Rel: April 12, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180035

Kandi Smith

v.

Heath Smith

Appeal from Bibb Circuit Court
(CV-17-900011)

THOMPSON, Presiding Judge.

Kandi Smith ("the wife") appeals from a judgment of the Bibb Circuit Court ("the trial court") divorcing her from

Heath Smith ("the husband").[1] Specifically, the wife challenges certain amendments the trial court made to the final judgment in response to the parties' postjudgment motions regarding the division of marital property and other miscellaneous provisions.

The record indicates the following. On February 8, 2017, the husband filed in the trial court a complaint for a divorce. On February 15, 2017, the trial court ordered the parties to mediate the matter and appointed a mediator. The parties met for mediation, and in July 2017 they executed an agreement ("the agreement") that was incorporated into the August 2017 divorce judgment.[2] The agreement provided that, among other things, the wife

> "will retain the [marital residence]. [The husband] will issue a quit claim deed to the [wife] for this property. [The husband] will get first right to purchase the property should [the wife] choose to

[1]In the wife's appellate brief, the husband is improperly referred to as "Keith."

[2]The agreement states that the mediation took place on August 26, 2017. The date appears to include a typographical error, however, because the trial court's judgment incorporating the terms of the agreement was entered on August 6, 2017. In their appellate briefs, the parties agree that the mediation occurred in July 2017.

> sell. [The wife] will not sell for at least 10 years or until all of the [husband's] debts associated with the business at the time of this [judgment] are paid off.
>
> "The enclosed @ one-acre pasture located at this address will be deeded to [the husband]. [The husband] will [have] the property surveyed and a quit claim deed prepared.[3]
>
> "....
>
> "The [wife] will retain the unattached garage building located on the property in Woodstock, Al.[, the location of the marital residence]."

On August 6, 2017, the trial court entered the judgment ("the August 2017 judgment") divorcing the parties, dividing the marital property, deciding custody, and setting forth the parties' child-support obligations. Regarding the division of the marital residence and the surrounding property, the judgment closely tracks the language of the agreement.

On September 5, 2017, the husband filed a timely motion to alter or amend the August 2017 judgment, asserting that there were "several clauses contained" in that judgment that did "not accurately state the agreement reached by the parties." On September 6, 2017, the trial court entered an

[3]The parties agree that the use of the symbol @ was intended to denote "approximately."

order directing the parties to reconcile the differences and to submit a proposed judgment within ten days. The record does not indicate that either party submitted a proposed judgment as the trial court had requested. Instead, on November 16, 2017, the parties filed a joint motion to extend the time for the trial court to consider the motion to alter or amend the August 2017 judgment, as permitted by Rule 59.1, Ala. R. Civ. P. In their joint motion, the parties stated that they were attempting to resolve "several issues regarding the children and the property." The same day, the trial court granted the motion.

The parties returned to mediation. On August 7, 2018, the trial court entered an order stating that the mediator had informed the court that the parties had engaged in a lengthy mediation, agreeing on several issues. However, the order continued, "there was still one issue on the table when the [wife] terminated the mediation by leaving abruptly." The trial court then ordered the parties to submit written arguments within 14 days, identifying the items that they had agreed upon and the items they had not agreed upon.

On August 20, 2018, the wife responded to the trial court's directive, saying that she was in agreement with all of the provisions of the August 2017 judgment except those pertaining to real estate. The wife, who submitted her August 20, 2018, document pro se, argued that, once the survey of the property was performed, it indicated that the husband was going to receive "a half acre more than the original mediated agreement called for and included property that was directly abutting the unattached garage specifically awarded to [the wife] in the original agreement." The wife went on to say that the survey indicated that the husband would receive 1.61 acres, not the 1.2 acres to which she had agreed. She appeared to argue that the husband had claimed a second, .41-acre parcel of land in addition to the 1.2-acre parcel she had intended that he receive in the agreement. The wife asked the trial court to set a formal hearing on the matter to take testimony from the parties and the surveyor.

The husband filed a proposed order containing a number of amendments to the August 2017 judgment regarding the children and the division of the marital residence and surrounding property. In the husband's proposed order, he suggested that

the August 2017 judgment be amended to award the husband "Parcel No. 1" as depicted on the survey and to award the wife "Parcel No. 2" as depicted on the survey. Among his other proposals was the provision that the husband would pay half of the cost of softball for each child "provided that he is permitted to take the child to lessons at least half of the time."

On August 23, 2018, the trial court entered an amended judgment ("the amended judgment") incorporating the husband's suggestions, including the provision regarding the husband's payment of half of the cost of softball. As to the dispute over the marital residence and surrounding property, the trial court amended the August 2017 judgment to delete the original language and include the following:

> "The [husband] is awarded Parcel No. 1 (the property enclosed by fencing) on the attached survey. It is the Court's intention that this piece of land remain 'Smith Family Land' as pointed out in the arguments submitted by both sides, that this was the [husband's] family land prior to being given to the parties. [The wife] shall execute a statutory warranty deed, conveying her interest in said property to the [husband].
>
> "The [wife] shall be awarded Parcel No. 2 on the attached survey. [The husband] shall execute a statutory warranty deed, conveying his interest in said property to the [wife]."

On September 20, 2018, the wife filed a timely postjudgment motion titled "Objection to Amendments to Final Decree of Divorce." In substance, the document is a postjudgment motion filed pursuant to Rule 59(e), Ala. R. Civ. P., seeking to amend the amended judgment. In her postjudgment motion, the wife challenges the trial court's division of the marital real property, saying it exceeds what the parties had agreed to in their original agreement. She points out that she had requested the right to present testimony on the issue of the division of the marital real property, but that the trial court amended the August 2017 judgment without affording her that opportunity. Additionally, the wife says that she never agreed to the "softball provision."

On September 20, 2018, the trial court set a hearing on the wife's objections to the amended judgment for November 1, 2018. The wife filed a notice of appeal on October 4, 2018, and a hearing was never held. The wife's notice of appeal was timely filed from the August 2018 amended judgment, regardless of whether her postjudgment motion was denied by operation of law.

On appeal, the wife argues that the trial court erred in dividing the real property in the amended judgment when no ore tenus evidence had been presented on that issue as she had requested and the agreement did not contemplate such a property division. Specifically, the wife contends that, by adding .41 acres to the property awarded to the husband, the trial court improperly deviated from the parties' agreement without any evidence having been presented to support that deviation.

The wife cites several opinions to support her assertion that the trial court erred in entering the amended judgment without first allowing her to present evidence. In J.F. v. D.C.W., 896 So. 2d 577 (Ala. Civ. App. 2004), this court discussed the entry of a judgment under similar circumstances, writing:

> "In Junkin v. Junkin, 647 So. 2d 797 (Ala. Civ. App. 1994), this court reversed the judgment of a trial court in which it disregarded an agreement reached between the plaintiff wife and defendant husband concerning attorney fees and costs. The agreement between the parties was read into the record before trial. The trial court then heard testimony regarding the remaining issues between the parties. Thereafter, the trial court entered a judgment inconsistent with the agreement of the parties as to attorney fees and costs.

"In Junkin, supra, this court recognized that a trial court is not bound by an agreement of the parties. However, we went on to state in Junkin that a 'trial court may adopt or reject such parts of [an] agreement as it deems proper from the situation of the parties as shown by the evidence. Therefore, the question becomes whether there was enough evidence presented to the trial court to support its finding.' 647 So.2d at 799 (citation omitted; first emphasis original; second emphasis added).

"Like the trial court in Junkin, the trial court in this case entered a judgment that deviated from the settlement agreement reached by the parties. The trial court in this case ordered that the parties participate in mediation; the mediation was a success. The six-page transcript of the proceedings before the trial court indicates that the terms of the settlement agreement were read into the record at the hearing; the trial court was not presented with evidence of any kind in support of the father's petition for visitation. Given the lack of evidence before the trial court, it is unclear why the trial court deviated from the settlement agreement reached by the parties in mediation and later in open court. As noted by the court in Junkin, compromises and settlements of litigation are favored by the courts of this state. 647 So. 2d at 798.

"While we recognize that a trial court may adopt or reject parts of a settlement agreement, the trial court's judgment concerning the award of additional visitation is not supported by the evidence, because there was no evidence presented on that issue. See Junkin, supra. Therefore, the judgment of the trial court is reversed and the cause is remanded for the trial court to enter an order consistent with the settlement agreement reached by the parties or to hold a hearing to allow the parties to present evidence on the issue of visitation."

896 So. 2d at 581.

In Blackledge v. Blackledge, 134 So. 3d 891 (Ala. Civ. App. 2013), this court reversed a judgment that deviated from a settlement agreement that had been read in open court when no ore tenus evidence had been presented to the court. Relying on Junkin, supra, and J.F., supra, this court wrote:

> "The cases cited by the husband indicate that the trial court may accept or reject a settlement agreement, in whole or in part, see Williams v. Williams, 261 Ala. 328, 337, 74 So. 2d 582, 591 (1954), and Porter v. Porter, 441 So. 2d 921, 924 (Ala. Civ. App. 1983); however, neither of the cases cited by the husband stand for the proposition that a trial court may reject or modify a portion of a settlement agreement when no ore tenus evidence has been presented to the court. In the present case, the transcripts of the proceedings that occurred on the trial date, at which the parties announced that they had reached a settlement agreement, and of the hearing on the wife's postjudgment motion, reveal that no ore tenus evidence was presented to the trial court. Indeed, at the hearing on the postjudgment motion, the trial court agreed that it should hear ore tenus evidence regarding the disposition of the marital home barring an agreement of the parties as to that issue. Based on Junkin and the other cases cited by the wife, we reverse the trial court's judgment and remand the case for the entry of a judgment in accordance with the actual agreement of the parties or for the presentation of evidence for the trial court's consideration in formulating an equitable judgment in accordance with the cases discussed in this opinion."

Blackledge, 134 So. 3d at 892-93.

After reviewing the record in this case, it is unclear whether the trial court did, in fact, deviate from the agreement the parties had reached regarding the disposition of the real property surrounding the marital residence. As in Blackledge, the trial court had agreed to a hearing regarding the wife's objections to the amendments to the August 2017 judgment. However, once the wife filed her notice of appeal, the hearing was not held. Moreover, there is no question that the "softball provision" requiring the husband to pay for half of the cost of the children's softball activities, including pitching lessons, if he is allowed to attend those lessons was not included in the agreement. Thus, that provision is clearly a deviation from the agreement.

We agree with the wife that she was entitled to have an evidentiary hearing to determine whether the amended judgment constituted a deviation from the agreement and, if so, whether the deviation was warranted. Accordingly, we reverse the amended judgment of the trial court and remand the cause for an evidentiary hearing. In reaching this holding, this court expresses no determination regarding the propriety of the

terms of the amended judgment. We hold only that the wife was entitled to an evidentiary hearing on the issues presented.

REVERSED AND REMANDED.

Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., concurs in the result, without writing.