Rel: November 12, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200422

Ja.T. and Jo.T.

v.

N.T.

Appeal from Autauga Juvenile Court
(JU-13-169.07)

THOMPSON, Presiding Judge.

In a December 17, 2013, judgment entered in case number JU-13-169.01, the Autauga Juvenile Court ("the juvenile court") found J.A.T.

("the child") dependent and awarded the child's paternal grandparents, Ja.T. and Jo.T. ("the paternal grandparents"), "primary physical custody" of the child.[1] In that judgment, the juvenile court specified that the paternal grandparents and the child's mother, N.T. ("the mother"), share joint legal custody of the child, awarded the mother a schedule of visitation, and restricted the mother from allowing S.M., her boyfriend at that time, from being present at her visitations with the child. The juvenile court amended that judgment on December 30, 2013, to place further restrictions as to the locations of the mother's visitations and to reiterate that the child was not to be in S.M.'s presence.

Over the next few years, four additional judgments, each in a new action involving the custody of the child, were entered. Those judgments left physical custody of the child with the paternal grandparents, and several reiterated the requirement that the mother not allow S.M. to have any contact with the child. In a July 23, 2018, judgment entered in case number JU-13-169.05, the juvenile court determined the mother's then-

[1]Such an award is properly termed an award of "sole physical custody" of a child. § 30-3-151(5), Ala. Code 1975.

existing child-support arrearage to be $10,813.75, and it ordered her to pay $50 monthly toward the elimination of that arrearage.[2]

On June 26, 2020, the mother filed in the juvenile court a petition seeking to modify custody of the child; that action was designated as case number JU-13-169.07. The paternal grandparents answered and counterclaimed, seeking to have the mother held in contempt for her continued failure to pay child support and for failing to pay her portion of the child's medical expenses.

The juvenile court entered an October 30, 2020, order stating that the matter had been called for a hearing on that date but that the hearing had been continued after it was determined that the child's father, Jo.T. II ("the father"), had not yet been served. The juvenile court noted, however, that it had conducted an in camera interview with the child on that date. Before the final hearing recommenced, the paternal

[2]In a December 19, 2019, judgment entered in case number JU-13-169.06, the juvenile court denied a contempt claim and slightly altered the mother's visitation arrangement.

grandparents filed a motion seeking to have the mother held in contempt for failing to timely return the child from a visitation.

After conducting the remainder of the ore tenus hearing in January 2021, the juvenile court entered a judgment on February 1, 2021, in which it found that the mother had failed to meet the required standard of proof for a custody modification. However, the juvenile court also found that the mother was "due" additional visitation and awarded the mother alternating weeks of "visitation" with the child, in addition to certain holiday visitation. In other words, the juvenile court ordered that the child spend one week with the mother and the next week with the paternal grandparents.

Also in its February 1, 2021, judgment, the juvenile court determined, in pertinent part, that the mother was "not in willful contempt" for her failure to pay certain of the child's medical expenses, but it ordered her to pay $560.48 for her share of the those expenses. In addition, the juvenile court stated that, "[b]ased on the income information submitted to the court, the mother's child-support payment would be $297; however, with the modified visitation schedule, the mother

is ordered to pay $197, plus $100 towards arrears." The juvenile court's judgment contains other provisions that are not pertinent to the issues on appeal, and it specifies that the judgments entered in the previous actions remain in effect and that any relief not granted in the February 1, 2021, judgment was denied.

The paternal grandparents filed a postjudgment motion that was denied by operation of law. See Rule 59.1, Ala. R. Civ. P.; and Rule 1(B), Ala. R. Juv. P. The paternal grandparents timely appealed. On September 10, 2021, this court issued an order reinvesting the juvenile court with jurisdiction to clarify its February 1, 2021, judgment and stating, in part:

> "The February 1, 2021, judgment requires the mother to pay $100 per month 'towards arrears.' It is not clear to this court whether that $100 is to be credited against the child-support arrearage established in the July 23, 2018, judgment entered in case number JU-13-169.05, or whether the trial court intended to grant the counterclaim in case number JU-13-169.07 seeking a redetermination of the child-support arrearage."

On September 17, 2021, the juvenile court entered an amended judgment in which it specified that that part of its February 1, 2021, judgment requiring the mother to pay $100 per month toward a child-

support arrearage directed the mother to pay that amount toward the child-support-arrearage amount established in the July 23, 2018, judgment entered in case number JU-13-169.05. Pursuant to Rule 28A, Ala. R. App. P., this court established a new briefing schedule, and the paternal grandparents submitted a supplemental brief to this court. The mother did not file a supplemental brief. We also note that the mother did not file a conditional cross-appeal. See Huntsville City Bd. of Educ. v. Sharp, 137 So. 3d 917, 923 (Ala. Civ. App. 2013); and Huntsville City Bd. of Educ. v. Frasier, 122 So. 3d 193, 202 n.17 (Ala. Civ. App. 2013).

The paternal grandparents argue that the juvenile court erred in entering what they characterize as a "de facto change in custody." They contend that the award of "visitation" to the mother set forth in the February 1, 2021, judgment was equivalent to a modification of custody to a joint-physical-custody arrangement. Section 30-3-151(5), Ala. Code 1975, explains that an award of "sole physical custody," which the juvenile court referred to in one judgment as "primary physical custody," see note 1, supra, is when "[o]ne parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court."

"Joint physical custody," however, is an arrangement in which "[p]hysical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time." § 30-3-151(3). The paternal grandparents contend that, by fashioning the "visitation" award to change the mother's visitation from alternating weekend visitation to having equal time with the child, the juvenile court awarded the mother joint physical custody.

In support of their argument, the paternal grandparents cite Hays v. Elmore, 585 So. 2d 40 (Ala. Civ. App. 1990). In that case, Mavis Hays and Michael Elmore each sought to modify an earlier custody judgment that had awarded Hays "physical control [and custody of the parties' children] subject to [Elmore's] right to reasonable visitation." 585 So. 2d at 41. After the trial court in that case received ore tenus evidence, it denied the parties' respective motions to modify custody of the children, but it altered the visitation award to specify that Hays and Elmore alternate equal periods of physical custody of the children every two weeks. This court reversed the judgment in that case, noting that Hays

had been awarded "primary physical custody," see note 1, supra, of the children and that the standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), governed any modification of that custody award. 585 So. 2d at 42. This court then explained:

> "Here, the effect of the trial court's purported visitation schedule is to change the original custody determination. Pursuant to the present [judgment], the parties will now share the custody of the children on an alternating two-week basis. Without [Elmore's] meeting the stringent standard set out in McLendon, the trial court consequently erred in the purported visitation determination. As noted above, visitation disputes alone are not enough to warrant a change in custody. Ward [v. Rodenbaugh, 509 So. 2d 910 (Ala. Civ. App. 1987)]."

585 So. 2d at 42-43.

However, in another case, Darby v. Sherrer, 689 So. 2d 875 (Ala. Civ. App. 1996), this court found that an award of visitation that specified that the parties' child spend equal time with each parent was not a modification of custody. In that case, the judgment that divorced Susan Darby and William Sherrer incorporated an agreement of the parties that specified that while " 'actual physical custody' " was awarded to Darby,

> " 'subject to extremely broad and liberal visitation privileges in favor of [Sherrer]. That is to say, [Sherrer] and [Darby] agree and covenant that [Sherrer] shall have no less than "equal

> time" with [the minor child]. No visitation schedule will be expressed in writing; it being the intent and desire of the parties to work together on a daily basis, or as often as necessary, in deciding which party will assume the various responsibilities in [the minor child's] upbringing. All holiday periods and school vacations will equally be shared with [the minor child]....' "

689 So. 2d at 876 (quoting the divorce judgment) (emphasis omitted). With regard to the parties' agreement, this court explained that "[t]he parties agreed that each parent would be entitled to spend half of each year with the child. The trial court's divorce judgment formally incorporated that agreement." Id. However, the parties to that case could not agree regarding the extent and timing of Sherrer's visitation, and Sherrer filed a modification petition; Darby counterclaimed, seeking a reduction in Sherrer's visitation award. The trial court in that case entered a judgment in which it found that Sherrer had not met the McLendon standard for modifying custody, and it ordered that Sherrer exercise his visitation with the child during the second semester of each school year and set out his summer and holiday visitation schedule. Darby v. Sherrer, supra.

Darby appealed, arguing that the trial court's award of visitation in that case constituted a modification of custody similar to that in Hays v.

Elmore, supra. This court distinguished the facts of that case from those of Hays v. Elmore, supra, by pointing out that Darby and Sherrer had agreed to a visitation schedule that awarded Sherrer broad visitation with the child that amounted to " 'no less than "equal time" ' " with the child. 689 So. 2d at 878. That agreement was incorporated into the divorce judgment. With regard to Darby's appeal of the judgment denying his modification petition but setting out his visitation schedule, this court explained:

> "The provisions of the [divorce] judgment regarding visitation were not modified; i.e., the trial court merely defined specific terms of visitation when the parties were unable to agree and sought the trial court's assistance. In its order, the trial court simply set out a less disruptive visitation schedule that harmonized with the stated goal of allowing each parent 'equal time' with the child each year.
>
> "The trial court merely denied the father's petition for a custody modification and specified the terms of visitation in accordance with the parties' intentions and agreement."

689 So. 2d at 878 (emphasis omitted). Accordingly, this court affirmed the trial court's judgment in that case.

In this case, as in Hays v. Elmore, supra, and in Darby v. Sherrer, supra, the juvenile court specifically found that the mother had failed to

meet the McLendon standard for modifying custody. The mother did not challenge that finding by filing a conditional cross-appeal. See Huntsville City Bd. of Educ. v. Frasier, 122 So. 3d at 202 n.17. Also, as in the two cases discussed above, the juvenile court awarded the mother a "visitation" schedule that afforded her equal time with the child.

We conclude, however, that the facts of this case are more similar to those of Hays v. Elmore, supra, than those of Darby v. Sherrer, supra. Unlike in Darby v. Sherrer, supra, the previous custody judgments in this matter did not award the mother a liberal schedule of visitation designed to ensure that she had equal, or almost equal, time with the child. Rather, the mother in this case had received a standard schedule of alternating weekend visitation. By drastically increasing the mother's "visitation" with the child, the juvenile court was not, as was the court in Darby v. Sherrer, supra, attempting to clarify the original intent of the parties and the court in fashioning the visitation award.

Rather, in awarding the mother alternating weekly periods with the child, the juvenile court's "visitation" award effected an award of joint physical custody of the child to the mother. See § 30-3-151(3); Hays v.

Elmore, supra. That award was an improper modification of the earlier custody judgments in favor of the paternal grandparents. Hays v. Elmore, supra. Accordingly, we reverse the "visitation" portion of the February 1, 2021, judgment.

The paternal grandparents also argue on appeal that the juvenile court erred in denying their request for a redetermination of the mother's child-support arrearage. In her testimony before the juvenile court at the January 2021 portion of the hearing, the mother admitted that, since the entry of the July 23, 2018, judgment in case number JU-13-169.05, she had not consistently paid the child-support amounts required under that judgment. On questioning from her own attorney, the mother agreed that her accumulated child-support arrearage at that time was $14,272.75. The paternal grandparents submitted evidence demonstrating that the mother's child-support arrearage at the time of the hearing totaled $15,463.75, and that her arrearage for failing to pay $50 per month toward the child-support arrearage as determined in the July 23, 2018, judgment was $2,494.98, for a total arrearage of $17,958.73.

In its February 1, 2021, judgment, as clarified by its September 17, 2021, amended judgment, the juvenile court specified that the mother was to pay a monthly amount toward the reduction of the child-support arrearage as determined in the July 23, 2018, judgment. The juvenile court denied all relief not granted in its judgment, i.e., it denied the paternal grandparents' claim for a redetermination of the mother's arrearage based on her continued failure, since the entry of the July 23, 2018, judgment, to pay child support or the monthly amount she had been directed to pay toward the reduction of the original child-support arrearage.

> "It is well settled that child support payments become final judgments on the day they are due and may be collected as any other judgment is collected; and that payments that mature or become due before the filing of a petition to modify are not modifiable. See State ex rel. Howard v. Howard, 671 So. 2d 83 (Ala. Civ. App. 1995); Cunningham v. Cunningham, 641 So. 2d 807 (Ala. Civ. App. 1994); Glenn v. Glenn, 626 So. 2d 638 (Ala. Civ. App. 1993); Frasemer v. Frasemer, 578 So. 2d 1346 (Ala. Civ. App. 1991); Barnes v. State ex rel. State of Virginia, 558 So. 2d 948 (Ala. Civ. App. 1990); Endress v. Jones, 534 So. 2d 307 (Ala. Civ. App. 1988). Furthermore, it is well settled that a trial court has no power to forgive an accrued arrearage. See, State ex rel. McDaniel v. Miller, 659 So. 2d 640 (Ala. Civ. App. 1995); Hardy v. Hardy, 600 So. 2d 1013 (Ala. Civ. App. 1992), cert. denied, Ex parte Hardy, 600

> So. 2d 1016 (Ala. 1992). Although the trial court has the discretion to give the obligated parent credit for money and gifts given to the child or for amounts expended while the child lived with the obligated parent or a third party, it may not discharge child support payments once they have matured and come due under the divorce judgment. See, Frasemer v. Frasemer, supra."

Ex parte State ex rel. Lamon, 702 So. 2d 449, 450-51 (Ala. 1997).

The undisputed evidence demonstrates that, even after the entry of the July 23, 2018, judgment, the mother failed to pay at least some portion of her child-support obligation and the monthly amount she had been directed to pay toward the earlier determined child-support arrearage. Thus, additional arrearages had accumulated since the entry of the July 23, 2018, judgment, and the juvenile court erred in denying the paternal grandparents' claim seeking a redetermination of the mother's child-support arrearage. Swindle v. Swindle, 55 So. 3d 1234, 1244 (Ala. Civ. App. 2010). On remand, the juvenile court is directed to determine the amount of the mother's total child-support arrearage and to enter a judgment in favor of the paternal grandparents in that amount.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, Edwards, Hanson, and Fridy, JJ., concur.