REL: September 24, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200423

T.J.

v.

L.D.

Appeal from Etowah Juvenile Court
(JU-18-478.02)

FRIDY, Judge.

T.J. ("the father") appeals from an order of the Etowah Juvenile Court ("the juvenile court") declining to consider his motion to alter,

amend, or vacate a judgment regarding modification of custody and child support, among other things. For the reasons set forth herein, we reverse.

Background

H.N. ("the child") was born in 2018. On November 7, 2019, the father, whom the juvenile court had recognized as the child's legal father in a judgment entered on July 7, 2019, filed a verified petition seeking custody of the child. In the petition, the father averred that L.D., the child's maternal grandmother ("the maternal grandmother"), had been awarded custody of the child because, he said, when the child was born she was experiencing withdrawals from opiates that the child's mother had used while pregnant. On February 10, 2020, the maternal grandmother filed a petition seeking child support from the father. The juvenile court considered the father's and the maternal grandmother's petitions together.

At the trial of the actions, the father testified that, after he had been adjudicated the father of the child, he was awarded supervised visitation with the child. The father lives in Decatur, Georgia, and, he said, he would drive three hours each way to Etowah County every week to exercise that

visitation. At first, the father said, he had two hours of visitation. During most of those visits, the father said, the child and he would play outside. After three months of supervised visitations, the father said, he was permitted to have four hours of unsupervised visitation in Etowah County every other week. After an additional three-month period, the father said, he was permitted to have standard weekend visitation and was permitted to take the child to his house in Decatur, Georgia.

The father testified that he worked as a server at a restaurant in Atlanta. He said that his work hours were from approximately 5:30 p.m. or 6:00 p.m. until 11:00 p.m. Because of the COVID pandemic, the father said, at the time of trial he worked only three nights a week and earned between $100 and $200 each night. He also worked as a massage therapist. The father described his work hours in that job as being on an "as-needed" basis by his clients. He said that he probably did four or five massages a week and that each massage lasted an hour or two. He said that he earned between $120 and $160 an hour before taxes for his work as a massage therapist.

The father offered into evidence a home study that had been conducted on his behalf in January 2020. The home study showed that the father lived in a duplex in what the study said was an "above-average" neighborhood in Decatur, Georgia. The study indicated that the father earned $2,500 each month from his full-time job as a server at a restaurant in Atlanta. Additionally, the study showed that the father earned $1,500 each month from his part-time job as a massage therapist. In documents accompanying the home study, the father indicated that he earned an annual income of $35,000. At the trial, the father testified that his income had decreased since the time of the January 2020 home study as a result of the COVID pandemic.

On February 9, 2021, the juvenile entered a judgment finding that the father did not meet his burden under Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), to warrant a change of custody and ordered that the maternal grandmother was to retain custody of the child subject to the father's visitation. The juvenile court also found that the father had an average monthly income of at least $3,000 from his jobs as a server and as a massage therapist. The juvenile court also took into consideration the

$390 a month paid for the child's day care. It is unclear from the record who paid the child's day-care expenses. Based on the "child support calculations and percentages and contribution of the parties responsible," the juvenile court said, it ordered the father to pay monthly child support in the amount of $768 to the maternal grandmother.

On February 10, 2021, the father's attorney filed a motion to withdraw. The juvenile court granted that motion on February 16, 2021. On February 23, 2021, the father's new attorney, who continues to represent the father on appeal, filed a motion to alter, amend, or vacate the judgment. In his postjudgment motion, the father asserted that the juvenile court had "misconstrued" the testimony regarding the father's income, saying that what the juvenile court had considered the father's weekly income was actually his income for two weeks. He also asserted that the juvenile court had failed to consider the travel expenses the father incurred for visitation when it calculated child support. In the postjudgment motion, the father asked the juvenile court to "amend" the CS-41 and CS-42 forms used to calculate child support under the guidelines set forth in Rule 32, Ala. R. Jud. Admin., and to calculate his

child-support obligation accordingly. Those forms could not be found in the record on appeal, and the father does not provide a cite to those forms in his appellate brief. In his postjudgment motion, the father also requested additional visitation periods with the child.

On February 24, 2021, the juvenile court entered an order that read in its entirety: "A motion has been filed in this case by an attorney who has not entered a notice of appearance regarding the case. The motion shall not be considered." On March 8, 2021, the father's attorney filed a notice of appearance as well as a timely notice of appeal to this court. The maternal grandmother did not file a brief with this court on appeal.[1]

Analysis

On appeal, the father first argues that the juvenile court erred in refusing to consider his motion to alter, amend, or vacate the judgment because his newly hired attorney had not yet filed a notice of appearance. We agree.

[1] Although the father listed M.D., the child's mother, and S.G., the child's court-appointed guardian ad litem, as appellees, neither filed a brief with this court, and they are not parties to this appeal.

In HICA Education Loan Corp. v. Fielding, 953 So. 2d 1261, 1263–64 (Ala. Civ. App. 2006), this court held that local counsel's failure to file a formal notice of appearance was not a sufficient basis for the trial court's refusal to accept his appearance on behalf of HICA Education Loan Corporation. In support of our holding in HICA, we relied on Kingvision Pay–Per–View, Ltd. v. Ayers, 886 So. 2d 45, 52 (Ala. 2003), in which our supreme court explained:

> "'"An appearance in a suit by an attorney of the proper court, is presumed to be authorized. The burden of proof is upon the party denying the authority."' Pallilla v. Galilee Baptist Church, 215 Ala. 667, 669, 112 So. 134, 135 (1927) (quoting Doe v. Abbott, 152 Ala. 243, 245, 44 So. 637, 637 (1907)). 'Where the authority of an attorney to appear for a party to a cause or proceeding is a subject of inquiry, the appearance of the attorney is presumptive evidence of the authority of the attorney to represent the party; and, in the absence of evidence to the contrary, such appearance is sufficient to justify the conclusion that the attorney was authorized by the party to appear and represent him in the cause or proceeding.' Kemp v. Donovan, 208 Ala. 289, 290, 94 So. 168, 169 (1922) (citations omitted). Accord 7 Am. Jur. 2d Attorneys at Law § 160 (1997) and 7A C.J.S. Attorney & Client § 171 (1980); [b]ut cf. Singleton v. Allen, 431 So. 2d 547, 549 (Ala. Civ. App. 1983)."

(Emphasis added.) See also Big Red Elephant v. Bryant, 477 So. 2d 342, 344 (Ala. 1985) (holding that an attorney who purported to represent a

party and against whom no allegation that he did not represent that party had been made had authority to file a suggestion of death on behalf of that party despite the fact that he had not filed a notice of appearance).

In this case, the father's new attorney filed the postjudgment motion at issue after the juvenile court had already granted the previous attorney's motion to withdraw from the case. The record shows that no one questioned whether the father's new counsel had the authority to act on behalf of the father. In her answer to the father's postjudgment motion, the maternal grandmother did not challenge the father's new attorney's authority to file the postjudgment motion, and no evidence was presented tending to indicate that the new attorney did not have the authority to do so. Accordingly, we conclude that the juvenile court erred in refusing to consider the father's motion to alter, amend, or vacate the judgment.

Our determination that the juvenile court erred in refusing to consider the father's postjudgment motion, in which the father requested a hearing, does not end our inquiry. The juvenile court's refusal to consider the motion in effect resulted in a denial of that motion as a

matter of law fourteen days after the motion was filed. See Rule 59.1, Ala. R. Civ. P.; Rule 1, Ala. R. Juv. P.

When a party requests a hearing on his or her postjudgment motion, he or she is generally entitled to such a hearing. Rule 59(g), Ala. R. Civ. P. A trial court's failure to conduct a hearing on a motion to alter, amend, or vacate is error. Flagstar Enters., Inc. v. Foster, 779 So. 2d 1220, 1221 (Ala. 2000); Dubose v. Dubose, 964 So. 2d 42, 46 (Ala. Civ. App. 2007). Such error is not necessarily reversible, however.

> "'This Court has established ... that the denial of a postjudgment motion without a hearing thereon is harmless error, where (1) there is ... no probable merit in the grounds asserted in the motion, or (2) the appellate court resolves the issues presented therein, as a matter of law, adversely to the movant, by application of the same objective standard of review as that applied in the trial court.' Historic Blakely Auth. v. Williams, 675 So. 2d 350, 352 (Ala. 1995) (citing Greene v. Thompson, 554 So. 2d 376 (Ala. 1989))."

Chism v. Jefferson Cnty., 954 So. 2d 1058, 1086 (Ala. 2006).

In his postjudgment motion, the father contended that the juvenile court had erred in using the higher estimates of the father's income despite the detrimental effect the COVID pandemic was having on his income. He also contended that the juvenile court had erred in failing to

consider his travel expenses for the six-hour round trip required of him to exercise visitation with the child.

In McCreless v. Valentin, 121 So. 3d 999, 1004 (Ala. Civ. App. 2012), this court considered whether the trial court's denial of a postjudgment motion involving the computation of child support was harmless error. We concluded that, because there was contradictory evidence regarding certain figures on the CS-41 form submitted by the mother in that case and the CS-42 form completed by the trial court and other documentary evidence presented at trial, there was probable merit to the mother's argument that the trial court had incorrectly computed her child-support obligation and that this court was unable to resolve the issue adversely to the mother as a matter of law. Therefore, we held, the trial court's failure to grant a hearing on the mother's postjudgment motion regarding the calculation of her child-support obligation was not harmless error. Id.

Here, the juvenile court had a range of figures to use in determining the father's monthly income, and the father's testimony showed that the COVID pandemic had created extraordinary circumstances affecting the incomes of people in the industries in which he was employed.

Additionally, the father is correct in stating that extraordinary costs of transportation for purposes of visitation borne substantially by one parent can be a reason for deviating from the child-support guidelines, see Rule 32(1)(b), Ala. R. Jud. Admin., and it is undisputed that the father was required to travel six hours each time he exercised visitation.

Because we cannot determine whether the juvenile court considered the father's travel expenses when calculating child support, we cannot say that the father's postjudgment motion is without probable merit, and we cannot resolve the issues the father raised in his postjudgment motion adversely to the father as a matter of law. As a result, the juvenile court's failure to consider the father's motion to alter, amend, or vacate the judgment cannot be harmless error.

We reverse the juvenile court's order declining to consider the father's motion to alter, amend, or vacate the judgment, and we remand the cause for the juvenile court to consider that motion.

REVERSED AND REMANDED.

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