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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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James E. Dean

v.

Kristin D. Dean

Appeal from Shelby Circuit Court  
(DR-15-900342.01 and DR.15-900342.02)

HANSON, Judge.

James E. Dean ("the former husband") filed in our supreme court a petition for a writ of mandamus directed to the Shelby Circuit Court seeking review of orders entered by that court

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in two cases on January 31, 2019, finding the former husband in contempt and modifying various aspects of a judgment entered in a divorce action to which the former husband and Kristin D. Dean ("the former wife") had been parties; that petition was transferred to this court for disposition. Treating the mandamus petition as a timely appeal from a final judgment, we affirm the January 31, 2019, judgment of the circuit court.

The attachments to the former husband's mandamus petition and the former wife's response indicate the following pertinent facts. The parties were divorced by a judgment of the circuit court entered in October 2015 based upon the parties' agreement. The former husband filed a petition in February 2016 seeking modification and enforcement of various provisions of that judgment (case no. DR-15-900342.01); the former wife answered that petition in July 2016 and also asserted a counterclaim seeking modification and enforcement of the October 2015 judgment (case no. DR-15-900342.02). In May 2018, the circuit-court judge that had previously been assigned the parties' modification and enforcement claims reassigned the cases to a retired circuit judge("the retired

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circuit judge") for disposition; the retired circuit judge had first been assigned by the Chief Justice of the Alabama Supreme Court in January 2017 to serve as a special circuit judge for the circuit that encompasses Shelby County, and a second order from the chief justice had reauthorized the retired circuit judge on August 1, 2017, to continue serving in that capacity through August 1, 2018. Although the retired circuit judge set the parties' claims for a trial to be held on August 13, 2018, several days after the second assignment order was to expire, no further reassignment order directed to the retired circuit judge was initially issued by the chief justice at the expiration of that subsequent order.

Notwithstanding the expiration of the orders assigning the retired circuit judge as a special circuit judge in the circuit encompassing Shelby County, the retired circuit judge continued to act in a judicial capacity as to the parties' claims without objection from either of the parties. Because the parties' cases were not tried as originally scheduled, the retired circuit judge entered an order on December 11, 2018, setting the cases for a trial to be held on January 14-15, 2019. On the first scheduled trial date, counsel for the

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former wife filed a "Notice of Filing Partial Settlement" to which was attached an agreement entered into by the parties addressing matters such as visitation with their minor child and access to that child's medical and educational records.

An ore tenus proceeding then took place on January 14 and January 15, 2019, before the retired circuit judge as to the parties' remaining pending claims, which apparently included a request on the part of the former husband to reduce his prospective child-support obligation, a claim asserted by the former wife seeking to have the former husband held in contempt as to alleged nonpayment of child-support and medical-expense-reimbursement obligations, and fee claims asserted against the former husband by guardians ad litem for the parties' minor child. The retired circuit judge orally indicated at the close of the trial that he intended to rule in favor of the former wife and the guardians ad litem on their contempt claims and that the punishment for those contempts would involve incarceration. On January 24, 2019, before any judgment or order had been entered pursuant to Rule 58, Ala. R. Civ. P., the former husband filed a motion requesting that the circuit court revisit its findings and

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conclusions as orally stated and allow further evidence to be presented; that motion presented only substantive challenges to the propriety of sanctions against him and did not challenge the authority of the retired circuit judge to act in a judicial capacity.

On January 31, 2019, a document entitled "Order on Criminal Contempt and Final Order of Modification" was executed by the retired circuit judge and entered as the judgment of the circuit court. In that judgment, the retired circuit judge ruled that, although the parties' agreement as to visitation and record-access issues should be ratified and the former husband's prospective child-support obligation should be reduced to \$381 per month, the former wife was entitled to money judgments of \$5,958.96 and \$5,574.41 representing, respectively, the arrearages in child-support and medical-reimbursement payments due from the former husband; the former husband was also sentenced to be incarcerated for 10 days with respect to 2 instances in which the former husband had not paid child support as directed and for 250 days with respect to 50 instances in which he had not timely reimbursed the former wife for the child's medical

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expenses. The former husband was also directed to report on February 26, 2019, for the circuit court to "determine when [the former husband] shall begin serving his period of incarceration." By a separate order, the former husband was directed to pay \$3,000 to the child's former guardian ad litem and \$2,400 to the child's current guardian ad litem.<sup>1</sup>

On February 7, 2019, within 30 days after the entry of the January 31, 2019, judgment (and after the former wife had acknowledged the receipt of \$5,800 from the former husband to be applied toward his arrearages), the former husband filed a motion to vacate the circuit court's judgment and the separate order directing him to pay fees to the child's guardians ad litem, asserting, in pertinent part, that the expiration of the chief justice's second assignment order on August 1, 2018, rendered void all orders or judgments rendered by the retired circuit judge after that date.<sup>2</sup> Additionally, the former

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<sup>1</sup>Because that order pertained to fees owed to counsel, it did not affect the finality of the order adjudicating the parties' substantive claims. See generally Liberty Mut. Ins. Co. v. Greenway Enters., Inc., 23 So. 3d 52, 55 (Ala. Civ. App. 2009).

<sup>2</sup>We note that, after the entry of the January 31, 2019, judgment, the retired circuit judge was reauthorized by the chief justice on February 5, 2019, to serve as a circuit judge in the circuit that encompasses Shelby County through December

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husband filed a motion on February 24, 2019, asserting that the retired circuit judge should deem himself disqualified as not being impartial and should recuse himself. After a hearing, the retired circuit judge rendered an order on behalf of the circuit court that, as corrected on March 1, 2019, specified that the former husband's motions to vacate and for recusal would soon be ruled upon and additionally indicating that the former husband was now facing, at most, a 10-day period of incarceration. On March 10, 2019, the retired circuit judge on behalf of the circuit court entered an order denying the former husband's motion to vacate and denying the motion seeking his recusal.<sup>3</sup>

In his mandamus petition, the former husband acknowledges that it is his burden to demonstrate that he does not have another adequate remedy in order to show his entitlement to the extraordinary writ of mandamus. However, the January 31, 2019, judgment of the circuit court addressed numerous matters

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31, 2019.

<sup>3</sup>To the extent that the former husband's February 7, 2019, motion was cognizable under Rule 59(e), Ala. R. Civ. P., as opposed to Rule 60(b)(4), Ala. R. Civ. P., the circuit court's express action on that motion necessarily obviates any necessity to deem the matter held in abeyance based upon the provisions of Rule 4(a)(5), Ala. R. App. P.

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in controversy between the parties as to modification and enforcement of the October 2015 divorce judgment; found the former husband in contempt for nonpayment of child-support and medical-reimbursement payments due; and additionally specified that, except as specifically modified by the January 31, 2019, judgment, the October 2015 divorce judgment would remain in effect. Further, the circuit court has ruled on all the matters asserted in the two motions filed by the former husband after the entry of the January 31, 2019, judgment. Finally, the former husband filed his mandamus petition within the time specified for taking an appeal (i.e., within 42 days of January 31, 2019). Accordingly, we conclude that the circuit court has entered a final judgment and that the former husband has an adequate remedy by appeal, and, thus, the facts of this case warrant the exercise of our discretion to treat the former husband's petition for a writ of mandamus as an appeal from a final judgment of the circuit court. See Ex parte Taylor, 252 So. 3d 637, 642 (Ala. 2017).

The former husband asserts that the retired circuit judge lacked explicit authority to act as a judge of the circuit court between August 1, 2018, and February 5, 2019, which



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dates represent the expiration of the chief justice's second assignment order and the inception of the third assignment order directed to the retired circuit judge; the former husband proceeds from that premise to advance the position that the acts of the retired circuit judge during that interim period, which we term "the assignment gap," are absolutely void and of no effect. For that position, the former husband cites two Alabama cases: Paulk v. Paulk, 249 So. 3d 521 (Ala. Civ. App. 2017), and Trammell v. State, 785 So. 2d 398 (Ala. Crim. App. 2000). However, the Court of Criminal Appeals decided Trammell based expressly upon judicial-authority principles enunciated in a case that would subsequently be reversed by our supreme court (Gwin v. State, 808 So. 2d 64 (Ala. Crim. App. 2000) ("Gwin I"), rev'd, 808 So. 2d 65 (Ala. 2001) ("Gwin II")); we thus perceive Trammell to be without precedential value for the propositions invoked by the former husband and confine our inquiry to Paulk.

In Paulk, a previous domestic-relations judgment of a circuit court that had been entered by a particular circuit judge in July 2015 had been reversed in part, and the cause had been remanded for further proceedings; however, by the

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time the circuit court had regained jurisdiction in November 2017 to address the manner in which best to comply with the mandate of this court, the circuit judge who had originally heard the case had retired from active service as a judge, and a motion was filed seeking the reassignment of the case from the retired judge. Although an active sitting judge entered an order on remand, his order was vacated as having been the result of a clerical error, and a new order on remand was entered that had been signed by the retired judge; further, the retired judge subsequently denied a postjudgment motion filed by one of the parties. On appeal from the order on remand that had been rendered by the retired judge, this court, acting ex mero motu, "raised the jurisdictional issue of the effect of [the trial judge's] retirement on the validity of the ... order [on remand] entered by him and requested that the parties brief that issue." 249 So. 3d at 522. After noting several pertinent Alabama statutes governing appointment of special judges, this court observed that the record on appeal in Paulk contained "no order indicating that [the retired judge] was appointed as a temporary judge in accordance with the law" and pointed out

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that neither party had "contended that there was a valid appointment." 249 So. 3d at 522-23 (emphasis added). This court further noted that "neither party ha[d] cited this court to any legal basis upon which a retired judge may enter an order without a valid appointment." Id. at 523. As a result, this court dismissed the appeal as having been taken from a void order, albeit with the additional observation that that decision did not "prevent[] or requir[e] the appointment of" the retired judge as a special, temporary judge prospectively. Id.

The facts and procedural posture of this case differ from those present in Paulk, however. First, although this court's opinion in Paulk disclosed the complete absence of any order whatsoever appointing the retired judge in that case as a temporary judge, there is no dispute in this case that the retired circuit judge was assigned by the chief justice as a special circuit judge to serve in the circuit encompassing Shelby County from January 2017 to August 1, 2018. See Ala. Const. 1901 (Off. Recomp.), Art. VI § 149 (providing that chief justice "may assign ... retired trial judges ... for temporary service in any court"). Thus, we perceive no lack

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of authority on the part of the retired circuit judge to act following his having been assigned the underlying case in May 2018 until the commencement of the "assignment gap."

Second, unlike the situation in Paulk, in which neither party offered any legal basis upon which it could be concluded that a retired judge could enter an order outside the scope of a valid appointment, the retired circuit judge opined in the March 10, 2019, order denying the motions filed by the former husband after the entry of the January 31, 2019, judgment that he "was acting as a de facto judge" and that the orders he rendered during the "assignment gap" were valid; the former wife offers this court a similar argument in favor of the validity of the retired circuit judge's orders entered during the "assignment gap."

Alabama law has long recognized the principle that actions taken by persons who have incorrectly claimed the right to act in the capacity of a public official of this state are, in certain instances, valid in spite of those persons' lack of legal authority to so act. The concept of a "de facto officer" was discussed at some length by our supreme court in Cary v. State, 76 Ala. 78 (1884), in which a question

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arose concerning the authority of a person named Frank Nabors, who signed an arrest warrant several months after the expiration of his appointment as a notary public. After noting that Nabors could not have acted as an officer de jure in signing the warrant, our supreme court proceeded to the resulting question:

"The rule is well settled, that the official acts of an officer de facto are just as valid, for all purposes, as those of an officer de jure, so far as the public and third persons are concerned. Joseph v. Cawthorn, 74 Ala. 411 [(1883)], and cases cited. As observed by Sutherland, J., in Wilcox v. Smith, 5 Wend. 231[, 233 (N.Y. Sup. Ct. 1830)], 'the affairs of society could not be carried on upon any other principle.'

"It is sometimes very difficult to determine whether one claiming to exercise the duties of an office, is an officer de facto, or a mere usurper. The distinction is sometimes said to be, that the former claims to hold under color of election or appointment, while the latter claims no authority or color of authority for his intrusion into possession of the office whose functions he undertakes to usurp ... The better and more modern view, however, is, that no color of election or appointment is needed to constitute one an officer de facto. While it is sufficient for such purpose, it is not a necessary pre-requisite ...

"To constitute Nabors a de facto notary, ... he must either have acted under color of appointment and claim of official right, or he must have continued to exercise the duties of his office, by public acquiescence, for such length of time and by such frequency of repetition as to afford reasonable

presumption of his holding over under a re-appointment. The first commission having expired, without any right in law to hold over, it could not, in our judgment, lend color for any length of time beyond its expiration.

"... [A]lthough an expired commission is not color of title to office, still, if an elected or appointed public officer continues, without break, and without question by the public, to exercise the functions of the office after the expiration of his commission, this is a continued exercise of the duties of the office by acquiescence, and, under the modern rule, constitutes the person thus acting an officer de facto ...

"It is manifest, moreover, that an appointment may often be presumed upon evidence which would fail to justify presumption of a popular election, because it is an investiture of office less public in its nature, and the whole doctrine imparting validity to the unauthorized acts of de facto officers is one based on justice, necessity and public policy, and is intended chiefly for the protection of an innocent public who may be ignorant of the officer's defect of official title. -- Joseph v. Cawthorn, 74 Ala. 411[, 415 (1883)]."

Cary, 76 Ala. at 84-86 (emphasis added). Our legislature subsequently codified the de facto officer doctrine that was applied in Cary. See Ala. Code 1975, § 36-1-2.

The de facto officer doctrine was more recently applied by our supreme court in Gwin II to the judicial acts of a circuit judge who had been appointed by our supreme court to serve as a circuit judge in a particular county, yet was not

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qualified to serve at the time he rendered a judgment against a motorist who had pleaded guilty to a charge of reckless driving. Reviewing the judgment of reversal of the Court of Criminal Appeals in Gwin I, our supreme court acknowledged the legal requirement upon which the Court of Criminal Appeals had relied: that a circuit judge be a resident of the circuit to whose bench that judge has been appointed for at least 12 months. However, our supreme court nonetheless declined to hold that that "irregularity", i.e., the claimed violation of the residency requirement, warranted declaring the judgment against the motorist invalid:

"Despite this irregularity, [the motorist] did not object to [the special circuit judge]'s appointment before the judgment of conviction and sentence was entered. [The special circuit judge], who was holding the office of circuit judge and was exercising the functions thereof, was a de facto officer when he accepted [the motorist]'s plea. "A de facto officer is one who exercises the duties of a de jure office under color of appointment or election...." Dixie Dairies v. Alabama State Milk Control Bd., 286 Ala. 198, 202, 238 So. 2d 551, 554 (1970) (quoting Ex parte Register, 257 Ala. 408, 413, 60 So. 2d 41, 46 (1952)). Section 36-1-2, Ala. Code 1975, which protects the actions of de facto officers, reads:

"The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts

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in regard to all persons interested or affected thereby, whether such person is lawfully entitled to hold office or not and whether such person is lawfully qualified or not ...'

"(Emphasis added.) The judgment [the motorist] appealed from is valid and remains intact as an action of a de facto officer protected by statute."

Gwin II, 808 So. 2d at 67. Accord Benjamin v. State, 156 So. 3d 424, 459-60 (Ala. Crim. App. 2013) (postconviction claim asserting that retired judge who had sentenced criminal defendant to death had exceeded limits of "temporary" active service was properly dismissed based upon de facto officer doctrine; defendant failed to object to judge's service until after trial and sentencing).

In this case, the retired circuit judge's actions during the "assignment gap" fall within the parameters of the de facto officer doctrine so as to warrant our rejection of the former husband's voidness argument. The order entered by the retired circuit judge on March 10, 2019, in response to the former husband's two motions filed after the entry of the judgment under review, notes that the retired circuit judge "has been regularly presiding over domestic cases in this circuit" and that, during the "assignment gap," he "presided



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over twelve separate long-established court dockets," entered "more than eight hundred orders," and entered "more than forty final judgments." That activity, in our view, amply warrants classification of the acts of the retired circuit judge during the "assignment gap" as those of a de facto circuit judge under Cary: he is an "appointed public officer [who] continue[d], without break, and without question by the public, to exercise the functions of the office [of circuit judge] after the expiration of his commission." 76 Ala. at 86. The former husband did not raise any objection to the assignment of the modification and enforcement claims to the retired circuit judge in May 2018, when they were first transferred to him for disposition, nor at any other time before the entry of the January 31, 2019, judgment. Thus, under Gwin II (and notwithstanding Paulk), the former husband may not properly be heard to complain here and now about the judicial authority of the retired circuit judge.

The former husband next attacks, on a number of fronts, the chief justice's February 5, 2019, third assignment order directed to the retired circuit judge. Several of the objections lodged by the former husband -- for example, the

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retired circuit judge's residency outside the circuit encompassing Shelby County and his purportedly having reached the age of 70 years -- pertain to requirements that a candidate for election to the circuit bench would be required to meet; the former husband additionally contends that the retired circuit judge's repetitive appointments by successive chief justices for more than 180 days at a time are not legally authorized. The former husband appears to assert that the sole source of the chief justice's assignment power is that set forth in Ala. Code 1975, § 12-1-14, which provides that our supreme court "may appoint and commission special circuit judges ... for temporary service[] provided ... that the person so appointed shall possess the qualifications for the judgeship to which [the person] is appointed" (emphasis added). However, our supreme court rejected in Gwin II the proposition advanced by the former husband here, noting that § 12-1-14 "requires that a commission be issued to the appointee and that the appointee take an oath of office" and "does not govern a person who, before the appointment, occupies the office of judge, because that person will have

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already fulfilled these requirements when he or she initially assumed the judgeship." 808 So. 2d at 66-67 (emphasis added).

In deeming the retired circuit judge in this case to similarly "occup[y] the office of judge" at the time of the chief justices' assignment orders, we note the applicability in this case of Ala. Code 1975, § 12-18-7(b), which provides that a "retiring justice or judge, upon being retired, shall take the oath of office as a retired justice or judge and thereupon become an extra or additional judge of the state," and that "[t]hereafter, on the request of the Chief Justice, ... any such retired justice or judge may serve on ... any circuit court in the state" (emphasis added). Accord Ala. Const. 1901 (Off. Recomp.), Art. VI § 149 (retired judges may be assigned by chief justice to perform "temporary service in any court"). Further, although a presiding circuit judge's authority to appoint and commission a special circuit-court judge for "temporary service" is limited to periods of 180 consecutive days in each instance, see Ala. Code 1975, § 12-1-14.1(b), we find no such temporal limitation upon the authority of the chief justice to assign a retired circuit judge in § 12-18-7 or in § 149. See also Benjamin, 156 So. 3d

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at 458-59 (opining that § 12-1-14.1(b) does not apply to judicial appointments or assignments not undertaken under the auspices of that statute). We therefore conclude that the former husband has failed to demonstrate that the chief justice acted outside the discretion of that office on February 5, 2019, in assigning the retired circuit judge to the circuit encompassing Shelby County for the remainder of this year.

The final contention presented by the former husband in this court is that the retired circuit judge erred in failing to recuse himself on the basis of alleged prejudice against the former husband, as purportedly evidenced by his entry of a final judgment imposing contempt sanctions. We reiterate that the retired circuit judge was first assigned the case in May 2018 and sat without objection until a final judgment was entered in January 2019 that was not favorable to the former husband; however, we assume, without deciding, that the former husband's efforts to seek the retired circuit judge's recusal were timely notwithstanding the principle that a claimed disqualification of a trial judge based upon alleged prejudice may be waived if the moving party proceeds to trial without

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objection. See generally Ex parte Parr, 20 So. 3d 1266, 1270 (Ala. 2009). Nonetheless, it remains the law in Alabama that "[a]dverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice" and that "[b]ias and prejudice must be shown by the conduct of the trial judge and may not be presumed or inferred by his subjective views." Hartman v. Board of Trus. of Univ. of Alabama, 436 So. 2d 837, 841 (Ala. 1983). We have no indication in the materials properly before us<sup>4</sup> that the retired circuit judge has acted in any manner suggesting bias or prejudice, and we decline, on the authority of Hartman, to impute bias or prejudice on the mere basis of rulings of the retired circuit judge adverse to the former husband.

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<sup>4</sup>Although the former husband contends in his argument to this court that the retired circuit judge made various statements at the hearing on the former husband's motions to vacate and for recusal about the former's husband's employment status and business arrangements, no transcript of that hearing has been supplied for this court's review, and it is well settled that "[t]he unsworn statements, factual assertions, and arguments of counsel are not evidence." M.G. v. Madison Cty. Dep't of Human Res., 248 So. 3d 13, 18 (Ala. Civ. App. 2017) (quoting L.F. v. Cullman Cty. Dep't of Human Res., 175 So. 3d 183, 185 (Ala. Civ. App. 2015), quoting in turn Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005)).

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Based upon the foregoing facts and authorities, the judgment of the Shelby Circuit Court, as rendered by the retired circuit judge in this case, is due to be affirmed.

AFFIRMED.

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