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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2100785

Daniel Warren

v.

Carol Warren

Appeal from Jackson Circuit Court
(DR-99-20.4)

THOMAS, Judge.

Daniel Warren ("the father") and Carol Warren ("the mother") were divorced in August 2000. The parties' separation agreement was incorporated into the divorce judgment. According to the divorce judgment, the father

"agree[d] to pay all reasonable college costs for the parties' minor child."

In February 2008, before the child graduated from high school, the mother filed a petition seeking to hold the father in contempt for failing to pay expenses associated with the child's acceptance to Troy University, including the fee incurred for her college-admission testing, registration expenses, and "other expenses associated with college costs." The mother further sought to have the father "pay in advance of each semester a sum of money equal to the average cost of attendance for an in state student at Troy University."

The father answered the mother's petition and filed a counterclaim, requesting that the trial court modify the postminority-educational-support provision in the divorce judgment because the father had lost the job he had held at the time of the divorce and his income had been drastically reduced as a result. The father also requested that both parents be required to pay a portion of the child's college expenses, that the mother and the child be required to seek financial aid, that the award of postminority educational support be limited to the attainment of a bachelor's degree

within five years, that the child be required to be a full-time student and to earn at least a "C" average, and that the amount of support be limited to the cost of tuition, room and board, and activity fees at a state-supported college.

The case was first set for a hearing in August 2009. On that date, however, the case was not called for trial, so the trial court entered an order on October 26, 2009, requiring the father to pay $650 per month toward the child's college expenses pending the trial on the matter. The case was apparently set for trial on October 4, 2010, after which, on February 10, 2011, the trial court entered a judgment stating: "The Parties consented to entry of judgment against [the father] for the matters alleged in the petition. Judgment is hereby rendered against [the father] in the amount of $74,821.74 for which execution may issue."

The father filed a timely postjudgment motion to the February 2011 judgment, in which he denied having consented to the entry of a judgment against him. In his motion, the father alleged that his counsel and counsel for the mother had discussed the amount the father owed and that they had not been able to agree on an amount due. However, the father

alleged, counsel for the mother had delivered a proposed order to the trial court on February 9, 2011, without specifying that the father had objected to the proposed order. According to the father, when his counsel arrived at the courthouse on February 11, 2011, to file a formal objection to the proposed order, the clerk's office informed her that the trial court had already entered the proposed order filed by the mother's counsel as its judgment.

In his postjudgment motion, the father also complained that the amount of the judgment was not supported by any evidence because the only "evidence" presented to support the amount was a list of expenses submitted by the mother as an exhibit to her proposed order.[1] The father said that he had objected to some of those expenses listed by the mother as either not being actual college-related expenses (e.g., the amount of money the automobile for the child purportedly would cost, although the mother had allegedly gifted the automobile

[1]Both parties agree on appeal that the trial court took no testimony and was presented no documentary evidence at any time during the pendency of this proceeding regarding either the postminority educational expenses anticipated to be incurred, or actually incurred, by the child or the father's ability to pay.

to the child) or being exorbitant or unsupported by documentation (e.g., an alleged $250 per week charge for "miscellaneous expenses, including gasoline, food, clothing, and supplies," although the mother had already listed "Misc. Supplies" totaling $4,526.09). To support his claim that the nearly $75,000 judgment was unreasonable, the father presented documentary evidence that, he contended, indicated that the reasonable cost of tuition, room and board, books and supplies, and other expenses for attending Troy University totaled $14,700 per year. According to the father, he had earned only $37,087.22 in 2010, an amount that is less than half the amount of postminority educational support the trial court ordered the father to pay in the February 2011 judgment. The father further requested credits against the amount of postminority educational expenses he was required to pay. Finally, the father requested that the trial court set aside the February 2011 judgment and hold an evidentiary hearing on the matter.

The trial court denied the father the relief he requested in his postjudgment motion. The trial court did, however, remove the sentence in the February 2011 judgment that

indicated that the father had consented to the judgment. The father appeals.

Before we may consider the arguments presented by the father on appeal, we must first consider whether we have jurisdiction over this appeal. This court can notice a jurisdictional issue ex mero motu. See J. Bryant, LLC v. City of Birmingham, 23 So. 3d 675, 677 (Ala. Civ. App. 2009) (citing Ruzic v. State ex rel. Thornton, 866 So. 2d 564, 568-69 (Ala. Civ. App. 2003), abrogated on other grounds by F.G. v. State Dep't of Human Res., 988 So. 2d 555 (Ala. Civ. App. 2007)). Generally, an appeal may be taken only from a final judgment. Ala. Code 1975, § 12-22-2. A final judgment is "one that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved." Bean v. Craig, 557 So. 2d 1249, 1253 (Ala. 1990).[2]

As noted above, in response to the mother's contempt petition, the father filed a counterclaim seeking a

[2]The only exception to the requirement that an appeal be taken from a final judgment is when a trial court has certified a judgment deciding fewer than all the pending claims or resolving the issues involving fewer than all the parties as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. See Bean, 557 So. 2d at 1253.

modification of the postminority-educational-expense provision of the parties' divorce judgment. The trial court awarded the mother a judgment against the father based on the allegations contained in her contempt petition. However, the trial court failed to address the father's request for a modification of his postminority-educational-support obligation in the February 2011 judgment. See Jordan v. Jordan, 717 So. 2d 822, 822 (Ala. Civ. App. 1998) (dismissing an appeal from a judgment adjudicating a father's claim to reopen a divorce judgment but failing to adjudicate the mother's counterclaim seeking a child-support modification). Because the trial court's judgment does not "conclusively determine[] the issues before the court and ascertain[] and declare[] the rights of the parties," Bean, 557 So. 2d at 1253, we must dismiss the appeal as having been taken from a nonfinal judgment.

Although a trial court may certify a judgment deciding fewer than all the pending claims or resolving the issues involving fewer than all the parties as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., we do not believe that a Rule 54(b) certification would be appropriate in the present case. Because the trial court is permitted to make

any modification of the father's postminority-educational-support obligation retroactive to the date he filed his counterclaim seeking a modification, see King v. Barnes, 54 So. 3d 900, 905 (Ala. Civ. App. 2010), and Fielding v. Fielding, 843 So. 2d 766, 769 (Ala. Civ. App. 2002),[3] which would impact the amount of postminority educational support that the father was responsible for paying between the date of the filing of his counterclaim and the date of the February 2011 judgment, we may not simply remand this cause with instructions that the trial court consider certifying the February 2011 judgment as final without incurring the risk of inconsistent results. Instead, we dismiss the appeal so that the trial court can properly adjudicate the pending counterclaim seeking modification of the father's postminority-educational-support obligation by holding a trial on the merits of that counterclaim and, if necessary, adjust the amount of postminority educational support awarded in the February 2011 judgment.

[3]We note that we have required retroactive application of postminority-educational-support orders since Bayliss v. Bayliss, 575 So. 2d 1117 (Ala. Civ. App. 1990), was decided.

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

APPEAL DISMISSED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Bryan, and Moore, JJ., concur.