

REL: March 22, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Carl Michael Seibert

v.

Lorri Fields

Appeal from Madison Circuit Court
(DR-13-900006.02)

MOORE, Judge.

Carl Michael Seibert ("the former husband") appeals from a judgment entered by the Madison Circuit Court ("the trial court") to the extent that it determined the amount of child support to be paid by Lorri Fields ("the former wife"), found

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the former husband in contempt of court, and ordered the former husband to pay the attorney's fees for the former wife. We affirm the judgment in part and reverse it in part.

Procedural History

These parties have previously been before this court. See Ex parte Seibert, 231 So. 3d 1111 (Ala. Civ. App. 2017) ("Seibert IV"); Seibert v. Seibert (No. 2140062, July 31, 2015), 217 So. 3d 843 (Ala. Civ. App. 2015) (table); Ex parte Seibert, 171 So. 3d 699 (Ala. Civ. App. 2013) (table); and Ex parte Seibert, 171 So. 3d 700 (Ala. Civ. App. 2013) (table).¹ In 2014, the trial court entered a judgment divorcing the parties ("the divorce judgment"); the divorce judgment, among other things, awarded the former wife one-half of the balance of the parties' joint bank accounts that had existed at the time of the parties' separation. The trial court rejected the former husband's postjudgment motions challenging that aspect of the divorce judgment, stating, in pertinent part:

"The court finds that such division is fair and equitable, and that, moreover, there was a standing pendente lite order adopted by the Madison County Circuit Court in October, 2012, that directed

¹In our previous decisions, the former wife was identified as Lorri Cox Seibert, Lorrie Seibert, and Lorrie Ann Fields Seibert.

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parties in a contested divorce to preserve joint[ly] held assets. The undersigned adopted the standing order after being assigned to this case, although the order was already effective."

On August 17, 2016, the trial court determined that the former wife was entitled to \$21,219.95, as one-half of the joint accounts, and entered a judgment against the former husband for that amount.

On September 13, 2017, the former wife initiated the present action by filing a verified complaint for contempt and for a rule nisi alleging, among other things, that the former husband had refused to pay her the \$21,219.95 as ordered by the trial court. She requested that the former husband be held in contempt and that he be ordered to pay her attorney's fees. On October 17, 2017, the former husband answered the former wife's complaint. On November 9, 2017, the former husband filed a counterclaim requesting, among other things, that he be awarded sole physical custody of both of the parties' children and that the former wife be ordered to pay child support. On November 16, 2017, the former wife filed a reply to the counterclaim.

On November 21, 2017, the former wife amended her complaint, adding a claim for attorney's fees under the

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Alabama Litigation Accountability Act, Ala. Code 1975, § 12-19-270 et seq. On December 7, 2017, the former husband filed an answer to the amended complaint and also requested that the former wife be ordered to pay his attorney's fees. On January 18, 2018, the former husband filed an amended counterclaim, to which the former wife filed a reply that same date.

After a trial, the trial court entered a judgment on March 8, 2018, that, among other things, awarded the former husband sole physical custody of the children and ordered the former wife to pay \$300 monthly in child support. The trial court found the former husband in contempt for refusing to pay the former wife the \$21,219.95 as ordered by the trial court on August 17, 2016, and again ordered the former husband to pay the former wife that amount to purge himself of the contempt. The trial court also awarded the former wife attorney's fees in the amount of \$10,484.13.

On April 7, 2018, the former husband filed a postjudgment motion challenging, among other things, the contempt and child-support provisions of the judgment. On June 27, 2018, the former husband moved the trial court to "find facts specially and state separately conclusions of law" regarding

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the child-support and contempt provisions of the judgment. On July 3, 2018, the trial court entered an order amending the March 8, 2018, judgment to order the former wife to pay the former husband \$500 per month in child support, which, the trial court explained, deviated from the recommended child-support obligation determined from application of the child-support guidelines set forth in Rule 32, Ala. R. Jud. Admin. ("the child-support guidelines"). The trial court declined to modify the judgment with regard to the contempt finding and the award of attorney's fees against the former husband. On August 14, 2018, the former husband filed his notice of appeal.

Standard of Review

"When evidence is presented ore tenus, the trial court is "unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility.'" Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007) (quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). Therefore, a presumption of correctness attaches to a trial court's factual findings premised on ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008). When evidence is taken ore tenus and the trial judge makes no express findings of fact, this Court will assume that the trial judge made those findings necessary to support the judgment. Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992) (citing Fitzner Pontiac-Buick-Cadillac, Inc. v. Perkins & Assocs.,

Inc., 578 So. 2d 1061 (Ala. 1991)). We will not disturb the findings of the trial court unless those findings are 'clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.' Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987) (citing Cougar Mining Co. v. Mineral Land & Mining Consultants, Inc., 392 So. 2d 1177 (Ala. 1981)). "'The trial court's judgment [in cases where evidence is presented ore tenus] will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment.'" Transamerica, 608 So. 2d at 378 (quoting Clark v. Albertville Nursing Home, Inc., 545 So. 2d 9, 13 (Ala. 1989), and citing Norman v. Schwartz, 594 So. 2d 45 (Ala. 1991)); see also Ex parte Perkins, 646 So. 2d 46 (Ala. 1994).

"'However, the ore tenus standard of review has no application to a trial court's conclusions of law or its application of law to the facts; a trial court's ruling on a question of law carries no presumption of correctness on appeal.' Ex parte J.E., 1 So. 3d at 1008 (citing Perkins, 646 So. 2d at 47, and Eubanks v. Hale, 752 So. 2d 1113, 1144-45 (Ala. 1999)). This Court "'review[s] the trial court's conclusions of law and its application of law to the facts under the de novo standard of review.'" Id. (quoting Washington v. State, 922 So. 2d 145, 158 (Ala. Crim. App. 2005))."

Espinoza v. Rudolph, 46 So. 3d 403, 412 (Ala. 2010).

Discussion

I. Contempt

On appeal, the former husband first challenges the trial court's finding of contempt against him and its award of attorney's fees to the former wife.

A.

The former husband first argues that he was ordered to pay the former wife \$21,219.95 pursuant to a standing order of the trial court. The former husband maintains that the standing order was void and could not be enforced. See Person v. Person, 236 So. 3d 90, 100 (Ala. Civ. App. 2017).

We reject the factual premise of the former husband's argument because the trial court did not order the former husband to pay the former wife \$21,219.95 based on the standing order. In its judgment, the trial court explained:

"[The former husband] has failed and refused to pay this judgment contending that it is based on a void pendente lite order that was a standing order of the Madison County Circuit Court at the time the divorce complaint was filed in January 2013. This contention flies in the face of the fact that the final divorce [judgment] as amended was affirmed by the Alabama Court of Civil Appeals and the [former] husband's petition for certiorari to the Alabama Supreme Court was denied.

"In any event, the validity of the standing pendente lite order is not determinative of the issue. There is no implication in the above quoted language from the order of September 12, 2014, that the court relied on the standing pendente lite order in making its award relative to the joint bank accounts. It is true that in an order entered December 18, 2014, responding to [the former husband]'s motion filed pursuant to Rule 59 and 60(b), [Ala. R. Civ. P.], or to alter, correct, alter[,], vacate[,], or amend, the court in addressing

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the joint account issue did make reference to the standing pendente lite order:

"The court finds that such division is fair and equitable, and that, moreover, there was a standing pendent lite order adopted by the Madison County Circuit Court in October, 2012, that directed parties in a contested divorce to preserve joint held assets. The undersigned adopted the standing order after being assigned to this case, although the order was already effective.'

"It is clear from the language of this post-trial order that in reviewing the joint account award it had previously made, the court refused to alter it because it considered the award to be fair and equitable. While the court's reference to the standing pendente lite order was supportive of the court's refusal to alter the award, it was not the basis for that decision.

"The court finds that [the former husband] has been and continues to be financially capable of paying the award of \$21,219.9[5], and adjudges him in civil contempt for his failure to do so. The [former husband] can purge himself of the contempt by compliance.

"It is adjudged that [the former wife] is awarded attorney fees of \$10,484.13 to be paid by [the former husband], and judgment is hereby entered against him for such fees."

Because the trial court specifically stated a basis for the division of the joint bank accounts -- that the division was fair and equitable -- that is separate and apart from the standing order, we conclude that, even if the standing order

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was void, any reference thereto was harmless and presents no ground to reverse the judgment. See Rule 45, Ala. R. App. P.

B.

The former husband also argues that there was insufficient evidence to support the finding of contempt against him. "To hold a party in contempt under either Rule 70A(a)(2)(C)(ii) or (D), Ala. R. Civ. P., the trial court must find that the party willfully failed or refused to comply with a court order." T.L.D. v. C.G., 849 So. 2d 200, 205 (Ala. Civ. App. 2002).

Although the former husband admits that he did not pay the former wife her portion of the joint bank accounts, he argues that he did not do so because (1) he was subjected to financial hardship and (2) the obligation arose from a void judgment. We have already rejected the second proposition. As to the first point, the former husband testified at trial that he would pay the former wife if the payment was required by a valid judgment. Considering that testimony, the trial court could have concluded that the former husband did, in fact, have the funds to pay the judgment. See, e.g., Espinoza, 46 So. 3d at 412 (discussing the ore tenus rule).

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Therefore, we cannot conclude that the trial court erred in finding the former husband in contempt.

C.

The former husband also argues that the trial court erred in ordering him to pay the former wife's attorney's fees because, he argues, he was not in contempt of court. We have already held that the trial court's finding of contempt is due to be affirmed. "Alabama Code 1975, § 30-2-54, authorizes a trial court to award attorney's fees in a domestic-relations action when a finding of contempt has been made." Hudson v. Hudson, 178 So. 3d 861, 871 (Ala. Civ. App. 2014). This argument is without merit.

II.

The former husband also challenges the amount of child support the former wife was ordered to pay.

A.

The former husband specifically argues that the trial court erred in its imputation of income to him. The trial court's judgment imputed to the former husband the same amount of income the former wife earns as a public-school teacher. It also reduced the former wife's child-support obligation

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from the recommended amount of \$682 a month, ultimately to \$500 a month. The former husband challenges the judgment on both points.

Rule 32(B)(5), Ala. R. Jud. Admin., provides, in pertinent part:

"If the court finds that either parent is voluntarily unemployed or underemployed, it shall estimate the income that parent would otherwise have and shall impute to that parent that income; the court shall calculate child support based on that parent's imputed income. In determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of that parent, based on that parent's recent work history, education, and occupational qualifications, and on the prevailing job opportunities and earning levels in the community."

The record shows that the former husband was disbarred as an attorney. He admitted, however, that he could work at a "desk job" if he could obtain one. He testified that he had contacted one company and had gone to "places," but, he said, he had been advised not to fill out any paperwork until his criminal issues were resolved. He admitted, however, that the criminal indictment against him had been "nol prossed" approximately three months before the trial. The former husband did not testify to any other attempts to find

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employment. Considering the former husband's lack of effort to find employment despite having admitted that he could work, the trial court could have determined that the former husband was voluntarily unemployed.

We cannot, however, conclude that the trial court's judgment imputing income to the former husband in the same amount that the former wife earns as a public-school teacher is based on "the employment potential and probable earning level of th[e former husband], based on th[e former husband's] recent work history, education, and occupational qualifications, and on the prevailing job opportunities and earning levels in the community" as required Rule 32(B)(5). It appears that the trial court simply equalized the parties' incomes without having sufficient evidentiary support for doing so. We, therefore, reverse the trial court's judgment as to this issue and remand this cause for the trial court to redetermine the amount of income that should be imputed to the former husband in compliance with Rule 32(B)(5).

B.

The former husband also argues that the trial court erred in deviating from the child-support guidelines to reduce the amount of child support to be paid by the former wife.

The postjudgment order provides, in pertinent part:

"[The former husband] asserts in his motion to alter, amend, or vacate that the court has improperly deviated from the Child Support Guidelines by requiring the [the former wife] to pay only \$300 per month child support.

". . . .

"While the court finds that the [former wife's] child-support obligation should be increased from the court's previous finding of \$300 per month, the court finds that the Guideline amount of \$682 per month is unjust and inequitable and that a deviation is justified due to the infrequency with which the children have chosen to visit [the former wife], although she lives only a few blocks away from the residence of [the former husband], where they reside. There was evidence at the hearing on March 1, 2018, that the children had visited [the former wife] only twice since March 2017, the two visits lasting for less than an hour on Thanksgiving and less than an hour on Christmas, 2017.

"The court has found that there is no apparent reason for the animosity that the children demonstrate toward their mother resulting in the infrequent visits.

"The court adjudges that the court's previous order setting the [former wife's] child-support obligation at \$300 per month is hereby modified to set the obligation at \$500 per month, and a Child Support Guideline form CS-42 shall be filed with this order."

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The former husband argues that the trial court used an improper reason to deviate from the child-support guidelines.

A trial court may order an amount of child support different from that recommended by application of the formulas set forth in the child-support guidelines if it enters "[a] written finding on the record indicating that the application of the guidelines would be unjust or inappropriate." Rule 32(A), Ala. R. Jud. Admin. In the absence of a stipulation between the parties, that finding must be based "upon evidence presented in court ... [demonstrating] that application of the guidelines would be manifestly unjust or inequitable." Rule 32(A)(ii), Ala. R. Jud. Admin. However, because child support is for the benefit of the minor child, see State ex rel. Shellhouse v. Bentley, 666 So. 2d 517, 518 (Ala. Civ. App. 1995), in determining whether application of the child-support guidelines would be unjust or inequitable, the controlling consideration should be the best interests of the children whose support is at issue. DeYoung v. DeYoung, 853 So. 2d 967, 970 (Ala. Civ. App. 2002).

"[A] parent remains obligated to pay child support even when the parent has no custodial rights and the child refuses

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visitation or when the noncustodial parent has no contact with the child." Ex parte M.D.C., 39 So. 3d 1117, 1129-30 (Ala. 2009) (discussing Judge Moore's dissent in M.D.C. v. K.D., 39 So. 3d 1105, 1109 (Ala. Civ. App. 2008)); see also McWhorter v. McWhorter, 705 So. 2d 423 (Ala. Civ. App. 1997) (reversing a judgment suspending the child-support obligation of a mother whose visitation was suspended). In DeYoung, this court reasoned:

"The record clearly indicates that in deviating from the child-support guidelines, the trial court considered the father's manipulation of the children and his interference with their relationship with the mother. This court does not condone the father's misconduct. However, child support is for the benefit of the minor children, and a minor child's right to parental support is a fundamental right. Abel v. Abel, 824 So. 2d 767 (Ala. Civ. App. 2001)."

853 So. 2d at 970.

In the present case, the trial court reduced the former wife's child-support obligation because of her diminishing contact with the children. That reduction unduly penalizes the children and deprives them of their fundamental right to support. The former wife's obligation to pay child support should not be affected by the infrequency of her visitations with the children. Thus, we conclude that the trial court

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erred in deviating from the child-support guidelines on that basis.

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it determined the former wife's child-support obligation, and we remand this cause for the trial court to recalculate the former wife's child-support obligation in accordance with Rule 32 and this opinion. The trial court's judgment regarding the finding of contempt against the former husband and the award of attorney's fees to the former wife is affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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