REL: August 14, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190272

Ex parte Loyd Jenkins

PETITION FOR WRIT OF MANDAMUS

(In re: Charon Steele

v.

Loyd Jenkins)

(Montgomery Circuit Court, DR-16-472.01)

MOORE, Judge.

Loyd Jenkins ("the father") appeals from a default judgment entered by the Montgomery Circuit Court ("the trial

court") in favor of Charon Steele ("the mother") modifying custody of the parties' two children ("the children"); he also challenges the trial court's denial of his motion to set aside the default judgment and the denial of his motion for relief from the judgment. We elect to treat the appeal as a petition for the writ of mandamus, and we grant the petition.

Procedural History

The trial court awarded the father sole physical custody of the children on August 21, 2017. On May 10, 2018, the mother filed in the trial court a form entitled "Petition to Modify." In that petition, the mother did not specifically request a change of custody of the children but, instead, requested the trial court's assistance with exercising the visitation and communication with the children to which she was entitled pursuant to the August 21, 2017, judgment.

On November 8, 2018, the trial court entered an order noting that service had not been perfected on the father and ordering the mother to take action within 14 days to serve the father or the matter would be dismissed. Thereafter, the mother filed in the trial court a printout from the United States Postal Service Web site indicating that, on May 29,

2018, a package had been delivered to Hutto, Texas, zip code 78634, and that the package had been left with an unnamed individual.

After the father had not filed any response to the petition, the mother, on June 5, 2019, filed a motion for a default judgment against the father. After a hearing, the trial court entered, on September 30, 2019, a default judgment awarding the mother sole legal and sole physical custody of the children. The judgment specifically reserved jurisdiction over the issue of child support pending the parties' submission of child-support forms within 10 days of the entry of the default judgment.

On October 30, 2019, the father filed a motion to set aside the default judgment; that motion was denied on November 27, 2019. On December 12, 2019, the father filed a verified motion for relief from the default judgment, purportedly pursuant to Rule 60(b)(1), (4), and (6), Ala. R. Civ. P., arguing that he had not been properly served. That motion was denied,[1] and the father filed a notice of appeal to this court on December 23, 2019.

[1]Although the order denying that motion is not in the record, the case-action-summary sheet shows that an order disposing of that motion was entered, and it is not disputed that the motion was denied.

Discussion

Initially, we note that the September 30, 2019, default judgment was not a final judgment because it reserved the issue of child support pending the parties' submission of child-support forms. See, e.g., S.M. v. C.A., 267 So. 3d 851, 852 (Ala. Civ. App. 2018). An appeal will not lie from a nonfinal judgment, id., and a "nonfinal order will not support a Rule 60(b), Ala. R. Civ. P., motion." Edwards v. Edwards, 951 So. 2d 699, 702 (Ala. Civ. App. 2006). Because of both the posture and the nature of this case, in which father asserts that the trial court has deprived him of custody of his children through a void judgment, this court, in its discretion, has elected to treat his appeal from the interlocutory default judgment as a petition for a writ of mandamus. See generally Ex parte Montgomery Cty. Dep't of Human Res., 291 So. 3d 1194, 1197 (Ala. Civ. App. 2019).[2]

[2]Ordinarily, a petition for the writ of mandamus in a civil action must be filed within 42 days of the entry of the order being challenged, see Rule 21(a)(3), Ala. R. App. P., but this court may consider a petition for the writ of mandamus filed outside the presumptively reasonable time when the petition asserts that the challenged order is void for lack of jurisdiction. Ex parte Montgomery Cty. Dep't of Human Res., 291 So. 3d at 1197 (quoting Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017)). In this case, the father filed his notice of appeal, which we

> "'[M]andamus will lie to direct a trial court to vacate a void judgment or order,' Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232 (Ala. 2004), and '[i]f a court lacks jurisdiction of a particular person, or if it denied that person due process, then the court's judgment is void.' Ex parte Pate, 673 So. 2d 427, 429 (Ala. 1995)."

Ex parte Bashinsky, [Ms. 1190193, July 2, 2020] ___ So. 3d ___, ___ (Ala. 2020).

"Failure of proper service under Rule 4[, Ala. R. Civ. P.,] deprives a court of jurisdiction and renders its judgment void." Ex parte Pate, 673 So. 2d 427, 428-29 (Ala. 1995). "When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983). "'[S]trict compliance with the rules regarding service of process is required.'" Johnson v. Hall, 10 So. 3d 1031, 1037 (Ala. Civ. App. 2008) (quoting Ex parte Pate, 673 So. 2d at 429).

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have elected to treat as a petition for the writ of mandamus, more than 42 days after the entry of the default judgment, but we may consider that portion of the petition asserting that the judgment is void. We do not, however, consider any arguments raised by the father attacking the correctness of the judgment.

Rule 4(i)(2)(B)(ii), Ala. R. Civ. P., provides that an attorney or party who attempts service by certified mail must, "[u]pon mailing, ... immediately file with the court an 'Affidavit of Certified Mailing of Process and Complaint.'" Rule 4(i)(2)(C), Ala. R. Civ. P., provides, in part, that "[s]ervice by certified mail shall be deemed complete and the time for answering shall run from the date of delivery to the named addressee or the addressee's agent as evidenced by signature on the return receipt." Rule 4(i)(2)(C) further provides that an agent's authority to receive and deliver mail to the party is conclusively established "when the addressee acknowledges actual receipt of the summons and complaint or the court determines that the evidence proves the addressee did actually receive the summons and complaint in time to avoid a default."

In the present case, the father points out that the materials submitted to this court contain no "Affidavit of Certified Mailing of Process and Complaint" and no signed return receipt. Although the trial court found that the mother submitted a tracking form from the United States Postal Service indicating that service by certified mail was

completed to "328 Brown Street,"[3] that finding is not supported by the materials. The tracking form in the record indicates only that service was perfected in "Hutto, TX," without referencing the actual street address. There is no evidence indicating that the father or his agent received the certified mail containing the summons and complaint and signed for it.

The mother argues that the father admitted that he had received the summons and complaint when he acknowledged in his motion to set aside the default judgment that "[t]he father did not answer the petition." That statement is not an admission by the father that he received service. The mother also points out that the trial court forwarded a copy of the complaint to the father's Texas attorney in July 2019. However, generally speaking, "[n]either the Alabama Code nor our Rules of Civil Procedure authorize process service on the defendant's attorney ...." Colvin v. Colvin, 628 So. 2d 802, 803 (Ala. Civ. App. 1993). The mother has not argued or attempted to prove that any exception to this general rule applies in this case. Thus, we conclude that the materials

[3]The father maintains that he did not live at that address, which, he further asserts, was a business address.

before this court show that the father was never properly served.

The mother further contends that the father waived service.

> "An argument as to insufficient or improper service of process may be waived if it is not raised in a motion to dismiss or in the first responsive pleading or a proper amendment thereto. See Rule 12(h)(1), Ala. R. Civ. P. A general appearance by a party either in person or through an attorney waives any objection to improper service of process. Kingvision Pay-Per-View, Ltd. v. Ayers, 886 So. 2d 45, 53 (Ala. 2003) (quoting Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972)) ('"A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court."'). An appearance may be made by filing an answer or other pleading, id. ('"The filing of a pleading is a general appearance."'), or by voluntarily appearing for and participating in trial. Boudreaux v. Kemp, 49 So. 3d 1190, 1197 (Ala. 2010) (stating that 'it is true that [the Alabama Supreme] Court has previously acknowledged that a defendant may waive defects in service by voluntarily appearing in the proceedings' but concluding that the parties in question had not appeared or participated in the proceedings at issue)."

D.D. v. Calhoun Cty. Dep't of Human Res., 81 So. 3d 377, 380-81 (Ala. Civ. App. 2011).

The materials before this court indicate that no attorney ever entered a general appearance on behalf of the father in the trial court. The father's Texas attorney contacted the

trial court and requested copies of the pleadings in this case and in the previous case between the parties, but it is undisputed that he did so for the purpose of initiating a custody case on behalf of the father in a Texas court.[4] The father's Texas attorney did not appear in the underlying Alabama proceedings at all. The father did retain an Alabama attorney to appear at the default-judgment hearing, but the father's Alabama attorney did not actually appear at the hearing, having arrived after it was concluded. The father's Alabama attorney subsequently filed a motion to set aside the default judgment on the basis that the trial court lacked subject-matter jurisdiction. An appearance by an attorney for the sole purpose of objecting to the jurisdiction of the court is not considered a general appearance. See Persons v. Summers, 274 Ala. 673, 681, 151 So. 2d 210, 215 (1963). Therefore, we conclude that no waiver of service of process took place in this case.

[4]The parties refer to a letter sent to the trial court by the father's Texas attorney, but that letter is not in the materials before this court. However, the parties do not dispute that the father's Texas attorney only requested copies of pleadings from the trial court.

Because service was not perfected on the father in strict compliance with the Alabama Rules of Civil Procedure and because the father did not waive service, we conclude that the trial court's default judgment is void. Pate, 673 So. 2d at 428-29. We also conclude that, even if service had been proper, the default judgment would still be void because, as the father correctly asserts, he was denied due process when the trial court modified custody of the children when that specific relief was not requested in the mother's petition.[5] See Rule 54(c), Ala. R. Civ. P. (providing that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment"); see also Owens v. Owens, 514 So. 2d 1041, 1042 (Ala. Civ. App. 1987) (holding that trial court violated mother's due-process rights by modifying custody in default judgment when father's

[5]The mother argues that the father was notified that she was seeking a change of custody of the children because the form filed by the mother was entitled "Petition to Modify." However, a petition to modify may relate solely to visitation, and, in this case, the mother, in her own handwriting in the body of the form indicated that she was seeking court assistance solely with her visitation rights, not a change of custody. The title of the petition alone was not sufficient to overcome the mother's express claim for relief so as to apprise a reasonable person that a change of custody was being requested.

contempt petition contained no averment or prayer for relief seeking custody modification). Therefore, the default judgment is void and due to be vacated on that basis as well.

Based on the foregoing, we grant the father's petition and issue a writ of mandamus directing the trial court to vacate its void default judgment.

PETITION GRANTED; WRIT ISSUED.

Donaldson, Edwards, and Hanson, JJ., concur.

Thompson, P.J., concurs specially.

THOMPSON, Presiding Judge, concurring specially.

I agree with the main opinion's conclusion that Loyd Jenkins ("the father") was not properly served with the "petition to modify" that Charon Steele ("the mother") filed in the Montgomery Circuit Court ("the trial court"). As a result, the default judgment the trial court entered awarding the mother custody of the parties' children is void. Accordingly, I agree that the father's petition for a writ of mandamus is due to be granted.

I write specially regarding the decision to treat the father's appeal as a petition for a writ of mandamus. Although the father appealed from a nonfinal judgment, which will normally result in the dismissal of the appeal, it is well established that this court has the discretion to treat an appeal from a nonfinal judgment as a petition for a writ of mandamus. Ex parte B.N., 203 So. 3d 1234, 1240 (Ala. Civ. App. 2016); Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1989). The appellate courts of this state do not favor piecemeal review. Ex parte Spears, 621 So. 2d 1255, 1258 (Ala. 1993). However,

> "'[t]here is no bright-line test for determining when this Court will treat a particular filing as a

> mandamus petition and when it will treat it as a notice of appeal.' Ex parte Burch, 730 So. 2d 143, 146 (Ala. 1999). See also Weaver v. Weaver, [4 So. 3d 1171 (Ala. Civ. App. 2008)](same).
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> > "'"[W]e consider the facts of the particular case in deciding whether to treat the filing as a petition or as an appeal:
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> > > "'"'The question we come to, then is this: Do the circumstances of this case make it such that the policies set forth in Rule 1[, Ala. R. App. P.,] will be served by resolving the matter presented to us? Or, will those policies be better served by requiring, as we do in the normal case, strict compliance with our appellate rules and thus not reviewing the trial court's interlocutory ruling?'
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> > "'"[Ex parte Burch,] 730 So. 2d [143,] 147 [(Ala. 1999)]."'
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> "Kirksey v. Johnson, 166 So. 3d 633, 644 (Ala. 2014) (quoting F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So. 2d 366, 372 (Ala. 2006))."

Ex parte L.L.H., 294 So. 3d 795, 801 (Ala. Civ. App. 2019).

In this case, in addition to showing that the father was not properly served with the mother's modification petition, the materials before us indicate that the children, who are nine years old and five years old, have lived with the father in Texas since before August 1, 2016. The mother lives in

Birmingham, so the trial court's order modifying custody uproots the children without providing the father the opportunity to respond to the modification petition. Furthermore, the mother did not request custody of the children in her modification petition. As the main opinion points out, the mother's purpose in filing that petition was to obtain the trial court's assistance in exercising her visitation and communication rights with the children. "The paramount interest and concern of courts, be they trial or appellate courts, in child custody cases is always what is best for the child or children." Dale v. Dale, 54 Ala. App. 505, 507, 310 So. 2d 225, 227 (Civ. App. 1975). I believe that, under the circumstances in this case, it is in the best interest of the children for this court to treat the father's appeal from a nonfinal judgment as a petition for a writ of mandamus, rather than dismissing the appeal and unnecessarily prolonging the effects of the void order.