Rel: August 12, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210021

Darin Eugene Cate

v.

Caroline Capps Cate

Appeal from Cullman Circuit Court
(DR-19-900325)

THOMPSON, Presiding Judge.

Darin Eugene Cate ("the father") and Caroline Capps Cate ("the mother") have previously been before this court on a petition for a writ of mandamus filed by the mother concerning the subject-matter jurisdiction of the Cullman Circuit Court ("the trial court") to consider certain aspects

of a divorce action initiated by the father in that court. See Ex parte Cate, 303 So. 3d 142 (Ala. Civ. App. 2020). In Ex parte Cate, this court explained:

> "On September 26, 2019, Darin Eugene Cate ('the father') initiated in the Cullman Circuit Court ('the trial court') an action seeking a divorce from Caroline Capps Cate ('the mother'). That action was assigned case number DR-19-900297. The father later amended his verified complaint. The allegations in the father's verified complaint, as amended, indicate that the parties married in South Carolina in 2009 and that they lived together thereafter. The parties' two minor children were born in South Carolina in 2010 and 2013. The father moved to Alabama on approximately March 29, 2019 (a little less than six months before he initiated the action), for new employment, and the mother and the children moved to Alabama in August 2019, when the parties purchased a house in Cullman; the parties enrolled the children in school in Alabama. The father alleged that the parties and the children had lived together in Alabama until September 25, 2019. In his divorce complaint, the father sought an award of joint custody of the parties' children and a division of the parties' marital property.
>
> "On September 27, 2019, an attorney filed a limited appearance on behalf of the mother and indicated the mother's intention to contest the jurisdiction of the trial court over the father's action. The mother filed a September 27, 2019, motion to dismiss case number DR-19-900297 for want of subject-matter jurisdiction. ...
>
> "....
>
> "The trial court conducted an ore tenus hearing on the pending motions in case number DR-19-900297 on October 16,

> 2019 [at which the parties argued issues concerning the trial court's jurisdiction]. ...
>
> "....
>
> "During the ore tenus hearing, the father and the trial court concluded that any jurisdictional defect in case number DR-19-900297 could be cured by the filing of a new divorce action. ...
>
> "Thereafter, on October 16, 2019, the father filed a verified complaint that initiated a new divorce action that was assigned case number DR-19-900325. The complaint in case number DR-19-900325 is substantially similar to the complaint, as amended, in case number DR-19-900297."

Ex parte Cate, 303 So. 3d at 144-46 (footnote omitted).

The new divorce action, i.e., case number DR-19-900325, proceeded in the trial court, and the mother moved to dismiss the action.[1] The trial court denied the mother's motion to dismiss, and the mother filed the petition for writ of mandamus that resulted in this court's opinion in Ex parte Cate, supra. The jurisdictional issues examined in Ex parte Cate, supra, are not relevant to the issues in this appeal, and, for that reason, we do not explain them in detail in this opinion. Instead, we note that this court granted, in part, the mother's petition for a writ of mandamus

[1]It is not clear from the record whether the trial court dismissed case number DR-19-900297.

and directed the trial court to make a determination under the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), § 30-3B-101 et seq., Ala. Code 1975, concerning its jurisdiction over custody issues and to set aside its pendente lite custody order that had been entered before such a determination had been made. Ex parte Cate, 303 So. 3d at 151.

On May 18, 2020, the trial court entered an order in which it determined that it had jurisdiction over the divorce action, as well as jurisdiction over the issue of child custody under the UCCJEA. As a part of that May 18, 2020, order, the trial court again denied the mother's motion to dismiss. Thereafter, the mother filed an answer to the father's complaint and a counterclaim in which she sought, among other things, an equitable division of the parties' marital property, custody of the children, and an award of child support. The trial court later entered a June 17, 2020, pendente lite order awarding the parties joint custody of the children.

The trial court conducted a hearing on July 29, 2021, at which it received ore tenus evidence on the parties' claims. On September 1, 2021, the trial court entered a judgment in which it divorced the parties,

awarded the parties joint custody of their children, and ordered the father to pay $1,571 per month in child support. In addition, the trial court divided the parties' marital property; awarded the mother amounts from the father's retirement accounts; and ordered the father to pay the mother alimony in gross, which, it directed, could be paid in monthly installments for 36 months.

The father filed a postjudgment motion on September 28, 2021. The father also filed a notice of appeal on October 8, 2021. That notice of appeal was held in abeyance until the ruling on, or denial by operation of law of, the father's postjudgment motion. See Rule 4(a)(5), Ala. R. App. P. The father's postjudgment motion was denied by operation of law on December 27, 2021. See Rule 59.1, Ala. R. Civ. P. Although the trial court entered a December 28, 2021, order purporting to slightly modify the divorce judgment, that order is void for want of jurisdiction. Ex parte Jackson Hosp. & Clinic, Inc., 49 So. 3d 1210, 1212 (Ala. 2010) ("The trial court's order was void because it lost jurisdiction after the running of the 90-day period prescribed by Rule 59.1."); Sibley v. Sibley, 90 So. 3d 191, 193 (Ala. Civ. App. 2012) ("After the postjudgment motions were denied

by operation of law, the trial court lost jurisdiction to act on the motions.").

During the July 29, 2021, hearing, the parties presented ore tenus evidence to the trial court and submitted numerous exhibits. Among the exhibits submitted to the trial court was a document setting forth the parties' stipulation concerning the amount of the parties' retirement accounts that were divisible in the divorce action. That exhibit provided, in part, that the father's three retirement accounts contained a total value, at the time of the July 29, 2021, hearing, of $108,439.51. The September 1, 2021, divorce judgment, however, contains a provision awarding the mother a total of $115,630.97 from the father's retirement accounts.

On appeal, the father argues that the amount of retirement benefits awarded to the mother is erroneous because § 30-2-51(b), Ala. Code 1975, limits the division of retirement accounts to an award of 50% of the total value of those benefits. Section 30-2-51 provides, in pertinent part:

> "(a) If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the

> judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage.
>
> > "(b)(1) The marital estate is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint, or group retirement benefits including, but not limited to, any retirement plans, retirement accounts, pensions, profit-sharing plans, savings plans, annuities, or other similar benefit plans from any kind of employment, including, but not limited to, self employment, public or private employment, and military employment.
> >
> > "(2) Notwithstanding the foregoing, unless the parties agree otherwise, the total amount of the retirement benefits payable to the noncovered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court."

(Emphasis added.)

In this case, the parties acknowledged that their retirement benefits were divisible and stipulated to the amount of those benefits. However, there is nothing in the record to support a conclusion that the parties agreed to a division that awards the mother more than 50% of the

father's retirement benefits. See § 30-2-51(b)(2) (limiting the division to 50% "unless the parties agree otherwise"). The trial court's award to the mother of a portion of the father's retirement benefits is in excess of 50% of those benefits, and, for that reason, we must reverse that part of the September 1, 2021, divorce judgment. Webb v. Webb, 950 So. 2d 322, 327 (Ala. Civ. App. 2006); Tompkins v. Tompkins, 843 So. 2d 759, 762 (Ala. Civ. App. 2002).

The father has challenged on appeal other aspects of the trial court's division of the parties' marital property, including the trial court's award to the mother of alimony in gross. "Issues concerning property division, alimony in gross, and periodic alimony are all interrelated." Underwood v. Underwood, 100 So. 3d 1115, 1121 (Ala. Civ. App. 2012). Because the award of retirement benefits, which we are reversing, is a part of the trial court's overall property division, we must also reverse the entirety of the property division and the award of alimony in gross. Sutton v. Sutton, 217 So. 3d 937, 941 (Ala. Civ. App. 2016). On remand, the trial court is instructed to enter a judgment providing a new property division in compliance with this opinion and taking into consideration §

30-2-51. Sutton v. Sutton, supra; Underwood v. Underwood, supra; Tompkins v. Tompkins, supra.

The father next argues that the trial court erred in ordering him to pay monthly child support for the benefit of the children. He first contends that, because the parties were awarded joint custody of the children, he should not have been required to pay child support or the trial court should have deviated from the Rule 32, Ala. R. Jud. Admin., child-support guidelines. As the father points out in his appellate brief, this case does not involve a situation in which "one party bears the overwhelming weight of providing a living space for the child the overwhelming percent of the time." Instead, both parties must provide a home for the children.

The application of the Rule 32 child-support guidelines is mandatory. DeYoung v. DeYoung, 853 So. 2d 967, 970 (Ala. Civ. App. 2002). However, Rule 32 allows the trial court to deviate from the child-support guidelines when, among other things, the trial court determines that the application of the child-support guidelines under the facts of the particular case "would be manifestly unjust or inequitable." Rule 32(A)(ii), Ala. R. Jud. Admin. In this matter, the father argues in his

appellate brief that the trial court erred in refusing to deviate from the child-support guidelines because the parties were awarded joint physical custody of the children. However, although shared physical custody is a reason for deviating from the application of the child-support guidelines, a deviation is not required merely because the parties share physical custody. See Rule 32(A)(1), Ala. R. Jud. Admin.; Boatfield v. Clough, 895 So. 2d 354, 356 (Ala. Civ. App. 2004).

In making his argument concerning child support, the father fails to acknowledge, however, that, at the time of the July 29, 2021, hearing, the father's income was approximately 90% of the parties' total income. The record demonstrates that, at the time of the July 29, 2021, hearing, the mother was attempting to complete the process for obtaining her nurse practitioner's degree and was within a few months of doing so. The mother presented evidence indicating that she was completing her required "clinical" hours, which meant working without compensation for approximately 40 hours each week. In addition, the mother was working as a registered nurse for two 12-hour shifts every other weekend to supplement the pendente lite child support paid to her by the father. The mother stated that she had earned $2,151 each month working those

shifts. The mother stated that her clinical hours would end within a couple of months of the July 29, 2021, hearing, and that she would then have to wait to be employed as a nurse practitioner until she had taken and passed her nursing "Board" exams. The mother stated that the results of those exams would be released sometime in December 2021 and that she hoped to be employed in January 2022.

The evidence indicated that, at the time of the July 29, 2021, hearing, the father earned $12,017 per month in salary and that he had received an annual bonus of up to 30% of his annual salary in March of each year. In March 2021, the father received a bonus for work done in 2020 in the amount of $36,922.41.

Thus, the trial court had before it evidence of a significant disparity in the parties' incomes that ~~would~~ warranted an award of child support to the mother. We recognize that one factor that could validly impact the trial court's decision to award the mother child support, despite the award of joint custody, was that the mother's lack of income was a result of her efforts to improve her education level and earning potential.

The father also argues that the trial court erred in failing to impute income to the mother for the purpose of determining his child-support obligation. Rule 32(B)(5), Ala. R. Jud. Admin., provides, in pertinent part:

> "(5) Unemployment; underemployment. If the court finds that either parent is voluntarily unemployed or underemployed, it shall estimate the income that parent would otherwise have and shall impute to that parent that income; the court shall calculate child support based on that parent's imputed income. In determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should take into consideration the specific circumstances of the parent to the extent known, including such factors as the parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case.

The father argued before the trial court, and reiterates before this court, that the trial court should have imputed to the mother an amount equal to what she could have earned as a full-time registered nurse.

> "The trial court is afforded the discretion to impute income to a parent for the purpose of determining child support, and the determination that a parent is voluntarily unemployed or underemployed 'is to be made from the facts presented according to the judicial discretion of the trial court.' Winfrey v. Winfrey, 602 So. 2d 904, 905 (Ala. Civ. App. 1992). See also Rule 32(B)(5), Ala. R. Jud. Admin."

Clements v. Clements, 990 So. 2d 383, 394 (Ala. Civ. App. 2007).

Given the evidence in the record, however, we are unable to determine how the trial court determined the amount of child support it awarded. Rule 32(E), Ala. R. Jud. Admin., provides that the child-support forms that are required to be filled out by the parties and the trial court shall be included in the record and "shall be deemed to be incorporated by reference in the court's child-support order." In this case, the trial court did not include such forms, and none of the child-support calculations in the record corresponds to the amount of child support awarded by the trial court in its September 1, 2021, judgment. Farnell v. Farnell, 3 So. 3d 203, 206 (Ala. Civ. App. 2008). Accordingly, this court is unable to discern the manner in which the trial court reached its child-support award. Id. Therefore, we reverse the trial court's child-support award and instruct the trial court, on remand, to calculate the amount of child support to be awarded as a part of the divorce judgment in accordance with Rule 32 and this opinion.[2]

[2]We note that, in his appellate brief, the father has argued that the trial court should have imputed to the mother full-time income based on her probable salary as a nurse practitioner, once she obtained that qualification. First, we note that the father stipulated in his testimony at the July 29, 2021, hearing that he was not asking that income be imputed

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

---

to the mother on the basis of her future earnings as a nurse practitioner. That stipulation was correct not only because the mother was not, at the time of the July 29, 2021, hearing, a nurse practitioner, but also because any such imputation of income to the mother based on that status would be entirely speculative. A child-support award may not be based on speculation about a parent's ability to pay. Abril v. Mobley, 166 So. 3d 697, 699 (Ala. Civ. App. 2014); Rimpf v. Campbell, 853 So. 2d 957, 960 (Ala. Civ. App. 2002).