REL: September 29, 2023

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2023

CL-2023-0251

Karen Miller

v.

James L. Miller

Appeal from Butler Circuit Court
(DR-20-900013)

EDWARDS, Judge.

In March 2020, James L. Miller ("the father") filed in the Butler Circuit Court ("the trial court") a verified complaint for a divorce from Karen Miller ("the mother"). Contemporaneously therewith, the father filed a verified motion for ex parte relief in which he sought an award of

custody of the parties' child, which the trial court granted. In June 2020, the mother filed a motion to dismiss the father's divorce action on the ground that the trial court lacked jurisdiction over the parties' divorce because, she averred, she was a resident of Florida and the father had not lived in the State of Alabama for the six months preceding the filing of the complaint as required by Ala. Code 1975, § 30-2-5. The trial court denied that motion on October 13, 2020.

In July 2021, the trial court ordered the parties to mediate the divorce action. On July 16, 2021, the mediator reported that the parties had reached an agreement. On July 20, 2021, the father filed in the trial court an answer and waiver by the mother, which was signed by the mother but was not notarized; his "deposition taken before notary public," which was signed but was not notarized; and an agreement executed by the parties respecting child custody and child support ("the custody agreement"). On August 6, 2021, the trial court entered a judgment divorcing the parties and incorporating the custody agreement. Neither party filed a postjudgment motion and neither party appealed.

In November 2022, the mother filed a motion for relief from the divorce judgment pursuant to Rule 60(b), Ala. R. Civ. P., citing Rules 60(b)(4) and 60(b)(6), Ala. R. Civ. P. The trial court set the mother's motion for a hearing, and the father filed a response to the mother's motion. On March 9, 2023, the trial court entered an order denying the mother's Rule 60(b) motion. The mother timely filed a notice of appeal.

Rule 60(b) provides, in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four (4) months after the judgment, order, or proceeding was entered or taken."

On appeal from the denial of a Rule 60(b) motion, we are concerned only with the propriety of the order denying the motion. Williams v.

Williams, 910 So. 2d 1284, 1286 (Ala. Civ. App. 2005). Our standard of review is dependent upon which aspect of the mother's motion we are considering.

> "Except for motions brought pursuant to Rule 60(b)(4), [Ala. R. Civ. P.,] whether a movant has established grounds for relief under Rule 60(b) is a matter within the sound discretion of the trial court. Ex parte Wal-Mart Stores, Inc., 725 So. 2d 279 (Ala.1998). On appeal, this court will reverse a judgment denying relief under Rule 60(b) only if the trial court has exceeded its discretion. See Price v. Clayton, 18 So. 3d 370 (Ala. Civ. App. 2008)."

Burleson v. Burleson, 19 So. 3d 233, 238 (Ala. Civ. App. 2009). However,

> "'"[t]he standard of review on appeal from the denial of relief under Rule 60(b)(4)[, Ala. R. Civ. P.,] is not whether there has been an abuse of discretion. When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside."'"

Bank of America Corp. v. Edwards, 881 So. 2d 403, 405 (Ala. 2003) (quoting Image Auto, Inc. v. Mike Kelley Enters., Inc., 823 So. 2d 655, 657 (Ala. 2001), quoting in turn Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991)).

On appeal, the mother argues first that the trial court erred by denying that aspect of her Rule 60(b) motion arguing that the divorce

judgment was void because the father failed to present evidence establishing a statutory ground for divorce. "Rule 60(b)(4) relief is applicable only in cases wherein the court rendering the prior judgment lacked jurisdiction over the subject matter, or over one or more of the parties, or otherwise acted in a manner inconsistent with due process." Steelman v. Steelman, 512 So. 2d 776, 777 (Ala. Civ. App. 1987). Furthermore, relief under Rule 60(b)(4) is available "only where the prior judgment is void rather than voidable." Steelman, 512 So. 2d at 777.

The mother relies on Mendia v. Encarnacion, 275 So. 3d 158, 161 (Ala. Civ. App. 2018), in which this court, considering an appeal from the denial of a Rule 60(b) motion, held that the lack of evidence supporting a ground for a divorce judgment is a "defect as to the trial court's subject-matter jurisdiction." Although the parties must present evidence to support a determination that a divorce may be granted on the ground of incompatibility in order "to overcome the prohibition of consensual divorce found in [Ala. Code 1975,] § 30-2-3," see Dubose v. Dubose, 132 So. 3d 17, 21 (Ala. Civ. App. 2013), both this court and our supreme court have explained that the lack of such evidence in the record does not

deprive the trial court of subject-matter jurisdiction over the divorce action or render any judgment entered by the court void. Ex parte DiGeronimo, 195 So. 3d 963, 968 (Ala. Civ. App. 2015) (explaining that "[a] trial court's failure to take testimony or other evidence regarding the grounds for a divorce does not render a divorce judgment void" but that such a judgment is reversible on direct appeal because the judgment was entered without statutory authority); Nelson v. Moore, 607 So. 2d 276, 277 (Ala. Civ. App. 1992) (explaining that a divorce judgment entered without the necessary evidence relating to the grounds for a divorce is entered without authority but is not void); Johnson v. Johnson, 182 Ala. 376, 382, 62 So. 706 (1913) ("A decree of divorce, though procured by the collusion of the parties, is not therefore void, and neither of the guilty parties is entitled as of right to have the decree set aside on that ground.").[1] Had the mother timely appealed the divorce judgment and

[1]We recognize, as we did in Nelson v. Moore, 607 So. 2d 276 (Ala. Civ. App. 1992), that cases like Wright v. Wright, 55 Ala. App. 112, 313 So. 2d 540 (1975); Meares v. Meares, 256 Ala. 596, 56 So. 2d 661 (1952); and Helms v. Helms, 50 Ala. App. 453, 280 So. 2d 159 (Ala. Civ. App. 1973), indicate that establishing factual grounds for divorce is "jurisdictional" but that in none of those cases were the judgments found void and the appeal dismissed; instead, those judgments were reversed,

argued that the trial court had lacked evidence establishing that the parties were incompatible, we would have reversed the judgment based on the judgment having been entered without statutory authority. Dubose, 132 So. 3d at 21. However, the mother did not appeal the judgment, and her collateral attack on the judgment on the ground of voidness lacks merit. Ex parte DiGeronimo, 195 So. 3d at 968; Nelson, 607 So. 2d at 276. To the extent that Mendia holds otherwise, it is overruled.

The mother's second argument fares no better. She contends that the trial court erred by denying her Rule 60(b) motion insofar as it was based on Rule 60(b)(6), Ala. R. Civ. P., and requested that the trial court set aside the divorce judgment on the grounds that the custody agreement was ambiguous and that there had been no "meeting of the minds" between the parties. The mother complains that she believed that

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indicating that the judgments were merely voidable and not void. As we stated in Nelson, "the error of the trial court in granting a decree that is not supported by the evidence may only be corrected on appeal." 607 So. 2d at 277. For a discussion of the difference between void and voidable judgments, see Bowen v. Bowen, 28 So. 3d 9, 14-15 (Ala. Civ. App. 2009).

the parties had agreed to exercise "joint legal and physical custody of the minor child, with the child's primary residence being designated with [the father]." The custody agreement, however, makes no mention of joint custody of any kind, and instead provides that the child's "primary residence" will be with the father and sets out what appears to be a standard visitation schedule for the mother.

> "'Relief under Rule 60(b)(6)[, Ala. R. Civ. P.,] is reserved for extraordinary circumstances, and is available only in cases of extreme hardship or injustice.' Douglass v. Capital City Church of the Nazarene, 443 So. 2d 917, 920 (1983), citing Howell v. D.H. Holmes, Ltd., 420 So. 2d 26 (Ala. 1982). Nor can Rule 60(b)(6) be used 'for the purpose of relieving a party from the free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interest.' See 11 C. Wright & A. Miller, Federal Practice & Procedure, § 2864 at 214-215 (1973)."

Chambers Cnty. Comm'rs v. Walker, 459 So. 2d 861, 866 (Ala. 1984).

Because the substance of the mother's argument is that the mother was mistaken regarding the meaning of the custody agreement, the mother's argument is more appropriately considered to be an argument that the divorce judgment should be set aside on the basis of mistake

under Rule 60(b)(1), Ala. R. Civ. P.[2] A motion seeking relief pursuant to Rule 60(b)(1) must be filed within four months of the entry of the judgment, but the mother's motion was filed more than one year after the entry of the judgment. Burleson, 19 So. 3d at 239. In addition, "'[c]lause (6) [of Rule 60(b)] … is mutually exclusive of the specific grounds of clauses (1) through (5), and a party may not obtain relief under clause (6) if it would have been available under clauses (1) through (5).'" Id. at 239-40 (quoting R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 229 (Ala. 1994)).

Moreover, the appellate courts of this state have repeatedly cautioned that Rule 60(b)(6) does not operate to relieve a party from his or her "free, calculated, and deliberate choices." Tichansky v. Tichansky, 54 Ala. App. 209, 212, 307 So. 2d 20, 23 (1974). In Tichansky, the husband sought to have a divorce judgment that had incorporated his agreement to, among other things, pay the wife $500 per month in alimony, set aside pursuant to Rule 60(b)(6). Tichansky, 54 Ala. App. at 212, 307 So. 2d at 23. We affirmed the trial court's denial of relief under

[2]We also note that relief under Rule 60(b)(1), Ala. R. Civ. P., may not be premised on a unilateral mistake of fact. Gonzalez v. Gonzalez, 315 So. 3d 1134, 1138 (Ala. Civ. App. 2020).

Rule 60(b)(6), explaining that the husband had been cautioned that the $500 payment was "excessive" but had freely entered the agreement and had waited almost four months after the entry of the judgment to seek to have the agreement set aside. Id. We further indicated that a trial court should "balance the desire to remedy injustice against the need for finality of judgments." 54 Ala. App. at 213, 307 So. 2d at 23.

The facts of the present case are quite similar to those in Tichansky. Like the husband in Tichansky, who signed an agreement to pay $500 per month to his wife, the mother in the present case signed the custody agreement. Like the husband in Tichansky, she did not appeal from the judgment incorporating the agreement. Brewer v. Commercial Credit Corp., 447 So. 2d 775, 777 (Ala. Civ. App. 1984) ("A Rule 60(b) motion cannot take the place of an appeal and is not available to relieve a party from his choice and decision not to appeal from a final judgment."). Instead, she waited over one year to seek relief from the judgment. Insofar as the mother sought relief from the divorce judgment because she was mistaken regarding the terms of the custody agreement, the trial

court properly denied the mother's request for relief pursuant to Rule 60(b)(6).

Having determined that the mother has not presented any basis for relief under Rule 60(b), we affirm the judgment of the trial court denying the mother's Rule 60(b) motion.

AFFIRMED.

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