REL: August 14, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190021

Jennifer Black Williams

v.

John Albert Williams

Appeal from Montgomery Circuit Court
(DR-12-900774.01)

DONALDSON, Judge.

Jennifer Black Williams ("the mother") appeals from the judgment of the Montgomery Circuit Court ("the trial court") modifying the judgment divorcing her from John Albert Williams ("the father"). The trial court initially entered a judgment

incorporating and adopting an agreement between the parties that included a modification of the father's visitation periods with J.A.W. and J.E.W. ("the children"). The trial court later amended the judgment to grant the father more visitation time with J.E.W., thereby deciding not to adopt the parties' agreement in its entirety. Because the trial court's decision was not based on evidence, we reverse the judgment and remand the cause with instructions.

Procedural History

On July 22, 2013, the trial court entered a judgment divorcing the parties. The divorce judgment, which incorporated a settlement agreement, granted joint legal custody of the children to the parties, sole physical custody to the mother, and visitation to the father. On February 6, 2014, the father filed a complaint seeking to modify the divorce judgment to increase his visitation time with the children. The mother filed an answer and a counterclaim seeking a finding of contempt against the father. The father filed an answer to the mother's counterclaim. The father amended his pleadings to include a claim seeking a finding of contempt against the mother. The contentious and protracted

proceedings included numerous motions and orders regarding visitation, contempt claims, and other matters.

On January 26, 2019, the parties filed a joint modification agreement in the trial court that included the following provision:

> "1. [The father] shall have weekend visitation every other Thursday at 6:00 p.m. through Sunday at 6:00 p.m. during the school year and each Thursday evening during the week he does not have weekend visitation from 6:00 p.m. until 8:00 a.m. the following morning when the children are delivered to school. The Monday visitation with [the father] immediately following [the mother's] weekend visitation is hereby eliminated. [The father] shall not force [J.A.W.] to visit. [J.A.W.'s] visitation shall be at her discretion; however, she is encouraged to participate."

On January 28, 2019, the trial court conducted a hearing. The trial court noted that the parties, their counsel, and the guardian ad litem who had been appointed to represent the children were present. The parties were collectively administered an oath. Counsel for the parties and the guardian at litem discussed with the trial court the joint modification agreement reached by the parties, focusing, in particular, on the father's visitation with J.A.W. At the conclusion of the hearing, the mother and the father both stated that they had reviewed the joint modification agreement and that it

contained all the terms needed to resolve the matters before the trial court. The trial court then announced that it would adopt the joint modification agreement in its judgment. On January 28, 2019, the trial court entered a judgment incorporating and adopting the terms of the parties' joint modification agreement. In the judgment, the trial court stated that it found that "the Parties have entered into a fair written agreement regarding the visitation of the Minor Children and all other outstanding issues in this matter ...."

On February 12, 2019, the father filed a motion to alter or amend the judgment incorporating the joint modification agreement. In the motion, the father asserted the following:

> "1. That the parties settled this case on a Saturday evening with [the father] signing the Joint Modification Agreement in the evening at his home after working all day with his attorney and [the mother] and her attorney in negotiating agreement terms.
>
> "2. Pursuant to the Divorce Decree and the practice of the parties over the last few years, [the father] enjoyed every other Friday picking the children up from school through Sunday at 7:00 p.m. in addition to every other Thursday from school recessing until Friday at 8:00 a.m. and Monday following [the mother's] weekend from school recessing until the following Tuesday morning at 8:00 a.m. In the modification action, [the father] intended to trade out the Monday visits following [the mother's] weekend for extra time every other

> weekend from Thursday at the time school recesses (which is 3:00 p.m.) through Monday morning at 8:00 a.m.
>
> "3. To achieve this, [the father] made generous monetary concessions by agreeing to pay [the mother] a lump-sum for all alimony in full rather than discounting it to 'present day value.'
>
> "4. That [the father] avers that he misunderstood that the Settlement Agreement he executed did not include overnight every other Sunday night through Monday morning at 8:00 a.m. and it was [the father's] intentions that the parties maintain the pick-up time for visitation to occur when school recesses rather than [the father] having to wait until 6:00 p.m."

On May 7, 2019, the trial court conducted a hearing on the father's motion in which it heard oral arguments from counsel for the parties and statements from the guardian ad litem regarding the joint modification agreement. On May 13, 2019, the trial court entered an order denying the father's motion to alter or amend the judgment incorporating the joint modification agreement but granting, ex mero motu, the father additional visitation time with J.E.W. The May 13, 2019, order stated the following, in part:

> "THIS case was called for hearing on [the father's] 'Motion to Alter or Amend Settlement Agreement and Modification Order' and [the mother's] response and amended response thereto. The parties and their attorneys of record, along with the Guardian ad Litem, were present and presented their

> positions to the Court. [The father's] 'Motion to Alter or Amend Settlement Agreement and Modification Order' is hereby DENIED.
>
> "On its own, ex mero motu, and as this is a court of equity, the undersigned awards and hereby grants to the Father additional time with [J.E.W.]. Specifically, the Father is awarded additional time with [J.E.W.] upon the conclusion of the agreed upon period between the Parties from Thursday at 6:00 pm until Sunday at 6:00 pm. Following the expiration of the time agreed upon by the Parties, the undersigned extends the custodial/visitation time between Father and [J.E.W.] on Sunday from 6:00 pm until Monday at 8:00 am when [J.E.W.] returns to school or returns to the home shared with his Mother and [J.A.W.]. The supplemental time awarded to the Father does not otherwise apply to any other provision regarding visitation between the Father and [J.E.W.]."

(Capitalization in original.)

On June 10, 2019, the mother filed a motion to alter, amend, or vacate the May 13, 2019, order. In her motion, the mother asserted the following, in part:

> "6. The Court cannot deviate from the terms of the parties' settlement agreement unless evidence is presented on which the Court can base its decision to deviate. Holder v. Holder, 86 So. [3d] 1001, 1004 (Ala. Civ. App. 2011). See also Freeman v. Freeman, 84 So. [3d] 939, 944 (Ala. Civ. App. 2011).
>
> "7. In this case, there was no evidence presented to the Court. Thus, there was nothing to justify its ex mero motu order of May 13, 2019, changing the terms of the 'Joint Modification Agreement.' The Court uses the principle of 'equity' to justify its order. But given there was absolutely no evidence presented to the Court, it had nothing

> before it on which it could make an 'equitable' decision. If anything, the Court's order is inequitable due to a lack of supporting evidence."

On September 3, 2019, the trial court conducted a hearing on the mother's postjudgment motion and the payment of the guardian ad litem's fees. During the hearing, the parties presented oral arguments regarding the trial court's ex mero motu amendment of the judgment incorporating the joint modification agreement and its departure from the parties' joint modification agreement to grant the father additional visitation time with J.E.W. On September 9, 2019, the trial court entered an order denying the mother's postjudgment motion.[1] In the order, the trial court stated, in part:

> "The Parties were not called upon to testify as to the legal issues before the court. However, these

[1]Rule 59.1, Ala. R. Civ. P., provides, in relevant part: "No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59 shall remain pending in the trial court for more than ninety (90) days .... A failure by the trial court to render an order disposing of any pending postjudgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period." We note, however, that the 90th day after the mother filed her postjudgment motion fell on Sunday, September 8, 2019. The trial court therefore rendered and entered the order on Monday, September 9, before the postjudgment motion was denied by operation of law. See Rule 6(a), Ala. R. Civ. P.; First Alabama Bank v. McGowan, 758 So. 2d 1116, 1117-18 (Ala. Civ. App. 2000).

> Parties have a lengthy history before this court, dating as far back as five years ago. Additionally, the undersigned has been called upon on multiple occasions to rule on various motions when the Former Husband was seeking more time with the Parties' two children, seeking time with [J.A.W.] or seeking an order from the court to allow the children to travel with him out of the state of Alabama on special occasions.
>
> "While the Parties did not testify at the most recent hearing on [the mother's motion to alter, amend, or vacate], the court did make specific inquiries of counsel regarding this agreement, given her familiarity with the Parties and [the father's] ongoing desire for a relationship with [J.A.W.] and more time with both children. The undersigned was concerned that the Agreement did not adequately address [the father's] visitation with [J.A.W.]. Given that during this protracted litigation, the court is very much aware of periods of time when the relationship between [the father] and [J.A.W.] was very strained, to the point that there was no visitation between them, unlike the situation between [the father] and [J.E.W.]. When the court was satisfied that [the father] and [J.A.W.] were making progress in their relationship, it proceeded to move forward with the process of adopting the Agreement of the Parties. There was no issue that was presented to the court regarding visitation between [the father] and [J.E.W.]. In adopting the Parties' agreement, this court clearly relied upon its history and familiarity with the Parties and the issues presented herein. The court did not adopt the Agreement in a vacuum. This court was not hearing this case for the first time, as it would appear in one of the two cases relied upon by counsel for [the mother].
>
> "Further, this court notes that family court is a court of equity. Given the lop-sided imbalance between the time that the children are with [the

> mother], compared to that of [the father], the court is very concerned that there appears to be an unwillingness on the part of [the mother] to co-parent with [the father]. [The father] was awarded approximately eight nights per month, compared to approximately 22 nights a month of custodial time enjoyed by [the mother]. While the standard visitation arrangement may have been good previously, as [the father's] career as a cardiologist consumed much of his time, that is no longer the situation. Why would [the mother] resist [the father's] request to spend what amounts to likely less than six waking hours with [J.E.W.], before he is returned to school the next day? I do not know, but believe any disagreement between the Parents should not adversely affect the children's relationship with the non-custodial parent.
>
> "As previously noted, family court is a court of equity and for this reason this court is of the opinion that the allocation of the additional hours to [the father] with [J.E.W.] on Sunday evenings/Monday mornings is in the best interest of the child. Further, the court notes that it was not the intent of [the father] to agree to termination of visitation on Sunday evening."

The mother filed a timely notice of appeal to this court. We have jurisdiction over the appeal pursuant to § 12-3-10, Ala. Code 1975.

Discussion

The mother first argues that the trial court lacked subject-matter jurisdiction because, she asserts, the trial court's amendment ex mero motu of the judgment incorporating the joint modification agreement occurred after the denial of

the father's postjudgment motion. "'[A] trial court retains the power to correct sua sponte any error in its judgment that comes to its attention during the pendency of a party's Rule 59(e)[, Ala. R. Civ. P.,] motion to alter, amend, or vacate the judgment ....'" Thomson v. Shepard, 225 So. 3d 627, 632 (Ala. Civ. App. 2016) (quoting Henderson v. Koveleski, 717 So. 2d 803, 806 (Ala. Civ. App. 1998)). When a trial court denies all pending postjudgment motions, however, the trial court lacks subject-matter jurisdiction to later enter orders on noncollateral matters. See, e.g., Woodget v. State Dep't of Human Res. ex rel. Woodget, 184 So. 3d 409, 410 (Ala. Civ. App. 2015). In this case, the trial court did not enter an order denying the father's postjudgment motion and then enter another order at a later time that amended the judgment ex mero motu. Instead, both the amendment of the judgment and the denial of the postjudgment motion occurred within the same order. We do not consider the rulings to have been made separately for the purpose of analyzing subject-matter jurisdiction. Therefore, we conclude that the trial court did not lose subject-matter jurisdiction before its amendment of the judgment.

The mother also argues that the judgment, as amended, should be reversed because the trial court altered the parties' joint modification agreement without any supporting evidence.

> "The courts of this state favor compromises and settlements of litigation. This is particularly true in cases involving families 'since the honor and peace of the family is often at stake.' Porter v. Porter, 441 So. 2d 921 (Ala. Civ. App. 1983). Agreements reached in divorce actions are as binding on the parties as any other contract. Porter. The trial court, however, is not bound by the agreement of the parties. Baumler v. Baumler, 368 So. 2d 864 (Ala. Civ. App. 1979). The trial court may adopt or reject such parts of the agreement as it deems proper from the situation of the parties as shown by the evidence. Baumler. Therefore, the question becomes whether there was enough evidence presented to the trial court to support its finding. Tidwell v. Tidwell, 505 So. 2d 1236 (Ala. Civ. App. 1987)."

Junkin v. Junkin, 647 So. 2d 797, 799 (Ala. Civ. App. 1994). See, e.g., Holder v. Holder, 86 So. 3d 1001, 1004 (Ala. Civ. App. 2011) ("[W]e reverse the trial court's judgment, as amended, to the extent that it differs from the parties' settlement agreement ...."); Freeman v. Freeman, 84 So. 3d 939, 944 (Ala. Civ. App. 2011) (reversing judgment in postdivorce modification and contempt proceeding and stating that "we cannot conclude that the trial court decided to

reject the parties' visitation agreement based on the evidence adduced at the trial").

In J.F. v. D.C.W., 896 So. 2d 577 (Ala. Civ. App. 2004), a trial court entered a judgment on a father's petition for visitation. The judgment in that case deviated from the parties' settlement agreement by providing the father additional visitation on certain holidays. This court stated:

> "While we recognize that a trial court may adopt or reject parts of a settlement agreement, the trial court's judgment concerning the award of additional visitation is not supported by the evidence, because there was no evidence presented on that issue. See Junkin[v. Junkin, 647 So. 2d 797 (Ala. Civ. App. 1994)]. Therefore, the judgment of the trial court is reversed and the cause is remanded for the trial court to enter an order consistent with the settlement agreement reached by the parties or to hold a hearing to allow the parties to present evidence on the issue of visitation."

Id. at 581. In Blackledge v. Blackledge, 134 So. 3d 891, 893 (Ala. Civ. App. 2013), this court also reversed a judgment of a trial court deviating from the parties' settlement agreement when no ore tenus evidence had been presented on which the deviation could be based.

This is not a case in which the parties had requested specific visitation terms and, following a trial, the trial court granted different visitation terms based on the trial

court's equity power. Instead, the parties had presented a joint modification agreement that was accepted by the trial court, and the trial court then amended a portion of the judgment incorporating the joint modification agreement regarding the father's visitation without providing the parties the opportunity to present evidence on the visitation issue. We reverse the judgment, as amended by the trial court, and remand the cause for the trial court to either enter a judgment that is consistent with the parties' joint modification agreement or to conduct a hearing to allow the parties to present evidence on the issue of the father's visitation with J.E.W.

The mother's request for an attorney fee on appeal is denied.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

Thompson, P.J., concurs in part and dissents in part, with writing.

THOMPSON, Presiding Judge, concurring in part and dissenting in part.

I agree with the main opinion's rationale and decision to reverse the amended judgment ("the amended judgment") in which the Montgomery Circuit Court ("the trial court") awarded John Albert Williams ("the father") additional visitation with one of the children of the parties. In entering the amended judgment, the trial court improperly deviated from the parties' joint modification agreement ("the agreement"). Unlike the main opinion, however, I would instruct the trial court on remand only to reinstate the January 28, 2019, judgment incorporating and adopting the terms of the agreement.

I disagree with the remand instruction permitting the trial court to hold an evidentiary hearing on whether the father should be awarded additional visitation with one of the children. As pointed out in the main opinion,

> "[a]n agreement reached in settlement of litigation is as binding on the parties as any other contract. Brocato v. Brocato, 332 So. 2d 722 (Ala. 1976). Moreover, there is a strong policy of law favoring compromises and settlements of litigation, especially in suits involving families, since the honor and peace of the family is often at stake. Western Grain Company Cases, 264 Ala. 145, 85 So. 2d

> 395 (1955). If a party could repudiate an oral agreement which was stated in open court and orally approved by the court, it would inevitably have a chilling effect upon all settlements made the day of a trial, which is an effect clearly contrary to established policy favoring settlement among litigants."

Porter v. Porter, 441 So. 2d 921, 923 (Ala. Civ. App. 1983).

In this case, the parties had already negotiated the terms of the agreement and announced after being sworn that the agreement "contained all the terms needed to resolve the matters before the trial court." ___ So. 3d at ___. Likewise, the trial court had already entered a judgment incorporating the agreement and had also already denied the father's motion to alter, amend, or vacate that judgment. I know of no legal basis for permitting an evidentiary hearing at this point in the litigation. To now allow a hearing for the presentation of evidence in support of the additional visitation the trial court awarded the father in the amended judgment would serve only to legitimize the trial court's improper amended judgment that deviated from the agreement.

Additionally, because the father attempted to renege on the agreement based on his alleged unilateral mistake by filing a postjudgment motion seeking to alter, amend, or

vacate the January 28, 2019, judgment incorporating the agreement, he caused Jennifer Black Williams ("the mother") to engage in additional, unnecessary litigation, including this appeal, after the parties had already told the trial court that they had settled all of the issues between them. Accordingly, I would award the mother an attorney fee on appeal.