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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150225

Wesley Person

v.

Lillian Person

Appeal from Crenshaw Circuit Court
(DR-13-49)

MOORE, Judge.

Wesley Person ("the husband") appeals from a divorce judgment entered by the Crenshaw Circuit Court ("the trial court") to the extent that it ordered him to pay child support and alimony to Lillian Person ("the wife"). He also

challenges a pendente lite order entered during the pendency of the divorce proceedings. We affirm the trial court's judgment in part and reverse it in part.

Procedural History

On August 29, 2013, the wife filed a complaint seeking a divorce from the husband. On September 4, 2013, the trial court entered an order providing, among other things, that the husband pay pendente lite spousal support and child support to the wife. On April 8, 2014, the husband answered the complaint and counterclaimed for a divorce. On February 17, 2015,the wife amended her complaint, adding allegations that the husband had committed adultery.

After a trial, the trial court entered a judgment on July 31, 2015, finding that the husband had committed adultery during the parties' marriage, dividing the parties' property, ordering the husband to pay $1,000 per month in alimony, awarding the wife sole physical and legal custody of the parties' two minor children, and ordering the husband to pay $2,500 per month in child support. With regard to child support, the trial court specifically stated:

> "As to present, and future child support, the provisions of Rule 32, [Ala. R. Jud. Admin.,] have

> not been followed in the award of child support herein made. This court finds that the application of said guidelines in this case would be manifestly unfair or inequitable because the parties live on an undetermined amount of income."

The trial court also stated:

> "While the Court finds that the [husband] is in fact $320,000.00 in arrears in respect to child support and spousal support, the court defers, at this time, to make any ruling in respect to the payment of such arrearage. Provisions for the payment of the arrearage will depend upon the manner in which the parties comply with all of the other provisions in this order. A decision will be entered by this court as to the payment of the above arrearage after the court has determined the manner in which each party has complied with all the other provisions in this order."

On August 27, 2015, the husband filed a postjudgment motion. On October 26, 2015, the postjudgment motion was denied. On December 7, 2015, the husband filed his notice of appeal.

Facts

The evidence indicated that the parties had been married over 20 years at the time of the trial. During the marriage, the husband had played for the National Basketball Association ("the NBA") for 11 years and had earned $40 million. At the time of the trial, the parties had a Prudential Annuities Service Account valued at $2.2 million and a Polaris Platinum

II Awards Annuity with an estimated value of $91,000; those accounts were awarded to the wife. The husband also had a pension through the NBA that he testified was valued at $711,000; that pension was awarded to the husband. The parties also owned multiple homes, farmland, a community center, a skating rink, a bowling alley, and approximately 20 vehicles.

The evidence also indicated that the wife does not have a college degree and that she had never worked during the marriage. The evidence indicated further that the parties' income leading up to the time of the separation had been solely from their approximately $5 million in investments. The wife testified that the husband had spent over $1 million during the parties' separation. She further testified that she had heard that the husband had secret accounts but that she had been unable to locate them.

Finally, there was evidence presented indicating that the husband had committed adultery, and the husband admitted that he had failed to pay any pendente lite child support or alimony for over two years during the pendency of this case.

Discussion

I.

On appeal, the husband first argues that the September 4, 2013, pendente lite order is void and is, therefore, due to be set aside. Therefore, he argues, his arrearage that accrued during the pendency of the litigation is due to be set aside.

In Morgan v. Morgan, 183 So. 3d 945, 966 (Ala. Civ. App. 2014), this court explained:

> "A pendente lite order is replaced by the entry of a final judgment. Reid v. Reid, 897 So. 2d 349, 355 (Ala. Civ. App. 2004) ('A pendente lite order is one entered during the pendency of litigation, and such an order is generally replaced by a final judgment.'). Thus, a pendente lite order is not made final by the entry of a final judgment such that it may be appealed as a part of the final judgment. Rather, the review of a pendente lite support order 'is by way of mandamus, inasmuch as it is not a final [judgment].' Sizemore v. Sizemore, 423 So. 2d 239, 241 (Ala. Civ. App. 1982). See also Ashbee v. Ashbee, 431 So. 2d 1312, 1313 (Ala. Civ. App. 1983) ('As to the wife's claim that alimony pendente lite should have been awarded, we note that the proper method of seeking appellate review of such an action on the part of the trial court is through a petition for a writ of mandamus. ... Since this issue has been raised improperly, we are unable to consider it [in an appeal of a final divorce judgment].') (citing Sizemore v. Sizemore, supra). Accordingly, the husband may not raise issues pertaining to the propriety of the ... pendente lite support order in th[e] appeal of the final divorce judgment."

Similarly, in the present case, review of the September 4, 2013, order could have been properly obtained by filing a petition for a writ of mandamus. Because this issue has been raised improperly, "we are unable to consider it" in the appeal from the divorce judgment in this case. Morgan, 183 So. 3d at 966.

II.

The husband next argues that the trial court's judgment is not final because, he says, the trial court declined to provide for the manner of payment of the arrearage accruing from the pendente lite order. In Johnson v. Johnson, 191 So. 3d 164, 171 (Ala. Civ. App. 2015), this court held:

> "If a final judgment is entered while a pendente lite alimony arrearage remains unpaid, the final judgment relieves the payor spouse from paying the pendente lite alimony arrearage, unless payment of the pendente lite alimony arrearage is ordered in the final judgment. This is so because an award of pendente lite alimony is interlocutory in nature and a subsequent final judgment can abrogate a former interlocutory order."

In the present case, the trial court clearly set forth the amount of arrearage owed by the husband. Compare D.M.P.C.P. v. T.J.C., 91 So. 3d 75, 76 (Ala. Civ. App. 2012) (noting that the trial court's "failure to adjudicate the

amount of the father's child-support arrearage render[ed] the ... order from which the mother has appealed nonfinal"). A determination of a party's arrearage is "the equivalent of a monetary judgment for that amount." Henderson v. Henderson, 680 So. 2d 373, 374 (Ala. Civ. App. 1996). That judgment may be collected by "'any ... process for collection of the judgment, such as garnishment.'" State ex rel. Walker v. Walker, 58 So. 3d 823, 827-28 (Ala. Civ. App. 2010) (quoting Leopold v. Leopold, 955 So. 2d 1031, 1036 (Ala. Civ. App. 2006)). Therefore, we conclude that the divorce judgment is final so as to support the present appeal.

III.

The husband next argues that the trial court erred in awarding child support without receiving evidence as to the parties' respective incomes or the needs of the children.

In Morgan, 183 So. 3d at 961-62, this court reasoned:

> "'"'This court has held that if the record does not reflect compliance with Rule 32(E)[, Ala. R. Jud. Admin.] (which requires the filing of "Child Support Obligation Income Statement/Affidavit" forms (Forms CS-41) and a "Child Support Guidelines" form (Form CS-42)), and if child support is made an

> issue on appeal, this court will remand (or reverse and remand) for compliance with the rule. See Martin v. Martin, 637 So. 2d 901, 903 (Ala. Civ. App. 1994). On the other hand, this court has affirmed child-support awards when, despite the absence of the required forms, we could discern from the appellate record what figures the trial court used in computing the child-support obligation. See, e.g., Dunn v. Dunn, 891 So. 2d 891, 896 (Ala. Civ. App. 2004); Rimpf v. Campbell, 853 So. 2d 957, 959 (Ala. Civ. App. 2002); and Dismukes v. Dorsey, 686 So. 2d 298, 301 (Ala. Civ. App. 1996). Nevertheless, without the child-support-guidelines forms, it is sometimes impossible for an appellate court to determine from the record whether the trial court correctly applied the guidelines in establishing or modifying a child-support obligation. See Horwitz v. Horwitz, 739 So. 2d 1118, 1120 (Ala. Civ. App. 1999).'"
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> "'Harris v. Harris, 59 So. 3d 731, 736-37 (Ala. Civ. App. 2010) (quoting Hayes v. Hayes, 949 So. 2d 150, 154 (Ala. Civ. App. 2006)).'

"Wellborn v. Wellborn, 100 So. 3d 1122, 1126 (Ala. Civ. App. 2012).

"This court is unable to determine from the record the manner in which the trial court determined the amount of the parties' gross incomes.

> The trial court is not bound by the income figures advanced by the parties, and it has discretion in determining a parent's gross income. However, '"[t]his court cannot affirm a child-support order if it has to guess at what facts the trial court found in order to enter the support order it entered...."' Willis v. Willis, 45 So. 3d 347, 349 (Ala. Civ. App. 2010) (quoting Mosley v. Mosley, 747 So. 2d 894, 898 (Ala. Civ. App. 1999)). Therefore, we reverse the judgment establishing the child-support award and remand the case to the trial court to redetermine the husband's child-support obligation in compliance with the Rule 32, Ala. R. Jud. Admin., child-support guidelines and this opinion."

In the present case, the trial court's judgment expressly states that the court could not determine the parties' incomes. Indeed, there is no evidence of the parties' incomes or the needs of the children in the record. The evidence indicated that the parties lived off their investments, but there was no evidence presented regarding the amount of that income. We do not even know if the parties' combined income is outside the maximum combined incomes set forth in the child-support guidelines. Without evidence of the parties' incomes and, if the parties' combined income is outside the maximum combined income set forth in the guidelines, evidence of the children's needs, we cannot affirm the child-support order. See Morgan, supra; see also Rule 32, Ala. R. Jud. Admin.

Therefore, we reverse the trial court's judgment regarding the award of child support and remand this cause for the trial court to take additional evidence and to enter a child-support order in compliance with Rule 32 and this opinion.[1] Id.

IV.

Finally, the husband argues that the trial court erred in awarding alimony to the wife without receiving evidence regarding a need for alimony.

> "'"'[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.' Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002). '"The presumption of correctness, however, is

[1]Rule 32(B)(2)(a) provides:

> "'Gross income' includes income from any source, and includes, but is not limited to, salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment-insurance benefits, disability-insurance benefits, gifts, prizes, and preexisting periodic alimony."

We note that the submission of the parties' tax returns and other documentation pursuant to Rule 32(F) would assist the trial court in determining the parties' incomes.

> rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment."' Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985))."

"'Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005).

> "'....'

"....

> "'"On appeal, the issues of alimony and property division must be considered together. The trial court's judgment on those issues will not be reversed absent a finding that the judgment is so unsupported by the evidence as to amount to an abuse of discretion. [Parrish v. Parrish, 617 So. 2d 1036 (Ala. Civ. App. 1993).] The property division need not be equal, but it must be equitable. Id. The factors the trial court should consider in dividing the marital property include 'the ages and health of the parties, the length of their marriage, their station in life and their future prospects, their standard of living and each party's potential for maintaining that standard after the divorce, the value and type of property they own, and the source of their common property.' Covington v.

> Covington, 675 So. 2d 436, 438 (Ala. Civ. App. 1996)."
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> "'Courtright v. Courtright, 757 So. 2d 453, 456 (Ala. Civ. App. 2000).'
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> "Weeks v. Weeks, 27 So. 3d 526, 529 (Ala. Civ. App. 2008)."

Sullivan v. Sullivan, [Ms. 2140760, Feb. 26, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016).

"Periodic alimony is completely a creature of legislative design." J.L.M. v. S.A.K., 18 So. 3d 384, 390 (Ala. Civ. App. 2008). Section 30-2-51(a), Ala. Code 1975, the operative statute in this case, provides, in part:

> "If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family."

See also Kean v. Kean, 189 So. 3d 61, 66 (Ala. Civ. App. 2015).

In Shewbart v. Shewbart, 64 So. 3d 1080, 1087-88 (Ala. Civ. App. 2010), this court stated:

> "A petitioning spouse proves a need for periodic alimony by showing that without such financial support he or she will be unable to maintain the parties' former marital lifestyle. See Pickett v. Pickett, 723 So. 2d 71, 74 (Ala. Civ. App. 1998)

> (Thompson, J., with one judge concurring and two judges concurring in the result). As a necessary condition to an award of periodic alimony, a petitioning spouse should first establish the standard and mode of living of the parties during the marriage and the nature of the financial costs to the parties of maintaining that station in life. See, e.g., Miller v. Miller, 695 So. 2d 1192, 1194 (Ala. Civ. App. 1997); and Austin v. Austin, 678 So. 2d 1129, 1131 (Ala. Civ. App. 1996). The petitioning spouse should then establish his or her inability to achieve that same standard of living through the use of his or her own individual assets, including his or her own separate estate, the marital property received as part of any settlement or property division, and his or her own wage-earning capacity, see Miller v. Miller, supra, with the last factor taking into account the age, health, education, and work experience of the petitioning spouse as well as prevailing economic conditions, see DeShazo v. DeShazo, 582 So. 2d 564, 565 (Ala. Civ. App. 1991), and any rehabilitative alimony or other benefits that will assist the petitioning spouse in obtaining and maintaining gainful employment. See Treusdell v. Treusdell, 671 So. 2d 699, 704 (Ala. Civ. App. 1995). If the use of his or her assets and wage-earning capacity allows the petitioning spouse to routinely meet only part of the financial costs associated with maintaining the parties' former marital standard of living, the petitioning spouse has proven a need for additional support and maintenance that is measured by that shortfall. See Scott v. Scott, 460 So. 2d 1331, 1332 (Ala. Civ. App. 1984)."

In the present case, there was no evidence presented indicating that the wife would be unable to maintain her former marital standard of living absent an award of periodic alimony. In fact, at the hearing on the husband's

postjudgment motion, the wife's testimony tended to show that she felt that her property award was sufficient to meet her needs. Furthermore, the evidence indicated that the parties had lived solely off of their investments, of which the wife was awarded a portion, and that neither party had been employed at the time of the parties' separation.

Without any evidence indicating that the wife will be unable to meet her needs absent an award of alimony, we conclude that the trial court exceeded its discretion in awarding periodic alimony. Accordingly, we reverse the judgment to the extent that it awarded the wife periodic alimony. Because the division of property and the award of alimony are interrelated, we also reverse the division of property. See Sullivan, ___ So. 3d at ___. On remand, the trial court is permitted to reconsider the division of property in light of our reversal of the award of alimony and all the applicable factors, including the finding of fault on the part of the husband. See id.

Conclusion

Based on the foregoing, we decline to consider the husband's challenge to the pendente lite order. We reverse

the trial court's judgment with regard to child support, alimony, and the division of property. We remand this cause for further proceedings in accordance with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.