

Rel: February, 22, 2022

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Ex parte Terry R. Amberson

PETITION FOR WRIT OF MANDAMUS

(In re: Betty Amberson Barrett

v.

Terry R. Amberson)

(Calhoun Circuit Court, DR-98-544.04)

THOMPSON, Presiding Judge.

This matter is before this court on a petition for a writ of mandamus.

The materials submitted to this court demonstrate the following. The

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Calhoun Circuit Court ("the trial court") entered a divorce judgment on August 11, 1999 ("the divorce judgment"), that, among other things, divorced Betty Amberson Barrett ("the wife") and Terry R. Amberson ("the husband").¹ In pertinent part, the divorce judgment contained a provision ordering that the husband "shall provide and maintain at his sole expense not less than \$150,000 of insurance on his life, naming the wife as sole beneficiary," that he take no action to diminish or encumber that life-insurance benefit, and that he provide the wife with proof of the maintenance of the life-insurance policy "at reasonable intervals."

In a judgment entered on September 6, 2006, the trial court found the husband in contempt for failing to comply with the life-insurance provision of the divorce judgment, and it ordered that the husband pay \$100 per day until he provided the trial court with proof of his compliance with that provision. Thereafter, the husband provided the trial court, and

¹The divorce judgment identified the wife as "Bette Jannette Amberson." The majority of the other materials submitted to this court by the parties spell the wife's first name "Betty."

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presumably the wife, with proof that he had a life-insurance policy for the benefit of the wife as required in the divorce judgment.

On August 9, 2021, the wife filed in the trial court a petition for a rule nisi, again alleging that the husband had failed to maintain the life-insurance policy and seeking to have him held in contempt. On August 16, 2021, the trial court entered an order requiring the husband to appear at a hearing to demonstrate why he should not be held in contempt.

The husband filed an answer and a counterclaim seeking to modify the divorce judgment on October 6, 2021. The husband also moved to consolidate his counterclaim with the contempt action initiated by the wife, and the trial court granted that motion. The matter was scheduled for trial and then postponed several times.

On December 10, 2021, the husband moved to place the matter on the trial court's administrative docket. In that motion, the husband alleged that he was in poor health because of several "serious and life-threatening conditions," and he alleged that he was, at that time, hospitalized to undergo carotid-artery surgery. The husband averred that his doctor believed that it was not likely that the husband would be well

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enough to attend court at any point "in the near future." The wife objected to the matter being placed on the administrative docket, and she requested that the trial court conduct a hearing. The trial court entered an order order scheduling a hearing on the husband's December 10, 2021, motion for December 14, 2021; the trial court specifically excused the husband from attending that hearing.

At the December 14, 2021, hearing, the trial court received the arguments of counsel; no evidence was taken. The trial court asked the husband's attorney whether a life-insurance policy for the benefit of the wife was in place, and the husband's attorney responded: "There is not, to my understanding." The husband's attorney later represented that the life-insurance policy that the husband had maintained for the wife was no longer in existence. The trial court then announced its intention to enter a pendente lite order requiring the husband to sign a release so that the wife could question the life-insurance company about the existence of a policy for the benefit of the wife. In addition, the trial court stated its intention to include in the order a judgment in favor of the wife in the amount of the insurance-policy benefit so that, in the future, the wife

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could file a claim for that amount against the husband's estate. The trial court specified that if a life-insurance policy for the benefit of the wife was found to be in existence, or if the husband "fixes it," it would set aside the pendente lite order in favor of the wife. The trial court stated during that hearing that "this is an emergency situation" and that it had "no other way to deal with it." The trial court explained that it was unable to schedule a hearing on the merits because of the husband's poor health and the fact that the husband's attorney was unable to speculate about when, or if, the husband would be well enough to participate in an evidentiary hearing. The husband's attorney then objected, citing a lack of notice that the issue of the husband's compliance with the life-insurance provision in the divorce judgment would be considered at the December 14, 2021, hearing, which, he argued, was supposed to address only the issue whether to place the matter on the trial court's administrative docket. The trial court noted that objection and stated, in part:

"But you have been here, you have told me there is not a policy. The only thing that -- logic is why there is not a policy. ... And hopefully, we will have an opportunity to hear that, but right now, we do not. So I do not have any choice but to do that. And again, I am not trying to intentionally not provide

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notice. I am not trying to intentionally not give your client an opportunity to have his day in court. I just do not know what else to do to secure what [the wife has] counted on at least through court filings for the last 16 years."

On December 15, 2021, the trial court entered an order awarding the wife a judgment against the husband in the amount of \$150,000 but specifying that, if the husband presented evidence of the existence of a life-insurance policy for the benefit of the wife in that amount before the wife executed on the order, the court would reconsider its order. The December 15, 2021, order also directed the husband to sign any releases necessary to allow the wife to obtain information "related to any and all insurance-policy holders since" the commencement of the action resulting in the September 2006 contempt judgment. The trial court also placed the matter on the May 4, 2022, administrative docket but ordered the parties to notify the court if the matter became ready for trial before that date.

On January 5, 2022, the trial court entered an order setting the matter for a trial on February 25, 2022, and on that same day, the husband filed an "objection" to that trial setting, arguing that the matter was on the administrative docket. The trial court, also on January 5, 2022,

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entered an order overruling that objection, noting that the hearing was scheduled in seven weeks and that, even in his objection, the husband had not argued, or presented any evidence indicating, that he was unable to participate in a trial in seven weeks' time.²

On January 17, 2022, the husband filed a petition for a writ of mandamus requesting that this court order the trial court to vacate that part of its December 15, 2021, order awarding the wife a judgment in the amount of \$150,000.

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995).

²The husband has submitted materials related to the January 5, 2022, order setting the matter for trial in his petition for a writ of mandamus, but he has not made any argument as to that ruling. Accordingly, any such argument has been waived. See Ex parte Burkes Mech., Inc., 306 So. 3d 1, 7 (Ala. 2019) ("Arguments not made as a basis for mandamus relief are waived." (quoting Ex parte Simpson, 36 So. 3d 15, 25 (Ala. 2009))).

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In his petition for a writ of mandamus, the husband cites a number of cases in support of his argument that he was entitled to notice that the merits of the matter would be considered at the December 14, 2021, hearing. See, e.g., Ex parte Weeks, 611 So. 2d 259, 261 (Ala. 1992); M.H. v. Jer. W., 51 So. 3d 334, 338 (Ala. Civ. App. 2010). With regard to notice, this court has stated:

"The constitutional requirement of due process of law means 'notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing.' Ex parte Rice, 265 Ala. 454, 458, 92 So. 2d 16, 19 (1957). See also Kingvision Pay-Per-View, Ltd. v. Ayers, 886 So. 2d 45, 54 (Ala. 2003). Our Supreme Court has also noted that due process

" 'contemplates the rudimentary requirements of fair play, which include a fair and open hearing ... with notice and the opportunity to present evidence and argument ... and information as to the claims of the opposing party, with reasonable opportunity to controvert them.'

"Ex parte Weeks, 611 So. 2d 259, 261 (Ala. 1992)."

Hosey v. Lowery, 911 So. 2d 15, 17-18 (Ala. Civ. App. 2005). A judgment entered without affording the parties proper notice, i.e., due process, is void. Cornelius v. Browning, 85 So. 3d 954, 955 (Ala. 2011). "Whether a judgment is void is a question of law. A judgment is void only if the trial

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court lacked subject-matter jurisdiction or jurisdiction over the parties, or if the trial court acted in a manner inconsistent with due process." Ex parte Citizens Bank, 879 So. 2d 535, 538 (Ala. 2003) (emphasis added).

In this case, the husband was notified only that the trial court would consider his motion to place the matter on the administrative docket at the December 14, 2021, hearing. We are not without sympathy for the positions of the parties and the efforts of the trial court. However, based on the materials before us, there was no indication that the husband could have been on notice that a money judgment might be entered against him as a result of the December 14, 2021, hearing. Accordingly, we grant the husband's petition for a writ of mandamus and order that the trial court set aside as void that part of the trial court's December 15, 2021, order awarding the wife a judgment in the amount of \$150,000. The husband did not specifically challenge any other portions of the December 15, 2021, order; accordingly, any arguments pertaining to the remainder of the December 15, 2021, order have been waived. Ex parte Burkes Mech., Inc., 306 So. 3d 1, 7 (Ala. 2019).

PETITION GRANTED; WRIT ISSUED.

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