REL: December 3, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200716

K.G.

v.

M.E.

Appeal from Jefferson Juvenile Court
(CS-19-73)

FRIDY, Judge.

K.G. ("the mother") appeals from a judgment of the Jefferson Juvenile Court ("the juvenile court") awarding joint legal custody of

O.C.G. ("the child"), whom the mother had with M.E. ("the father"), to the mother and the father and ordering that the child's surname be changed from the mother's to the father's. For the reasons set forth herein, we affirm the juvenile court's judgment with respect to the custody award but reverse it to the extent that it ordered the change of the child's surname.

Background

The mother and the father have never been married. They had a brief relationship in high school, and the mother became pregnant. The child was born in February 2019. About a week later, the father's parents, on the father's behalf, filed a complaint in the Jefferson Circuit Court ("the circuit court") against the mother's parents, on the mother's behalf, alleging that the father and the mother were minors, that the mother intended to place the child for adoption, and that the child was in the custody of an adoption agency. They sought an order enjoining the adoption, ordering DNA testing to establish the father's paternity of the child, and vesting them with custody of the child. The father's parents, also on the father's behalf, filed a motion for a restraining order to prevent any adoption from moving forward. On February 28, 2019, the circuit

court denied the motion for a restraining order and transferred the case to the juvenile court.[1]

On May 8, 2019, the father's parents, on the father's behalf, filed an amended complaint in which they alleged that the child was, at that time, in the mother's custody.[2] They sought an immediate award of joint custody of the child and the establishment of custodial time and child support. On June 14, 2019, the father's parents, on behalf of the father, filed a motion for immediate DNA testing. The juvenile court entered an order granting that motion. The mother's parents filed a motion to vacate that order, asserting that the mother had not yet been served with process in the action and arguing that they were not proper parties to the action.

After a hearing on August 12, 2019, the juvenile court entered an order in which it found that the mother had been served with process and

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[1]The juvenile court has "exclusive original subject-matter jurisdiction to make a paternity adjudication with respect to a child born out of wedlock, after which -- and as a consequence of which -- the juvenile court has subject-matter jurisdiction to decide related issues with respect to the care, custody, and control of the child who is already before the court." L.L.M. v. J.M.T., 964 So. 2d 66, 74 (Ala. Civ. App. 2007).

[2]When the father's parents filed the amended complaint, the mother was no longer seeking to have the child adopted.

set a hearing for August 16, 2019. The juvenile court ordered the mother to bring the child to the hearing. On August 14, 2019, the mother filed an answer in which, among other things, she asserted that the father's parents were not proper parties to the action. She also requested that the juvenile court order DNA testing of the child.

At the hearing on August 16, 2019, the juvenile court dismissed the mother's parents and the father's parents from the action in response to an oral motion by the father's parents. The father remained in the action as the plaintiff and the mother remained as the defendant. The juvenile court, noting that the father had already submitted to DNA testing, ordered the mother to produce the child for DNA testing that day.

On August 19, 2019, the father filed a second amended complaint in which he requested that the child's surname be changed from the mother's to his. On September 30, 2019, the results of a DNA test that confirmed the father was the child's biological father were filed with the juvenile court. Based on those results, the father filed a motion asking the juvenile court to award him all the relief he had thus far requested, including an award of custodial time with the child and an order directing that the

child's surname be changed from the mother's to his. The mother filed an objection to establishing custodial time for the father and to changing the child's surname.

The COVID-19 pandemic caused a delay in the litigation. On January 11, 2021, the juvenile court entered an order in which it adjudged the father as the legal father of the child, ordered that the father's name be added to the child's birth certificate, ordered the father to pay the mother monthly child support, established visitation for the father, and established the amount of the child-support arrearage that the father owed the mother. The juvenile court set the issues of custody and whether to change the child's surname for a trial to be held on April 28, 2021.

The father was the only witness to testify at the trial. The father testified that he was a student at a university in Vermont and that he resided with his parents, who, according to the complaint, lived in Jefferson County. He testified that he did not know at the time he began college in August 2018 that the mother was pregnant. At one point, he testified that he did not find out about her pregnancy until about twelve hours before the child was born, but he later said that he had

communicated with the mother about her pregnancy in the fall of 2018 and had offered to pay for a doctor's appointment for her. He said that, when he found out after the child's birth that the mother was going to put the child up for adoption, he had objected to the adoption.

Regarding his request that the child's surname be changed to his, the father testified:

> "The reason why I wanted his last name to be changed to [the father's surname] is because I'm his father. I'm going to be his father from the beginning. When they put him up for adoption, they didn't want him to carry their name. I've wanted him from the beginning. It is important to me for him to have my last name because I want to be in his life. I want to help him to the end."

After testimony was complete, the child's guardian ad litem recommended that the juvenile court order the name change, stating: "I would recommend a name change because of the age of the child. He is not -- he is not at an age where it would have any negative impact to have his father's name at this time." The guardian ad litem also recommended that the parties have joint legal custody of the child, with the mother maintaining sole physical custody of the child.

On April 28, 2021, the same day as the trial, the juvenile court entered a judgment awarding the mother and the father joint legal custody and the mother sole physical custody of the child, subject to the father's visitation. It also found that it was in the child's best interest to change the child's surname from the mother's to the father's.

On May 12, 2021, the mother filed a motion to alter, amend, or vacate the judgment. As to the child's name change, she argued that the father had failed to present evidence demonstrating that the name change will materially promote the child's best interest. As to the award of joint legal custody, she asserted that the father had made social-media posts after the trial that, she said, indicated that he had testified falsely at the trial and demonstrated that he was not sufficiently mature to exercise joint legal custody. She attached to her motion her affidavit in which she asserted that, although the father had testified at trial that he was a student and was unemployed, he had posted on social media a photo of his application to purchase a vehicle in which he had indicated that he was, in fact, employed. She also asserted that he had made an inappropriate social-media post regarding the trial and had posted a video on social

media in which he was teaching the child to say an inappropriate word. She attached to her affidavit what she said were screenshots of those social-media posts.

The mother's postjudgment motion was denied by operation of law on May 26, 2021. See Rule 1(B), Ala. R. Juv. P. The mother filed a timely notice of appeal on June 4, 2021.[3]

Discussion

The mother contends on appeal that the juvenile court erred in ordering that the child's surname be changed from her surname to the father's. Specifically, she asserts that the father failed to present any evidence indicating that the name change would serve the child's best interest and, that as a result, the statutory prerequisite for granting the name change was not met. We agree.

[3]On May 27, 2021, the juvenile court purported to set a hearing on the mother's postjudgment motion for June 10, 2021. That order was a nullity because, by May 27, the juvenile court already had lost jurisdiction over the case because of the denial of the postjudgment motion by operation of law the previous day.

Section 26-17-636(e), Ala. Code 1975, which is part of the Alabama Uniform Parentage Act, §§ 26-17-101 to -905, Ala. Code 1975, provides statutory authority for changing a child's name in conjunction with the adjudication of parentage. That subsection reads: "On request of a party and for good cause shown, the court may order that the name of the child be changed."

This court discussed the showing necessary to support a finding of good cause for ordering a name change under § 26-17-636(e) in J.M.V. v. J.K.H., 149 So. 3d 1100 (Ala. Civ. App. 2014). In that case, we held — based on the language of the § 26-17-636(e) and the treatment of the issue by courts in other states — that "a parent petitioning to change the name of the child must present evidence showing that the change would benefit the child in some positive manner." J.M.V., 149 So. 3d at 1105. We concluded that no such showing had been made and reversed the juvenile court's judgment ordering a name change. Id. at 1106.

Here, the juvenile court found that it was in the child's best interest to change his surname to that of his father, and we are bound by that finding if it is supported by substantial evidence. J.M.V., 149 So. 3d at

1105. As in J.M.V., however, we conclude that such supporting evidence is lacking in this case.

The only reasons the father gave for seeking to change the child's surname were that he was the child's father and that he wanted to be in the child's life. The father's testimony on this issue failed to show any promotion of the child's interest, as opposed to the father's own interests, in changing the child's name. The guardian ad litem recommended that the child's name be changed, but the only reason given for that recommendation was that the child had not yet reached such an age that the name change would negatively impact him. In J.M.V., we rejected that basis as support for a name change, writing that "[a] court may not change the name of a child on the ground that the change would not cause the child any particular detriment" and concluding that such a standard "would essentially place the burden on the nonmoving parent to prove that the requested name change would harm the child instead of placing the burden on the petitioning parent to prove that the name change will benefit the child, as § 26-17-636(e) contemplates." J.M.V., 149 So. 3d at 1106.

In his brief, the father contends that he established good cause for changing the child's surname because he had sought a relationship with, and joint custody of, the child since the child's birth. He attempts to distinguish J.M.V. on the basis that the father in that case had waited several years to establish his paternity knowing that the child in that case would become accustomed to the mother's surname. He also argues that the mother in the present case did not offer any evidence regarding the child's best interest.

The father's attempt to distinguish J.M.V. is unavailing. As in that case, the father here bore the burden of presenting evidence demonstrating that changing the child's surname would promote the child's best interest, and he presented no such evidence. As a result, we are bound by the plain language of § 26-17-636(e) and persuaded by our holding in J.M.V. to conclude that the juvenile court's decision to change the child's name was not based on a factual predicate supported by the evidence. Thus, the juvenile court erred to reversal in ordering that the child's name be changed.

The mother also contends that the juvenile court erred in awarding the parties joint legal custody of the child. When the parties in a child custody case present ore tenus evidence to the trial court, "that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses." Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996). "It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous." Id. When, as in this case, a court has not previously determined custody, a court determining custody should make an award of custody based on the child's best interest. D.D. v. E.E.B, 707 So. 2d 247, 248 (Ala. Civ. App. 1997).

The mother argues that the juvenile court, in awarding joint legal custody of the child to the parties, did not consider the factors set out in § 30-3-152, Ala. Code 1975, which sets forth a nonexhaustive list of factors to be considered when deciding whether to award joint custody. Those factors include whether the parents have agreed to joint custody; the

parents' ability to cooperate with each other; each parent's ability to encourage the sharing of love, affection, and contact between the child and the other parent; any history of or potential for abuse or kidnapping; and, with regard to joint physical custody, the parents' geographic proximity to each other. Although the mother contends that the evidence did not support an award of joint legal custody between the parties in light of those factors, she fails to demonstrate how the evidence at trial mandated the juvenile court's rejection of an award of joint legal custody to the parents with an award of sole physical custody to the mother. Moreover, she fails to explain why a dearth of evidence relating to those factors at trial should result in an award of sole custody of the child to her.

The thrust of the mother's contention relates not to evidence submitted at trial, however, but to the affidavit and social-media screenshots the mother submitted in support of her postjudgment motion. Based on the representations in the mother's affidavit, those documents appear to have been generated after the entry of the juvenile court's April 28, 2021, final judgment and, as a result, would constitute "new evidence." Therefore, those documents and the mother's affidavit testimony about

them were not properly before the juvenile court and are not subject to our consideration on appeal.[4] See Greene v. Greene, [Ms. 2190816, Mar. 26, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021); Jackson v. Jackson, 999 So. 2d 488, 493 (Ala. Civ. App. 2007) ("Because the evidence of the wife's change in income presented in support of the wife's postjudgment motion was not properly before the trial court, we review the trial court's determination of child support in light of the evidence presented at trial.").

A "trial court is given wide discretion in awarding custody and establishing visitation, and its determination of such matters will not be reversed absent a showing of a clear abuse of discretion." Lowery v. Lowery, 72 So. 3d 701, 704 (Ala. Civ. App. 2011). The evidence properly before the juvenile court showed that the father strongly desired a

[4]The mother does not contend that the social-media posts existed at the time of the trial and were subject to consideration by the juvenile court as "newly discovered" evidence. Furthermore, she specifically fails to argue or demonstrate that, if they did exist at the time of the trial, she could not have discovered them with the exercise of due diligence and presented them at the trial. See Welch v. Jones, 470 So. 2d 1103, 1112 (Ala. 1985) (noting that newly discovered evidence is, among other things, evidence that "could not have been discovered with the exercise of due diligence before trial"); Greene v. Greene, [Ms. 2190816, Mar. 26, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021).

relationship with the child and wanted to play a significant role in raising the child. No evidence submitted at the trial indicated that he was not capable of playing an important role in the child's upbringing. Moreover, no evidence submitted at the trial indicated that either parent was better suited to care for the child or to make decisions concerning the child's welfare. As a result, we cannot conclude, based on the evidence that was properly before the juvenile court, that the juvenile court erred in awarding the father and the mother joint legal custody of the child, with sole physical custody vested in the mother subject to the father's visitation.

Conclusion

Based on the foregoing, we reverse the juvenile court's judgment to the extent that it ordered that the child's surname be changed to the father's surname, and we affirm the remainder of the judgment.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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