Rel: May 3, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171021

Deborah M. Ramer

v.

Matthew C. Ramer

Appeal from Covington Circuit Court
(DR-13-101.02)

THOMPSON, Presiding Judge.

This is an appeal from a custody-modification judgment entered by the Covington Circuit Court ("the trial court"). Deborah M. Ramer ("the mother") and Matthew C. Ramer ("the father") had one child ("the child") during their marriage.

The mother also had a child ("the son") from a previous marriage, who resided with the parties throughout their marriage. At the time of this opinion, the child is 8 years old and the son is 16 years old (the child and the son are hereinafter referred to collectively as "the children").

The record demonstrates that the parties divorced on December 14, 2014. The 2014 divorce judgment entered by the trial court is not contained in the record on appeal.[1] After the divorce judgment was entered, the father filed a petition in the trial court seeking to modify custody. On November 19, 2015, the trial court entered a judgment noting that the

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[1]The mother included that judgment as an appendix to her appellate brief.

> "'"'[A]ttachments to briefs are not considered part of the record and therefore cannot be considered on appeal.'" Morrow v. State, 928 So. 2d 315, 320 n. 5 (Ala. Crim. App. 2004) (quoting Huff v. State, 596 So. 2d 16, 19 (Ala. Crim. App. 1991)).' ...
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> "Roberts v. NASCO Equip. Co., 986 So. 2d 379, 385 (Ala. 2007)."

Hildreth v. State, 51 So. 3d 344, 352 (Ala. Civ. App. 2010).

father had sought to "change custody from the Plaintiff/Mother to the Defendant/Father." At that time, the trial court found, the father, who had been working in North Dakota, had changed jobs and had begun working "in the family business in the local area." The trial court found that the father's "decision to change jobs [would] have a positive effect on both of the minor children." However, the trial court stated, simply being more available to parent the children did "not meet the standard required under the law to change custody." Accordingly, the trial court did not modify the custody arrangement at that time, although it did increase the amount of visitation to which the father was entitled, awarding him "liberal visitation" with both children. The mother did not appeal from that judgment.

The record in the current action indicates that, in both the 2014 divorce judgment and the 2015 modification judgment, the trial court included a provision prohibiting the children from having contact with the mother's boyfriend, J.W. The provision ("the J.W. injunction") stated:

> "[J.W.]: The [mother] is temporarily enjoined from having [the child] and [the son] (hereinafter sometimes referred to as 'the children') in the presence of [J.W.]. The term 'in the presence' is

> defined for the purposes of this order as follows: The [mother] shall refrain from taking the children to [J.W.]'s place of business, his home, or any other place that the [mother] should reasonably believe [J.W.] to currently be located. The [mother] shall further refrain from allowing [J.W.] to visit her home when the children are present, to include the home itself, as well as the yard, driveway, and street in front of the home. In short, it is the intention of this Court that these children have no contact with [J.W.]. This injunction shall remain in place until further Order of the Court."

(Emphasis in the original.)

On May 22, 2017, the father filed a second petition in which he requested "a change of primary physical custody of the minor children from the Plaintiff/mother to the Defendant/father." He also asked that the mother be held in contempt for violating the previous court orders. In seeking the change of custody and the order of contempt against the mother, the father alleged that the mother had violated the J.W. injunction. The father asserted that the mother had allowed the children to be around "a convicted felon" in violation of the previous court orders and that, in doing so, the mother's conduct constituted a material change in

circumstances warranting a change in custody.[2] In addition to his claim that the mother had violated the J.W. injunction, the father also asserted in his petition that the mother had left the children alone "in the middle of the night" without adult supervision and had created an unsafe and unhealthy environment for the children.

The trial court heard three days' of testimony over a period of several months. On September 29, 2017, two days after the first day of the trial, the trial court entered a "temporary order" in which it found that the mother had willfully violated the J.W. injunction and awarded the father "temporary physical custody" of the children subject to the mother's visitation, which was limited to Sundays. The trial court also explicitly left the J.W. injunction in place. The trial court stated that the temporary order was entered because the trial had not yet concluded. The mother did not seek to have this court review the "temporary order."

[2]The record indicates that, in 2006, J.W. pleaded guilty to possession of marijuana in the first degree, that is, for other than personal use, and was sentenced to five years in prison. In 2008, he pleaded guilty to another count of the same offense and was sentenced to eight years in prison.

At the trial, the son testified that J.W. had been to the mother's house "maybe three times" while he was there and that J.W. had come to check on him at the mother's house after the son had had shoulder surgery. The son also said that J.W. had never spent the night at the mother's house while the son was there. According to the son, the mother had told him J.W. was not to be around the children, but, he said, regarding the times J.W. had visited the house while the son was present, the mother had invited J.W. The son also testified that the mother had told him not to let the father know he had seen J.W. "because she would get in trouble." The son also acknowledged that he had J.W.'s telephone number in his cellular telephone, adding that he had spoken to J.W. about a week before the son testified.

The mother did not dispute that J.W. had been to her house when the son was present. She testified that J.W. had gone with her to pick up the son from the airport in Atlanta when the son returned from visiting his biological father in Ireland. She denied that the child was ever at her house when J.W. visited, although she acknowledged that J.W. had been outside the house when both the children were present. The

mother also presented evidence tending to indicate that J.W. did not pose a danger to the children. She alleged that the real reason the father did not want the children around J.W. was because J.W. is African-American, not because of his drug convictions. The father conceded at trial that he did not believe in interracial relationships.

The son testified that he believed that the father "has a drinking problem." However, the son said, when the father is drinking alcohol, he does not attempt to drive. The son said that the father does not provide much supervision for the children when they are at the father's house. We note that the father lives with his own parents in their house.

The father testified that he had obtained counseling for the child, who, the father said, was afraid to visit the mother's house and was also afraid that J.W. would move into the mother's house. The father said that the child had recurring nightmares about that scenario. The child also cries when it is time to go to the mother's house. The child's counselor, Alex Hart, testified that the child is very close to her paternal grandmother and that the child has separation anxiety when she goes to the mother's house. Hart

opined that it was not in the child's best interest to return to live with the mother.

After hearing three days of testimony, the trial court entered an order on March 26, 2018, finding that the mother had "intentionally and willfully violated the Court's 'no contact' order regarding [J.W.]." Other than the circumstances relating to J.W., however, the trial court found no evidence that the children's health or safety was "significantly impacted in a negative way while in the care and custody of either parent." After noting that the original custody order for the child, which, as mentioned, is not included in the record on appeal, provided for "joint custody," the trial court determined that it was in the child's best interest "that the parties continue to exercise joint physical and legal custody." The trial court then instructed the parties to develop a visitation schedule "structured so that [the child] resides primarily with [the father] during the school year. To meet this requirement, the Court expects that the child will reside with [the] father more than [the] mother." The trial court awarded custody of the son to the mother, subject to the father's visitation.

The trial court did not address the issue of child support in the March 26, 2018, order. Instead, it scheduled a hearing on that issue for early May 2018.

After the May 2018 hearing, the trial court entered a judgment on July 2, 2018, that, among other things, set forth the parties' custodial periods as to the child in the event the parties were unable to agree on a custody schedule themselves. Based on that schedule, the mother no longer retained sole physical custody of the child. Based on the wording of the March 26, 2018, order and the substantial parenting time given to each party in the July 2, 2018, judgment, it appears that the trial court awarded the parties joint physical custody of the child.

The mother did not file a postjudgment motion. On August 10, 2018, she filed a notice of appeal to this court.

On appeal, the mother first seeks a reversal of the trial court's judgment regarding custody of the son. Because the father in this case is not the son's biological father, the mother argues, the biological father had to have been joined as an indispensable party in this action. We reiterate that, in the March 26, 2018, order, the trial court awarded the

mother sole physical custody of the son, beginning with the completion of the 2018 school year. The father was not awarded joint or sole legal custody of the son in the March 2018 order. In her appellate brief, the mother failed to advise this court that she had prevailed on the issue of custody of the son. Because the trial court awarded the mother sole physical custody of the son, and the father has no legal custody of the son, contrary to the mother's assertion, there is no custody award to the father for this court to review.

In Miller v. City of Birmingham, 235 So. 3d 220, 230 (Ala. 2017), our supreme court held unequivocally that "the absence of an indispensable party does not deprive the circuit court of subject-matter jurisdiction." Here, the trial court denied the father's request to modify custody of the son from the mother to the father. Thus, as to this issue, there is no adverse ruling from which the mother can appeal. "Only adverse rulings by the trial court are reviewable on appeal. McCulloch v. Roberts, 290 Ala. 303, 276 So. 2d 425 (1973)." Lewis v. Providence Hosp., 483 So. 2d 398, 398 (Ala. 1986).

Furthermore, the biological father's parental or custodial rights were not infringed upon when the trial court denied the father's request for a custody modification for the son. Rule 45, Ala. R. App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil ... case ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

Because the substantial rights of the son's biological father were not affected by the order denying the father's request for a custody modification as to the son, to the extent, if any, that the trial court erred in failing to add the son's biological father as a party in this matter, such error was harmless and is not a ground for reversal.

Moreover, on appeal, the mother does not challenge the award of visitation for the father. We note that the mother also did not challenge the November 2015 judgment permitting the father to exercise visitation with the son. The mother did not ask us to decide the issue of the father's visitation with the son, and she did not develop a legal argument on the

issue of a stepparent's ability to visit a stepchild. Because of the unique facts of this case and because of the importance of extended family relationships involving stepparents and stepchildren, we conclude that this is not the proper case in which to consider the propriety of visitation awarded to a stepparent.[3] See Muhammad v. Ford, 986 So. 2d 1158, 1165 (Ala. 2007) ("'An argument not made on appeal is abandoned or waived.'" (quoting Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 n. 8 (Ala. 2003))); see also Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005) ("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

The mother also argues that the trial court erred in awarding what the trial court and the parties called "temporary custody" of the children to the father before the close of the evidence. On September 29, 2017, after the first day of a total of three days of testimony, the trial court

[3]The mother and the father married in September 2008, when the son was six years old, and the son resided with the parties throughout the marriage.

entered the order awarding the father custody of the children pending the outcome of this matter.

This court has discussed the use of the term "temporary" in a custody award and whether such an award is intended to be a pendente lite custody award or a final appealable judgment.

> "Although somewhat confusing, an order awarding 'temporary' custody can be either a pendente lite order or a final order. As the Supreme Court has explained:
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> > "'Semantically, this entire matter would be simpler if all courts declined to use the phrase "temporary custody" and simply used "pendente lite" or "custody" as the circumstances require.
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> > "'Pendente lite orders are generally entered only during the pendency of the litigation and are usually replaced by a final order or judgment that is entered at the end of the litigation. Sims v. Sims, 515 So. 2d 1 (Ala. Civ. App. 1987). In custody situations, a pendente lite order clearly envisions continuing custody pending a later final determination of that custody dispute, whereas "custody awards" are final and are generally intended to remain in effect until one of the parties succeeds in a petition requesting the court to modify its custody award. Sims, supra.'
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> "Ex parte J.P., 641 So. 2d 276, 278 (Ala. 1994)."

S.S. v. T.R.A., 716 So. 2d 719, 720 (Ala. Civ. App. 1998).

In this case, the trial court's award of "temporary custody" to the father was intended to be effective only during the pendency of the litigation of this custody-modification matter. Therefore, the September 29, 2017, order was a pendente lite order.

> "As [this court] explained in Morgan v. Morgan, 183 So.3d 945, 966 (Ala. Civ. App. 2014):
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> > "'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.'"

Person v. Person, 236 So. 3d 90, 95 (Ala. Civ. App. 2017).

There is no indication in the record that the mother sought review of the award of pendente lite custody, and the pendente lite custody order has been replaced by the final judgment modifying custody. Thus, the mother cannot raise the issue of the propriety of the pendente lite order in this appeal of the final judgment.

Finally, the mother argues that the trial court erred in removing the child from her sole physical custody on the basis of her contempt, i.e., her violation of the J.W. injunction, and because, she says, the father failed to meet the standard set forth in Ex parte McLendon, 455 So.2d 863, 865-66 (Ala. 1984).

> "There are two different standards for reviewing custody arrangements. If custody has not previously been determined, then the 'best interest of the child' standard is appropriate. Ex parte Couch, 521 So. 2d 987 (Ala. 1988). However, if a judgment has granted custody to one parent, or if one parent has given up legal custody, then custody will be changed only if the change would 'materially promote' the child's welfare. Ex parte McLendon, 455 So. 2d 863 (Ala. 1984)."

Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996). See also Whitehead v. Whitehead, 214 So. 3d 367, 370 (Ala. Civ. App. 2016).

> "A parent seeking modification of any type of custody arrangement must show a material change of circumstances giving rise to a need for a change of custody. Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005); Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987). A material change of circumstances is a change in the circumstances of the parties '"such as to affect the welfare and best interest of the child or children involved."' Watters, 918 So. 2d at 916 (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. App. 1973)). The alleged material changes must 'affect[] the best interest and welfare of the child such that a change in the existing custodial arrangement [is] warranted,' and mere tangential effects on the child are not sufficient to make changes in circumstances material. Watters, 918 So. 2d at 916."

R.D.F. v. R.J.F., [Ms. 2170013, Aug. 10, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018).

The 2015 judgment that extended the father's visitation periods with the children made clear that the mother had sole physical custody of the children when the father filed his current modification petition in May 2017. However, in the March 26, 2018, order, the trial court stated that "[t]he original custody order for [the child] provided for joint custody." The term "joint custody" is defined in §

30-3-151(1), Ala. Code 1975, as "[j]oint legal and joint physical custody." Furthermore, the trial court stated: "It is in the best interest of [the child] that the parties continue to exercise joint physical and legal custody." (Emphasis added.)

We recognize that, during the trial, the parties and the trial court discussed the use of the McLendon standard in determining whether a change in custody was warranted. Under Ex parte McLendon, supra, as the parent seeking to modify a previous custody award, the father was required to demonstrate that a material change in circumstances had occurred such that a change of custody would materially promote the child's best interests and that the benefits of the change would offset the disruptive effect of the change in custody. McLendon, 455 So. 2d at 866; Ex parte Cleghorn, 993 So. 2d 462, 468-69 (Ala. 2008).

In awarding the parties what appears to be joint physical custody of the child in this case, the language used in the March 26, 2018, order and the July 2, 2018, judgment indicates that the trial court was under the mistaken belief that the mother and the father already had joint physical custody.

Based on the entire record before us, we cannot discern whether the trial court found that the father had met the McLendon standard and intended to modify custody, that is, to remove sole physical custody from the mother. Because we cannot determine what the trial court intended, we are unable to perform a meaningful review of the custody award. Therefore, we reverse the judgment of the trial court and remand the cause for the trial court to ensure that it recognized that, at the time the father filed his modification petition, the mother had sole physical custody, or to explain the basis for its belief that the parties had joint physical custody, and to enter a judgment accordingly.

REVERSED AND REMANDED.

Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., concurs in part and concurs in the result, with writing.

EDWARDS, Judge, concurring in part and concurring in the result.

I concur in the main opinion regarding the rejection of the challenge by Deborah M. Ramer to the September 29 2017, pendente lite custody order and the necessity to reverse the trial court's judgment insofar as it addresses the custody of the parties' child and to remand the case to the trial court for it to apply the standard discussed in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). As to the remaining issues discussed in the main opinion, I concur in the result.