Rel: July 15, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210139

Joshua Adam Grantham

v.

Courtney Virginia Grantham-Potts

Appeal from Elmore Circuit Court
(DR-18-111.01)

THOMPSON, Presiding Judge.

Joshua Adam Grantham ("the father") appeals the judgment of the Elmore Circuit Court ("the trial court") denying his petition to modify the custody of the child born in 2015 of his marriage to Courtney Virginia Grantham-Potts ("the mother") and granting the counterpetition filed by

the mother to modify his child-support obligation. We affirm the portion of the trial court's judgment denying the father's petition to modify custody of the child, reverse the portion of the judgment modifying the father's child-support obligation, and remand the case with instructions.

On December 18, 2018, a judgment was entered divorcing the father and the mother. A settlement agreement between the parties was incorporated into the divorce judgment, which provided that the mother was awarded sole legal custody of the child, that the parties would share joint physical custody of the child, and that the mother was awarded $325 per month in child support. The agreement incorporated into the divorce judgment further provided, however, that the father was awarded visitation with the child one weekend, or three consecutive days, a month; one week in the summer; and alternating holidays depending on the year.

On June 16, 2020, the father filed a petition to modify custody, alleging, among other things, that he was concerned about the child's safety, living conditions, and unstable environment. Specifically, he alleged that the mother and the child had moved to Mississippi and were living in a one-bedroom apartment with the mother's new boyfriend. The father further alleged that the child was sleeping on the floor of the

bedroom that the mother shared with her new boyfriend. On June 30, 2020, the mother filed an answer, denying the allegations in the father's petition, and a counterpetition, alleging, among other things, that the father was consistently late in paying his child-support obligation. The mother asked the trial court, among other things, to modify the father's child-support obligation to comply with the Alabama Child-Support Guidelines, see Rule 32, Ala. R. Jud. Admin., and to issue an income-withholding order to collect the father's monthly child-support obligation. On July 14, 2020, the trial court appointed a guardian ad litem to represent the child. On August 4, 2020, the trial court entered an order awarding the father pendente lite custody of the child, awarding the mother visitation with the child, and scheduling a trial.

On March 31, 2021, and April 2, 2021, the trial court conducted a two-day trial. On April 6, 2021, the mother filed a verified motion for immediate custody and a motion to reopen testimony. In her motion, the mother alleged that the father had not disclosed at the trial that on March 26, 2021, while the child was present, a drive-by-shooting incident had occurred at the father's home. On April 9, 2021, the trial court entered an order awarding the mother pendente lite custody of the child.

The trial court also ordered that a hearing would be conducted on June 8, 2021, to receive testimony regarding the drive-by-shooting incident at the father's home.

At the trial, the father testified that he and his wife, April Grantham, whom he married in October 2020, reside in Pendleton, South Carolina, in a three-bedroom, two-bathroom double-wide mobile home. He explained that the child has her own room with a bed, toys, and clothes and that, after he was awarded pendente lite custody of the child, he enrolled the child in kindergarten. According to the father and her kindergarten teacher, the child has grown academically and socially while attending kindergarten. The father further testified that he had stable employment working as a truck driver delivering local loads and that, except for when he was working, he took care of the child.

The father admitted that, after he and the mother separated in 2015, he did not visit with the child for approximately two and a half years. He stated that in 2018 the mother permitted him to have contact with the child and that since 2018, except for a few instances, he had consistently exercised his visitation with the child.

When asked about his concern for the child that necessitated the filing of the custody-modification petition, the father testified that the mother had a history of instability and that the mother had not informed him of the child's address in Mississippi. According to the father, since the birth of the child, the mother's stability had been a continual issue, and, he said, she had been evicted in the past and had been homeless at times. He testified that he wanted to provide the child with a "safe home" where the child did not worry about having a place to live. The father admitted that he had no direct knowledge of the child's living conditions in Mississippi but that, when the mother had been married to Jason Sword, the child had had a stable home.

The mother testified that the father and she separated in October 2015, approximately three months after the child was born. According to the mother, she did not allow the father to visit with the child until after the divorce judgment was entered in December 2018, and, consequently, the father did not have contact with the child from 2016 until approximately June 2019. She stated that, except for three months in 2020, the father had visited with the child regularly since approximately June 2019.

The mother stated that the divorce judgment awarded her $325 per month in child support and that, initially, the father had paid the award regularly; however, she said, in 2019, when the father was employed as a long-haul trucker, he frequently failed to pay the full monthly amount and was often late with his payment.

When asked about her inability to provide a stable home for the child, the mother explained that, in May 2019, Sword, her husband at that time, and she were in a transition period and decided to earn income as long-haul truckers. The mother stated that she had offered to allow the child to stay with the father during that period but that the father had declined the offer because he did not have stable housing. From June 2019 through November 2019, while the mother was working as a long-haul trucker, the child stayed with Stephanie Stewart, Sword's former wife. When the mother "came off the road" in November 2019, she secured housing and the child returned to live with her. In March 2020, the mother and Sword separated, and, in May 2020, she and the child moved to Mississippi. The mother testified that the child had her own bed in her Mississippi home and that she planned on obtaining a two-

bedroom, two-bathroom home. At the time of the trial, the mother was a full-time paralegal student.

According to the mother, before pendente lite custody of the child was awarded to the father, she had arranged for the child to enroll in kindergarten in Mississippi for the 2020-2021 school year. She stated that when she lost custody of the child in July 2020 she began suffering from severe depression and anxiety, but, she said, she had undergone treatment and her condition had improved. She testified that she visited with the child regularly and that, if custody were returned to her, she would work with the father to provide him with regular visitation.

Stewart testified that the child had stayed with her from June 2019 through November 2019 while the mother and Sword worked as long-haul truckers. She stated that, during that period, the father had visited with the child once a month and had paid child support to her. She further stated that the mother also had periodically visited the child during that period.

Sword testified that the mother had been the child's primary caregiver and that, when he and the mother were married, he had helped the mother take the child to doctor's appointments. Sword stated that

the mother had not wanted to leave the child in Stewart's care from June 2019 until November 2019 but that she had done so because they needed income to care for their children.

As previously mentioned, on June 8, 2021, the trial court reopened testimony in light of the mother's allegations that a drive-by-shooting incident had occurred at the father's home during the night of March 26, 2021, and that the father had not disclosed the incident during the trial. The father testified that he was sleeping when the incident occurred and that, when he was awakened by the shooting, he ran to the child's room, awakened her, and carried her to safety. When asked why he did not inform the trial court about the shooting incident, he stated that law-enforcement officers had asked him not to discuss the matter due to an ongoing investigation.

Robert Crosby, the Chief of Police for Pendleton, and Daniel Carpenter, a law-enforcement officer, investigated the incident. Carpenter testified that he had responded to the drive-by-shooting call, that no one had been injured, and that he had no evidence linking the mother to the shooting. Chief Crosby testified that he had investigated the incident and that multiple shell casings had been found in the

roadway outside the father's home. When asked if it was a common practice to ask alleged victims not to notify court authorities that a shooting endangering a child's life had occurred, Chief Crosby responded that not informing court authorities would not be a good practice.

On October 11, 2021, the trial court entered its final judgment. In its judgment, the trial court applied the standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), to the father's custody-modification claim, found that the father had not satisfied his burden of proof, and, thus, denied the father's petition to modify custody. The trial court made the following findings:

> "Both parties do a poor job of communicating with each other regarding the child. The mother's sporadic and inconsistent love life has not put the child in any danger. The father has refused to take the child on occasion when the mother was moving or on the road trucking. As a result, the child has lived with third parties with the consent of both parties. The father provided witnesses that thought the child would be better in his custody; however, the evidence provided does not meet the McLendon standard and the evidence showed a long period of time occurred between the conditions the witnesses testified to and the time the child was back in the mother's custody. The [guardian ad litem] recommended it was in the child's best interests that [the child] be placed with the father. However, this was before all parties were notified that the child had been shot at, and that the father failed to notify the child's attorney [of the drive-by-shooting]. Though the shooting incident may or may not have been random, clearly the father withholding that information from the court and all

> parties over the initial two-day hearing gives the court concern about the father's ability to be truthful and open in his communication regarding the well-being of the child. Though the mother's communication with the father was trivial, unproductive and juvenile, there was always communication. Based on the evidence the court is more confident in the mother's ability to communicate and protect the child than the father.
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> "Based upon the testimony presented over three days and the evidence presented to the court, the court finds that the father did not meet the burden of proof required to meet the McLendon standard."

The trial court ordered the father to pay $400 per month in child support, effective July 1, 2021, and entered an income-withholding order to collect his monthly child-support obligation. The trial court acknowledged that the child-support award was a downward deviation from the amount listed in the child-support guidelines, but it did not provide its reasoning for the deviation.

On November 10, 2021, the father filed a motion to strike the income-withholding order; a postjudgment motion, pursuant to Rule 59, Ala. R. Civ. P.; a motion to stay enforcement of the October 11, 2021, judgment; and a notice of appeal. In his postjudgment motion, the father argued, among other things, that the trial court had exceeded its discretion by denying his custody-modification petition and by modifying

his child-support obligation. He further argued that the requirement that his increased child-support obligation become effective on July 1, 2021, was improper.

On November 15, 2021, the trial court entered an order granting the father's motion to stay and an order setting the father's motion to strike the income-withholding order for a December 15, 2021, hearing. On February 16, 2022, the trial court entered an order that purported to modify the mother's child-support award.

> "It is well settled that a notice of appeal filed before a ruling on a Rule 59, Ala. R. Civ. P., postjudgment motion is held in abeyance pending the disposition of that postjudgment motion. Rule 4(a)(5), Ala. R. App. P. ('A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59, Alabama Rules of Civil Procedure, shall be held in abeyance until all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59 are ruled upon; such a notice of appeal shall become effective upon the date of disposition of the last of all such motions.'); … V.L. v. A.W., 275 So. 3d 156, 157 (Ala. Civ. App. 2018)(noting that, when a postjudgment motion and a notice of appeal were filed on the same day, the notice of appeal was held in abeyance until the denial by operation of law of the postjudgment motion)."

Harvison v. Lynn, 303 So. 3d 1195, 1205 (Ala. Civ. App. 2020).

In this case, the father's Rule 59 postjudgment motion was denied by operation of law on February 8, 2022 -- the 90th day after the

postjudgment motion was filed. See Rule 59.1, Ala. R. Civ. P. Thereafter, the trial court lost jurisdiction to consider or act upon the postjudgment motions. Cornelison v. Cornelison, 180 So. 3d 883, 887 (Ala. Civ. App. 2015). The trial court entered its order purporting to modify the child-support award on February 16, 2022, eight days after it lost jurisdiction over this case. Therefore, the trial court's February 16, 2022, order is void. D.E.C.C. v. K.N.R., 51 So. 3d 1068, 1071 (Ala. Civ. App. 2010)("A judgment entered without jurisdiction is void.").

On appeal, the father contends that the trial court applied the incorrect standard of proof for determining whether a custody modification was warranted. The father argues that because he had been awarded joint physical custody in the divorce judgment, the trial court should have used "the best-interest-of-the-child" standard set forth in Ex parte Berryhill, 410 So. 2d 416 (Ala 1982), and should not have required him to prove that a material change in circumstances had occurred since the prior custody award and that a change in custody in light of the change in circumstances would promote the child's welfare. See Ex parte McLendon, supra.

Whether the trial court applied the correct standard of proof in considering the father's custody-modification petition is a question of law, see Daniel v. Daniel, 842 So. 2d 20, 21 (Ala. Civ. App. 2002), and an appellate court reviews questions of law de novo. Brooks v. Brooks, 991 So. 2d 293, 300 Ala. Civ. App. 2008).

> "If custody has not previously been determined, then the appropriate standard is 'the best interest of the children.' See Murphy v. Murphy, 479 So. 2d 1261 (Ala. Civ. App. 1985); Ex parte Berryhill, 410 So. 2d 416 (Ala. 1982). However, if there is a judgment granting custody to one parent, or if one parent has 'given up' legal custody, then custody will be changed only if it would 'materially promote' the children's welfare. Ex parte McLendon, 455 So. 2d 863 (Ala. 1984)."

Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988).

In Motley v. Motley, 69 So. 3d 210 (Ala. Civ. App. 2011), this court considered a custody award similar to the custody award in the judgment divorcing the mother and the father in this case. In Motley, the trial court had ordered that the parties' child would reside with the wife and had awarded the husband visitation with the child four days and five nights per month, on certain holidays, and one month during the summer. This court observed that the wife had been awarded custody of the child for more than three quarters of the year and that the husband had been awarded custody for only one quarter of the year. We concluded

that the custody arrangement did not amount to an award of joint physical custody of the child; rather, this court determined, the wife had been awarded sole physical custody of the child, subject to the visitation rights of the husband. 69 So. 3d at 218.

Likewise, the record in this case supports the trial court's implicit determination that, in the divorce judgment, the mother had been awarded sole physical custody of the child and the father had been awarded visitation. Evidence was presented indicating that the divorce judgment provided that the mother would have sole legal custody of the child and that the parties would share joint physical custody of the child. The divorce judgment further provided, however, that the father would have visitation with the child "one weekend a month, or three consecutive days, one week in the summer or 7 days and alternate holidays determined by even and odd years." Thus, the evidence supports the conclusion that the parties did not actually engage in shared physical custody of the child but, rather, that the mother had sole physical custody of the child with the father exercising visitation with the child. Therefore, because a prior custody determination awarding the mother,

in substance, sole physical custody of the child had been made, the trial court did not err by applying the McLendon standard of proof in this case.

Next, the father contends that the trial court exceeded its discretion by denying his petition to modify custody of the child because, he says, the judgment is against the great weight of the evidence.

> "'On appellate review of custody matters, this court is limited when the evidence was presented ore tenus, and, in such circumstances, a trial court's determination will not be disturbed "absent an abuse of discretion or where it is shown to be plainly and palpably wrong." Alexander v. Alexander, 625 So. 2d 433, 434 (Ala. Civ. App. 1993)(citing Benton v. Benton, [520 So. 2d 534 (Ala. Civ. App. 1988)]). As the Alabama Supreme Court highlighted in [Ex parte] Patronas, [693 So. 2d 473 (Ala. 1997)], "'[T]he trial court is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence, and to decide the issue of custody.'" Patronas, 693 So. 2d at 474 (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1326 (Ala. 1996)). Thus, appellate review of a judgment modifying custody when the evidence was presented ore tenus is limited to determining whether there was sufficient evidence to support the trial court's judgment. See Patronas, 693 So. 2d at 475.'

"Cheek v. Dyess, 1 So. 3d 1025, 1029 (Ala. Civ. App. 2007).

> "....

> "…'[T]he trial court ... was in the best position to observe the demeanor, determine the credibility, and assign weight to the testimony of each witness.' Carquest Auto Parts & Tools of Montgomery, Alabama, Inc. v. Waite, 892 So. 2d 422, 426 (Ala. Civ. App. 2004). Our supreme court has held that the trial court's unique ability to observe witnesses and assess their demeanor and credibility 'is especially important in child-custody cases.' Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001).
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> "A custody determination made after the trial court receives ore tenus evidence is presumed to be correct, and this court will not reverse the trial court's judgment on that issue absent a determination that the '"'evidence so fails to support the determination that it is plainly and palpably wrong.'"' Ex parte Fann, 810 So. 2d at 633 (quoting Ex parte Perkins, 646 So. 2d 46, 47 (Ala.1994), quoting in turn Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993))."

Adams v. Adams, 21 So. 3d 1247, 1254-55 (Ala. Civ. App. 2009).

The record supports the trial court's conclusion that the father did not present sufficient evidence to satisfy his burden of proof to support a modification in custody. To prove that a change in custody of the child was necessary, the father was required to prove "a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child," Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 614 (Civ. 1973), and that a change in custody would "materially promote" the child's welfare, Ex parte McLendon, 455 So. 2d at 866. In his petition,

the father alleged that the mother had changed residences, had been cohabiting with a man, and could no longer provide a safe, stable environment for the child. Much of the evidence presented by the father, however, indicated that since the entry of the divorce judgment, which, we have determined, awarded the mother, in substance, sole physical custody of the child, the mother's housing had been unstable, even when she had been married to Sword, and that, when the mother had needed to travel to earn income, the father could not provide stable housing for the child and had agreed for the child to be cared for by a third party. No evidence was presented addressing the mother's current circumstances and how her current housing detrimentally affected the child. Therefore, we agree with the trial court that the father did not present sufficient evidence of a material change in circumstances since the entry of the earlier custody determination. Additionally, evidence of the father's failure to disclose at the trial the drive-by-shooting incident that had occurred days before the trial began could have drawn the veracity of the father's testimony into question, and, thus, the trial court could have determined that the father's explanations and other testimony were not credible. After reviewing the evidence in the record, we conclude that the

evidence supports the trial court's finding that the father did not meet his burden of proof under Ex parte McLendon, supra. Accordingly, the trial court's judgment as to the custody-modification issue is affirmed.

The father further contends that the trial court exceeded its discretion by modifying his child-support obligation and that the amount designated to be withheld by his employer on the income-withholding order is incorrect. According to the father, because the trial court did not explain how it had calculated the child-support award and this court would therefore have to guess as to what facts the trial court had found to support the child-support award, the award is erroneous.

To the extent that the father contends that the trial court erred by ordering that the modification in the child-support award be effective July 1, 2021, the date the mother filed her counterpetition, rather than October 11, 2021, the date the judgment was entered, we note that in Bosarge v. Bosarge, 267 So. 3d 868 (Ala. Civ. App. 2018), this court observed that Rule 32(A)(3), Ala. R. Jud. Admin., provides that a modification of child support may be effective as of the date of the filing of a modification petition and that it is within the trial court's discretion to apply a child-support modification retroactively.

It is well established that when the record does not contain documentation in compliance with Rule 32, Ala. R. Jud. Admin., and a child-support award is challenged on appeal, this court, if it cannot discern from the record the basis for the award, will reverse the judgment and remand the case for the trial court to comply with Rule 32. Walker v. Lanier, 221 So. 3d 470, 473-74 (Ala. Civ. App. 2016); Martin v. Martin, 637 So. 2d 901, 902 (Ala. Civ. App. 1994). Although the record contains some information regarding the parties' respective incomes, this court cannot determine the propriety of the child-support award. Therefore, we reverse that portion of the judgment modifying the father's child-support obligation and remand this case to the trial court to redetermine the child-support award in compliance with the Rule 32, Ala. R. Jud. Admin., child-support guidelines and this opinion.[1]

On remand, if the trial court determines that a child-support award in compliance with the Rule 32 child-support guidelines is unjust or inequitable, the trial court has discretion to deviate from those guidelines so long as it expressly states the reason for the deviation. Walker, supra;

[1]Considering our reversal of the child-support award, we pretermit discussion of the father's arguments addressing the income-withholding order.

and Rule 32(A).

The father's request for an award of a reasonable attorney fee on appeal is denied. See Ex parte Bland, 796 So. 2d 340, 345 (Ala. 2000)(citing Chancellor v. Chancellor, 52 Ala. App. 10, 288 So. 2d 794 (1974)). See also K.D.H. v. T.L.H., 3 So. 3d 894, 902 (Ala. Civ. App. 2008).

For the foregoing reasons, the portion of the trial court's judgment denying the father's petition to modify custody is affirmed; the portion of the judgment regarding the father's child-support obligation is reversed, and the cause is remanded to the trial court for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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