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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Cynthia Charlene Pitts

v.

Wesley Burton Pitts

Appeal from Pickens Circuit Court
(DR-16-900029.01)

DONALDSON, Judge.

Cynthia Charlene Pitts ("the mother") appeals from a judgment entered by the Pickens Circuit Court ("the trial court") denying her request to relocate with A.E.P. ("the child") to Mississippi and granting Wesley Burton Pitts ("the

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father") sole physical custody of the child if the mother and the child did not return to Alabama by a certain date. We dismiss the appeal because we lack jurisdiction.

Procedural History

On June 27, 2017, a judgment was entered divorcing the mother and the father. The divorce judgment, which incorporated a settlement agreement, granted joint legal custody of the child to the parties, sole physical custody to the mother, and visitation to the father.

In October 2017, the mother sent the father notice of her intent to relocate and to change the child's principal residence to Philadelphia, Mississippi. On November 1, 2017, the father filed a complaint denominated as an "Objection to Change of Principal Residence of the Minor Child." On November 29, 2017, the mother filed an answer and a counterclaim seeking to hold the father in contempt because, she alleged, he still owed her an amount on a payment that was ordered in the divorce judgment. The father filed a reply to the counterclaim.

On August 22, 2018, the father filed a "Verified Emergency Motion for Contempt, Emergency Motion for

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Injunction, and Emergency Motion for Change of Custody." In the motion, the father asserted that the mother had unilaterally relocated the child to Mississippi in the absence of any order and without mentioning any imminent relocation to the trial court. Also on August 22, 2018, the father filed an amended complaint that added a claim in which he sought to modify the custody arrangement and to receive sole physical custody of the child.

On August 28, 2018, the trial court entered an order that established a pendente lite custodial schedule. The parties were ordered to exchange custody of the child every Sunday. In the order, the trial court denied all other pending requests.

On September 4, 2018, the father filed a motion for leave to amend his complaint. On the same day, the trial court entered an order granting the father's motion. On September 30, 2018, the father filed an amended complaint adding a claim seeking a finding of contempt against the mother.

On October 2, 2018, and November 13, 2018, the trial court conducted a trial. On November 30, 2018, the trial court entered a judgment that contained detailed findings of fact. In the judgment, the trial court ordered the following:

"1. Alabama Code Section 30-3-169.4 states that there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. The Court finds that Mother did not meet her burden and that it is in the best interest of the child not to allow him to be moved away from the father. Therefore, the Court **GRANTS the Objection to Change in Principal Address.**

"2. It is ordered that the parties shall continue to alternate keeping the child for 7 day intervals until Mother can relocate back to Pickens County. Mother shall have until February 1, 2019 to relocate. At that time, if she has not relocated back to Pickens County, custody of the minor child shall be modified and the Father shall be awarded custody.

"3. The Court denies the motion for contempt filed by Mother, and any and all other motions and requests by both parties are denied.

"4. This is a final order and costs are taxed a paid."

(Capitalization and bold typeface in original.)

On January 16, 2019, the mother filed a "Motion to Set Hearing." In the motion, the mother requested that the trial court set aside "the custody element" of its November 30, 2018, judgment and to "set a hearing to address issues of custody, visitation, and child support." In support of her requests, the mother asserted that the November 30, 2018, judgment was not a final judgment, that the mother's understanding was that the trial court had bifurcated the

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relocation and custody issues before the trial, and that the November 30, 2018, judgment did not address the issue of child support, and she affirmed that she was not moving back to Pickensville. The father filed a response and an objection to the mother's motion. On February 27, 2019, the trial court conducted a hearing on the mother's "Motion to Set Hearing."

On March 5, 2019, the father filed another objection to the mother's motion to set a hearing and a motion to dismiss the proceedings on the mother's motion for lack of jurisdiction. On March 26, 2019, the father filed a renewed motion to dismiss the proceedings for lack of jurisdiction. In his motion, the father asserted that the November 30, 2018, judgment was final and that the trial court lacked jurisdiction to rule on the mother's January 16, 2019, motion because it was filed "beyond ... the thirty (30) day time-limit imposed under Rule 59 of the Alabama Rules of Civil Procedure."

On April 8, 2019, the trial court entered an order denying the mother's motion to set a hearing on the basis that it lacked jurisdiction. In the order, the trial court stated, in relevant part:

"On October 2, 2018 and November 13, 2018, this Court heard extensive testimony from both parties, witnesses and expert witnesses. Prior to the trial beginning, it was discussed and the court stated that there needed to be a ruling on the relocation case first before the court could hear facts regarding a change of custody.

"The following facts are significant and very important in this case. Months prior to the trial, the parties appeared in court on a hearing date. The parties came before the Court with their respective attorneys and issues were discussed in open court regarding this trial. The parties also had discussions that day outside the presence of the court. **After [the mother] left court, on that very day, and without telling or notifying the Court or [the father], [the mother] moved to Mississippi with the child.** Even though she appeared in court the same morning, she never mentioned that she was moving nor did she request approval from the Court.

"At a subsequent court date, [the mother] stated that her attorney ... told her it was 'OK' to move to Mississippi. [The mother's attorney] instructed the court that his client had a Constitutional right to move if she chose to do so. The Court reminded [the mother] and her attorney ... that even though she could move, the child relocation was under the Alabama Parent-Child Relationship Protection Act, Section 30-3-160 of the Code of Alabama. The court then ordered for the child to be shared equally between the parties, 7 days with [the father] and 7 days with [the mother], until the conclusion of this case. Whether or not [the mother's attorney] instructed his client to move or not, as his client stated he did, this Court does not know. But the fact remains that his client did move with the child and did not move back pending the litigation.

"As stated earlier, the two issues in this matter were the relocation case and the custody

modification. There were multiple possible outcomes for the relocation and how to proceed on the custody modification depended on the outcome of the relocation.

"A. If the court agreed that [the mother] overcame the presumption that it was [not] the best interest of the child to relocate, [the mother] could move with the child to Mississippi, and then a custody trial would be the next step.

"B. If the court ruled and denied the relocation, then the mother and child would remain in Pickensville and the next step would be a custody modification trial.

"C. The Court had not considered, before trial, a third option. [The mother] had already moved without permission of the court. Therefore, if the court denied the relocation and she refused to move back with the child, then the child is brought back, to Pickens County to live with his Father and there is no need for a custody modification. If [the mother] had not moved, this is not even an alternative. But since she did, without approval of the Court, this option now is in play. It's no different outcome if [the mother] had remained in Pickensville until after the trial, the court denies the relocation and she chooses to move to Mississippi anyway. If she chooses to move, she certainly can, but she cannot take the child. It has been denied. The child would remain in Alabama with the Father.

"The last option is what happened in this case. [The mother] decided not to move back to Pickensville and chose to stay in Mississippi. On November 30, 2018, the Court issued a Final Order and stated it was a Final Order. [The mother] chose to remain in Mississippi, despite being given an option to return with the child. She chose not to return. In the order, if she did not return, then

the child was to be returned to Pickensville, Alabama and custody awarded to the Plaintiff father. [The mother] waited until January [16], 2019 to file [her] Motion to Set Hearing. [The mother] did not timely file a Motion to Alter, Amend or Vacate under Rule 59 of the Alabama Rules of Civil Procedure nor did [the mother] timely file an appeal under Rule 4 of Alabama Appellate Rules of Procedure. [The mother] argues that in the final order that no child support was ordered and therefore it cannot be a final order. However, the court states that due to [the mother's] conduct during this matter, moving without leave of the court, putting the court and the parties in a situation where [the mother] is trying to dictate the outcome, that [the mother] comes with these motions with unclean hands. [The mother] then waits past the 30 days to file any Motions even though the Final Order was stated to be the 'final order'."

(Bold typeface in original.) The trial court determined that it "no longer ha[d] jurisdiction in the above styled cause due to the failure to file timely motions or an appeal. [The trial court] can only have jurisdiction to modify the November 30, 2018 order by a properly filed new petition."

On May 10, 2019, the mother filed a notice of appeal to this court. The father filed a motion to dismiss the appeal. The mother filed a response to the motion, and the father filed a rebuttal. The parties' briefs on appeal present arguments regarding both the rulings of the trial court and the issue of our jurisdiction over the appeal.

Discussion

The father argues that the November 30, 2018, judgment was a final judgment and that the mother did not timely file a notice of appeal from that judgment. Rule 4(a)(1), Ala. R. App. P., provides that, ordinarily, a notice of appeal must be filed within 42 days of the entry of a final, appealable judgment in order to appeal that judgment. Rule 4(a)(3), Ala. R. App. P., provides that "[t]he filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure (ARCP) shall suspend the running of the time for filing a notice of appeal." No motions pursuant to Rule 50, 52, or 55 were filed after the trial court entered the November 30, 2018, judgment. Rule 59(b) and (e), Ala. R. Civ. P., provide that a motion for a new trial or a motion to alter, amend, or vacate the judgment must be filed within 30 days of the entry of the judgment. Neither party filed a motion within 30 days after the entry of the November 30, 2018, judgment. Accordingly, the 42-day period for filing a notice of appeal was not suspended, and the notice of appeal filed on May 10, 2019, is untimely if the November 30, 2018, judgment was an appealable final judgment.

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The mother argues that the November 30, 2018, judgment was not a final judgment.

"An appeal ordinarily lies only from a final judgment. Ala. Code 1975, § 12-22-2; Bean v. Craig, 557 So. 2d 1249, 1253 (Ala. 1990). An order is generally not final unless it disposes of all claims or the rights or liabilities of all parties. Ex parte Harris, 506 So. 2d 1003, 1004 (Ala. Civ. App. 1987)."

Tomlinson v. Tomlinson, 816 So. 2d 57, 58 (Ala. Civ. App. 2001). In his pleadings, the father objected to the mother's proposed relocation with the child and sought sole physical custody of the child. The November 30, 2018, judgment granted the father's objection to the mother's relocation with the child and granted the father sole physical custody of the child if the mother did not return to Pickensville by a certain date. The trial court denied all other requests by the parties, including each party's request for a finding of contempt against the other. The mother asserts that the custody provision did not fully adjudicate the custody issue because it is predicated on a future event.

In Ex parte Monroe, 727 So. 2d 104 (Ala. 1999), a divorce judgment had placed custody of the parties' child with the mother. The father in that case had petitioned the court for

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a modification of custody, alleging that the mother would be moving to Michigan with their child. After ore tenus proceedings, "[t]he trial court modified its custody award so as to place the child with the father if the mother moved to Michigan." Id. at 104. "Monroe ... did not deal with the effect of a speculative future change in the custodial parent's residence, but with the modification of custody after an extensive ore tenus proceeding specifically directed to the impact on the child of an impending change of residence." Korn v. Korn, 867 So. 2d 338, 344 (Ala. Civ. App. 2003). Our supreme court upheld the trial court's judgment in Monroe.

The judgment in Monroe and the November 30, 2018, judgment in this case both condition a modification of custody upon a permanent relocation by a custodial parent as the parent had proposed. As in Monroe, no other action was required of the trial court to effectuate the change in custody. Therefore, the adjudication in the November 30, 2018, judgment fully disposed of the custody issue and made the judgment final as to all pending issues.

In Barsell v. Barsell, 882 So. 2d 859, 860 (Ala. Civ. App. 2003), we held that an order was nonfinal when the trial

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court had expressly retained jurisdiction to modify custody if a parent who had relocated with a child did not return with the child to a previous residence by a certain time. We have also held a judgment nonfinal when it "did not determine all the rights or liabilities of the parties but, instead, reserved the issue of child support pending the occurrence of a specific event" Naylor v. Naylor, 981 So. 2d 440, 441 (Ala. Civ. App. 2007). In the November 30, 2018, judgment, the trial court did not reserve any issues or retain jurisdiction for a ruling on custody at a later time, and no claims raised by the pleadings remained unadjudicated.

The mother further argues that the November 30, 2018, judgment was nonfinal because it did not address child support and visitation. "A 'final judgment' is a terminal decision which demonstrates there has been a complete adjudication of all matters in controversy between the litigants." Tidwell v. Tidwell, 496 So. 2d 91, 92 (Ala. Civ. App. 1986). We note that the father did not request child support in his pleadings. Nevertheless, the trial court stated in the November 30, 2018, judgment that "any and all other motions and requests by both parties are denied." Therefore, the November 30, 2018,

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judgment fully addressed any requests for any type of relief. The mother asserts that, without an award of child support or visitation, the November 30, 2018, judgment denied the child his fundamental rights. Regardless of the merits of the judgment, the denial of child support and visitation did not render the November 30, 2018, judgment nonfinal.

The mother argues that the April 8, 2019, order was the final judgment in the case because the trial court noted in that order that the mother had chosen not to move back to Pickensville, and she asserts that she timely filed a notice of appeal from the April 8, 2019, order. As discussed, the November 30, 2018, judgment did not require any further findings by the trial court to effectuate its terms. Moreover, the April 8, 2019, order expressly stated that the trial court no longer had jurisdiction in the case because the mother had not filed a motion pursuant to Rule 59 within 30 days of the entry of the November 30, 2018, judgment. Therefore, we do not agree that the April 8, 2019, order adjudicated the issue of custody.

We note that "'the denial of a Rule 60(b) [, Ala. R. Civ. P.,] motion is an appealable order'" and that a Rule 60(b)

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motion may be filed more than 30 days after the entry of a judgment. Reeves v. State, 882 So. 2d 872, 873-74 (Ala. Civ. App. 2003) (quoting Ex parte King, 821 So. 2d 205, 209 (Ala. 2001)). The mother filed a "Motion to Set Hearing" more than 30 days after the entry of the November 30, 2018, judgment, and the April 8, 2019, order denied that motion to the extent that it sought a hearing. The mother's motion, however, sought relief on the basis that the November 30, 2018, judgment was not final. "The purpose of Rule 60(b) is to 'relieve a party or a party's legal representative from a final judgment'" Rowe v. Dunn, 949 So. 2d 146, 149 (Ala. Civ. App. 2006) (quoting Rule 60(b), Ala. R. Civ. P.). We therefore do not construe the mother's "Motion to Set Hearing" as a motion pursuant to Rule 60(b).

Because the mother's "Motion to Set Hearing" was not filed within 30 days of the entry of the November 30, 2018, judgment, it was not timely filed pursuant to Rule 59(b) and (e). An untimely motion does not extend the period for filing a notice of appeal. Vincent v. Kondaur Capital Corp., 274 So. 3d 998, 1001 (Ala. Civ. App. 2018). Therefore, the trial court

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properly determined in its April 8, 2019, order that it no longer had jurisdiction in the case.

Among other arguments, the mother challenges the trial court's rulings on her attempt to relocate the child and on the custody of the child. We, however, cannot decide upon the merits of a judgment in an untimely appeal. "'The timely filing of [a] notice of appeal is a jurisdictional act.'" Id. (quoting Rudd v. Rudd, 467 So. 2d 964, 965 (Ala. Civ. App. 1985)). Because the mother did not timely file a notice of appeal, we must dismiss the appeal. See Rule 2(a)(1), Ala. R. App. P. ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.").

APPEAL DISMISSED.

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

Edwards, J., concurs in the result, without writing.