REL: September 25, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190142

Ronnie Alan Thornton

v.

Alexis Michelle Davies

Appeal from Autauga Circuit Court
(DR-18-900149)

DONALDSON, Judge.

Ronnie Alan Thornton ("the father") appeals (1) from a default judgment entered against him by the Autauga Circuit Court ("the trial court") in an action initiated by Alexis Michelle Davies ("the mother") seeking custody of the parties' minor child ("the child") and child support from the father and (2) from the trial court's subsequent order denying the

father's motion to set aside the default judgment. We reverse and remand.

Facts and Procedural History

The mother and the father were involved in an exclusive relationship when the mother became pregnant with the child. The child was born in January 2017. The parties lived together with the child until September 2017, when they terminated their relationship and separated. The child lived with the mother and visited with the father after the separation.

On July 9, 2018, the mother filed a verified petition in the trial court seeking sole legal and physical custody of the child and requesting that the father be ordered to pay child support. The mother also filed affidavits and a child-support information sheet, form CS-47, pursuant to Alabama's child-support guidelines, Rule 32, Ala. R. Jud. Admin. The mother attempted to serve the father by certified mail, but she was unsuccessful. The following year, on June 28, 2019, the trial court notified the mother that she must perfect service of process on the father within 21 days or her case would be dismissed. After the trial court granted the mother

additional time in which to perfect service, the father was served personally on July 29, 2019.

The father did not file an answer to the mother's petition. On September 3, 2019, the mother filed a motion for a default judgment against the father. On September 12, 2019, the trial court entered an order setting the case for a hearing to be held on September 26, 2019. The trial court also requested that the mother prepare a proposed final judgment, an income-withholding order directed to the father's employer, and, pursuant to the child-support guidelines, forms CS-41 and CS-42 for both parties based on her best available information.

On September 24, 2019, the mother filed a motion seeking the entry of a default judgment along with her proposed final judgment, an affidavit containing her testimony, and completed forms CS-41 and CS-42. In her affidavit, the mother testified that she was "the fit and proper person to have sole legal and sole physical custody" of the child. The mother asked that the father "be restricted to no alcohol, drug, and/or non-prescribed medication intake" while the child was in his presence because of his "history." The mother further

testified that she believed that it was in the best interests of the child that the father have supervised visitation on a limited basis, that the visitation schedule should be agreed upon by the parties, that the father should provide her with specific notice when he would like to visit with the child, and that she should be allowed to appoint the person responsible for transporting the child to and from visitation with the father.

The mother also testified that she worked part-time for a realty company and attended classes full-time to obtain her real-estate license. She stated that she did not know whether the father was employed but that he made approximately $500 per week at the last job of which she had knowledge.

The mother testified in her affidavit that her attorney had submitted a proposed final judgment and that she was asking for "all the relief requested therein." That proposed judgment requested child support in the amount of $700 per month; an award of $16,800 for child support retroactive to September 1, 2017, plus interest, with a total arrearage due of $18,900; and that the father be required to make an additional payment of $50 per month to be applied to the

child-support arrearage. In addition, the mother testified in her affidavit that she was also requesting that the father be required to pay for half of any extra curricular expenses incurred on behalf of the child, half of the child's educational expenses and costs for after-school care, and half of the child's medical and dental expenses not covered by insurance, with a 10% interest rate applied to any untimely reimbursement of those expenses. The mother also testified that she should be allowed to claim the child as a dependent for tax purposes, that the father should be responsible for court costs and attorney fees of $2,500, and that the final judgment contain a mutual non harassment clause.

The form CS-41 filed by the mother on her own behalf indicated that her part-time employment income was $867 per month, that she incurred child-care expenses of $520 per month, and that the child's health-insurance coverage was provided by Medicaid of Alabama. The form CS-41 filed by the mother on behalf of the father indicated that his employment income was $2,167 per month and that he had a child-support obligation of $310 per month for another child. The form CS-42 filed by the mother calculated the father's monthly child-

support obligation as $711.28, but she stated that she agreed to accept $700 per month.

On September 25, 2019, the day before the scheduled hearing on the mother's motion for a default judgment, the trial court entered a final judgment in which it granted the mother's motion for a default judgment. The judgment ordered the father to pay $700 per month in child support, plus $50 per month to be credited toward a child-support arrearage of $18,900, and ordered the parties to equally divide all medical, dental, educational, and extra curricular expenses relating to the child. The judgment also provided that, in the event the child did not qualify for Medicaid, the parties were to divide any insurance premiums equally. The judgment provided that the mother was entitled to claim the child as a dependent for tax purposes and awarded her court costs and an attorney fee in the amount of $2,500.

The final judgment also awarded sole legal and physical custody of the child to the mother. The judgment allowed the father visitation with the child "as the parties mutually agree" but also provided that his visitation would be supervised, "if so required" by the mother, by "an individual

of her choice." The judgment further provided that the father could not visit with the child until he had completed a parenting class and provided proof of its completion to the mother, that the father could not pick up the child from any location unless approved by the mother, and that the father's visitation must take place in Elmore and/or Autauga Counties only. The judgment encouraged the parties to mutually agree on "an alternating visitation schedule so the child can attend special events and/or other special occasions" and to work together to arrange for the child to visit with the father during major holidays. The judgment required the father to provide all transportation for visitation purposes but allowed the mother to specify who would be allowed to transport the child. Additionally, the judgment prohibited the father or any third party from drinking alcohol or ingesting illegal and/or nonprescribed drugs while in the presence of the child.

On October 25, 2019, the father filed a verified motion to set aside the September 25, 2019, default judgment. The father alleged in his motion that he was present at the courthouse on September 26 to attend the hearing scheduled for

that day, that the mother did not attend that hearing, and that no testimony was taken. The father further alleged that "[t]he Court and Counsel for [the mother] stated that Court had been continued on [this] matter." According to the record, the hearing scheduled for September 26, 2019, did not take place, and the certification of the record includes a statement by the court reporter that no oral testimony was taken in the proceedings.

The father also alleged in his motion that he telephoned the mother as he left the courthouse on September 26 and that she stated that her attorney had advised her she did not have to be there. The father argued in his motion that the default judgment was deficient because it did not adjudicate him as the father of the child, it failed to provide a visitation schedule, and it applied an interest rate on past-due child support in excess of the statutory maximum of 7.5%. The father further argued that the three-factor analysis a trial court must apply in deciding whether to set aside a default judgment, established by our supreme court in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600, 605 (Ala. 1988), weighed in favor of setting the judgment aside.

The Kirtland factors are "1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct." Id.

On October 29, 2019, the trial court entered an order denying the father's motion to set aside the default judgment. The father filed a timely notice of appeal to this court.

Standard of Review

> "'The applicable standard of review in appeals stemming from a trial court's granting or denying a motion to set aside a default judgment is whether the trial court's decision constituted an [excess] of discretion.' Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600, 603 (Ala. 1988). '[T]his court and the Supreme Court have reiterated that the trial court "should exercise its broad discretionary powers with liberality and should balance the equities of the case with a strong bias toward allowing the defendant to have his day in court." Hutchinson v. Hutchinson, 647 So. 2d 786, 788 (Ala. Civ. App. 1994).' DeQuesada v. DeQuesada, 698 So. 2d 1096, 1098 (Ala. Civ. App. 1996)."

B.E.H., Jr. v. State ex rel. M.E.C., 71 So. 3d 689, 692 (Ala. Civ. App. 2011).

Discussion

The father argues that the trial court exceeded its discretion in denying his motion to set aside the default judgment.

> "'"A trial court has broad discretion in deciding whether to grant or deny a motion to set aside a default judgment. Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600 (Ala. 1988). In reviewing an appeal from a trial court's order refusing to set aside a default judgment, this Court must determine whether in refusing to set aside the default judgment the trial court exceeded its discretion. 524 So. 2d at 604. That discretion, although broad, requires the trial court to balance two competing policy interests associated with default judgments: the need to promote judicial economy and a litigant's right to defend an action on the merits. 524 So. 2d at 604. These interests must be balanced under the two-step process established in Kirtland.
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> "'"We begin the balancing process with the presumption that cases should be decided on the merits whenever it is practicable to do so. 524 So. 2d at 604. The trial court must then apply a three-factor analysis first established in Ex parte Illinois Central Gulf R.R., 514 So. 2d 1283 (Ala. 1987), in deciding

> whether to deny a motion to set aside a default judgment. Kirtland, 524 So. 2d at 605. The broad discretionary authority given to the trial court in making that decision should not be exercised without considering the following factors: '1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct.' 524 So. 2d at 605."
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> "'Zeller v. Bailey, 950 So. 2d 1149, 1152-53 (Ala. 2006).'

"Brantley v. Glover, 84 So. 3d 77, 80-81 (Ala. Civ. App. 2011)(emphasis added). All three factors set out in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988), must be considered, but there is no requirement that all three must be resolved in favor of the movant for the default judgment to be set aside. Sumlin v. Sumlin, 931 So. 2d 40, 45 (Ala. Civ. App. 2005).

"Scrutiny of the granting or denial of default judgments is even greater in cases involving the custody of children. The strong bias in favor of deciding cases upon the merits identified by the Kirtland court is particularly strong in domestic-relations cases. Sumlin v. Sumlin, supra; DeQuesada v. DeQuesada, 698 So. 2d 1096 (Ala. Civ. App. 1996); and Evans v. Evans, 441 So. 2d 948, 950 (Ala. Civ. App. 1983); see also Buster v. Buster, 946 So. 2d 474, 478 (Ala. Civ. App. 2006).

"This court has written that

> "'a particularly "strong bias" exists for deciding domestic-relations cases on the merits. Buster v. Buster, 946 So. 2d 474, 478 (Ala. Civ. App. 2006). As this court stated in DeQuesada [v. DeQuesada, 698 So. 2d 1096 (Ala. Civ. App. 1996)], "'[w]e think that especially in the divorce context, a court should be particularly reluctant to uphold a default judgment (and thereby deprive a litigant of his day in court) because it means that such important issues as child custody, alimony, and division of property will be summarily resolved.'" 698 So. 2d at 1099 (quoting Evans v. Evans, 441 So. 2d 948, 950 (Ala. Civ. App. 1983)).
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> "'Furthermore, this court has previously stated that "'we can envision no species of case in which the "strong bias" in favor of reaching the merits ... could be any stronger than in a case such as this involving custody of a minor child.'" Buster, 946 So. 2d at 478 (quoting Sumlin v. Sumlin, 931 So. 2d 40, 44 (Ala. Civ. App. 2005), quoting in turn Kirtland, 524 So. 2d at 605).'

"Bates v. Bates, 194 So. 3d 976, 978-79 (Ala. Civ. App. 2015).

"After applying the presumption that a case should be tried on its merits whenever practicable, courts are to consider the second prong of the Kirtland analysis. The first of the Kirtland factors the trial court was required to consider was whether the [father] had a meritorious defense. Kirtland, 524 So. 2d at 605.

> "'"'To present a meritorious defense, for Rule 55(c)[, Ala. R. Civ. P.,] purposes, does not require that the movant satisfy

> the trial court that the movant would necessarily prevail at a trial on the merits, only that the movant show the court that the movant is prepared to present a plausible defense.'" B.E.H., Jr. v. State ex rel. M.E.C., 71 So. 3d 689, 693 (Ala. Civ. App. 2011) (quoting Sampson v. Cansler, 726 So. 2d 632, 634 (Ala. 1998)). Moreover, the defense offered "must be of such merit as to induce the trial court reasonably to infer that allowing the defense to be litigated could foreseeably alter the outcome of the case." Kirtland, 524 So. 2d at 606.'

"Bates, 194 So. 3d at 979.

"The Kirtland court provided guidance for analyzing what constitutes a meritorious defense, writing:

> "'Although the showing of a meritorious defense is a necessary and practical requirement, the quantum of evidence needed to show a meritorious defense has caused some controversy. For this reason, we now establish a standard that will be both workable and consistent with our policy objectives. The defense proffered by the defaulting party must be of such merit as to induce the trial court reasonably to infer that allowing the defense to be litigated could foreseeably alter the outcome of the case. To be more precise, a defaulting party has satisfactorily made a showing of a meritorious defense when allegations in an answer or in a motion to set aside the default judgment and its supporting affidavits, if proven at trial, would constitute a complete defense to the action, or when sufficient evidence has been adduced either by way of affidavit or

> by some other means to warrant submission of the case to the jury.'
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> "Kirtland, 524 So. 2d at 606."

Wise v. Wise, 264 So. 3d 871, 875-76 (Ala. Civ. App. 2018).

In his verified motion asking the trial court to set aside the default judgment, the father stated:

> "14. That the [father] avers that the child lived in a residence shared by the parties and that the [father] supported the child during this time. The [father's] testimony to this effect could alter the award of back child support. The [father] avers that he is not financially capable of the $2,500 attorney fee award detailed in the Court's order. The [father's] testimony and proof to this effect could alter the award of attorney's fees or, in the least, the amount of the attorney's fees, as the [father's] financial capability is a factor to be considered in awarding the same. The [father] avers that he had access to the child until approximately three months ago, around the time he was served with the complaint in this action, after which time his requests to see the child have been rejected by the [mother]. The [father] avers that his testimony to this effect could alter the custodial and visitation schedule. The [father] avers that he is a loving father who is capable of exercising custody of the child. The [father's] testimony to this effect could affect this Court's award of sole legal and sole physical custody to the [mother], the Court's failure to award a specific visitation schedule, and the Court's refusal to allow the [father] to exercise any visitation with the child until the completion of a parenting class. The [mother's] refusal to allow the [father] access to the child could affect this Court's decision to leave all visitation decisions up to the discretion of the [mother]. All such averments could affect ... the

> first factor of the Kirtland test demonstrating that the [father] has a meritorious defense."

The mother argues that the father did not support his motion to set aside the default judgment with evidence, but "a '[v]erified pleading[] constitute[s] [an] affidavit[] and [is] treated as evidence.' Mead v. State, 449 So. 2d 1279, 1280 (Ala. Crim. App. 1984)." Hensley v. Kanizai, 143 So. 3d 186, 193 (Ala. Civ. App. 2013). Thus, paragraph 14 of the verified motion quoted above constituted testimony by the father that, among other things, "he is a loving father who is capable of exercising custody of the child"; that "the child lived in a residence shared by the parties and that the [father] supported the child during this time"; and that "he had access to the child until approximately three months ago, around the time he was served with the complaint in this action, after which time his requests to see the child have been rejected by the [mother]." That evidence established a sufficient presentation of a meritorious defense because it can reasonably be inferred from that evidence that the outcome of the case could foreseeably be altered by allowing the father to litigate his claim that he is a fit parent to whom legal and physical custody should be granted or that the visitation

schedule should be modified. See Wise. The father also argues that he demonstrated a meritorious defense because, he says, he pointed out at least four errors in the trial court's default judgment; however, because we have concluded that the father sufficiently presented a meritorious defense to the mother's custody claim and/or the visitation provisions of the judgment, we do not reach the father's arguments regarding those alleged errors.

With respect to the second Kirtland factor, i.e., whether the mother will be unfairly prejudiced if the default judgment is set aside, the father, like the parent against whom a default judgment had been entered in Wise, "presented little to no evidence regarding whether the [mother] will be unfairly prejudiced if the divorce judgment is set aside," 264 So. 3d at 877; however, as we noted in Wise:

> "'"[D]elay alone is not a sufficient basis for establishing prejudice. Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'" (Citations omitted.) Davis v. Musler, 713 F.2d 907, 916 (2d Cir. 1983) (cited with approval in Kirtland, 524 So. 2d at 607).'"

Id. (quoting Owens v. Owens, 626 So. 2d 640, 642 (Ala. Civ. App. 1993)). In Wise, this court held:

> "Because the [party against whom the default judgment had been entered] filed her initial motion to set aside slightly more than two weeks after the 'entry of default' and the divorce judgment were entered, it is unlikely that the [party in whose favor the default judgment had been entered] would suffer undue prejudice of the type contemplated in Kirtland. See Harkey[v. Harkey], 166 So. 3d [126] at 128 [(Ala. Civ. App. 2014)](noting that it seemed that no undue prejudice would befall the husband by setting aside the default judgment because the wife had filed her first motion to set aside the default judgment only a week after its entry, so the evidence material to the divorce should still have been available)."

264 So. 3d at 877. In the present case, the father filed his motion to set aside the default judgment on the 30th day after the entry of that judgment. From the record, we perceive of no material difference between a delay of "slightly more than two weeks," id., and a delay of 30 days. Therefore, based on the record before us and the holding in Wise, we conclude that it is unlikely that the mother would suffer undue prejudice of the type contemplated in Kirtland if the default judgment is set aside.

With respect to the third Kirtland factor, i.e., whether the default judgment was a result of the father's own culpable

conduct, the father testified in his verified motion to set aside the default judgment as follows:

> "17. The [father] avers that although he failed to answer the complaint within the statutory time, he did appear in Court on September 26, 2019 when the Court was set to take the [mother's] testimony. The [father] further avers that he was told at that time the hearing had been continued. The [father] avers that although he did not answer within the statutory time period, he did make objective efforts to participate in the proceeding and did appear at the hearing in an effort to participate in the proceedings and attempt to prevent a default judgment. After the [father] attempted to attend the default judgment hearing and was told the matter was continued, he received the Final Judgment by Default dated the day prior to the hearing in the mail. The [father's] averments in this paragraph demonstrate mitigating factors worthy of consideration for the third Kirtland factor."

The mother argues that the father avoided service of process and that, therefore, the entry of the default judgment was the result of his culpability. The record, however, contains no evidence indicating that the father avoided service. We conclude that the father's uncontradicted testimony that he appeared for the hearing on the mother's motion for a default judgment on the day set for that hearing was sufficient evidence to establish that the entry of the default judgment was not a result of culpability on his part. See Harkey v. Harkey, 166 So. 3d 126, 128 (Ala. Civ. App.

2014) ("[T]he trial court may have determined that the wife consciously or unreasonably failed to answer the complaint and participate in the litigation, but that circumstance alone has been deemed insufficient to deny a motion to set aside a default judgment in a child-custody case.").

Accordingly,

> "[c]onsidering the presumption that a trial on the merits is preferable and the 'strong bias' in favor of deciding cases concerning child custody on the merits, and giving consideration to the [father's] demonstration of a meritorious defense and the harshness of denying a trial on the merits when the custody of [a child] is at stake, in balancing the equities presented in this case we conclude that the trial court [exceeded] its discretion in denying the [father's motion to set aside the default judgment]."

Wise, 264 So. 3d at 878. Therefore, we reverse the default judgment entered by the trial court and remand the cause for further proceedings consistent with this opinion. We do not reach the father's argument that it was error for the trial court to rule on his motion to set aside the default judgment without conducting a hearing. The father's request for an attorney's fee on appeal is denied.

REVERSED AND REMANDED.

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