REL: July 9, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2190756

J.A.S.

v.

S.W.S.

Appeal from Jefferson Circuit Court
(DR-18-900971)

On Applications for Rehearing

MOORE, Judge.

This court's opinion of April 30, 2021, is withdrawn, and the following is substituted therefor.

J.A.S. ("the husband") appeals from a judgment entered by the Jefferson Circuit Court ("the trial court") divorcing him from S.W.S. ("the wife"). We affirm the judgment.

Procedural History

On July 16, 2018, the wife filed a complaint seeking a divorce from the husband. On July 24, 2018, the husband filed an answer and counterclaimed for a divorce, alleging that the parties had entered into a prenuptial agreement, a copy of which was later attached to his answer by amendment.

On August 2, 2019, the wife filed a motion to amend her complaint to seek permission to relocate to Chicago, Illinois, with the parties' children, D.S., whose date of birth is October 22, 2012, and L.S., whose date of birth is February 14, 2017. The husband objected to the wife's request to relocate on August 6, 2019. The trial court initially granted the husband's objection, but, subsequently, on August 26, 2019, it permitted the wife to amend her complaint to request relocation.

The trial court scheduled a trial of the case for September 5, 2019, but granted the husband a continuance; the trial was subsequently

rescheduled for November 6 and 7, 2019. On the first day of the trial, the husband moved for another continuance; that motion was denied.

After the trial, the trial court entered, on February 27, 2020, a judgment that, among other things, divorced the parties. The husband filed a timely postjudgment motion, pursuant to Rule 59, Ala. R. Civ. P., and he subsequently filed two supplements to that motion. On June 7, 2020, the trial court denied the husband's motion but amended the divorce judgment, on its own motion, with regard to custody, the relocation of the parties' children, and attorney's fees.[1] The trial court stated that it would "enter a separate Order entitled 'Amended Final Judgment of Divorce' reflecting those amendments." On June 10, 2020, the trial court entered

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[1] "Although a trial court generally loses jurisdiction to amend its judgment 30 days after the entry of judgment (see Ex parte Owen, 420 So. 2d 80, 81 (Ala. 1982)), a trial court retains the power to correct sua sponte any error in its judgment that comes to its attention during the pendency of a party's Rule 59(e)[, Ala. R. Civ. P.,] motion to alter, amend, or vacate the judgment, regardless of whether the error was alleged or not alleged in the motion."

Henderson v. Koveleski, 717 So. 2d 803, 806 (Ala. Civ. App. 1998).

the amended divorce judgment incorporating the June 7, 2020, amendments.[2] The divorce judgment, as finally amended, divorced the parties, awarded the wife sole legal and physical custody of the children, awarded the husband specified visitation, granted the wife's request to relocate the children to Chicago, ordered the husband to pay child support, provided that the prenuptial agreement was "acknowledged, ratified and confirmed and shall control all claims of either party regarding division of assets and spousal support," and ordered the husband to pay $50,000 in attorney's fees for the wife. The husband filed his notice of appeal to this court on July 17, 2020.

Discussion

I.

On appeal, the husband first argues that the trial court erred in granting the wife permission to relocate with the children. He specifically

[2]That same day, the trial court, on its own motion, set aside the June 10, 2020, amended divorce judgment and entered a second amended divorce judgment. The second amended divorce judgment incorporates the changes set forth in the June 7, 2020, order relating to custody, the relocation of the parties' children, and attorney's fees, and corrects certain clerical errors. We treat the second amended divorce judgment as having been entered pursuant to Rule 60(a), Ala. R. Civ. P.

argues that the Alabama Parent-Child Relationship Protection Act ("the Act"), Ala. Code 1975, § 30-3-160 et seq., applies in this case and that the wife failed to satisfy her burden of proof under the Act. The trial court stated in the divorce judgment, as finally amended, that it had applied the Act in determining whether to grant the wife permission to relocate with the children. The trial court approved the relocation for the following reasons:

> "Considering the [husband's] living and parenting styles during the marriage, the Court finds a relocation of the children's principal residence out of state will not interfere with and will not disrupt the [husband's] relationships with the children. The Court finds and the evidence supports that the children will benefit from a relocation to Chicago, Illinois. Further the Court finds that the husband has ample means to sustain contact and exercise visitation with the children as ordered herein. The Court finds the [wife] met her burden of proof to overcome the rebuttable presumption that a change of principal residence of [the children] is not in the best interest of the [children] as set forth in Section 30-3-169.4 of the Code of Alabama, 1975. Moreover, pursuant to Section 30-3-169.7 of the Alabama Code, 1975, having considered the factors set forth in Section 30-3-169.2 and -169.3 of the Code of Alabama 1975, the evidence supports and the Court finds that it is in the best interests of the children to relocate with the [wife] to Chicago, Illinois."

The Act clearly applies in cases in which a trial court initially determines the custody of a child in the context of a planned relocation, see Lackey v. Lackey, 18 So. 3d 393, 399 (Ala. Civ. App. 2009); therefore, we consider only the question whether the trial court's judgment is supported by the evidence.[3]

The Act sets forth "a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child." § 30-3-169.4, Ala. Code 1975. Section 30-3-169.7, Ala. Code 1975, provides:

> "If the issue of change of principal residence of a child is presented in a petition for divorce or dissolution of a marriage or other petition to determine custody of or visitation with a child, the court shall consider, among other evidence, the factors set forth in [Ala. Code 1975, §§] 30-3-169.2 and 30-3-169.3[,] in making its initial determination."

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[3]In cases like this, in which a trial court initially determines custody, the presumption set forth in Ala. Code 1975, § 30-3-169.4 -- that relocation is not in the best interests of the child -- does not apply. See Lackey, supra. The trial court in this case erroneously applied the presumption, but neither party has appealed the final judgment for that reason, so we review the case as if the trial court correctly applied the presumption. See Alabama Forest Prods. Indus. Workmen's Comp. Self-Insurers' Fund v. Harris, 194 So. 3d 921, 925 (Ala. Civ. App. 2014) (holding that an appellate court reviews a case based on the legal theories litigated below, even if they are incorrect in principle).

The husband does not discuss the factors set forth in § 30-3-169.2, Ala. Code 1975; rather, he asserts that the factors in § 30-3-169.3(a), Ala. Code 1975, weigh in his favor. Those factors are:

> "(1) The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate with the child and with the non-relocating person, siblings, and other significant persons or institutions in the child's life.
>
> "(2) The age, developmental stage, needs of the child, and the likely impact the change of principal residence of a child will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
>
> "(3) The increase in travel time for the child created by the change in principal residence of the child or a person entitled to custody of or visitation with the child.
>
> "(4) The availability and cost of alternate means of communication between the child and the non-relocating party.
>
> "(5) The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
>
> "(6) The preference of the child, taking into consideration the age and maturity of the child.

"(7) The degree to which a change or proposed change of the principal residence of the child will result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child.

"(8) The extent to which custody and visitation rights have been allowed and exercised.

"(9) Whether there is an established pattern of conduct of the person seeking to change the principal residence of a child, either to promote or thwart the relationship of the child and the non-relocating person.

"(10) Whether the person seeking to change the principal residence of a child, once out of the jurisdiction, is likely to comply with any new visitation arrangement and the disposition of that person to foster a joint parenting arrangement with the non-relocating party.

"(11) Whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the change of principal residence of the child and the child, including, but not limited to, financial or emotional benefit or educational opportunities.

"(12) Whether or not a support system is available in the area of the proposed new residence of the child, especially in the event of an emergency or disability to the person having custody of the child.

"(13) Whether or not the proposed new residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, which does not have an adequately functioning legal system,

> or which otherwise presents a substantial risk of specific and serious harm to the child.
>
> "(14) The stability of the family unit of the persons entitled to custody of and visitation with a child.
>
> "(15) The reasons of each person for seeking or opposing a change of principal residence of a child.
>
> "(16) Evidence relating to a history of domestic violence or child abuse.
>
> "(17) Any other factor that in the opinion of the court is material to the general issue or otherwise provided by law."

In the present case, the wife testified that she had been the primary caregiver for the children. She also testified that the husband's income is approximately $750,000 per year from investments and that the husband does not have to work to earn an income. It was undisputed that the husband travels extensively and often. In fact, the husband testified that he knows the chief executive officer of every airline. The wife testified that, before D.S., the older child, was born, the husband had traveled approximately 70% of the time. She testified that the husband's travel pattern had been similar even after the birth of D.S. and that the husband had sometimes been gone from the marital residence for weeks and up to

a month at a time. She testified that the husband had provided very little of the day-to-day care for D.S. The parties separated approximately six months after the birth of L.S.

According to the wife, during the pendency of the divorce proceedings, the husband had disrupted the children by going to their respective schools excessively. The wife testified that the husband had informed employees at D.S.'s school that the wife did not live in the school district of the school that D.S. was attending. The wife testified that she could not co-parent with the husband. She testified that D.S. has been diagnosed with autism spectrum disorder and needs structure that the husband does not provide.

The wife, who is an orthodontist, testified that the Birmingham orthodontic market is saturated and that there is little opportunity for work, other than her running her own practice. She testified that there are opportunities for her to work in a salaried position in Chicago, which, she said, would allow her to spend more time with the children. The wife testified that she has no family support in Birmingham but that she has a brother who lives in Chicago and other family members who live close

to Chicago. She testified that she had looked into the schools in the Chicago area. She testified that her cousin is a special-education teacher in the Chicago area and that her cousin had given her advice regarding schools the children should attend. According to the wife, the school in the Chicago area where she planned to move would offer the same or better resources for D.S. as the school that D.S. was attending in Birmingham offers him; she also testified that there would be better opportunities for both children in the Chicago area.

Based on the foregoing evidence, we conclude that the trial court's findings -- i.e., that "[c]onsidering the [husband's] living and parenting styles during the marriage, the ... relocation of the children's principal residence out of state will not interfere with and will not disrupt the [husband's] relationships with the children," "that the children will benefit from a relocation to Chicago, Illinois," and "that the husband has ample means to sustain contact and exercise visitation with the children" -- are supported by the evidence. Although the husband disputed the wife's testimony on several points, the trial court was in the best position to determine the credibility of the parties. Applying the relevant factors, the

trial court's determination that the wife had met her burden of proof on this issue is supported by the evidence and, thus, is affirmed.

II.

The husband also argues that the trial court's award of attorney's fees to the wife is barred by the parties' prenuptial agreement, which, he says, was not proven to be unenforceable. The trial court found:

> "The Court finds that the [husband's] actions during the pendency of this cause directly impacted the [wife's] accrued attorney fees and that it would be unjust and inequitable to enforce the prenuptial agreement provision barring attorney fees in the event of divorce. The [wife's] income is not sufficient to cover her attorney fees. The [husband] shall pay to the [wife] for the services of her attorney relating solely to the issues of child custody and visitation, the sum of Fifty Thousand and 00/100 Dollars ($50,000.00) ...."

(Emphasis added.) At the trial, the wife's attorney testified, in pertinent part, as follows:

> "The predominant amount of work being performed for [the wife] was to react, defend against, reinstitute all the actions taken by [the husband] to undo all the things that we were attempting to do and to get them before the Court.... We've been in court on at least nine different occasions, and [the husband] has been through numerous changes of lawyers, which requires re-upping, redoing, restarting things ....We were in court on one occasion because [the husband] disobeyed a court order and did not return [the] children to [the wife] at

> the time that he was supposed to and, in fact, tried to claim that a police officer gave him authority to disobey a court order."

In Hogan v. Hogan, 199 So. 3d 50, 52 (Ala. Civ. App. 2015), this court stated that,

> "[i]n Ex parte Walters, 580 So. 2d 1352, 1355 (Ala. 1991), our supreme court held that when 'a provision of a valid ante-nuptial agreement specifically states that attorney fees will be waived in the event of a divorce, a trial court cannot award attorney fees unless it would be inequitable and unjust to enforce that provision.' "

Moreover, courts in other jurisdictions have specifically refused to enforce prenuptial agreements on public-policy grounds to the extent that the agreements in those cases barred the award of attorney's fees incurred as a result of litigation on issues of child custody and support. See, e.g., In re Marriage of Burke, 96 Wash. App. 474, 480, 980 P.2d 265, 268 (1999) ("The state's interest in the welfare of children requires that the court have the discretion to make an award of attorney fees and costs so that a parent is not deprived of his or her day in court by reason of financial disadvantage."); and In re Marriage of Erpelding, 917 N.W.2d 235, 247 (Iowa 2018) (holding that "provisions in a premarital agreement that

contain fee-shifting bars as to the litigation of child custody are void as a matter of public policy"). We find the reasoning in those cases to be persuasive.

In the present case, because the trial court specifically held that preventing the award of attorney's fees would be unjust and inequitable and because the trial court expressly limited the award of attorney's fees to those fees incurred that related to the issues of child custody and visitation, we conclude that the trial court did not err in awarding the wife attorney's fees. See Hogan, 199 So. 3d at 52.

III.

The husband also argues that the trial court erred in awarding the wife sole legal and physical custody of the children.

> "When the trial court makes an initial custody determination, neither party is entitled to a presumption in his or her favor, and the 'best interest of the child' standard will generally apply. Nye v. Nye, 785 So. 2d 1147 (Ala. Civ. App. 2000); see also Ex parte Byars, 794 So. 2d 345 (Ala. 2001). In making an initial award of custody based on the best interests of the children, a trial court may consider factors such as the '"characteristics of those seeking custody, including age, character, stability, mental and physical health ... [and] the interpersonal relationship between each child and each parent."' Graham v. Graham, 640 So. 2d 963, 964 (Ala.

> Civ. App. 1994) (quoting Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981)). ... Other factors the trial court may consider in making a custody determination include 'the sex and age of the [children], as well as each parent's ability to provide for the [children's] educational, emotional, material, moral, and social needs.' Tims v. Tims, 519 So. 2d 558, 559 (Ala. Civ. App. 1987). The overall focus of the trial court's decision is the best interests and welfare of the children."

Steed v. Steed, 877 So. 2d 602, 604 (Ala. Civ. App. 2003). In the present case, as discussed previously, the evidence, when viewed in the light most favorable to the wife, indicates that the husband had not been a consistent presence in the children's lives, often traveling 70% of the time and leaving the wife to care for the children. There was also evidence indicating that the husband did not provide the consistency that D.S. needs because of his special needs and that the parties could not co-parent the children. Given that evidence, we conclude that the trial court did not err in awarding the wife sole legal and physical custody of the children.

IV.

Finally, the husband argues that the trial court erred in denying his request for a continuance made on the day of the trial.

> "A trial judge has broad discretion to grant or deny a motion for continuance, Wood v. Benedictine Society of

> Alabama, Inc., 530 So. 2d 801, 805 (Ala. 1988), and it is firmly established that continuances are not favored, and therefore the trial court's denial of a motion for continuance will not be reversed unless an abuse of discretion is shown."

Griffin v. American Bank, 628 So. 2d 540, 542 (Ala. 1993).

In this case, the trial court entered an order on August 26, 2019, granting a motion to withdraw filed by the attorney who was representing the husband at that time. The record indicates that the husband had had two other attorneys withdraw before that date. In the order allowing the husband's third attorney to withdraw, the trial court also allowed the wife to amend her complaint to request permission to relocate with the children to Chicago and granted the husband's request for a continuance of the trial that was scheduled for September 5, 2019. The case was subsequently rescheduled for a trial to take place on November 6 and 7, 2019, and, on the first day of trial, the husband moved for a continuance. Considering that the husband had been granted a continuance of the first trial setting and had had over two months to hire a new attorney and to prepare for the November 6 and 7, 2019, trial and that the case had been pending for over one year, we conclude that the

trial court did not exceed its discretion in denying the motion for continuance filed by the husband on the first day of the trial.

Conclusion

Based on the foregoing, we affirm the trial court's judgment. The wife has requested an award of attorney's fees on appeal; however, she fails to request a specific amount or to set forth evidence in support of her request. Therefore, we deny that request.

J.A.S.'S APPLICATION GRANTED; S.W.S.'S APPLICATION OVERRULED; OPINION OF APRIL 30, 2021, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

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

Fridy, J., recuses himself.