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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2015

2140292

Denise M. Williams

v.

John R. Williams

Appeal from Elmore Circuit Court
(DR-13-900304)

THOMAS, Judge.

This is the second time Denise M. Williams ("the wife") and John R. Williams ("the husband") have been before this court. See Williams v. Williams, [Ms. 2130615, Nov. 14, 2014] ___ So. 3d ___, ___ (Ala. Civ. App. 2014)("Williams I"). In

Williams I we considered the propriety of the Elmore Circuit Court's partial summary judgment on the issue of the validity of the parties' prenuptial agreement and whether the partial summary judgment had been properly certified as final pursuant to Rule 54(b), Ala. R. Civ. P. Williams I, ___ So. 3d at ___. A majority of this court concluded that the partial summary judgment had been properly certified as final and that the circuit court had erred by entering a partial summary judgment in favor of the husband because a genuine issue of material fact existed. ___ So. 3d at ___. Our opinion was released on November 14, 2014. On January 20, 2015, after his application for rehearing was denied by this court, the husband filed a petition for the writ of certiorari in our supreme court, which is currently pending. Thus, no certificate of judgment has been issued in Williams I.

> "A '"judgment of [a Court of Appeals] is not a final judgment until that court issues a certificate of judgment, and an application for rehearing in that court and a petition in [the supreme court] for writ of certiorari stay the issuance of that certificate."' Ex parte Tiongson, 765 So. 2d 643, 643 (Ala. 2000) (quoting Jackson v. State, 566 So. 2d 758, 759 n.2 (Ala. 1990), and citing Rule 41, Ala. R. App. P.)."

Veteto v. Yocum, 792 So. 2d 1117, 1118-19 (Ala. Civ. App. 2001).

In the meantime, on October 31, 2014, and December 4, 2014, the husband filed unopposed motions in the circuit court seeking the entry of a divorce judgment. On December 5, 2014, the circuit court entered a judgment divorcing the parties, which reads, in pertinent part:

> "This cause was submitted on the Complaint filed herein by [the wife], the Answer of the [husband], the [the husband]'s Motion for Summary Judgment, the Court's Order granting Summary Judgment, and the Husband's Affidavit. Upon consideration thereof, it is the opinion of the Court that a Decree of Divorce should be entered as provided herein below.
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> "It is therefore ORDERED, ADJUDGED, AND DECREED BY THE COURT AS FOLLOWS:
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> "1. That the bonds of matrimony heretofore existing between the parties be and the same are hereby dissolved, and that the [wife] and [the husband] be and they are hereby forever divorced for and on account of incompatibility...."

On January 12, 2015, the wife filed this appeal seeking a determination as to whether the circuit court lacked jurisdiction to enter the divorce judgment; she asserts that the circuit court lacked jurisdiction because the pendency of the husband's petition for the writ of certiorari and the lack of a certificate of judgment in Williams I prevents the

circuit court from proceeding on the divorce issue and because the circuit court did not conduct a hearing to establish grounds for a divorce.

> "On questions of subject-matter jurisdiction, this Court is not limited by the parties' arguments or by the legal conclusions of the trial court regarding the existence of jurisdiction. See Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983) ('Lack of subject-matter jurisdiction may not be waived by the parties and it is the duty of an appellate court to consider lack of subject-matter jurisdiction ex mero motu.' (citing City of Huntsville v. Miller, 271 Ala. 687, 688, 127 So. 2d 606, 608 (1958)))."

Loachapoka Water Auth., Inc. v. Water Works Bd. Auburn, 74 So. 3d 419, 422 (Ala. 2011).

The circuit court did not lack jurisdiction to act on the divorce claim based on the lack of a certificate of judgment in Williams I. Although the wife would be correct if the December 5, 2014, judgment had addressed the division of the parties' property, the lack of a certificate of judgment in Williams I does not affect the circuit court's jurisdiction to enter the divorce. "Rule 54(b)[, Ala. R. Civ. P.,] provides a mechanism for appealing a judgment on fewer than all the claims that are before a trial court." Regions Bank v. Reed, 60 So. 3d 868, 877 (Ala. 2010). "Under 'appropriate facts,' a partial summary judgment on an original claim may be finally

adjudicated pursuant to Rule 54(b), leaving a [remaining claim] undecided so that the parties can further litigate the issues presented by the [remaining claim]." Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987)(citing Pate v. Merchants Nat'l Bank of Mobile, 409 So. 2d 797, 798 (Ala. 1982)). In Williams I we instructed the circuit court to conduct further proceedings on the claim regarding the validity of the prenuptial agreement. We did not, and indeed could not, reach the remaining claim -- the claim for a divorce -- in Williams I. Similarly, the circuit court has not and cannot hold a hearing on the validity of the prenuptial agreement until a certificate of judgment is issued in Williams I.[1] However, the parties could properly litigate

[1]In this case, the husband cannot assert the law-of-the-case doctrine if our opinion in Williams I is upheld by our supreme court. "'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.'" Southern United Fire Ins. Co. v. Purma, 792 So. 2d 1092, 1094 (Ala. 2001) (quoting Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987)). Even assuming that the supreme court upholds our decision in Williams I, and, thus, that the parties have not litigated the remaining claim -- the validity of the prenuptial agreement and any potential property division -- any determination by the circuit court, in granting the divorce, on the issue of the husband's alleged

the issue of the divorce itself. Thus, we do not agree with the wife that, by adjudicating the claim for a divorce, the circuit court acted outside its jurisdiction.

Next, the wife complains that the circuit court lacked authority to enter the divorce judgment because it failed to conduct a hearing to elicit grounds for a divorce and failed to take "in-court testimony," which, she argues, resulted in the circuit court's impermissible entry of the divorce judgment without its having received evidence indicating, in this case, incompatibility. Section 30-2-1(a)(7), Ala. Code 1975, allows a circuit court to enter a divorce judgment when it is "satisfied from all the testimony in the case that there exists such a complete incompatibility of temperament that the parties can no longer live together." (Emphasis added.) The circuit court indicated that it had relied on, among other documents, the wife's complaint, the husband's answer, and the

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fault would not serve to bar, under the law-of-the-case doctrine, the circuit court's consideration of fault in making a property division. A court may consider fault when making a division of property, even if the divorce was granted on the ground of incompatibility. Nickerson v. Nickerson, 467 So. 2d 260 (Ala. Civ. App. 1985).

husband's affidavit. Thus, the wife complains, the circuit court heard no "testimony" upon which to base its conclusion that the parties were incompatible. Although the circuit court did not take oral testimony, it was not without testimony upon which to base the divorce judgment.[2]

The wife's verified complaint alleged incompatibility, an irretrievable breakdown of the marriage, and verbal abuse as grounds for a divorce. The wife's verified complaint met the requirements of Rule 56(e), Ala. R. Civ. P., and, therefore,

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[2]We do not share the dissent's concern that "[a]llowing one party to obtain a divorce on the basis of incompatibility based merely on the submission of an affidavit by that party might operate to prevent the other spouse from adequately presenting evidence on the issue of misconduct or from opposing the divorce action itself." ___ So. 3d at ____ (Thompson, P.J., concurring the result in part and dissenting in part). The wife had an opportunity to oppose the entry of the divorce judgment; however, she did not file any opposition to the two motions seeking the entry of a divorce judgment that were filed by the husband. Furthermore, "[i]f the state of incompatibility is declared by either party to exist and the evidence, either objective or subjective, supports the existence of such a state, the court must grant a divorce." Clark v. Clark, 384 So. 2d 1120, 1121 (Ala. Civ. App. 1980). See also Phillips v. Phillips, 49 Ala. App. 514, 520, 274 So. 2d 71, 77 (Civ. App. 1973)(explaining that it is incumbent on one party to establish that incompatibility exists); Dyal v. Dyal, 54 Ala. App. 206, 209, 307 So. 2d 17, 20 (Civ. App. 1975); and Kegley v. Kegley, 355 So. 2d 1121, 1123 (Ala. Civ. App. 1977).

was properly treated as an affidavit. See Kessler v. Gillis, 911 So. 2d 1072, 1080 (Ala. Civ. App. 2004)(plurality opinion). In Dunn v. Dunn, 124 So. 3d 148, 151 (Ala. Civ. App. 2013), we relied on Dubose v. Dubose, 964 So. 2d 42, 44 n.1 (Ala. Civ. App. 2007), to explain that

> "'"[a] verified pleading may be treated as an affidavit and used in the action in any way in which an affidavit would be suitable[,]"' provided that the pleading '"contain[s] facts that the affiant knows to be true of his or her own knowledge and [has] a certain level of factual specificity."' Ex parte Quinlan, 922 So. 2d 914, 917 (Ala. 2005) (quoting 5A Charles Alan Wright & Arthur K. Miller, Federal Practice and Procedure: Civil 3d § 1339 (2004))."

In this case, the wife's pleading -- her verified complaint -- was properly treated as an affidavit because it contained sufficient specific facts that the wife knew to be true.

The husband denied the wife's allegations in his answer; however, he later submitted an affidavit testifying to the parties' incompatibility. An affidavit from either party stating a ground for a divorce suffices as testimony regarding that ground for a divorce. See Ex parte Robertson, [Ms. 2130264, Aug. 15, 2014] ___ So. 3d ___, ___ (Ala. Civ. App. 2014), cert. denied, [Ms. 1140083, Feb. 13, 2015] ___ So. 3d ___ (Ala. 2015). In light of the parties' affidavits, a

hearing to elicit testimony establishing incompatibly as the ground for a divorce was not necessary.

In conclusion, the wife has failed to present an argument explaining how the circuit court erred in entering the divorce judgment. The judgment of the circuit court is, therefore, affirmed.

AFFIRMED.

Pittman and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result in part and dissents in part, with writing, which Moore, J., joins.

THOMPSON, Presiding Judge, concurring in the result in part and dissenting in part.

I concur only in the result reached by the main opinion with regard to its discussion of the issue whether the pendency of the husband's petition for certiorari review of this court's judgement of reversal in Williams v. Williams, [Ms. 2130615, Nov. 14, 2014] ___ So. 3d ___ (Ala. Civ. App. 2014), precluded the trial court's consideration of the parties' claims seeking to be divorced on the basis of incompatibility. The wife argued that the trial court could not enter the divorce judgment because the issue of the validity of the prenuptial agreement governing issues pertaining to property division was still the subject of review in the appellate courts. In her brief submitted to this court, the wife correctly argues that, while an appeal is pending in an appellate court, a trial court lacks jurisdiction to rule in the action except as to matters that are "entirely collateral" to the issues before the appellate court. See M.G. v. J.T., 105 So. 3d 1232, 1233 (Ala. Civ. App. 2012). The wife has failed to present, and my research did not disclose, authority to support the proposition that,

when an order addressing other issues in a divorce action has been certified as final pursuant to Rule 54(b), Ala. R. Civ. P., the issue of a claim for a divorce is not "entirely collateral" to the issues presented to the appellate court. Accordingly, I concur in the result reached by the main opinion in rejecting the wife's argument as to this issue; I do not believe that the wife demonstrated error in the argument she raised in her brief submitted to this court.

I dissent from the determination in the main opinion that the wife did not demonstrate that the trial court erred in failing to conduct a hearing before divorcing the parties on the basis of incompatibility. Alabama law provides that a divorce based on incompatibility may not be obtained merely on the agreement of the parties but that, instead, the trial court must receive "testimony" establishing incompatibility as a ground for the divorce. § 30-2-1(7), Ala. Code 1975. See also § 30-2-3 (forbidding divorce by consent of the parties); Dubose v. Dubose, 132 So. 3d 17, 20 (Ala. Civ. App. 2013) (citing Wright v. Wright, 55 Ala. App. 112, 114, 313 So. 2d 540, 541-42 (Civ. 1975), and Johns v. Johns, 49 Ala. App. 317, 320, 271 So. 2d 514, 515-16 (Civ. 1973)). Thus, the wife is

correct in her argument asserted before this court that mere allegations of incompatibility are not a sufficient basis for obtaining a divorce. Phillips v. Phillips, 274 So. 2d 71, 77 (Ala. Civ. App. 1973). Rather, as noted, § 30-2-1(7), Ala. Code 1975, provides that a circuit court may divorce the parties on the basis of incompatibility "when the court is satisfied from all the testimony in the case that there exists such a complete incompatibility of temperament that the parties can no longer live together." The trial court's jurisdiction in a divorce action is statutory; facts supporting the exercise of jurisdiction, such as facts supporting a finding of incompatibility, must appear in the record in order for the trial court to exercise jurisdiction to enter a divorce judgment. Crenshaw v. Crenshaw, 646 So. 2d 144, 145 (Ala. Civ. App. 1994).

The main opinion equates the mother's verified complaint for a divorce with an affidavit sufficient for the purposes of Rule 56(e), Ala. R. Civ. P., to support a ruling on the merits. In doing so, it relies on Kessler v. Gillis, 911 So. 2d 1072 1080 (Ala. Civ. App. 2004), a plurality opinion in which four judges of this court concurred in the result. In

Kessler v. Gillis, supra, the plurality opinion did not conclude that the verified complaint in that case was sufficient under Alabama law as an affidavit--i.e., that it was sufficient as evidence in support of, or in opposition to, a Rule 56 summary-judgment motion; rather, that plurality opinion noted that other jurisdictions and many federal courts had reached that conclusion. In reaching its result in Kessler v. Gillis, the plurality determined that there was no contradiction between an affidavit submitted in opposition to the summary-judgment motion and the allegations made in the verified complaint. In Dunn v. Dunn, 124 So. 3d 148, 151 (Ala. Civ. App. 2013), and Dubose v. Dubose, 964 So. 2d 42, 44 n.1 (Ala. Civ. App. 2007), this court construed factually specific verified postjudgment motions as affidavits sufficient to warrant the granting of a request for a hearing on those postjudgment motions.[3] My research has located no authority in which an Alabama appellate court has held, in a majority opinion, that a verified complaint is equivalent to

[3]"'[V]erification alone does not necessarily convert a pleading into an acceptable affidavit.'" Ex parte Quinlan, 922 So. 2d 914, 917 (Ala. 2005) (quoting 5A Charles Alan Wright & Arthur K. Miller, Federal Practice and Procedure: Civil 3d § 1339 (2004)).

an affidavit for the purposes of Rule 56(e), which governs the form and content of affidavits filed for summary-judgment purposes, or, more to the point in this case, that a verified complaint can be interpreted to constitute "testimony" for the purposes of § 30-2-1(7), Ala. Code 1975.

I would not hold that a verified complaint is sufficiently equivalent to the testimony required under § 30-2-1(7), which requires that the trial court be "satisfied from all the testimony in the case" that the parties are incompatible in order to exercise jurisdiction pursuant to § 30-2-1. (Emphasis added.) Rather, I conclude that, in enacting § 30-2-1(7), our legislature intended that a trial court receive at least some oral testimony or testimony by way of affidavits from the parties to a divorce action on the issue of incompatibility as the ground for a divorce, i.e., that they are sufficiently incompatible such that a divorce is warranted. "'Testimony' is defined as '[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.' Black's Law Dictionary, 1485 (7th ed. 1999)." K.D.H. v. State, 849 So. 2d 983, 989 (Ala. Crim. App. 2002); see also Black's Law Dictionary 1704 (10th

ed. 2014) (same). This is particularly true, where, as here, the wife has alleged both verbal abuse and incompatibility as grounds for a divorce; the trial court, upon receiving the testimony required by § 30-2-1(7) could divorce the parties on the basis of cruelty or another ground different than that alleged in the parties' pleadings.[4] See Lassitter v. Lassitter, 371 So. 2d 918, 919 (Ala. Civ. App. 1979) ("Although there was no specific allegation of cruelty in the complaint for divorce, the trial court had the authority under [Rule] 15(b)[, Ala. R. Civ. P.,] to grant the divorce upon unrequested grounds so long as there is sufficient support in the evidence for the decree.").

Further, I disagree with the main opinion's conclusion that the husband's March 27, 2014, affidavit alone was sufficient to support the entry of a divorce judgment under § 30-2-1(7). The main opinion, relying on Ex parte Robertson, [Ms. 2130264, Aug. 15, 2014] ___ So. 3d ___ (Ala. Civ. App. 2014), concludes that "[a]n affidavit from either party stating a ground for a divorce suffices as testimony regarding that ground for a divorce." ___ So. 3d at ___. However, the

[4]The wife's complaint contains an allegation that the parties had engaged in a "nontraditional lifestyle."

comparable proposition in Ex parte Robinson, supra, is not supported by any citation to authority, and, in that case, this court noted that the wife had provided oral testimony before the trial court. See Ex parte Robertson, ___ So. 3d at ___. The language of § 30-2-1(7) requires that a trial court be "satisfied from all the testimony in the case" that the parties are incompatible. I do not construe that provision as being satisfied by basing a decision on "all the testimony" of one spouse without affording the other spouse an opportunity to provide testimony. This court should not summarily hold, without adequate argument from interested parties, that the affidavit of only one party to a divorce action is sufficient, by itself, to support a finding that the parties to the divorce action are incompatible.

In Alabama, a trial court may divorce the parties on the ground of incompatibility even when other grounds, such as adultery, are alleged, see Crowder v. Crowder, [Ms. 2120928, Oct. 31, 2014] ___ So. 3d ___, ___ (Ala. Civ. App. 2014), and Allen v. Allen, 53 So. 3d 960 (Ala. Civ. App. 2010), or even when one party does not desire the divorce. See Phillips v. Phillips, 49 Ala. App. 514, 274 So. 2d 71 (Civ. 1973). In

addition, a trial court may, under Rule 15(b), Ala. R. Civ. P., consider the evidence presented to it and divorce the parties on an alternate ground or one not alleged in the complaint. Lassitter v. Lassitter, supra.

It is common for parties to allege in their complaints for a divorce alternate bases for seeking a divorce; the parties sometimes allege both incompatibility and misconduct, such as abuse or adultery, for example. In this case in particular, in addition to alleging incompatibility as a basis for seeking a divorce, the wife has also alleged that the husband verbally abused her. A finding of fault in bringing about the end of a marriage, even when the parties are divorced on the basis of incompatibility, may affect the distribution of property. Baggett v. Baggett, 855 So. 2d 556, 559 (Ala. Civ. App. 2003). Thus, basing a finding of incompatibility solely on the affidavit of only one of the parties to a divorce action--and failing to allow the other spouse to present evidence, either by affidavit or by oral testimony, on the issue of the basis for the divorce--could affect the rights of the other spouse. Allowing one party to obtain a divorce on the basis of incompatibility based merely

on the submission of an affidavit by that party might operate to prevent the other spouse from adequately presenting evidence on the issue of misconduct or from opposing the divorce action itself. As the wife has argued in her brief submitted to this court, she was deprived of the ability to present evidence of the husband's misconduct to the trial court.

I realize that evidence of fault in bringing about the end of a marriage may be presented to the trial court as evidence to pertaining to one of many factors a trial court may consider when it fashions a property division. See Baggett v. Baggett, 855 So. 2d at 559-60 (discussing the factors, including the fault of the parties, that are to be considered by the trial court in fashioning a property division). As a practical matter, I do not see the point of having a trial court divorce parties on the basis of incompatibility without receiving evidence and then, later, hearing evidence on the issue of fault. Such a result is avoided by compliance with § 30-2-1(7), which requires that a trial court base an incompatibility finding on "all the testimony" presented. When both of the parties present

testimony, either oral or through affidavits, to the trial court, the trial court can determine the basis upon which it can exercise its jurisdiction over the divorce action. I believe that § 30-2-1(7) requires that both parties in this case be afforded an opportunity to present evidence before the trial court regarding the basis for their claims for a divorce or should be allowed to agree to submit the issue on affidavits from each party. Accordingly, I dissent from the main opinion on this issue.

Moore, J., concurs.