontested divorce from the mother, including a divorce settlement agreement ("the divorce agreement") signed by both parties, which provided, in pertinent part:

> "2. THAT [the father] shall pay to [the mother] child support in the amount of $416.49 per month effective upon the issuance of the judgment of

> divorce, which amount is in compliance with [the child-support guidelines]."

The father also filed a Form CS-41, see Rule 32(E), Ala. R. Jud. Admin., that had been signed by the mother, a Form CS-41 that had been signed by the father, and a Form CS-42 and a Form CS-43, both of which had been prepared by the father's attorney; those documents are hereinafter referred to collectively as "the first child-support forms."

On September 28, 2017, before the trial court could act on a motion to enter a final judgment of divorce based on the divorce agreement,[1] the mother filed a motion to set aside the divorce agreement, arguing, among other things, that the father had "manipulated" the child-support guidelines. On September 29, 2017, the trial court entered an order granting the motion to set aside the divorce agreement, stating: "Matter shall be considered to be a contested matter and shall be set for a trial." On October 18, 2017, the trial court nevertheless entered a judgment based on the divorce agreement, but it vacated that judgment on the same date,

[1]Section 30-2-8.1(a), Ala. Code 1975, provides that "[a] court shall not enter a final judgment of divorce until after the expiration of 30 days from the date of the filing of the summons and complaint."

noting that the judgment had been entered as the result of a clerical error.

The parties then filed various pleadings and amended pleadings setting forth their claims against one another regarding, among other things, child custody and child support. A bench trial was held on April 5, 2018, at which the parties offered testimony and exhibits and submitted new CS-41 and CS-42 forms. On April 16, 2018, the trial court entered a judgment divorcing the parties. The divorce judgment provided, among other things, that the parties would share joint legal and joint physical custody of the child, with the father having the child "Monday through Sunday at 6:00 p.m. and the [mother] having the following week with the [same] schedule or any other agreed upon times." The trial court directed the father to pay child support to the mother in the amount of $416.49 per month.

The father filed a postjudgment motion on April 26, 2018, challenging, among other things, the custody and child-support provisions of the divorce judgment. The mother also filed a postjudgment motion asserting, among other things, that the divorce judgment should be amended to require the father to

pay health insurance for the child. Following a hearing, the trial court entered an order on the postjudgment motions on June 8, 2018, amending the divorce judgment, in part, by explaining how it had determined the amount of its child-support award, by directing the father to maintain health insurance for the benefit of the child, and by otherwise denying all other requested relief. The father filed his notice of appeal to this court on July 18, 2018.

Analysis

I. Custody Schedule

The father, through new counsel, first argues on appeal that the judgment should be reversed for failing to clarify which party would exercise physical custody of the child between 6:00 p.m. on Sunday evenings and Monday morning. We recognize that the judgment does not expressly provide which parent shall have custody of the child during that period, but it does allow for the parties to reach an agreement as to when the child will be exchanged. The father does not cite any legal authority indicating that a provision of this nature violates the law. The father also does not cite any legal authority to support his argument that the judgment should be

reversed and the cause remanded for the imposition of a more exact custody schedule. See City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998) ("When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research."). Accordingly, that portion of the trial court's judgment is affirmed.

I. Child Support

The father also challenges the child-support provision of the judgment. The trial court awarded the mother $416.49 in monthly child support. In his postjudgment motion, the father objected to the amount of child support awarded to the mother, stating, in pertinent part: "The Court did not attach a CS-42 to the judgment of Divorce and [the father] does not know how the same was calculated. The amount seems high based on the testimony and the joint custody arrangement...."

At the hearing on the parties' postjudgment motions held on June 7, 2018, the father's attorney argued that the trial court had erred in ordering the father to pay the mother child

support "when they: number one, have joint custody and, number two: she makes more money than he does." The father's attorney theorized that the trial court must have relied on income figures for the parties that had been inadvertently reversed by the mother on the CS-42 form filed by her on the trial date. The trial judge could not recall how he had determined child support, but he informed the parties that he would look into the matter following the hearing. The next day, the trial court entered its order on the parties' postjudgment motions that provided, in pertinent part:

> "2. THAT the Court notes that the parties had entered into an agreed upon Legal Separation, in which they had agreed to custody, visitation and other matters concerning the minor child. The parties then filed for divorce and attached thereto a proposal, as an agreement of the parties concerning custody and child support. The Court takes the child support as agreed upon by the parties originally at $416.49 per month and reestablishes that as the child support. The Court hereby specifically rejects both parties CS-41 and CS-42 forms and adopts by reference the original CS-41 and CS-42 forms filed at the beginning of this litigation."

(Emphasis added.)

On appeal, the father initially challenges the manner in which the trial court determined child support as violating his procedural-due-process rights and Rule 408(a), Ala. R.

Evid.[2] We cannot consider these arguments, however, because they are being raised for the first time on appeal. Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ("[An appellate court] cannot consider arguments raised for the first time on appeal; rather, [its] review is restricted to the evidence and arguments considered by the trial court."); Smith v. Smith, 196 So. 3d 1191, 1198 (Ala. Civ. App. 2015) (holding that appellate court could not consider procedural-due-process argument raised for the first time on appeal). The father complains that he could not have raised these arguments earlier because, he says, he first learned the basis

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[2]Rule 408(a) provides:

> "Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount or when offered to impeach through a prior inconsistent statement or contradiction:
>
> > "(1) furnishing or offering or promising to furnish -- or accepting or offering or promising to accept -- a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > "(2) conduct or statements made in compromise negotiations regarding the claim."

for the child-support award when he received the order ruling on his postjudgment motion. The father maintains that the "rule against successive postjudgment motions" prevented him from filing a second postjudgment motion to raise these objections to the trial court. We disagree.

As a general rule, a party may not file a second postjudgment motion that merely requests that the trial court reconsider the same issues raised in the original postjudgment motion. See Ex parte Keith, 771 So. 2d 1018 (Ala. 1998). Our supreme court has characterized such impermissible postjudgment motions as "successive" postjudgment motions, but they are actually more accurately described as "repetitive" postjudgment motions. The general rule against repetitive postjudgment motions does not apply when a subsequent postjudgment motion raises new and different grounds upon which a judgment could be set aside. In McGinnis v. Steeleman, 199 So. 3d 69 (Ala. Civ. App. 2015), the trial court granted a motion filed by Cheryl K. Steeleman requesting dismissal of the complaint filed by Chad McGinnis. Steeleman asserted various grounds in her motion. The trial court granted Steeleman's motion without stating the ground upon

which it based the dismissal. McGinnis filed a postjudgment motion arguing that he had stated a valid claim that was not barred by the grounds asserted by Steeleman in her motion to dismiss. The trial court denied McGinnis's motion, stating that McGinnis had not responded to the motion to dismiss or attended the hearing on the motion. McGinnis then filed a "motion to reconsider," arguing that he had been unaware of the hearing. The trial court denied that motion, and McGinnis appealed.

In addressing the timeliness of McGinnis's appeal, this court determined that McGinnis's "motion to reconsider" was not an unauthorized successive postjudgment motion, explaining:

> "In this case, when it denied [McGinnis's] first postjudgment motion, the trial court explained, for the first time, that it had granted [Steeleman's] motion to dismiss because [McGinnis] had not filed a written response to the motion and his counsel had not appeared at the hearing on [Steeleman's] motion. In effect, the trial court amended its earlier judgment to reflect that it had dismissed the petition, not under Rule 12(b), Ala. R. Civ. P., for failure to state a viable claim, but under Rule 41(b), Ala. R. Civ. P., due to [McGinnis's] failure to prosecute his action. ... In his 'motion to reconsider,' [McGinnis] did not rehash what he had stated in his initial Rule 59[, Ala. R. Civ. P.,] motion regarding the reasons he had a viable claim for relief; rather, he argued solely that his

> petition should be reinstated due to excusable neglect by his counsel."

199 So. 3d at 72. See also E.S.R. v. Madison Cty. Dep't of Human Res., 11 So. 3d 227, 230 n.2 (Ala. Civ. App. 2008). Thus, if the trial court takes some action on an original postjudgment motion that prompts a new objection that could not have been previously raised in the original postjudgment motion, a party may file another postjudgment motion raising that objection. McGinnis, 199 So. 3d at 72. Under those circumstances, the second postjudgment motion would not be considered an impermissible repetitive postjudgment motion. Id.; see also J.B.M. v. J.C.M., 142 So. 3d 676, 682 (Ala. Civ. App. 2013). In this case, the father could have filed a second postjudgment motion asserting his procedural-due-process and evidentiary arguments because those arguments constituted grounds for vacating or amending the judgment different from the grounds asserted in his first postjudgment motion. Having failed to file a second postjudgment motion, the father did not preserve for appeal the arguments he now asserts in this court. See Pratt v. Pratt, 56 So. 3d 638, 645 (Ala. Civ. App. 2010).

On rehearing, the father cites a number of cases in which this court affirmed that a successive postjudgment motion seeking the same or similar relief that had been denied in an original postjudgment motion would not toll the time for filing an appeal. See, e.g., Thompson v. Ladd, 207 So. 3d 76 (Ala. Civ. App. 2016) (concluding that a second postjudgment motion that sought relief that had been denied in an original postjudgment motion and raised a new request that did not result from the order on the original postjudgment motion did not toll the time for taking an appeal); Green v. Green, 43 So. 3d 1242 (Ala. Civ. App. 2009) (former husband's repetitive postjudgment motions did not toll the time for taking an appeal when the arguments asserted in later postjudgment motions could have been asserted in original motion); BancTrust Co. v. Griffin, 963 So. 2d 106, 109 (Ala. Civ. App. 2007) (second postjudgment motion seeking the same relief as original postjudgment motion did not toll the time for taking an appeal); Hudson v. Hudson, 963 So. 2d 92, 94 (Ala. Civ. App. 2007) (concluding that a second postjudgment motion seeking the same relief as original postjudgment motion did not toll the time for taking an appeal); and Ex parte Dowling,

477 So. 2d 400, 404 (Ala. 1985) (concluding that a "motion to reconsider" could not be construed as a Rule 60(b), Ala. R. Civ. P., motion when the facts alleged in the motion to reconsider were known by the moving party at the time of his original motion). The circumstances in each of those cases are distinguishable from those in the present case, in which the new legal arguments asserted by the father on appeal arose when the trial court entered its June 8, 2018, postjudgment order indicating the reasoning behind its child-support award. Thus, like in McGinnis, the father could have raised his arguments that the trial court erred in basing its child-support award on the divorce agreement in a Rule 59(e), Ala. R. Civ. P., motion following the entry of that order. See McGinnis, 199 So. 3d at 72 n.1. Because the father did not file a postjudgment motion asserting those arguments before the trial court, however, we cannot consider those arguments for the first time on appeal. See Andrews, supra.

To the extent the father asserts on rehearing that this court's reliance on McGinnis requires that we reverse the trial court's judgment to allow the father an opportunity to present the arguments he raises for the first time on appeal

before the trial court based on "the absence of prior reasonable notice of the rule of law that would be applied in the facts of this case as to a second postjudgment motion," we note that this court's decision in McGinnis was released years before the entry of the trial court's judgment in the present case, as was our supreme court's decision in Andrews, directing that issues raised for consideration on appeal must first be raised in the trial court. Because the father had the relevant caselaw available to him, we cannot conclude that the father was denied fairness or due process of law by virtue of our reliance on those cases on appeal.

The father argues that the trial court did not correctly compute his child support. As explained by the trial court, it based its award on the divorce agreement and the first child-support forms. Rule 32(A)(1), Ala. R. Jud. Admin., authorizes a trial court to accept a stipulation of the parties as to child support when it is certified on a Form CS-43 that the parties determined the child-support obligation in compliance with the child-support guidelines. See J.L. v. A.Y., 844 So. 2d 1221, 1225 (Ala. Civ. App. 2002). In this case, the father filed a Form CS-43 along with the divorce

agreement in which the father's attorney verified that he had determined the monthly child-support obligation of $416.49 by following and applying the child-support guidelines. The trial court reviewed and approved that stipulation in accordance with Rule 32(A)(2), having rejected the parties' later filed CS-41 and CS-42 forms. The father argues that the trial court should not have relied on the first child-support forms, which, he contends, had been set aside along with the divorce agreement. However, the father has waived any argument regarding the manner in which the trial court determined child support by failing to raise his objections at the trial-court level. See Waller v. Waller, 197 So. 3d 1002, 1005 (Ala. Civ. App. 2015). Thus, we do not consider this point.

Lastly, the father asserts that the trial court erred in failing to deviate from the child-support guidelines. Again, we conclude that the father failed to raise this argument to the trial court. In his postjudgment motion, the father stated that he believed that the amount of child support awarded "seemed high based on the testimony and the joint custody arrangement...." During the hearing on the parties'

postjudgment motions, the father's attorney asserted, without further explanation, that the trial court had erred in ordering the father to pay the mother child support because of the award of joint custody and the disparity between the incomes of the parties. The father did not specifically argue in the trial court that the trial court should have deviated from the child-support guidelines under Rule 32(A)(1)(a) because of the "shared custody" arrangement implemented in the divorce judgment, see generally Bonner v. Bonner, 170 So. 3d 697, 705-06 (Ala. Civ. App. 2015); rather, that is an argument that he develops fully for the first time in his brief to this court.

> "'Specific objections or motions are generally necessary before the ruling of the trial judge is subject to review, unless the ground is so obvious that the trial court's failure to act constitutes prejudicial error.' Lawrence v. State, 409 So. 2d 987, 989 (Ala. Crim. App. 1982). See also Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994) (recognizing that '[t]he purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury')."

Ex parte J.W.B., 230 So. 3d 783, 791 (Ala. 2016). The father did not sufficiently apprise the trial court of the objections

he now argues at length before this court. Therefore, we cannot put the trial court in error for failing to address those objections.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

APPLICATION GRANTED; NO-OPINION ORDER OF AFFIRMANCE OF MARCH 8, 2019, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.