Rel: May 1, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180928

Don Franklin Rhodes

v.

Susan Davis Rhodes

Appeal from Baldwin Circuit Court
(DR-16-900946.02)

THOMPSON, Presiding Judge.

Don Franklin Rhodes ("the husband") appeals from a judgment of the Baldwin Circuit Court ("the trial court") holding him in contempt after finding that he failed to comply with certain provisions of the 2017 judgment ("the divorce

judgment") divorcing him from Susan Davis Rhodes ("the wife").

The divorce judgment was entered on December 27, 2017. At that time, the parties had two minor children. The older child was 18 years old; the younger child was approximately one month shy of his 17th birthday. In the divorce judgment, the husband was ordered to pay child support in the amount of $1,137 each month, which, the trial court noted, was in compliance with the amount contemplated by Rule 32, Ala. R. Jud. Admin. The divorce judgment also included the following provision relevant to this appeal:

> "12. Rhodes Properties LLC is to be dissolved and the real properties held by Rhodes Properties LLC are to be sold with proceeds split equally between the parties. During the dissolution process of Rhodes Properties LLC the [husband] is responsible for the management of the three properties that comprise Rhodes Properties LLC and shall be responsible for the payment of any debts on said property. The [wife] shall turn over to the [husband] any and all checkbooks and financial records related to Rhodes Properties LLC."

On February 9, 2018, in response to a timely filed postjudgment motion, the trial court entered an order amending paragraph 12 of the divorce judgment

> "to add the requirement that [the husband] shall have an obligation to provide to [the wife] a monthly accounting showing in detail ... the activities, income and expenses of the continuing

> management of three (3) properties that comprise Rhodes Properties, LLC and the actions of the LLC pending the ongoing winding down of the LLC and the sale of the real property and dissolution."

In the divorce judgment, the trial court also ordered that any proceeds the parties received "from a settlement or an award of damages resulting from a Deepwater Horizon/BP claim are to be split equally between the parties." If the husband had already received those proceeds ("the BP settlement"), the trial court directed that he was to "send one-half of said amount to Wife with proof of his award." If a law firm still held the proceeds, the trial court directed that firm to divide the money equally between the parties. Neither party appealed from the divorce judgment.

On August 3, 2018, the wife filed the current action ("the contempt action"), which was given a .02 designation in the trial court.[1] In the contempt action, the wife alleged that, among other things, the husband was in receipt of the BP settlement but that he had failed to give the wife her share.

[1]On February 5, 2018, four days before the order amending the divorce judgment was entered, the husband filed an action, which was given a .01 designation in the trial court, against the wife alleging that she had interfered with Rhodes Properties LLC. The husband voluntarily dismissed the .01 action before a judgment was entered in that matter.

She also alleged that, "in direct, intentional and contumacious violation" of the divorce judgment, the husband had failed to provide her with an "adequate monthly cash [sic] detail of all of the activities, income and expenses of the continued management" of the three properties owned by Rhodes Properties LLC ("Rhodes Properties"). The wife said that she understood that the three properties had been sold. However, she alleged, the husband had "failed to properly divide the proceeds" and had engaged in "self dealing." She also claimed that the husband had failed to properly dissolve Rhodes Properties. Finally, regarding issues relevant to this appeal, the wife alleged that the husband had failed to pay the amount of child support ordered in the divorce judgment.

The evidence presented at the hearing in the contempt action, which was conducted over several days, demonstrated the following. The husband testified that he believed that he had complied with the provision in the divorce judgment and the order amending the divorce judgment regarding the dissolution of Rhodes Properties. He said that the real-estate company he had hired to sell the three properties -- two rental homes and a warehouse in Loxley -- had provided the

wife with "offerings, negotiations," and similar information. However, the husband said, he did not supplement the records given to the wife and did not respond to e-mails the wife had sent to him with questions about the properties.

The husband acknowledged that he did not immediately disburse any money to the wife after the sale of the two rental houses because, he said, he had "final bills" to pay. The settlement document presented at the closing of the sale of the rental houses indicated that the net proceeds paid to Rhodes Properties from the sale of the two rental houses was $13,570.79. The husband said that the closing on those sales took place in April 2018 but that he did not disburse any money to the wife at that time because Rhodes Properties had not yet been dissolved.

The warehouse in Loxley sold on May 25, 2018, for $1,340,000. After the mortgage on the warehouse was satisfied, the settlement statement indicates, Rhodes Properties received $262,417.20. Out of that amount, taxes and closing costs of $5,650 were deducted. The wife did not challenge the deduction of those expenses from the total amount from which her share was to be disbursed. However, at

the trial, she did question the husband's payment of certain items on the settlement statement presented at the closing on the warehouse, including the reasonableness of a 6% sales commission in the amount of $80,400 paid to the real-estate company that had listed the warehouse, $10,000 paid to Rhodes Mechanical, which the husband owned and which he said did work for the benefit of Rhodes Properties, and a $1,000 payment for "environmental" that appears to have been deducted from the real-estate company's commission. She also questioned expenses that the husband paid to himself, as discussed later in this opinion. The husband testified that, as was the case with the sale of the rental houses, he did not immediately disburse to the wife her share of the proceeds from the sale of the warehouse because Rhodes Properties still had not been dissolved.

The husband testified that his understanding of the divorce judgment was that he was responsible for managing and dissolving Rhodes Properties. After the divorce, he said, he used $36,428.60 of his own money to pay Rhodes Properties' expenses during his management and the dissolution of that entity. He said that he repaid himself for those expenses

before paying the wife her share of the proceeds from the sale of the three properties because, he said, the divorce judgment did not make him personally responsible for those expenses.

The husband explained that, after the sale of the three properties, Rhodes Properties made a gross profit of $178,449.25. From that total, he said, he deducted $36,428.60 to repay himself for the money he had spent to manage and dissolve Rhodes Properties and an additional $7,492.24 he paid for work he said Rhodes Mechanical had done on behalf of Rhodes Properties. The husband said that, after the expenses were deducted, the remaining balance was $134,529.71. He then paid the wife half of that balance, or $67,264.71.

Regarding the wife's contention that the husband had failed to pay child support as ordered in the divorce judgment, the husband testified that, when the parties' older child turned 19 in September 2018, he began paying half of the amount of child support ordered in the divorce judgment. He explained that he had paid the older child's college tuition and expenses. The husband said that he notified the court, through his attorney, of what he was doing. It is undisputed

that the husband did not seek to modify his child-support obligation.

Regarding the BP settlement, the husband testified that, on December 20, 2017, he received a check in the amount of $301,161.93, representing proceeds from that settlement. At the contempt hearing, the husband testified that, in April 2018, he had given the wife $84,325.34, which, he said, was her share of the $301,161.93. He explained that he had deducted taxes from the total amount before dividing the proceeds with the wife. During the course of the litigation of the contempt action, the trial court ordered the husband to immediately pay the wife an additional $66,255.62, which was the balance of the half of $301,161.93 owed to the wife. The husband paid the wife $66,255.62 in May 2019, after being ordered to do so. He also paid the wife $6,764.63 for her share of approximately $13,000 that he had earlier received as part of the BP settlement.

On July 8, 2019, the trial court entered a judgment in the contempt action ("the contempt judgment"). Among other things not relevant to this appeal, the trial court found that the husband was in contempt for charging the wife for his

expenses regarding Rhodes Properties, which, it held, was not in compliance with the divorce judgment. The trial court found that the husband owed the wife an additional $46,539.40 for the sale of the properties "as a result of his actions." The trial court also found the husband to be in contempt for his failure to pay child support as ordered in the divorce judgment. The husband was directed to pay $4,548 plus interest in unpaid child support. The husband was also ordered to pay the wife an attorney fee of $15,000.

Both the husband and the wife filed timely motions to alter, amend, or vacate the contempt judgment. On July 30, 3019, after a hearing, the trial court entered an order denying both motions. The husband then filed a timely notice of appeal on August 6, 2019.

The trial court received both oral and documentary evidence at the trial of the contempt action; therefore, the ore tenus rule applies. "The [ore tenus] rule applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d

669, 672 (Ala. 1995)." Yeager v. Lucy, 998 So. 2d 460, 463 (Ala. 2008).

> "'The ore tenus rule affords a presumption of correctness to a trial court's findings of fact based on ore tenus evidence, and the judgment based on those findings will not be disturbed unless those findings are clearly erroneous and against the great weight of the evidence. Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000). It is grounded upon the principle that when a trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of the witnesses. Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The ore tenus rule does not cloak a trial court's conclusions of law or the application of the law to the facts with a presumption of correctness. Kennedy v. Boles Invs., Inc., 53 So. 3d 60 (Ala. 2010)."

Allsopp v. Bolding, 86 So. 3d 952, 958 (Ala. 2011).

The husband argues that the trial court abused its discretion in finding him in contempt regarding the division of the proceeds from the sale of the properties because, he says, the divorce judgment was ambiguous. Specifically, the husband says, paragraph 12 of the divorce judgment, as amended, does not clearly define whether the proceeds from the sale of the properties meant gross proceeds or net proceeds. The husband also contends that the divorce judgment "does not clearly state" that he was personally responsible for paying the debts of Rhodes Properties.

> "[T]he determination of whether a party is in contempt is within the discretion of the trial court, and, unless the record reveals an '"abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm."' Nave v. Nave, 942 So. 2d [372,] 377 [(Ala. Civ. App. 2005)] (quoting Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)). Furthermore, in Stamm [v. Stamm, 922 So. 2d 920 (Ala. Civ. App. 2004)], we held that a 'trial court's determination that a party's failure to comply with a judgment is willful and not due to an inability to comply, when based on ore tenus evidence, will be affirmed if it is supported by one view of that evidence.' 922 So. 2d at 924."

Clements v. Clements, 990 So. 2d 383, 397 (Ala. Civ. App. 2007).

> "'"Civil contempt" is defined as a "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with." Rule 70A(a)(2)(D), Ala. R. Civ. P. ...'
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> "Routzong v. Baker, 20 So. 3d 802, 810 (Ala. Civ. App. 2009). '"The failure to perform an act required by the court for the benefit of an opposing party constitutes civil contempt." Carter v. State ex rel. Bullock County, 393 So. 2d 1368, 1370 (Ala. 1981).' J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1012 (Ala. Civ. App. 2007). Furthermore, '"[t]he purpose of a civil contempt proceeding is to effectuate compliance with court orders and not to punish the contemnor." Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997).' Hall v. Hall, 892 So. 2d 958, 962 (Ala. Civ. App. 2004)."

Reed v. Dyas, 28 So. 3d 6, 8 (Ala. Civ. App. 2009).

The husband asserts that, based on his "understanding and interpretation" of the divorce judgment, he complied with paragraph 12. Therefore, he says, he cannot be held in contempt. We find the husband's argument to be unpersuasive.

As mentioned, paragraph 12 states in pertinent part:

> "12. Rhodes Properties LLC is to be dissolved and the real properties held by Rhodes Properties LLC are to be sold with proceeds split equally between the parties. During the dissolution process of Rhodes Properties LLC the [husband] is responsible for the management of the three properties that comprise Rhodes Properties LLC and shall be responsible for the payment of any debts on said property. ..."

(Emphasis added.) The February 9, 2018, order amending paragraph 12 imposed a requirement on the husband that he provide the wife with a monthly accounting of the activities, income, and expenses of Rhodes Properties.

There is no evidence indicating that the husband sought to obtain a clarification of the divorce judgment or that he sought advice of counsel before deciding when and how he would divide the proceeds from the sale of the properties. Regardless of the husband's "understanding and interpretation" of the divorce judgment, it is clear from the contempt

judgment that the trial court did not believe that, in deducting a portion of the proceeds of the sales to recoup money he said he had paid toward Rhodes Properties' expenses, including payments to Rhodes Mechanical, the husband was in compliance with the requirement that the proceeds of the sale of the properties be divided equally between the parties.

It is well settled that "[a] trial court has the inherent power to enforce its judgments 'and to make such orders and issue such process as may be necessary to render [the judgments] effective.'" Goetsch v. Goetsch, 990 So. 2d 403, 413 (Ala. Civ. App. 2008) (quoting Dial v. Morgan, 515 So. 2d 14, 15 (Ala. Civ. App. 1987)). See also Ex parte Stouffer, 214 So. 3d 1192, 1198 (Ala. Civ. App. 2016). Based on the record before us, we cannot say that the trial court abused its discretion in determining that the husband had failed to comply with the terms of paragraph 12 and in ordering him to pay the wife money to make up the shortfall his actions had created.

The husband also challenges the amount he was ordered to pay the wife as her share of the proceeds from the sale of the properties. In their respective appellate briefs, both

parties provide this court with their version of figures that support their arguments regarding the amount the wife should have been paid. Evidence in the record indicates that the sale of the two rental houses and the warehouse in Loxley netted proceeds of $275,987.99 ($262,417.20 + 13,570.79), before the husband began deducting amounts for various payments, including payments to himself and to his business, Rhodes Mechanical. Half of that total is $137,994. The husband paid the wife $67,264.71, which is less than a quarter of the total amount of the net proceeds. In the contempt judgment, the trial court ordered the husband to pay the wife an additional $46,539.40, for a total payment to the wife of $113,804.11, which is still $24,189.89 less than half of the total of the net proceeds from the sale of the three properties. Thus, it appears that the trial court accepted nearly $50,000 of the expenses the husband said were paid for the benefit of Rhodes Properties before he divided the proceeds, if those expenses were also divided equally between the parties. Based on the record before us, we cannot say that the trial court abused its discretion in ordering the

husband to pay the wife an additional $46,539.40 as her share of the proceeds from the sale of the properties.

The husband also argues that the trial court abused its discretion in finding him in contempt for his failure to pay his full child-support obligation as set forth in the divorce judgment. He asserts that he simply made an "error in judgment" when he stopped paying the full amount and that there was no evidence of bad faith on his part.

> "Generally, a willful failure to pay child support is held to be a form of civil contempt. Davenport v. Hood, 814 So. 2d 268, 275 (Ala. Civ. App. 2000). Whether a parent is in contempt for a failure to pay child support is a determination within the discretion of the trial court. T.L.D. v. C.G., 849 So. 2d 200, 205 (Ala. Civ. App. 2002); Poh v. Poh, 64 So. 3d [49,] 61 [(Ala. Civ. App. 2010)]."

Chunn v. Chunn, 183 So. 3d 985, 996 (Ala. Civ. App. 2015). Furthermore,

> "[a] parent may not unilaterally reduce court-ordered child support payments when the judgment does not provide for a reduction in child support. Earheart v. Mann, 545 So. 2d 85, 86 (Ala. Civ. App. 1989); Smith v. Smith, 443 So. 2d 43, 45 (Ala. Civ. App. 1983). In those cases in which the order establishing the amount of child support to be paid does not designate a specific amount for each child, events such as a child's reaching the age of majority or a child's marriage may be considered if a party seeks a modification of child support payments; however, 'neither [event] automatically modifies a child support judgment.' Alred v. State

> ex rel. Hill, 603 So. 2d 1082 (Ala. Civ. App. 1992); see also Smith, 443 So. 2d at 45."

State ex rel. Killingsworth v. Snell, 681 So. 2d 620, 621 (Ala. Civ. App. 1996).

In this case, the divorce judgment did not designate a specific amount of child support to be paid for each child. The evidence is undisputed that the husband unilaterally made the decision to pay only half of his child-support obligation once the parties' older child reached the age of 19. He did not seek a modification of the divorce judgment. Instead, he notified the court, through his attorney, that he was no longer paying the full amount of child support. There is no suggestion that the husband was unable to pay the amount of child support ordered. We conclude that the record supports the trial court's determination that the husband failed to comply with the divorce judgment regarding his child-support obligation, and the trial court did not abuse its discretion in holding him in contempt as to this issue.

The husband also asserts that the trial court erred in failing to consider money he had provided to or for the children outside of the court-ordered child support as credit against his child-support arrearage. He points out that the

trial court appeared to believe that it could not consider evidence of amounts he paid to support the parties' younger child while that child was in the husband's custody or money he paid to support the older child while that child was in college but still a minor. The record indicates that the trial court appeared to believe that such evidence should be heard in the husband's separate, pending action for a modification of his child-support obligation. Therefore, the husband argues, this court should remand this cause for the court to receive evidence of the payments he made.

In support of his contention, the husband cites Dodd v. Dodd, 588 So. 2d 476 (Ala. Civ. App. 1991). In that case, this court reversed the judgment regarding the amount of the father's child-support arrearage and remanded the action for the trial court to take evidence regarding money the father had paid to support his child while that child was in his custody. Id. at 479. The trial court could then consider whether the father was entitled to a credit toward his child-support arrearage. Id. In reaching our conclusion, this court explained:

> "It is well settled that claims of arrearage of child support may be offset by credit for amounts

> expended by the obligated parent when the parent actually furnishes support for a child while the child is in his custody or the custody of another. Weaver v. Weaver, 401 So. 2d 77 (Ala. Civ. App. 1981). However, the obligated parent should not be allowed a credit against the child support arrearage where he has presented no proof of the amounts given to the child. O'Neal v. O'Neal, 532 So. 2d 649 (Ala. Civ. App. 1988)."

588 So. 2d at 479 (emphasis added).

In reaching that holding, this court recognized that a trial court has discretion to award credits against such an arrearage. Id. at 479 (citing McDaniel v. Winter, 412 So. 2d 282 (Ala. Civ. App. 1982)). Furthermore, we noted that "[t]he father may be credited for expenses which he assumes gratuitously, but only if these expenses can clearly be categorized as essential to basic child support. Evans v. Evans, 500 So. 2d 1095 (Ala. Civ. App. 1986)." Id. at 479. We further recognized that a parent is not permitted to unilaterally alter his or her child-support payments, "and the trial court should give much consideration to this misconduct when determining any credit to be given. Smith v. Smith, 443 So. 2d 43 (Ala. Civ. App. 1983)." Id.

In this case, the trial court precluded the husband from presenting evidence of the amount of support he may have

furnished to the children outside of his court-ordered child-support obligation. Accordingly, on the authority of Dodd, we reverse that portion of the trial court's contempt judgment establishing the amount of the father's child-support arrearage and remand the cause for the trial court to take evidence on the nature and amount of support the father may have provided to the children aside from his court-ordered support obligation.

Finally, the husband argues that the trial court abused its discretion in ordering him to pay the wife an attorney fee of $15,000, asserting that the award is contrary to the law and not supported by the evidence. Specifically, the husband contends that the amount of the attorney fee is based on the trial court's finding in the contempt judgment of "several findings of contempt herein." He maintains that there were not "several" findings of contempt; therefore, he argues, the amount of the award is not supported by the evidence.

Section 30-2-54, Ala. Code 1975, provides that a trial court, in its discretion, may award an attorney fee in a divorce case upon a finding of civil contempt. Norland v. Tanner, 513 So. 2d 1055, 1057 (Ala. Civ. 1990). Since the

entry of the divorce judgment, the husband has demonstrated a pattern and practice of failing to equally divide proceeds that were to be paid to the wife, whether it was the BP settlement proceeds or the proceeds from the sale of the properties, and in unilaterally reducing his child-support obligation. Rather than strictly follow the trial court's orders and divorce judgment, the husband consistently "interpreted" them in a manner that favored him. Even after being forced by the court to pay the wife her equal share of the BP settlement proceeds, the husband persisted in his efforts to pay the wife less than she was owed under the terms of the divorce judgment. Based on the record before us, we cannot say that the trial court's decision to award the wife an attorney fee of $15,000 in this case constitutes an abuse of discretion.

As previously explained, we reverse that portion of the contempt judgment establishing the amount of the husband's child-support arrearage and remand this cause for the trial court to take evidence on the amount and the nature of support the husband provided to the children outside of his child-support obligation. The trial court is then to determine

whether the father is entitled to a credit for such support and to enter a judgment accordingly. The remainder of the contempt judgment is affirmed.

The appellant's motion to strike exhibits attached to the appellee's brief is granted.

The appellee's request for an attorney fee on appeal is granted in the amount of $4,000.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Donaldson and Hanson, JJ., concur.

Moore, J., concurs in part and dissents in part, with writing, which Edwards, J., joins.

MOORE, Judge, concurring in part and dissenting in part.

I agree with all aspects of the main opinion except that portion affirming the finding of contempt regarding the reduced payments of child support, to which I respectfully dissent. The record indicates that Don Franklin Rhodes ("the father") unilaterally reduced by one-half his child-support payments to Susan Davis Rhodes ("the mother") as the parties' older child was turning 19 years old, the age of majority in Alabama. See Ex parte University of S. Alabama, 541 So. 2d 535, 538 (Ala. 1989) ("A child has [a] fundamental right to financial support until its majority ...."). Before doing so, the father wrote a letter to the mother in July 2018, informing her of his intent to reduce the child-support payments and to obtain a modification of the child-support provision of their divorce judgment. The father directed his attorney to inform the Baldwin Circuit Court ("the trial court") of his intentions, and, in September 2018, the father himself sent a request to the trial court in an attempt to initiate child-support-modification proceedings. The clerk of the trial court returned that filing as "inappropriate," but

the father later commenced an "appropriate" child-support-modification action in May 2019.

At trial, the father explained that, although he had reduced his child-support payments, he had continued to support the older child after she reached the age of majority by voluntarily paying some of her college tuition and associated expenses. He testified that he had also paid child support for the younger child even though that child had resided almost exclusively with him and not the mother since the parties divorced. The father attempted to prove the expenses he had paid to support the children, but the trial court precluded the father from presenting any evidence on that point, which the main opinion correctly determines to be reversible error.

It is true that, despite justified criticism, see Hartley v. Hartley, 42 So. 3d 743, 746-47 (Ala. Civ. App. 2009), Alabama law still provides that an obligor parent may not unilaterally reduce his or her child-support obligation when one of multiple children reaches the age of majority but must continue to pay child support, despite the adult child's being ineligible for support, until the obligor parent obtains an

order from the appropriate court modifying his or her child-support obligation. However, to the average layperson exercising common sense, it would seem that when one of two children reaches the age of majority so as to no longer be eligible for child support, child support should be reduced by one-half the court-ordered amount to cover the remaining minor child. The father clearly, although mistakenly, understood that to be the case and acted accordingly, even while simultaneously attempting, albeit unsuccessfully, to file a request for a modification of his child-support obligation to obtain judicial approval of his actions.

The mother clearly proved that the father did not pay the full amount of his monthly child-support obligation; however, in a contempt action, the party asserting contempt must present evidence of more than mere noncompliance with a court order. The party asserting civil contempt must prove that the accused party did not comply out of willful disobedience to the mandate of the trial court. See Rule 70A(a)(2)(D), Ala. R. Civ. P. "An error in judgment without clear and convincing evidence of bad faith intent is insufficient for a finding of contempt." In re Powers, 523 So. 2d 1079, 1082 (Ala. Civ.

App. 1988). The record does not show any bad-faith intent on the part of the father in regard to supporting the children. Therefore, I believe the trial court abused its discretion in finding the father in contempt on this point, and I would reverse the judgment as to that determination.

Edwards, J., concurs.