REL: June 21, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171090

Christopher J. LaFontaine

v.

Yvonne D. LaFontaine

Appeal from Lee Circuit Court
(DR-16-900104)

On Application for Rehearing

MOORE, Judge.

This court's opinion of February 15, 2019, is withdrawn, and the following is substituted therefor. Christopher J. LaFontaine ("the former husband") appeals from a judgment entered by the Lee Circuit Court ("the trial court"),

asserting that the judgment improperly modified an earlier judgment divorcing him from Yvonne D. LaFontaine ("the former wife"). We affirm the trial court's judgment.

Procedural History

The parties married on February 14, 2009, and separated on or about October 23, 2014. On March 29, 2016, the former wife filed a complaint in the trial court, seeking a divorce from the former husband; that case was assigned case number DR-16-900104. The former wife asserted, among other things, that she was entitled to reimbursement for certain expenditures made by her on behalf of the former husband during their marriage. Following ore tenus proceedings, the trial court entered a judgment on May 11, 2017 ("the divorce judgment"), divorcing the parties and providing, in pertinent part:

> "The Court finds from the evidence that the parties entered into an agreement that during the marriage [the former wife] would remain employed by the U.S. Army and support the parties while the [former husband] went to school to finish his education, and thereafter the [former husband] would become and remain employed and support the parties while the [former wife] then separated from the U.S. Army and completed her education. The Court finds that the [former wife] upheld her end of the bargain and the [former husband] did not reciprocate. The evidence at trial established that the [former husband] only reported approximately $ 10,000 in total income during two of the four and a half years

> while the parties were married and living together. The Court finds that while employed full time and continuously, the [former wife], in addition to providing the overwhelming portion of monetary support for the parties, spent approximately $15,000 during this time on [the former husband's] child-support obligations ($5,400) and related child-visitation-travel expenses ($9,500) for and on behalf of the [the former husband's] child by a prior relationship. The Court acknowledges that the [the former wife] benefitted from a portion of the money spent on travel, as she traveled on some of the trips. In addition, the Court finds that during the marriage, the [former wife] borrowed sums of money, approximately $54,000, solely in her name, the loan proceeds for which were used to fund the parties' expenses while married. The Court finds that [the former husband] should reimburse the [former wife] half of those loan proceeds, the obligation for which remains outstanding. The Court finds that the [former husband] abandoned the marital home and over $10,000 was paid by [the former wife] for the remainder of the lease payments on the marital home. The Court finds that the [former husband] should reimburse [the former wife] for half of those lease payments. There was evidence that [the former wife] expended approximately $1,837 for private-investigator expenses in dealing with [the former husband's] custody battle with the mother of his child. The evidence revealed that after the separation, [the former husband] reneged on an agreement to pay half of an attorney fee ($275) for an attempt to resolve these divorce proceedings in an uncontested manner. Due to the foregoing, the Court finds that the [former wife] is due to be awarded a monetary property settlement from the [former husband]. As such, and taking the entirety of the evidence into consideration, the Court hereby Orders the [former husband] to pay to the [former wife] the sum of $45,000, as a property settlement, and the Court hereby enters judgment for the [former wife] and against the [former husband]

> for the sum of $45,000. This judgment shall be paid by [the former husband] at the rate of no less than $625 per month until paid in full."

The former husband appealed the divorce judgment, but this court dismissed the appeal for lack of prosecution on August 10, 2017. See LaFontaine v. Triplett (No. 2160755, Aug. 10, 2017), 266 So. 3d 36 (Ala. Civ. App. 2017) (table).[1] The former husband thereafter filed in the trial court a "Suggestion of the Pendency of Bankruptcy Proceedings Under Chapter 13 of the Bankruptcy Code," notifying the trial court that he had, in fact, filed for Chapter 13 bankruptcy protection on February 9, 2018. None of the proceedings before the bankruptcy court appear in the record in this appeal.

The former wife filed a motion for relief from the divorce judgment in a separate civil action that was assigned case number DR-16-900104.01.[2] The trial court held a hearing on the former wife's motion on July 25, 2018. At the outset of that hearing, the trial court informed the former husband:

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[1]In that appeal, the former wife was identified as Yvonne Triplett.

[2]The record on appeal does not include that motion or any of the other materials filed in case number DR-16-900104.01.

> "[The former wife] has filed a motion asking that the judgment be amended to make the award of money to her that was issued in the divorce spousal support, or in Alabama we call it alimony in gross as opposed to property settlement. And so we're here to take testimony on that issue and then the court will rule one way or the other."

The former wife testified that she had appeared in the bankruptcy proceedings as a creditor based on the divorce judgment. According to the former wife, during those proceedings, the bankruptcy judge told her that the former husband could discharge his debt to her because it was labeled as a "property settlement" instead of as "spousal support." The former wife testified that she had filed the motion for relief from the divorce judgment in order to prevent the $45,000 award to her in the divorce judgment from being discharged in the bankruptcy proceedings.

After receiving the testimony of the former wife, the trial court explained that it had jurisdiction to correct a clerical mistake in the divorce judgment if it determined that it had erroneously described the former husband's obligation to the former wife as a "property settlement." The trial court stated, in pertinent part:

> "In looking at the -- looking back over the divorce [judgment], the court went into a long

> discussion about the monetary support, your then wife provided to the two of you, and then it was with the understanding that at some point the tables would be turned and you would return some of that support and let her then pursue a college degree and the things that were brought up in the testimony. There is ample support in the order that the award -- that the sums discussed were support and as a matter of fact the word support was used several times. So -- so it does seem to be justified and the court can correct [the divorce judgment] and declare that it's alimony in gross and not a property settlement."

The former husband testified that he had filed for bankruptcy protection out of necessity and that the wording of the divorce judgment should not be changed for the benefit of the former wife. The former husband indicated that he understood that the trial court had the power to change the wording of the divorce judgment, but he stated further that he considered that it would be unfair for the trial court to correct a clerical error that would have the effect of preventing the debt to the former wife from being discharged in the bankruptcy proceedings.

On July 25, 2018, the trial court entered an order in case number DR-16-900104, providing:

> "The [former wife] filed a Motion for Relief From Judgment (actually filed in 43-DR-2016-900104.01), and a hearing was held this day on said Motion. The [former wife] appeared

> personally, and the [former husband] appeared with the Court's permission telephonically.
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> "The Court took testimony from the parties and announced that, based on the Court's reading of [the divorce judgment], based on the Court's review of its trial notes, and based on the Court's reading of the applicable law, the Court finds that a clerical error occurred in [the divorce judgment] when monetary award was referred to as a property settlement.
>
> "The Court finds that the term 'property settlement' as used in [the divorce judgment] was a mistake, a clerical error made by the Court, when the sums involved are most certainly spousal support, and thus should have been termed alimony in gross. As such,
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> "The [former wife's] Motion is GRANTED. The [divorce judgment] entered and filed on May 11, 2017, is hereby MODIFIED as follows:
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> "'The sums awarded ... are hereby declared to be alimony in gross, and not a property settlement.'"

On August 24, 2018, the former husband filed his notice of appeal.

Discussion

On appeal, the former husband argues that the trial court effectuated an impermissible substantive modification of the divorce judgment more than 30 days after the entry of the divorce judgment.

Alabama law does not authorize a trial court to modify a property division more than 30 days after the entry of the final judgment effectuating such division. Stender v. Stender, 194 So. 3d 960, 971 (Ala. Civ. App. 2015). However, a trial court may correct a clerical error in a divorce judgment after that 30-day period has lapsed. See Rule 60(a), Ala. R. Civ. P.; Michael v. Michael, 454 So. 2d 1035, 1037 (Ala. Civ. App. 1984). In this case, the trial court expressly relied upon Rule 60(a) in amending the divorce judgment to describe the monetary award to the former wife as "alimony in gross" rather than the original term it had used -- "property settlement" -- so as to reflect its original intention. On appeal, the former husband argues that the change in terminology did not merely correct a clerical error but impermissibly modified the divorce judgment in a substantive manner. "[T]he object of a judgment nunc pro tunc or motion under rule 60(a) is to make the judgment or record speak the truth. ... It cannot be used to modify or enlarge a judgment nor to make the judgment say something other than what was originally pronounced." Michael, 454 So. 2d at 1037.

We need not address this argument, however. The former husband did not raise this argument before the trial court. When informed that the trial court considered the reference to a "property settlement" to be a clerical error that could be corrected under Rule 60(a) to "alimony in gross," the former husband did not object on the ground that the change would effect an impermissible substantive modification to the judgment. Instead, the former husband expressly stated that he understood that the trial court had the power to make the change to the divorce judgment. The former husband asserted that it would be unfair to him to modify the language because it would have the practical effect of preventing him from discharging the debt in bankruptcy, but at no point did the former husband specifically argue that the change would constitute an impermissible substantive modification to the divorce judgment.

Generally speaking, this court cannot consider arguments raised for the first time on appeal. See J.P. v. R.L.P., 194 So. 3d 945, 947 (Ala. Civ. App. 2015). The former husband has not cited any legal authority indicating that the issue whether a circuit court has impermissibly modified a property

division more than 30 days after the entry of the divorce judgment effectuating that division may be raised for the first time on appeal under any exceptions to the general rule; hence, we do not consider that issue. See Rule 28(a)(10), Ala. R. App. P.

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

APPLICATION GRANTED; OPINION OF FEBRUARY 15, 2019, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

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