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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Justin D. Gordon

v.

Desirae R. Gordon

Appeal from Montgomery Circuit Court
(DR-17-900103)

HANSON, Judge.

Justin D. Gordon ("the husband") appeals from a judgment of the Montgomery Circuit Court ("the trial court") divorcing him from Desirae R. Gordon ("the wife"), dividing the parties' marital property, and awarding custody of the parties' child

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("the child"), as well as from that court's order denying his postjudgment motion. For the reasons stated herein, we vacate the order denying the husband's postjudgment motion and remand the cause for further proceedings.

The husband commenced the divorce action giving rise to this appeal on February 14, 2017, and the action was initially assigned to Judge Anita Kelly, who presided over the initial stages of the case. However, in August 2017, Judge Kelly became disqualified, as a matter of law, from acting as a judge under the provisions of § 159 of the Alabama Constitution of 1901 because the Alabama Judicial Inquiry Commission initiated Court of the Judiciary Case Number 50 by filing a complaint naming Judge Kelly as a defendant.¹ The divorce action was thereafter reassigned to the Presiding Judge of the Montgomery Circuit Court, Judge Johnny Hardwick.

A bench trial was then held before Judge Hardwick on May 16, 2018, and, on October 23, 2018, Judge Hardwick entered a final judgment in the divorce action. That judgment divorced the parties, awarded the wife sole physical custody of the

¹The allegations asserted against Judge Kelly by the Judicial Inquiry Commission were unrelated to this case.

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child, divided the martial property and debts, and found the husband to be in contempt because of a failure to comply with a previously entered pendente lite order.

On October 29, 2018, the husband filed a postjudgment motion that included a challenge to the sufficiency of the evidence adduced during the trial conducted before Judge Hardwick as it pertained to several substantive aspects of the judgment, as well as a request for a hearing on the motion; the husband also sought a stay of the trial court's judgment. On January 10, 2019, without any hearing having been held by the trial court as is required by Rule 59(g), Ala. R. Civ. P., Judge Kelly, who had been reinstated to judicial service by the Court of the Judiciary as of May 14, 2018 (but who had not presided at the trial in the divorce action), rendered and entered a three-sentence order denying the husband's postjudgment motion and his accompanying motion to stay. However, there is in the record no order or other notice to the parties indicating that Judge Kelly, at any point after her return to judicial service, had been reassigned to the divorce action in lieu of Judge Hardwick, nor does the record contain a statement of any reasons that might have rendered

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Judge Hardwick unable to rule on the husband's postjudgment motion. Further, the text of Judge Kelly's order denying the postjudgment motion indicates that she had, in rendering that order, considered the husband's postjudgment motion, the husband's motion to stay, and the wife's response in opposition to those motions; notably, the order does not mention that any review of the evidence adduced during the trial before Judge Hardwick occurred at the postjudgment-motion stage, and the record does not affirmatively indicate that a transcript of the trial testimony was available to Judge Kelly at the time she rendered the order denying the postjudgment motion. To the contrary, the record indicates that there was a delay in obtaining a copy of the reporter's transcript, which was certified as completed on May 29, 2019.

In his appeal, the husband contends, among other things, that the trial court erred in denying the postjudgment motion because Judge Kelly, who did not preside at the trial, did not certify her familiarity with the record as required by Rule 63, Ala. R. Civ. P. That rule provides:

"If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the

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case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness."

In Baldwin v. Baldwin, 160 So. 3d 34, 39 (Ala. Civ. App. 2014), this court held that "Rule 63 requires that a successor judge who is hearing a postjudgment motion review that part of the record pertaining to the issues raised in the postjudgment motion." In Baldwin, the term of office of the judge who had presided over the trial and had entered a final judgment in the case expired, after which a successor judge granted a party's postjudgment motion seeking a new trial. The successor judge, however, had not read the trial transcript, which contained testimony material to various issues raised in the postjudgment motion. This court thus concluded that the successor judge had "committed reversible error in granting the ... postjudgment motion without considering all the relevant evidence in the record," and we reversed the trial court's postjudgment order granting a new trial and remanded the case for the successor judge to reconsider the motion after he had reviewed the transcript. Id. at 40.

Similarly, in this case, assuming that Judge Kelly had the authority, under Rule 63, to act at the postjudgment-motion stage as a successor judge to Judge Hardwick,² she failed to comply with that rule by failing to certify her familiarity with those parts of the record bearing upon the substantive issues raised in the husband's postjudgment motion, nor does it appear from the record before this court that Judge Kelly ever reviewed a transcript or recording of the trial proceedings. As in Baldwin, "[g]iven the nature of the issues raised in the [husband]'s postjudgment motion, Judge [Kelly], without the benefit of reviewing the trial

²The record on appeal does not indicate the reasons for Judge Hardwick's withdrawal from the divorce action, nor does it indicate whether he was "unable to proceed" at the postjudgment-motion stage following the entry of the judgment he had rendered in the divorce action. Our Rule 63 is an adoption of Rule 63 of the Federal Rules of Civil Procedure, as amended in 1991, see Committee Comments to October 1, 1995, Amendment to Rule 63, and this court has previously cited with approval the Advisory Committee Notes to the federal rule. See Baldwin, 160 So. 3d at 39. The Advisory Committee Notes to the 1991 amendment to federal Rule 63 point out that a judge's withdrawal from a proceeding after a trial has commenced should be based on "compelling reasons"; stress that, "[m]anifestly, a substitution should not be made for the personal convenience of the court"; and explicitly direct that "the reasons for a substitution should be stated on the record." Advisory Committee Notes to 1991 Amendment to Rule 63, Fed. R. Civ. P. (emphasis added).

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transcript, could not have been sufficiently apprised of the facts and circumstances so that [she] could have judiciously decided the merits of the postjudgment motion." 160 So. 3d at 40. Accordingly, on the authority of Baldwin, we must vacate the trial court's order denying the husband's postjudgment motion and remand the case for further proceedings on the husband's postjudgment motion. See also Canseco v. United States, 97 F.3d 1224, 1227 (9th Cir. 1996) (vacating order denying postjudgment motion where successor judge refused to certify familiarity with record under Rule 63, Fed. R. Civ. P.). Such further proceedings should, among other things, include a hearing on that motion. See Rule 59(g), Ala. R. Civ. P.

After the issuance of this court's certificate of judgment, if Judge Kelly again elects to consider the merits of the husband's postjudgment motion, she is to strictly comply with the provisions of Rule 63, Ala. R. Civ. P., governing procedure involving successor judges. In the alternative, because the record does not contain any formal act on the part of Judge Hardwick to withdraw from hearing postjudgment matters in the divorce action, nor any indication

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regarding an inability on his part to proceed at the postjudgment-motion stage following the entry of the judgment he had rendered in the divorce action, we perceive no current impediment to Judge Hardwick's ruling on the postjudgment motion. Regardless of the identity of the judge considering the merits of the postjudgment motion, however, an order granting or denying that motion should be entered by the trial court as soon as practicable. Cf. Rule 59.1, Ala. R. Civ. P. (establishing a default 90-day period for disposition of postjudgment motions). Because of the potential in this case for the trial court to render and enter a modified judgment in response to this court's remand instructions, we pretermitt consideration of the husband's arguments concerning the correctness of the trial court's October 23, 2018, judgment.

JANUARY 10, 2019, ORDER VACATED; CAUSE REMANDED WITH INSTRUCTIONS.

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

Donaldson, J., recuses himself.