

Rel: May 1, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Lacarris Jolanda Earl Jackson

v.

Kwajera Z. Jackson

Appeal from Lee Circuit Court
(DR-17-900031)

THOMPSON, Presiding Judge.

Lacarris Jolanda Earl Jackson ("the father") appeals from a judgment of the Lee Circuit Court ("the trial court") dismissing his action for a divorce from Kwajera Z. Jackson ("the mother") and seeking a determination of custody of the

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parties' child ("the child"). The trial court dismissed the action upon determining that it did not have subject-matter jurisdiction to make an initial custody determination regarding the child. The trial court also dismissed the divorce claim.

The record indicates that the parties had been married almost four years when the father filed his initial complaint for a divorce on June 29, 2016. The child was born during the marriage. When the father filed the 2016 complaint, the parties had been separated for six months. After the parties attended a counseling session in Alabama in August 2016, the father dismissed the 2016 complaint.

On January 26, 2017, the father filed a second verified complaint seeking a divorce from the mother and joint legal and physical custody of the child. In the 2017 complaint, the father alleged that the mother had been a bona fide resident of Alabama for more than six months before the filing of the complaint. He also averred that the mother and the child had left Alabama on August 8, 2017, and that Alabama was the child's home state pursuant to the Uniform Child Custody

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Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975.

On August 6, 2017, the mother filed a verified notice of limited appearance and a motion to dismiss the 2017 complaint on the ground that the trial court lacked subject-matter jurisdiction to make an initial custody determination under the UCCJEA. The mother did not address the trial court's jurisdiction over the divorce claim. In the motion, the mother stated that, at the time the current action was filed, Alabama was no longer the child's home state under the UCCJEA. She stated that she and the child had moved to Maryland, where the parties had lived at the time they married, on June 22, 2016. She attached a change-of-address form as an exhibit to her motion to dismiss. The sticker the circuit clerk applied showing the date on which the exhibit was electronically filed covers the date the change-of-address form was submitted, but the document clearly indicates that the mail-forwarding expiration date for first-class mail and packages was June 21, 2017 -- one year after the date the mother said she moved to Maryland. The mother also attached as an exhibit a letter

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from her employer in Maryland stating that she had been hired July 1, 2016.

On June 27, 2016, the mother filed a complaint for a limited divorce, i.e., a legal separation, in the Baltimore City Circuit Court ("the Maryland court"). In an August 1, 2016, letter to the Maryland court, the mother stated that, although she intended to remain in Maryland "for the period of my extended separation," she no longer intended to pursue the legal separation and asked that her complaint be dismissed.¹

The mother does not dispute that, after she went to Maryland in June 2016, she and the child traveled to Alabama to visit the father, and the mother attended a session with a marriage counselor in Alabama in August 2016. She stated that the father "was fully aware" that she and the child had moved to Maryland in June 2016, and she noted that he had visited them in Maryland. She said that the father had offered to move to Maryland in an attempt to reconcile with the mother.

At the father's request, the trial court placed the current action on its administrative docket in January 2018. In September 2018, the father requested that the matter be set

¹The action in the Maryland court was not dismissed until April 11, 2018.

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for trial. The mother moved to stay pretrial proceedings and asked for a hearing on the issue of the trial court's subject-matter jurisdiction. On December 3, 2018, the trial court entered an order stating that the issue of jurisdiction would be taken up at the trial, which was scheduled for February 12, 2019.

Before the trial was held, the parties engaged in mediation and entered into a settlement agreement on February 8, 2019. Pursuant to the agreement, the parties would share legal custody of the child and the mother would have sole physical custody of the child subject to the father's visitation, which was set forth in the agreement. The parties also agreed that the father would be awarded the marital residence in Opelika and that the mother would receive a property settlement of \$7,500. The settlement agreement was submitted to the trial court, as was the father's affidavit testifying that there existed between the parties such a complete and total incompatibility of temperament that they were unable to live together as husband and wife. On February 19, 2019, the trial court entered a judgment divorcing the parties and incorporating the settlement agreement.

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On March 13, 2019, the father filed a postjudgment motion seeking to set aside the divorce judgment incorporating the parties' settlement agreement on the ground of newly discovered evidence. On March 21, 2019, the mother, represented by new counsel, filed a response to the father's motion to set aside in which she said that she did not oppose the father's motion. She also filed her own postjudgment motion, pursuant to Rule 59, Ala. R. Civ. P., or 60(b), Ala. R. Civ. P, and a renewed motion to dismiss the action for lack of subject-matter jurisdiction. The father then filed a motion seeking to withdraw his motion to set aside the divorce judgment.

The trial court held an evidentiary hearing on the issue of jurisdiction on August 1, 2019. A transcript of that hearing does not appear in the record on appeal. On August 15, 2019, the trial court entered a judgment finding that the weight of the evidence presented demonstrated that the mother and the child had moved to Maryland and had not resided in Alabama during the six months leading up to the filing of the father's complaint in the current action. Accordingly, the trial court concluded that it did not have jurisdiction, and

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it dismissed the action for lack of jurisdiction. On September 16, 2019, in response to the father's motion to clarify the August 15, 2019, judgment, the trial court entered an order stating:

"[B]ecause the issues of Divorce and the property division are often intertwined with the child support and custody, it is this Court's custom to allow those issues to travel together if any of those issues are going to another Court. In regards to the settlement agreement, either of the parties may seek to have the State of Maryland enforce that agreement. This Court is not taking a stance on whether or not the parties' agreement is enforceable. It may be enforceable in a court with jurisdiction[;] however, because this Court's jurisdiction has been challenged and found to be lacking, this Court does not have the authority to enter an order adopting that agreement."

On August 29, 2019, the father filed a "motion to reconsider" the August 15, 2019, judgment dismissing the action. The father also filed a notice of appeal to this court on August 30, 2019. On September 5, 2019, the trial court denied the father's "motion to reconsider."

The father, appearing pro se on appeal, contends that the trial court should not have considered the mother's Rule 59 or 60(b) motion to set aside the February 19, 2019, judgment because, he says, if the motion is considered one filed pursuant to Rule 59, it was untimely. If the motion is

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considered a Rule 60(b) motion, the father argues, the mother should not be permitted "the benefit of this extraordinary writ" because, he claims, she improperly used it as a substitute for appeal.

The trial court signed the divorce judgment on February 12, 2019; however, the judgment was not entered on the State Judicial Information System ("SJIS") until February 19, 2019. Rule 58(c), Ala. R. Civ. P., provides that an order or a judgment shall be deemed "entered" "as of the actual date" it is put into SJIS. The mother filed her postjudgment motion on March 21, 2019, the 30th day after the judgment was entered. Accordingly, the mother's motion was timely filed. See Rule 59(b) and Rule 60(b). However, the trial court's August 15, 2019, judgment dismissing the action was entered more than 90 days after the postjudgment motion was filed.

Rule 59.1, Ala. R. Civ. P., provides that a motion under Rule 59 to alter, amend, or vacate a judgment must be ruled on within 90 days or else it is automatically denied. "If a trial court does not rule on a post-judgment motion within 90 days, it loses jurisdiction to rule on the motion." Ex parte Caterpillar, Inc., 708 So. 2d 142, 143 (Ala. 1997); see also

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Ex parte Chamblee, 899 So. 2d 244, 247 (Ala. 2004) (same). Thus, if the mother's motion is treated as having been filed pursuant to Rule 59, the trial court no longer had jurisdiction over the matter when it held the evidentiary hearing on August 1, 2019, or when it entered the judgment dismissing the action on August 15, 2019.

On the other hand, if the motion is considered a Rule 60(b)(4) motion, the trial court did have jurisdiction to rule on that motion when it entered the August 15, 2019, judgment. It is well settled that this court looks to the essence of a motion and not to its title to determine how the motion is to be considered under the Alabama Rules of Civil Procedure. Ex parte Johnson, 715 So. 2d 783, 785-86 (Ala. 1998).

In Ex parte R.S.C., 853 So. 2d 228, 233-34 (Ala. Civ. App. 2002), this court explained that the substantive difference between the relief sought in a motion to alter, amend, or vacate a judgment filed pursuant to Rule 59 and a motion to vacate a judgment filed pursuant to Rule 60(b) affects the applicable procedures involved.

"It is well settled that the 90-day period for pending postjudgment motions applies only to motions filed under Rules 50, 52, 55, and 59, and that it does not apply to Rule 60(b) motions to set aside a

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judgment. Conway v. Housing Auth. of Birmingham Dist., 676 So. 2d 344 (Ala. Civ. App. 1996). A Rule 60(b) motion does not bring up for review the merits of the underlying judgment and is instead a collateral attack on the judgment. It does not affect the finality of a judgment or suspend its operation. While a postjudgment motion filed pursuant to Rule 50, 52, 55, or 59 cannot remain pending in the [circuit] courts for more than [90] days, ... a Rule 60(b) motion for relief from judgment is not deemed denied by operation of law under Rule [59.1, Ala. R. Civ. P]."

853 So. 2d at 233-34.

In this case, the basis of the mother's postjudgment motion challenging the child-custody aspect of the February 19, 2019, judgment was that that judgment was void for lack of subject-matter jurisdiction. Such an assertion does not challenge the merits of that judgment; it is a collateral attack on the judgment. Accordingly, we conclude that, even though the mother's postjudgment motion was filed within 30 days of the entry of the judgment, that motion, insofar as it challenged the trial court's jurisdiction to rule on issues of child custody in the February 19, 2019, judgment, was not a Rule 59 motion subject to Rule 59.1 but, rather, a Rule 60(b)(4) motion to set aside the judgment as void, to which Rule 59.1 does not apply.

Turning to the merits of the mother's contention that the trial court did not have jurisdiction over the issue of custody of the child, the mother correctly points out that issue is governed by the UCCJEA.

"[T]he [UCCJEA], codified at Ala. Code 1975, § 30-3B-101 et seq., controls decisions regarding whether a court of this state has jurisdiction to make a child-custody determination or to modify another state's child-custody determination. M.J.P. v. K.H., 923 So. 2d 1114, 1116-17 (Ala. Civ. App. 2005). A "child-custody determination," as defined in the UCCJEA, includes any judgment providing for the legal or physical custody of a child or providing visitation with a child. § 30-3B-102(3). ...'

"R.W. [v. G.W.], 2 So. 3d [869,] 871 [(Ala. Civ. App. 2008)]."

J.D. v. Lauderdale Cty. Dep't of Human Res., 121 So. 3d 381, 384 (Ala. Civ. App. 2013). A "child custody proceeding" is defined in the UCCJEA to include divorce actions involving the custody of a child, among other things. § 30-3B-102(4).

Section 30-3B-201, Ala. Code 1975, a part of the UCCJEA, sets forth the following bases pursuant to which a court may make an initial custody determination:

"(a) Except as otherwise provided in Section 30-3B-204, [Ala. Code 1975, dealing with temporary emergency jurisdiction,] a court of this state has

jurisdiction to make an initial child custody determination only if:

"(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

"(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 30-3B-207 or 30-3B-208, [Ala. Code 1975,] and:

"a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

"b. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

"(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 30-3B-207 or 30-3B-208; or

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"(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

"(b) Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

"(c) Physical presence of a child is not necessary or sufficient to make a child custody determination."

The UCCJEA defines the term "home state," referenced in § 30-3B-201, as:

"The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of the child or any of the mentioned persons is part of the period."

§ 30-3B-102(7).

In this case, the father filed the complaint in the current action on January 26, 2017. The mother presented testimony by means of her verified motion to dismiss the current action, in which she stated that she and the child had lived in Maryland since June 22, 2016, more than six months before the complaint was filed. To support her motion, the mother submitted exhibits indicating that she had filed a

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change-of-address request on or about June 22, 2016, and it is undisputed that she obtained a job in Maryland on July 1, 2016. Although there is evidence in the record indicating that the mother and the child returned to Alabama to visit the father and that the mother attended a counseling session in August 2016, there is no evidence indicating that the mother intended to remain in Alabama on those visits.

""[C]ourts have found that "temporary absences include court-ordered visitations, and vacations and business trips." In re Marriage of McDermott, 175 Wash. App. 467, 487, 307 P.3d 717, 727 (2013) (emphasis added). '[W]here both parents intend a child's absence from a state to be temporary, the duration of that absence must be counted toward the establishment of a home state pursuant to the UCCJEA....' 175 Wash. App. at 489-90, 307 P.3d at 728. '[T]emporary absences do not interrupt the six-month pre-complaint residency period necessary to establish home state jurisdiction.' Ogawa v. Ogawa, 125 Nev. 660, 662, 221 P.3d 699, 700 (2009)."

Ex parte Siderius, 144 So. 3d 319, 325 (Ala. 2013).

The father argues that the mother used the August 2016 counseling session to "deceive" him into dismissing the 2016 complaint. In his appellate brief, he argues that, under a pendente lite order regarding the custody of the child entered in the 2016 action, the mother should have been precluded from moving to Maryland with the child. However, the 2016 divorce

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action was dismissed, and the pendente lite order was no longer viable after the dismissal.

The undisputed evidence indicates that the mother and the child had not resided in Alabama for at least six consecutive months immediately before the father filed the complaint in the current action. Accordingly, the trial court did not have jurisdiction to consider the issue of child custody as part of the current action. Thus, that portion of the February 19, 2019, judgment dealing with issues of child custody is void for lack of jurisdiction.² Therefore, the trial court did not err in granting the mother's Rule 60(b)(4) motion and dismissing the child-custody portion of the 2017 complaint.

The father contends that the trial court had subject-matter jurisdiction over his divorce claim and that it erred in dismissing the 2017 complaint. Our review of the record shows that, in her postjudgment motion, the mother did not

²We note that the UCCJEA does not govern jurisdiction over issues of child support. See Lattimore v. Lattimore, 991 So. 2d 239, 241 (Ala. Civ. App. 2008). The father does not raise any issues regarding child support on appeal. Accordingly, any issues the father could have raised regarding the propriety of the child-support provisions of the February 19, 2019, judgment are waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived.").

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challenge the trial court's jurisdiction to consider the father's claim for a divorce. The trial court appears to have dismissed that claim sua sponte in its September 16, 2019, order entered in response to the father's motion to clarify the August 15, 2019, judgment.

This court has previously considered the question of a trial court's jurisdiction over a divorce claim when it does not have jurisdiction to decide issues of child custody in the same action. In Chafin v. Chafin, 101 So. 3d 234, 236-37 (Ala. Civ. App. 2012), this court wrote:

"For a trial court to gain jurisdiction over the marital res, the complaining party must have been a resident of Alabama for six months before filing a complaint for a divorce. Livingston v. Livingston, 835 So. 2d 1021, 1023 (Ala. Civ. App. 2002). This court has discussed the role of in personam jurisdiction in the context of a divorce action, explaining:

"We first note that Alabama statutes do not require that a court have in personam jurisdiction over both parties to grant a divorce. The wife alleged and proved her residence in the State of Alabama pursuant to § 30-2-5, Ala. Code 1975. This was sufficient to allow jurisdiction over the wife and the marital res. Lightell v. Lightell, 394 So. 2d 41, 42 (Ala. Civ. App. 1981). However, a potential judgment awarding custody and child support necessarily fixes upon a [parent] a personal obligation for the care

and support of the minor children and requires in personam jurisdiction over the [parent]. May v. Anderson, 345 U.S. 528, 534, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), and Lightell, 394 So. 2d at 42-43.'

"Coleman v. Coleman, 864 So. 2d 371, 374 (Ala. Civ. App. 2003).

"In Fuller v. Fuller, 51 So. 3d 1053 (Ala. Civ. App. 2010), this court determined that the trial court had jurisdiction to divorce the parties when, at the time the divorce complaint was filed, the father, who had filed the complaint, was a resident of Alabama and the mother was a resident of Mississippi. In reaching our conclusion, this court explained:

"'The plaintiff in this case, the father, alleged in his complaint for a divorce that he had been a bona fide resident of this state for more than six months before he filed his complaint. Neither of the parties raised any issue in the trial court or on appeal questioning the residency of the father. Thus, the trial court had jurisdiction to divorce the parties, and the part of its judgment dissolving the marriage is due to be affirmed.'

"Id. at 1058. In this case, the husband alleged in the second divorce complaint that he was a resident of Alabama and that he had been a resident for more than six consecutive months at the time the complaint was filed. The wife does not dispute that the husband is an Alabama resident. Accordingly, we conclude that the trial court had jurisdiction to divorce the parties. Therefore, the trial court erred in dismissing the divorce action in its entirety."

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It is undisputed in this case that the father had been an Alabama resident for more than six consecutive months immediately before he filed the January 26, 2017, complaint. Therefore, the trial court had jurisdiction to divorce the parties when it did so in the February 19, 2019, judgment.

In her postjudgment motion filed on March 21, 2019, which we construe as a Rule 59 motion insofar as it challenged the February 19, 2019, judgment divorcing the parties, the mother asserted that the father had "failed to substantially comply with the provisions" contained in their settlement agreement, which had been incorporated into the February 19, 2019, judgment. Therefore, the mother said, grounds existed to vacate the judgment based on fraud, misrepresentation, and misconduct. The mother's assertion that the father had failed to abide by the February 19, 2019, judgment constitutes grounds for contempt. This court's research has revealed no authority, and the mother has not cited any authority, indicating that failure to comply with the terms of a judgment constitutes fraud that can be used as a basis for vacating the judgment. Accordingly, we conclude that there was no legal ground for determining that the trial court still had

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jurisdiction over the divorce claim 90 days after the mother filed her postjudgment motion. See Rule 59.1; see also Hughes v. Cox, 601 So. 2d 465, 467 n. 3 (Ala. 1992) ("Insofar as the motion argued that the default judgment was void, we will construe it as a motion under Rule 60(b)(4), Ala. R. Civ. P.; insofar as it sought to have the default judgment set aside on other grounds, we will construe it as a motion under Rule 55(c), Ala. R. Civ. P."); Tucker v. Nixon, 215 So. 3d 1102 (Ala. Civ. App. 2016) (same). Therefore, the trial court no longer had jurisdiction over the divorce claim when it purported to dismiss that claim. "A judgment entered without jurisdiction is void, and a void judgment will not support an appeal. Jones v. Sears Roebuck & Co., 342 So. 2d 16, 17 (Ala. 1977)." D.E.C.C. v. K.N.R., 51 So. 3d 1068, 1071 (Ala. Civ. App. 2010).

For the reasons set forth above, the August 15, 2019, judgment granting the mother's Rule 60(b) motion and dismissing that portion of the February 19, 2019, judgment regarding child custody is affirmed. The September 16, 2019, judgment purporting to dismiss the divorce claim is void because the trial court no longer had jurisdiction to enter

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it. The trial court is therefore instructed to reinstate those portions of the February 19, 2019, judgment divorcing the parties and dividing their marital property.

JUDGMENT AFFIRMED IN PART AND APPEAL DISMISSED IN PART WITH INSTRUCTIONS.

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