REL: May 3, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171059

Elton T. Adcock

v.

Gretchen L. Fronk

Appeal from Madison Circuit Court
(DR-11-900145.01)

EDWARDS, Judge.

Elton T. Adcock ("the father") and Gretchen L. Fronk ("the mother") were divorced in 2013. The 2013 divorce judgment, among other things, awarded the parties joint legal custody of their children and designated the mother as the

sole physical custodian, awarded the father limited supervised visitation, ordered the father to pay child support in the amount of $958 per month, required the father to maintain medical insurance covering the children subject to certain conditions, and required the parties to equally split the cost of noncovered reasonable and necessary medical expenses of the children. In addition, the 2013 divorce judgment ordered the father to pay the mother $5,000 as a property settlement and to maintain in effect an existing life-insurance policy designating the mother as beneficiary ("the life-insurance policy").

In December 2016, the father filed a complaint seeking to modify his child-support obligation. The mother answered the father's complaint and later filed a counterclaim seeking to hold the father in contempt for his failure to pay child support as ordered, to maintain health insurance covering the children, to maintain the life-insurance policy, to pay her the $5,000 property settlement, and to pay one-half of the noncovered medical expenses incurred on behalf of the children. The father amended his complaint to add a claim seeking to hold the mother in contempt for failing to allow

the father to exercise visitation; in his amended complaint, he sought to modify certain provisions of the 2013 divorce judgment relating to visitation.

After a trial on July 18, 2018, the trial court entered a judgment on July 31, 2018 ("the 2018 modification judgment"), denying the father's request for a modification of child support, suspending the father's duty to pay child support so long as the children continued to receive monthly Social Security disability payments in an amount at least equivalent to the father's monthly child-support obligation, and determining that the father was due a credit for overpayment of child support in the amount of $7,611.43. In the 2018 modification judgment, the trial court also determined that the father owed the mother $4,742.17 for one-half of the noncovered medical expenses she had incurred on behalf of the children. The 2018 modification judgment further ordered the father to pay the mother $3,159.42 for reimbursement of one-half of the cost of the health insurance covering the children and to pay one-half of the cost of that insurance going forward. The trial court also declared that the father was in contempt of the 2013 divorce judgment, but

it did not set a purger or impose any punishment. Finally, the 2018 modification judgment terminated the provision in the 2013 divorce judgment permitting the father to exercise visitation at the Family Services Center in Huntsville and awarded the mother a $6,836.40 attorney's fee. The father timely filed a notice of appeal.

At the trial, the trial court heard testimony from the father, the mother, and Timothy Roy Callins, who formerly served as an attorney in the child-support division of the Department of Human Resources. The father testified that he and the mother had divorced in 2013 and that, at that time, the mother and the children had already relocated to Lavonia, Georgia. According to the father, the distance between Huntsville and Lavonia is approximately 350 miles and takes between 5 and 6 hours to traverse. The father explained that he had been awarded supervised visitation with the children twice per month for no more than three hours per visit and that he was entitled to exercise at least one of those visits each month at the Family Services Center in Huntsville. However, he testified that he had had only one visit with the children since the divorce, which, he said, had been held at

the Family Services Center on May 20, 2017, and had been limited to only one hour. He said that he had asked for visits multiple times and that the mother had told him that the children were too busy with their extracurricular activities or were going on vacation; he said that he and the mother could never arrive at an agreeable time for any visits.

The father testified that he had retired from his employment with the State of Alabama on September 28, 2012, before the entry of the 2013 divorce judgment. He testified that, upon his retirement from the State of Alabama, the children were covered by his former employer's medical-insurance policy pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), but, he said, coverage under COBRA "abruptly stopped" in September 2014. After that time, the father explained, he purchased private medical insurance to cover the children at the cost of $453 per month, which he maintained through August 2017. The father testified that, once he was declared disabled, he was entitled to Medicare but that the children were not.

In November 2016, the Social Security Administration determined that the father was disabled as of February 17,

2015. The children were each awarded a $9,284 lump-sum payment representing the amount they were entitled to receive from the date of the onset of the father's disability and $548 per month in Social Security disability benefits each month after December 2016. The combined amount of the children's Social Security disability benefits exceeds the father's monthly child-support obligation of $958.

The father testified that he had not maintained the life-insurance policy as required by the 2013 divorce judgment. According to the father, "[t]hat was impossible to do at the time that the [trial] court ordered it, and I have a document." However, the father did not further explain the alleged impossibility or provide documentary evidence regarding the alleged impossibility.

The father further admitted that he had not always paid his entire monthly child-support obligation of $958. The father admitted that, at the time the 2013 divorce judgment was entered, he had a child-support arrearage in the amount of $1,616. Exhibits admitted by both parties indicate that the father failed to make child-support payments in February, March, April, and August 2013; in September 2013, he paid the

mother $1,916 in child support. Those same exhibits show that, from January 2015 through March 2016, the father paid $4,580.27 in child support; he was obligated to pay $14,370 during that 15-month period.

The mother testified that she had encouraged the children to visit the father. The mother explained that she had attempted to schedule a visit between the father and the children in 2014, but, she said, the father had suggested a facility in Georgia that was some distance away from her and the children's home in Lavonia. She testified that she had offered the father some alternative facilities in Georgia that could supervise his visitation, but, she said, he never contacted her further about a facility. According to the mother, after the 2014 attempt, the father did not contact her about visiting the children until March 2017, after he had commenced this action.

The mother explained that the children were very busy with activities; both children were active in the Farmer's Federation of America, one was a competitive cheerleader for a period, one had a part-time job, one was editor of her high-school yearbook, both taught Sunday school at their church and

participated in mission trips, and both were members of the Beta Club. The mother testified that she had located a facility near her home in Lavonia at which the father could have visited, but, she said, the father had declined to use that facility because he did not want to hire an officer to supervise the visit. The mother said that she had offered to pay the expense associated with the supervisor but that the father had declined her offer. Furthermore, the mother explained that the father never contacted her to work out a mutually agreeable date; she said that he had desired her to bring the children to visit him in Huntsville on a school day. According to the mother, whenever she had offered alternative dates to the father or to the Family Services Center's personnel, either the father would indicate that he had a conflict or the Family Services Center's personnel would take so long to get back to her that the one child would have already been scheduled to work on the proposed date.

The mother complained that the father had not paid his half of the children's noncovered medical expenses. Although she admitted that the divorce judgment required her to provide the father notice of those expenses on a monthly basis, the

mother testified that she had sent the father statements and bills "at least ... quarterly." She presented exhibits containing the total amount of noncovered medical expenses incurred on behalf of each child; the combined total for both children was $9,484.34. She also testified that she had begun providing health insurance for the children as of August 1, 2017.[1]

Callins testified at trial about the calculation of the father's child-support arrearage and about the credit he had received for the lump-sum Social Security disability payments received by the children. Callins explained that the lump-sum payments could be used to offset any arrearage that had accrued from the date of the onset of the father's disability forward but that any amount of the lump-sum payments over and above that arrearage could not be used as a credit in his favor toward any arrearage accumulated before the onset of the

[1]Although the trial court calculates an amount due to the mother for one-half of the health-insurance premiums allegedly paid by the mother between August 2017 and July 2018, the record contains no evidence regarding the amount the mother pays for health insurance each month for the children other than an exhibit listing the remedies the mother was seeking, which contained only the total amount awarded by the trial court.

father's disability. Callins prepared an exhibit calculating the father's arrearage, which, as of the date the father was declared disabled in February 2015, was $3,001.73. According to that exhibit, between the date of the onset of his disability and the payment of the lump sum in January 2017, the father accrued a child-support arrearage of $9,662. The lump-sum payments of $18,568 were larger than that amount, so, based on the exhibit, only $10,620 was used to pay that portion of the father's arrearage accumulated between February 2015 and January 2016 -- or $9,662 -- and to pay the father's January 2016 child-support payment of $958. Callins explained that the amount of the lump-sum payments to the children that exceeded the father's total arrearage that accumulated between February 2015 and December 2016 is a benefit to the children and could not be used to decrease the father's arrearage that had accrued during other periods. See Windham v. State ex rel. Windham, 574 So. 2d 853, 855 (Ala. Civ. App. 1990).

Regarding the monthly Social Security disability awards to the children, which exceed the amount of the father's monthly child-support obligation, Callins explained that the father is not entitled to a credit for the difference. See

Rule 32(B)(9)(ii)(3), Ala. R. Jud. Admin. (explaining that "[a]ny payment received in excess of the amount of child support owed to the child" should not be credited toward an obligor's child-support obligation). However, the exhibit prepared by Callins reflects that, between February 2017 and February 2018, the father's monthly child-support obligation was withheld from his monthly retirement benefit pursuant to an income-withholding order. Callins testified that, in those months, because the children were receiving monthly Social Security disability benefits in an amount exceeding the father's monthly child-support obligation and $958 was withheld from the father's retirement benefits, the father was entitled to a credit for the extra $958 that was withheld from his monthly retirement benefits. After crediting a portion of that amount to the father's existing arrearage, Callins testified, the father was ultimately due a credit of $7,611.43 for overpayment of child support.

On appeal, the father raises several arguments. The father first complains that the trial court erred in awarding him a child-support credit of only $7,611.43. He also contests the award to the mother of $4,742.17, representing

half of the children's noncovered medical expenses, contending that the mother failed to prove that she had timely informed him of those expenses. In addition, he argues that the trial court lacked jurisdiction to modify the visitation provisions of the 2013 divorce judgment under Ala. Code 1975, § 30-3B-202, because the mother and the children no longer reside in Alabama, and that the trial court erred in considering the visitation issue after it expressly stated that the issue had not been properly pleaded. The father further challenges the trial court's decision to require him to pay one-half of the cost of the children's health insurance, arguing that the trial court improperly interpreted the language of the divorce judgment. Finally, the father contends that the trial court erred by holding him in contempt and by ordering him to pay the mother an attorney's fee.

Because it raises the issue of subject-matter jurisdiction, see Ala. Code 1975, § 30-3B-201, Official Comment ("[J]urisdiction to make a child custody determination is subject matter jurisdiction."), we first address the father's challenge to the 2018 modification judgment insofar as it modified the visitation provisions of the 2013 divorce

judgment. As the father points out, the evidence is undisputed that the mother and the children have resided in Georgia since the entry of the 2013 divorce judgment. According to § 30-3B-202(a),

> "[e]xcept as otherwise provided in Section 30-3B-204, [Ala. Code 1975,] a court of this state which has made a child custody determination consistent with Section 30-3B-201 or Section 30-3B-203[, Ala. Code 1975,] has continuing, exclusive jurisdiction over the determination until:
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> > "(1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
> >
> > "(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state."

The fact that the mother and the children reside in Georgia is not alone sufficient to terminate the continuing, exclusive jurisdiction of the trial court over the original child-custody determination in the 2013 divorce judgment. Typically, a court considering whether it still retains continuing, exclusive jurisdiction under the Uniform Child

Custody Jurisdiction and Enforcement Act, Ala. Code 1975, § 30-3B-101 et seq., would need to consider "whether the child and at least one parent have a significant connection to this state and whether substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships." Ex parte Collins, 184 So. 3d 1036, 1038 (Ala. Civ. App. 2015).

However, the father, who was awarded joint legal custody of the children, still resides in Alabama. Alabama Code 1975, § 30-3-169.9(b), a part of the Alabama Parent-Child Relationship Protection Act, Ala. Code 1975, § 30-3-160 et seq., provides that,

> "[w]here the parties have been awarded joint custody, joint legal custody, or joint physical custody of a child ..., and at least one parent having joint custody, joint legal custody, or joint physical custody of a child continues to maintain a principal residence in this state, the child shall have a significant connection with this state and a court in fashioning its judgments, orders, or decrees may retain continuing jurisdiction under Sections 30-3B-202 to 30-3B-204, [Ala. Code 1975,] inclusive, even though the child's principal residence after the relocation is outside this state."

See also Ex parte Breslow, 259 So. 3d 673, 677 (Ala. Civ. App. 2018) (applying § 30-3-169.9(b) to conclude that a trial court

retained continuing jurisdiction to modify a child-custody determination despite the fact that the mother and the children had moved to another state after the entry of the divorce judgment). Thus, the trial court had continuing, exclusive jurisdiction to modify the visitation provisions of the 2013 divorce judgment.

The father's second argument relating to the modification of the visitation provisions of the 2013 judgment fares no better. The father contends that the trial court was precluded from deciding the issue of visitation in its 2018 modification judgment based on the trial court's statement on the record indicating that the visitation issue had not been properly pleaded. The father's argument on this issue is meager, and lacks supporting authority. See Rule 28(a)(10), Ala. R. App. P. (requiring a party to support his or her legal arguments with appropriate authority); White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008) (noting that this court is not required to perform legal research for a party or to construct legal arguments on his or her behalf and that "Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal

authorities that support the party's position" and that, "[i]f they do not, the arguments are waived"). We therefore decline to further consider the father's argument on this issue.

We turn now to the father's argument that the trial court erred in concluding that he was required to pay one-half of the monthly insurance premium incurred by the mother to secure the children's health-insurance coverage. The father contends that the trial court did not properly construe and apply the language of the provision in the 2013 divorce judgment relating to his obligation to provide health insurance for the children. The provision in question states:

> "6. The Father is ordered to maintain a policy of medical, hospitalization, vision and dental insurance covering the parties' minor children ... for so long as the Father has insurance available through his employment, and, further, for so long as each child is eligible under the plan. In the event that neither party has medical insurance coverage available for the children through their employers, the parties shall make their best efforts to procure reasonably priced medical insurance coverage for the minor children and each shall pay one half the cost of the same."

The father testified that he had provided health insurance for the benefit of the children through his employer until that coverage was "abruptly" terminated in September 2014, two years after he retired. He also testified that,

after he was determined to be disabled, he was eligible for Medicare, but the children were not. The father procured private insurance for the children at his own expense between September 2014 and August 2017. The mother testified that, after August 2017 and at the time of trial, the children were covered under insurance provided to her through her employment.

> "An appellate court 'construe[s] [a] trial court's judgment like other written instruments: the rules of construction for contracts are applicable for construing judgments.' Boykin v. Law, 946 So. 2d 838, 848 (Ala. 2006) (citing Hanson v. Hearn, 521 So. 2d 953, 954 (Ala. 1988), and Moore v. Graham, 590 So. 2d 293, 295 (Ala. Civ. App. 1991)). '"If the terms of a judgment are not ambiguous, then they must be given their usual and ordinary meaning and their 'legal effect must be declared in the light of the literal meaning of the language used' in the judgment."' Thornton v. Elmore Cnty. Bd. of Educ., 882 So. 2d 855, 858 (Ala. Civ. App. 2003) (quoting State Pers. Bd. v. Akers, 797 So. 2d 422, 424 (Ala. 2000), quoting in turn Wise v. Watson, 286 Ala. 22, 27, 236 So. 2d 681, 686 (1970))."

Muellen v. Ritter, 96 So. 3d 863, 868 (Ala. Civ. App. 2012).

Our review of the pertinent provision of the 2013 divorce judgment indicates that the father was required to provide insurance for the children "for so long as the father has insurance available through his employment." The undisputed evidence before the trial court indicated that the father was

no longer employed after September 2012. Although the father continued to provide health insurance for the children through August 2017, five years after he retired, the evidence indicates that he was, and continues to be, no longer able to provide health insurance "through his employment." Thus, based on the terms of the 2013 divorce judgment, the condition attached to the father's duty to provide health-insurance coverage is no longer met, and his obligation to provide that coverage terminated.

We also agree with the father that provision 6 of the parties' divorce judgment does not require him to pay one-half of the cost of the children's health insurance. The provision requires the parties to split the cost of insurance only "[i]n the event that neither party has medical insurance coverage available for the children through their employers." The undisputed evidence at trial indicated that the mother was providing health insurance for the children as a benefit of her employment. Therefore, the condition precedent to the father's obligation to pay one-half of the cost of the children's health insurance has not yet occurred. Accordingly, we reverse the judgment of the trial court

insofar as it ordered the father to pay the mother $3,159.42, representing one-half of the cost of the children's health-insurance coverage between August 2017 and July 2018, and to be responsible for one-half the cost of the children's health-insurance coverage going forward.

The father next argues that the trial court erred in requiring him to pay one-half of the noncovered medical expenses of the children because, he contends, the mother did not prove that she had complied with the divorce judgment by submitting those expenses to the father within one year of their having been incurred. However, at trial the parties stipulated to "how much the medical bills are that the parties should split 50/50," and the father never argued that he had not received the medical bills the mother testified she had sent to the father. Thus, because the father failed to present his argument to the trial court, we affirm the judgment insofar as it ordered the father to pay $4,742.17 in noncovered medical expenses. See Stender v. Stender, 194 So. 3d 960, 968 (Ala. Civ. App. 2015) (quoting 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, [an appellate court's] review is restricted to the evidence and arguments considered by the trial court.'").

The father also argues that the trial court failed to award him the proper credit for the Social Security disability payments received by the children. According to the father's appellate brief, he contends that he should have received a credit of $22,034, or $958 per month for the 23 months between the onset of his disability and the receipt of benefits by the children. At trial, however, the father's counsel questioned Callins and contended that the father was due a credit of $18,568 based on the amount of the lump-sum awards to the children, after processing fees were withheld by the Social Security Administration ($9,284 x 2). Callins explained that the father had paid child support in varying amounts during the 23-month period and that, as a result, he could receive credit for only that amount of past-due support that accrued during the 23-month period between the onset of disability and the receipt of benefits, or $9,662. To award the father credit for the entire amount of the lump-sum payment, explained Callins, would run afoul of Alabama law regarding third-party payments to children.

We conclude that the trial court correctly computed the credit due to the father based on applicable law. Rule 32(B)(9)(ii)(4), Ala. R. Jud. Admin., provides that "[a]ny payment received by the child shall not be credited against arrearages that accrued before the obligor was deemed eligible to receive the third-party payment." As we explained in Windham:

> "The amount received by the children from Social Security was because of the determination of Social Security benefits due them, and any excess was an extra benefit to them. ... It did not decrease the father's arrearage obligation which arose prior to March 1986.
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> "Clearly, the Social Security disability payments belong to the children. To allow any part of that money to be credited towards the father's arrearage which was due prior to his date of disability would be, in essence, requiring the children to purge the father of contempt."

574 So. 2d at 855. Thus, the trial court's adoption of the calculations performed by Callins was proper, and we affirm the judgment of the trial court insofar as it awarded the father a credit of $7,611.43 for the overpayment of his child-support obligation.

The father also complains that the trial court could not have held him in contempt for his failure to maintain the

life-insurance policy because, he says, he proved that it was impossible for him to have maintained that policy. The trial court held the father in contempt for several violations of various provisions of the 2013 divorce judgment in addition to the provision relating to the life-insurance policy, including his failure to pay child support between February 2015 and April 2016 and his failure to pay moneys he was required to pay in the 2013 divorce judgment. Even assuming that the trial court erred in concluding that the father was in contempt for failing to maintain the life-insurance policy,[2] the trial court imposed no sentence or sanction upon the father, and, therefore, that error would be harmless error. See Cheek v. Dyess, 1 So. 3d 1025, 1031 (Ala. Civ. App. 2007) (concluding that any possible error in a contempt finding was

[2]The trial court was "'the sole judge of the facts and of the credibility of the witnesses, and it [was permitted to] accept only that testimony which it consider[ed] worthy of belief.'" Freeman v. Freeman, 84 So. 3d 939, 950 (Ala. Civ. App. 2011) (quoting Clemons v. Clemons, 627 So. 2d 431, 434 (Ala. Civ. App. 1993)). Thus, the trial court was not required to believe the father's testimony that he that was unable to maintain the life-insurance policy because it was impossible for him to do so.

harmless error when the "contempt judgment ... imposed no sanction upon the [appellant], nor were the [appellant's] person, property, or rights adversely affected by the judgment"); Rule 45, Ala. R. App. P. ("No judgment may be reversed or set aside ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). Accordingly, we affirm the 2018 modification judgment insofar as it determined that the father was in contempt of various provisions of the 2013 divorce judgment.

Finally, the father challenges the trial court's award of an attorney's fee to the mother. He contends that he should not have been held in contempt and that, therefore, the trial court had no authority to award an attorney's fee. As noted above, the trial court held the father in contempt for several violations of various provisions of the 2013 divorce judgment. On appeal, the father challenges only one ground for contempt -- the failure to maintain the life-insurance policy. Even

had we determined that the father was correct that the trial court had erred in determining that he was in contempt for failing to maintain the life-insurance policy, the trial court had evidence from which it could have determined that the father was in contempt of other provisions of the 2013 divorce judgment, which it outlined in the judgment, including, for example, the father's failure to pay child support as ordered and his failure to pay his half of the noncovered medical expenses of the children. Those additional grounds for contempt are unchallenged on appeal. The father admits that it is well settled "that in proper circumstances a reasonable attorney's fee may be allowed the prevailing prosecuting party in a civil contempt proceeding." Moody v. State ex rel. Payne, 355 So. 2d 1116, 1119 (Ala. 1978). Because the mother succeeded in having the father held in contempt, the trial court was permitted to award her an attorney's fee. Accordingly, we affirm the judgment of the trial court insofar as it awarded the mother $6,836.40 as an attorney's fee.

After a review of the record and the father's arguments on appeal, we reverse the trial court's 2018 modification judgment insofar as it ordered the father to pay the mother

$3,159.42, representing one-half of the cost of the health insurance provided for the children by the mother through her employment and insofar as it ordered the father to pay one-half of the premium for that insurance going forward. The cause is remanded to the trial court with instructions that it delete those provisions from the 2018 modification judgment. Having rejected the father's other arguments on appeal, all other aspects of the 2018 modification judgment are affirmed.

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

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