

REL: February 26, 2021

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190878

Ex parte Joy Ann Kelley

PETITION FOR WRIT OF MANDAMUS

(In re: Joy Ann Kelley

v.

Steven Hunter Kelley)

(Colbert Circuit Court, DR-14-136)

FRIDY, Judge.

2190878

Joy Ann Kelley ("the wife") petitions this court for a writ of mandamus directing the Colbert Circuit Court ("the trial court") to vacate an order ("the July 2 order ") entered by the trial court on July 2, 2020, in a divorce action the wife had brought against Steven Hunter Kelley ("the husband"). Because we conclude that the trial court lacked subject-matter jurisdiction to enter the July 2 order, we grant the wife's petition and issue the writ.

Procedural History

In 2014, the wife commenced an action for a legal separation from the husband in the Lauderdale Circuit Court. She subsequently amended her complaint to seek a divorce. Thereafter, the Lauderdale Circuit Court entered an order directing that the parties refrain from transferring or disposing of assets for purposes other than their usual, normal, and ordinary living expenses. After the entry of that order, the action was transferred to the trial court on the ground that the trial court was the proper venue for the action.

Following a trial, the trial court entered an amended final judgment on February 4, 2020 ("the February 4 judgment"). Among other things, the

2190878

February 4 judgment found both parties in contempt; found that the wife had willfully disposed of personal property belonging to the husband with a total value of \$26,586; found that the husband had willfully failed to pay the wife pendente lite alimony totaling \$34,125; awarded the wife \$7,539, which represented the difference between the \$34,125 in unpaid pendente lite alimony and the \$26,586 value of the husband's personal property disposed of by the wife; awarded the wife \$18,266, which represented one-half of the value of the husband's retirement account on the date the parties had separated; and awarded the wife \$2,400, which represented the value of her one-half interest in the parties' automobile. The February 4 judgment also ordered the wife to return to the husband within 10 days of the entry of that judgment certain personal property that had a total value of \$55,600.

On February 20, 2020, the wife filed a document notifying the trial court and the husband that she was unable to fully comply with the February 4 judgment because, she said, the personal property she had been ordered to return to the husband consisted of some items that were

2190878

no longer in her possession, some items that had been destroyed in a flood, and some items that she was unaware existed.

On February 21, 2020, the husband filed a motion ("the February 21 motion") in which he asked the trial court to find the wife in contempt for her failure to comply with the February 4 judgment; to award him \$55,600 in lieu of the personal property the wife claimed she was unable to return to the husband; to deduct from that \$55,600 the aggregate total of the monetary amounts awarded the wife in the February 4 judgment, which was \$28,205; and, after deducting that \$28,205, to award the husband the net amount of \$27,395.

On July 2, 2020, the trial court entered the July 2 order. In that order, the trial court purported to deny the husband's contempt claim but purported to treat the February 21 motion as a Rule 59(e), Ala. R. Civ. P., motion to alter, amend, or vacate the February 4 judgment and, as so treated, purported to amend the February 4 judgment by setting aside all the monetary awards to both parties contained in that judgment and by awarding the husband \$1,000, which represented the amount of the penalty he would incur as a result of his being unable to discharge his

2190878

obligation to transfer to a third party certain items of the personal property the February 4 judgment had ordered the wife to return to the husband.

On August 21, 2020, the wife filed her petition for a writ of mandamus. This court called for an answer; however, neither the trial court nor the husband filed an answer to the wife's petition.

Timeliness of the Mandamus Petition

Although the wife did not file her mandamus petition within the presumptively reasonable period of 42 days after the entry of the July 2 order, see Rule 21(a)(3), Ala. R. App. P., our supreme court has held that a petition for a writ of mandamus that challenges the jurisdiction of the trial court to enter the order sought to be vacated need not be filed within the presumptively reasonable period prescribed by Rule 21. See Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016).

In the present case, the wife asserts that the trial court lacked subject-matter jurisdiction to enter the July 2 order. Therefore, the wife's mandamus petition is properly before us despite her failure to file it within the presumptively reasonable period for doing so.

Analysis

Mandamus is a drastic and extraordinary writ, to be issued only when there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. See Ex parte A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008).

As noted above, the wife asserts that the trial court lacked subject-matter jurisdiction to enter the July 2 order. Specifically, she argues that, because the February 21 motion sought a finding of contempt based on the wife's failure to comply with the February 4 judgment, the husband was required to commence an independent contempt action; that the commencement of such an independent action required the husband to pay a docket fee when he filed the February 21 motion; that he failed to pay such a docket fee; and that his failure to pay the docket fee prevented the February 21 motion from invoking the trial court's subject-matter jurisdiction. The wife further asserts that, to the extent that the February 21 motion may have constituted a Rule 59(e) motion, the trial court lacked

2190878

jurisdiction to rule on that motion on July 2, 2020, because, the wife says, that motion had been denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P., before the trial court entered the July 2 order.

Because the wife challenges the trial court's subject-matter jurisdiction to enter the July 2 order, that order is reviewable by a petition for a writ of mandamus. See Ex parte Johnson, 715 So. 2d 783, 785 (Ala. 1998). The February 4 judgment disposed of all the parties' claims then pending and, therefore, was a final judgment. See Heaston v. Nabors, 889 So. 2d 588, 590 (Ala. Civ. App. 2004). "[T]he filing of any contempt motion relating to the failure to abide by the terms of a final divorce judgment requires the initiation of an independent proceeding." Morgan v. Morgan, 183 So. 3d 945, 954 (Ala. Civ. App. 2014) (quoting Kyle v. Kyle, 128 So. 3d 766, 772 (Ala. Civ. App. 2013)). The wife alleges in her mandamus petition that the husband did not pay a docket fee in order to commence a separate contempt action when he filed the February 21 motion. See § 12-19-70(a), Ala. Code 1975 ("There shall be a consolidated civil filing fee, known as a docket fee, collected from a plaintiff at the time a complaint is filed in circuit court or in district court."). Neither the

2190878

husband nor the trial court have filed an answer challenging that allegation; therefore, we accept it as true. See Ex parte Turner, 840 So. 2d 132, 134–35 (Ala. 2002) (holding that when a respondent fails to challenge factual allegations contained in a petition for a writ of mandamus, the appellate court accepts as true the factual statements in the petition). The failure to pay the docket fee when a new action is commenced is a jurisdictional defect.¹ See Farmer v. Farmer, 842 So. 2d 679, 681 (Ala. Civ. App. 2002). Accordingly, we conclude that, to the extent that the husband's February 21 motion sought a finding of contempt against the wife based on her failure to comply with the February 4 judgment, it failed to invoke the trial court's subject-matter jurisdiction because the husband did not pay the docket fee necessary to commence a new action when he filed that motion. See, e.g., Haynes v. Haynes, 97 So. 3d 781 (Ala. Civ. App. 2012) (holding that the trial court

¹Section 12-19-70(b), Ala. Code 1975, provides that the payment of the docket fee may be waived initially and taxed as costs at the conclusion of the case if a verified affidavit of substantial hardship is filed and approved by the court. The materials before us contain no indication that the husband filed such an affidavit in connection with the February 21 motion.

2190878

lacked jurisdiction to enter a contempt judgment when the movant sought a finding of contempt based on the other party's failure to comply with a final judgment and the movant had neither paid the applicable filing fee to commence a new action nor filed a verified affidavit of substantial hardship).

As relief for the wife's alleged contempt, the husband's February 21 motion sought, among other things, a modification of the February 4 judgment, and the trial court treated that motion as a Rule 59(e) motion. Assuming, without deciding, that the February 21 motion, by virtue of its request that the trial court amend the February 4 judgment, constituted a Rule 59(e) motion, the trial court lost jurisdiction to rule on that motion on the 90th day after it was filed. See Rule 59.1, Ala. R. Civ. P.; Ex parte Chamblee, 899 So. 2d 244, 247 (Ala. 2004) (" 'If the trial court allows a post-trial motion to remain pending, and not ruled upon, for 90 days, then the motion is denied by operation of law and the trial court loses its jurisdiction to further entertain that motion.' " (quoting Ex parte Johnson Land Co., 561 So. 2d 506, 508 (Ala. 1990))). The 90th day after February 21, 2020, was May 21, 2020, which was well before the trial court entered

2190878

the July 2 order.² Therefore, insofar as the husband's February 21 motion might have constituted a Rule 59(e) motion, the trial court lacked jurisdiction to rule on that motion on July 2, 2020. Id. Accordingly, because we conclude that the trial court lacked subject-matter jurisdiction

²As a result of the COVID-19 pandemic, our supreme court issued an administrative order on March 13, 2020, that, among other things, provided that deadlines that were set by, or subject to regulation by, the supreme court and were due to expire between March 16, 2020, and April 16, 2020, were extended to April 20, 2020. On April 2, 2020, our supreme court issued its COVID-19 Administrative Order No. 5, which, among other things, extended those deadlines through April 30, 2020. Our supreme court's COVID-19 Administrative Order No. 6, which was issued on April 30, 2020, provided that all deadlines previously extended by the supreme court's previous COVID-19 administrative orders through April 30, 2020, were further extended through May 15, 2020. Our supreme court's COVID-19 Administrative Order No. 7, which was issued on May 13, 2020, provided that, subject to certain specified exceptions, the supreme court's previously issued COVID-19 administrative orders would remain in effect; however, it did not further extend any of the deadlines that were set by, or subject to regulation by, the supreme court beyond May 15, 2020. Because the 90th day after the filing of the February 21 motion in the present case was May 21, 2020, the supreme court's COVID-19 administrative orders did not extend the deadline for the trial court to rule on the February 21 motion under Rule 59.1, and that deadline expired on May 21, 2020.

2190878

to enter the July 2 order, we grant the wife's mandamus petition and issue the writ.

PETITION GRANTED; WRIT ISSUED.

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