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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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Ex parte Robin Fipps

PETITION FOR WRIT OF MANDAMUS

(In re: Kimbellee B. Fipps

v.

Robin Fipps)

(Jefferson Circuit Court, DR-15-900129.03)

PER CURIAM.

Robin Fipps ("the father") petitions this court for a writ of mandamus directing the Jefferson Circuit Court ("the trial court") to set aside its order granting the motion to

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disqualify the father's counsel, Scott Harwell, filed by Kimbellee B. Fipps ("the mother"). We deny the petition.

Procedural History

The parties were divorced by a judgment of the trial court entered on June 11, 2015. On July 3, 2019, the father, through Harwell, filed a petition to modify his child-support and life-insurance obligations under the divorce judgment and for a rule nisi relating to his telephone communication with the parties' child. On February 26, 2020, the mother filed a motion to disqualify Harwell from representing the father, stating, in pertinent part:

"1. That the [mother] filed for divorce from [the father] on January 24, 2015 That on January 27, 2015, Attorney Scott Harwell entered a Notice of Appearance on behalf of the [father].

"2. That Attorney Harwell represented the [mother] in her previous divorce, finalized in 2003. That during the course of her representation by Attorney Harwell, [the mother] disclosed confidential and private information which was related to the posture of [her and her former husband's] divorce, including matters related to [her and her former husband's] oldest child.

"3. That based on Attorney Harwell's previous representation of [the mother], [the mother] filed a Motion to Disqualify Attorney Harwell that same day, January 27, 2015. ...

"4. That on February 5, 2015, th[e] [trial court] entered an Order explicitly stating that Attorney Harwell had 'knowledge of private and confidential information' regarding [the mother] and disqualifying Attorney Harwell. ...

"5. That on February 10, 2015, Attorney Harwell entered a Notice of Limited Scope Representation for the purposes of filing a Motion to Set Aside th[e] trial] [c]ourt's Order disqualifying Attorney Harwell.

"6. That on April 1, 2015, [the trial c]ourt heard oral arguments from Attorney Harwell and the undersigned on Attorney Harwell's Motion to Set Aside. That same day, [the trial c]ourt entered an Order denying Attorney Harwell's Motion. ...

"7. That [the father] retained new counsel, and the parties were divorced by Agreement, as incorporated into the Final Judgment of Divorce, on June 11, 2015.

"8. That on October 14, 2015, [the mother] filed a Petition for Rule Nisi ... based on [the father's] failure to adhere to the terms of the parties' Settlement Agreement.

"9. That on November 17, 2015, Attorney Harwell entered a Notice of Appearance on behalf of [the father] in the above-styled matter.

"10. That based on Attorney Harwell's previous representation of [the mother] and Attorney Harwell's disqualification from the original divorce proceedings, [the mother] filed another Motion to Disqualify Attorney Harwell on November 23, 2015. ...

"11. That on December 17, 2015, [the trial c]ourt entered an Order explicitly stating that there existed 'a conflict of interest in that there

was a substantial relationship between the [mother] and opposing counsel' and disqualifying Attorney Harwell. ...

"12. That on May 2, 2017, Attorney Harwell, on behalf of [the father], filed a Complaint in the Circuit Civil Court of Jefferson County, Alabama[,] alleging identity theft, invasion of privacy, conversion, negligence and outrage against [the mother]

"13. That [the mother] hired Wallace, Jordan, Ratliff and Brandt to represent her in the civil claims filed against her who filed a Motion to Dismiss arguing, among other things, that [the trial c]ourt had jurisdiction over the issues and that [the father] was seeking to avoid disqualification of his counsel. ...

"14. That on February 7, 2018, [the mother's] Motion to Dismiss was denied. ...

"15. That on February 26, 2018, in light of [the mother's] Motion to Dismiss being denied, [the mother] filed a Motion to Disqualify Scott Harwell as counsel for [the father in the civil action]. ...

"16. That prior to the hearing on said Motion to Disqualify Scott Harwell, [the civil action] was settled in order to prevent further financial devastation to [the mother] due to enormous cost of litigation.

"17. That the above-styled matter is entirely derivative of the original divorce and modification, from which Attorney Harwell was previously disqualified. [The father's] interests in the above-styled matter are materially adverse to those interests of [the mother], just as they were in the original divorce action and the first modification on which the above-styled matter is based."

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On February 26, 2020, the father filed a response to the mother's motion to disqualify; he filed a brief in support of his response on March 4, 2020. He filed an amended response on April 2, 2020, and an amended brief in support of his amended response on April 7, 2020. On April 8, 2020, the trial court entered an order granting the mother's motion to disqualify. On May 19, 2020, the father filed his petition for a writ of mandamus with this court.

Standard of Review

"Mandamus is a drastic and extraordinary writ, to be issued only where 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.' Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)."

Ex parte S.T., 149 So. 3d 1089, 1090-91 (Ala. Civ. App. 2014).

Discussion

In her answer to the petition for a writ of mandamus, the mother argues that the petition should be denied based on the law-of-the-case doctrine.

"Under the doctrine of the "law of the case," whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the

decision was predicated continue to be the facts of the case. Alford v. Summerlin, 423 So. 2d 482 (Fla. Dist. Ct. App. 1982).' Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987). "In the words of Justice Holmes, the doctrine of the law of the case 'merely expresses the practice of courts generally to refuse to reopen what has been decided' Messinger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912) (emphasis added [in Bagley ex rel. Bagley v. Creekside Motors, Inc., 913 So. 2d 441, 445 (Ala. 2005)])."' G.E.A. v. D.B.A., 920 So. 2d 1110, 1115 (Ala. Civ. App. 2005)."

J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1009 (Ala. Civ. App. 2007).

We have carefully reviewed the motion filed by the mother and the other materials attached to the petition and the answer, and we find that the mother did not raise the law-of-the-case doctrine before the trial court. In her motion to disqualify Harwell, the mother indicated that the trial court had entered an order disqualifying Harwell from representing the father in the 2015 divorce action between the parties and that the trial court also had entered a similar order in a 2015 action to enforce the divorce judgment. The mother asserted that the current case was "entirely derivative" of those cases, but she did not mention the law-of-the-case doctrine or otherwise argue that the question of Harwell's

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ability to represent the father had already been conclusively decided based on the 2015 orders. The mother argued before the trial court only that Harwell should be disqualified for the same reasons for which he was disqualified in the 2015 actions, namely, that his representation of the father violated Rules 1.6 and 1.9 of the Alabama Rules of Professional Conduct, the latter of which generally prohibits an attorney from representing a party adverse to a former client "in the same or a substantially related matter." Rule 1.9(a), Ala. R. Prof. Cond. From the materials before this court, it is apparent that the mother is raising the applicability of the law-of-the-case doctrine for the first time in this mandamus proceeding.

Nevertheless, in Ex parte CTB, Inc., 782 So. 2d 188, 191 (Ala. 2000), our supreme court held that a petition for the writ of mandamus may be denied if the order under review is correct and supported by any valid legal ground, even one not argued in the trial court. Thus, we will consider whether the law-of-the-case doctrine requires the denial of the father's mandamus petition.

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In his petition, the father does not dispute the material allegations of the motion filed by the mother. The father acknowledges that Harwell represented the mother in her 2003 divorce action against her former husband and in subsequent paternity proceedings regarding the mother and her former husband's oldest child. The father also acknowledges that, in 2015, upon motion of the mother, the trial court entered orders disqualifying Harwell from representing the father on the basis of Rules 1.6 and 1.9, Ala. R. Prof. Cond. The father admits that he intentionally did not seek review of those orders, see Ex parte Central States Health & Life Co. of Omaha, 594 So. 2d 80, 81 (Ala. 1992) (holding that an order disqualifying an attorney is to be reviewed by petition for a writ of mandamus), and that he was ultimately represented by other attorneys in the 2015 proceedings as a result of Harwell's disqualification.

In several cases, this court has held that, once an issue has been decided in a divorce action, the law-of-the-case doctrine precludes reconsideration of that issue in subsequent modification and enforcement actions arising out of the divorce judgment. In Hummer v. Loftis, 276 So. 3d 215, 224

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(Ala. Civ. App. 2018), this court held that, because the father in that case had failed to appeal a divorce judgment requiring him to pay postminority support for his adult, disabled child, the law-of-the-case doctrine precluded him from arguing in a later modification action that he should not be responsible for that postminority support. In Hamaker v. Seales, 227 So. 3d 32, 38-39 (Ala. Civ. App. 2016), this court held that the failure of the father in that case to appeal an earlier judgment awarding visitation to his child's grandmother barred the father from raising that issue in his appeal of a later judgment entered in a modification action based on the law-of-the-case doctrine. Other cases have reached the same conclusion with regard to the law-of-the-case doctrine in actions that sought to modify or enforce a divorce judgment. See Thompson v. Ladd, 207 So. 3d 76, 79 n.3 (Ala. Civ. App. 2016) (holding that the failure to appeal a judgment containing an error rendered the erroneous holding in that judgment the law of the case); Kendrick v. Congo, 180 So. 3d 904, 908 (Ala. Civ. App. 2015) (applying the law-of-the-case doctrine in a postdivorce modification action); S.B. v. Lauderdale Cty. Dep't of Human Res., 142 So. 3d 716, 720 (Ala.

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Civ. App. 2013) (holding that a parent's failure to appeal an earlier judgment precluded the courts from considering, based on the law-of-the-case doctrine, an issue resolved in the earlier judgment in an appeal of a later modification judgment); N.T. v. P.G., 54 So. 3d 918, 920 (Ala. Civ. App. 2010) (holding that an earlier judgment awarding visitation became the law of the case and that, in a modification action, the mother in that case could not overturn the visitation award established in that earlier judgment); and McQuinn v. McQuinn, 866 So. 2d 570, 575 (Ala. Civ. App. 2003) (holding that the right of a former husband to visitation with his stepson became the law of the case and, thus, was not subject to challenge in a subsequent action).

None of the material facts that supported the 2015 disqualification orders have changed. Harwell maintains that the factual conclusion that he had acquired confidential "knowledge of private and confidential information" during his 2003 representation of the mother was erroneous; however, the specific purpose of the law-of-the-case doctrine is to preclude rehashing of the same issues in repeated litigation. See Ex parte Discount Foods, Inc., 789 So. 2d 842, 846 n.4

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(Ala. 2001) ("The purpose of the [law-of-the-case] doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided."). In this case, the law-of-the-case doctrine precludes relitigation of not only the legal, but also the factual, bases for Harwell's disqualification.

The father maintains that the mother has waived her right to seek disqualification of Harwell because she did not object to Harwell's representing the father in a 2018 modification action. The facts regarding that representation are undisputed. In 2018, Harwell initiated a civil action against the mother and the mother moved to disqualify Harwell from representing the father in that action. Before obtaining a ruling on the motion, the parties settled the case through a mediation in which Harwell continued to represent the father. As a result of that mediation, the parties agreed, among other things, to a modification of the divorce judgment by consent, requiring the filing of a separate action in the trial court in order to obtain the approval of the trial court to the modification. Harwell filed the modification action on behalf

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of the father on May 23, 2018, and the trial court ratified the agreement to modify the judgment on that same date.

We recognize that a former client may tacitly waive his or her right to object to his or her former attorney's representation of an adverse party in subsequent litigation, see Hall v. Hall, 421 So. 2d 1270, 1271 (Ala. Civ. App. 1982), but the undisputed facts relating to the 2018 litigation do not show that the mother voluntarily and knowingly relinquished her right to object to Harwell's representation of the father in any subsequent domestic-relations litigation between the parties. In 2018, the mother proceeded to mediation and settled the civil case while a motion to disqualify Harwell was pending. Before a ruling could be made on the motion to disqualify, which the mother did not withdraw at any point, the parties agreed to modify the divorce judgment, and Harwell filed the 2018 modification action solely for the purpose of obtaining the trial court's approval of the modification agreement, with neither party intending to litigate any issue in that action. Under those circumstances, it cannot be said that the mother, by failing to object to Harwell's performing the largely ministerial task

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of filing the uncontested modification action, acquiesced in Harwell's representing the father in subsequent domestic-relations litigation between the parties. The materials before this court show that the mother has consistently and timely objected to Harwell's representation of the father throughout the divorce and postdivorce proceedings, including in the underlying action.

We conclude that, as a matter of law, the law-of-the-case doctrine applies to disqualify Harwell from representing the father in the underlying case. We also conclude that the mother did not waive her right to seek Harwell's disqualification. Accordingly, we deny the petition for a writ of mandamus.

PETITION DENIED.

Moore and Hanson, JJ., concur.

Thompson, P.J., concurs specially.

Donaldson and Edwards, JJ., concur in the result, without writings.

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THOMPSON, Presiding Judge, concurring specially.

I concur in the conclusion in the main opinion that the law-of-the-case doctrine applies to preclude Scott Harwell from representing Robin Fipps ("the father") in the current modification action the father filed against Kimbellee B. Fipps ("the mother"). I also conclude that there exists another basis upon which to deny the father's petition. In her February 26, 2020, motion to disqualify Harwell, the mother pointed out that the trial court had twice before entered orders disqualifying Harwell from representing the father, and she argued that "the above-styled matter is entirely derivative of the original divorce and modification" actions, and that the parties' interests remained adverse.

In opposing the mother's motion to disqualify, the father never disputed before the trial court that the current action was derivative of the two earlier actions. He contended, as he had previously done, that there was no ethical basis for disqualifying Harwell from representing the father and that the mother had "waived" her objection to Harwell's representation of the father in a previous action. He asserted that that "waiver" applied to bar the mother from

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objecting to Harwell's representing the father in any future domestic-relations actions between the parties. Although the trial court had specified the bases for its earlier orders disqualifying Harwell, in its April 8, 2020, order granting the mother's motion to disqualify Harwell in the current action, the trial court did not set forth a reason for its ruling.

In Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006), our supreme court stated:

"When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."

(Footnote omitted.)

The father never asserted, either before the trial court or in his petition for a writ of mandamus, an argument that this domestic-relations action is not a derivative action related to the previous domestic-relations actions involving the parties. I believe that the father's failure to address the mother's argument that this action is derivative of the previous domestic-relations actions is another reason for this

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court to deny the father's petition for a writ of mandamus.

Fogarty v. Southworth, supra.