Rel: June 30, 2023

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 2022-2023

2210339

Scott Andrew Sabo v. Avery Caldwell Sabo, Harry Miller Caldwell, Jr., and Deborah D. Caldwell.
Appeal from Jefferson Circuit Court (DR-16-901609.02).

2210340

Scott Andrew Sabo v. Avery Caldwell Sabo, Harry Miller Caldwell, Jr., and Deborah D. Caldwell.
Appeal from Jefferson Circuit Court (DR-16-901609.03).

CL-2022-0622

Avery Caldwell Sabo v. Scott Andrew Sabo.
Appeal from Jefferson Circuit Court (DR-16-901609.03).

CL-2022-0630

Avery Caldwell Sabo v. Scott Andrew Sabo.
Appeal from Jefferson Circuit Court (DR-16-901609.02).

FRIDY, Judge.

2210339 -- AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(A), Ala. R. App. P.

Avery Caldwell Sabo's request for an attorney fee on appeal is denied.

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

Edwards, J., dissents, with opinion.

2210340 -- AFFIRMED. NO OPINION.

CL-2022-0622 -- AFFIRMED. NO OPINION.

CL-2022-0630 -- AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(A), Ala. R. App. P.

Avery Caldwell Sabo's request for an attorney fee on appeal is denied.

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

EDWARDS, Judge, dissenting in appeal number 2210339.

I respectfully dissent from affirming the Jefferson Circuit Court's judgment at issue in appeal number 2210339 insofar as it denied the petition filed by Scott Andrew Sabo ("the father") seeking a modification of the custody provisions of a judgment entered by the trial court on December 11, 2018 ("the December 2018 judgment").

On March 26, 2019, the father filed in the trial court a verified petition against Avery Caldwell Sabo ("the mother") in which he sought, among other things, to modify and enforce the custody provisions of the December 2018 judgment; the trial court assigned the father's petition case number DR-16-901609.02. The December 2018 judgment incorporated an agreement of the parties ("the custodial agreement"), pursuant to which the father, the mother, Harry Miller Caldwell, Jr. ("the maternal grandfather"), and Deborah D. Caldwell ("the maternal grandmother") were awarded joint legal custody of the mother and the father's four children ("the children") and the maternal grandfather and the maternal grandmother (referred to collectively as "the maternal grandparents") were awarded "primary residential custody" of the

children.[1] The custodial agreement further provided that the "arrangement" was being entered into because of the father's work schedule, which, at that time, required him to work approximately 80 hours a week as he completed his surgical-residency program. The custodial agreement specifically stipulated that neither the father nor the mother was "unfit at [that] time."

The maternal grandparents were also made parties to the modification action. After significant litigation over temporary issues and at least four continuances of the multiday trial, at least two of which were at the request of the maternal grandparents, the trial concluded in June 2021, more than two years after the date the father filed his modification petition. The trial court entered a judgment on November 30, 2021, which, among other things, denied the father's request for a modification of custody. All the parties filed postjudgment motions,

[1]Although the judgment was not entered by the trial court until December 2018, the father, the mother, and the maternal grandparents had entered into the custodial agreement in August 2018.

which were denied on March 24, 2022. The father and the mother filed separate notices of appeal.[2]

Suffice it to say, my reading of the record has convinced me that the custodial agreement is completely unworkable and that the children's best interests would be materially promoted by a modification of custody. The record clearly illustrates the difficulties inherent in having four joint legal custodians and no specific terms addressing which party has the final say on major issues affecting the children. To be sure, the custodial agreement may have been more workable had the parties complied with Ala. Code 1975, § 30-3-153(a), which requires that, as part of any joint-custody agreement, the parties

> "submit, as part of their agreement, provisions covering matters relevant to the care and custody of the child, including …:
>
> > "….
> >
> > "(6) Designating the parent possessing primary authority and responsibility regarding involvement of the minor child in academic, religious, civic, cultural, athletic, and other

[2]The father filed his notice of appeal before the trial court ruled on the pending postjudgment motions, and his notice of appeal was held in abeyance until those motions were denied. See Rule 59.1, Ala. R. App. P., and Rule 4(a)(5), Ala. R. App. P.

> activities, and in medical and dental care if the parents are unable to agree on these decisions. …"[3]

I am aware that the ore tenus presumption controls our review of a trial court's custody-modification judgment. Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996); Goetsch v. Goetsch, 990 So. 2d 403, 411 (Ala. Civ. App. 2008); and Ward v. Rodenbaugh, 509 So. 2d 910, 910 (Ala. Civ. App. 1987). I am also aware that the parties agreed that the father was required to meet the stringent standard for modifying custody set out in Ex parte McLendon, 455 So. 2d 863, 866 (Ala. 1984).[4] As our supreme court explained in Ex parte Cleghorn, 993 So. 2d 462, 466-67 (Ala. 2008):

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[3]Notably, § 30-3-153(a)(6) expressly explains that "[t]he exercise of this primary authority is not intended to negate the responsibility of the parties to notify and communicate with each other as provided in this article [i.e., Title 30, Chapter 3, Article 7, entitled 'Joint Custody']."

[4]I am less convinced that Ex parte McLendon should apply in situations like the present one. In my opinion, the custodial agreement was, in essence, an agreement for the care of the children entered into during "necessitous times," albeit a formal agreement incorporated into a judgment and not an informal one like those addressed in our caselaw. See, e.g., M.D.K. v. V.M., 647 So. 2d 764, 765 (Ala. Civ. App. 1994) (citing Ex parte Couch, 521 So. 2d 987 (Ala. 1988), and Curl v. Curl, 526 So. 2d 26 (Ala. Civ. App. 1988), and explaining that "[t]his court and our Supreme Court have encouraged custodial arrangements during necessitous times" and that allowing such arrangements to serve as grounds for finding a voluntarily relinquishment of custody would "promote family discord and discourage parents from seeking assistance from grandparents to insure that the children have adequate care"). All

> "In Ex parte McLendon, we held that the trial court cannot order a change of custody '"unless [the parent] can show that a change of the custody will materially promote [the] child's welfare."' 455 So. 2d at 865 (quoting Greene v. Greene, 249 Ala. 155, 157, 30 So. 2d 444, 445 (1947)). We noted in Ex parte McLendon that '[i]t is important that [the parent] show that the child's interests are promoted by the change, i.e., that [the parent seeking the change in custody] produce evidence to overcome the "inherently disruptive effect caused by uprooting the child."' 455 So. 2d at 866."

As the supreme court explained in Ex parte McLendon, showing a favorable change in the noncustodial parent's circumstances is not sufficient, because "[t]he parent seeking the custody change must show not only that [he or] she is fit, but also that the change of custody

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the parties agreed that the father was a fit parent and that placement in the home of the maternal grandparents was not because the maternal grandparents had established that placement in their custody would be in the children's best interest but, rather, was because the mother was unable to parent them because of her mental-health issues and because the father could not parent them because of the demands of his surgical-residency program. Thus, to require the father to establish that a return of the children to his custody would materially promote the children's welfare in order to overcome the disruption inherent in a change of custody, see McLendon, 455 So. 2d at 865-66, completely ignores the fact that, but for the particular circumstances present in this case, which were temporary, the father could rear his children. This case illustrates the reason that the "necessitous times" doctrine was developed. The record is replete with examples of how the maternal grandparents' exercise of joint legal and sole physical custody of the children served to "promote family discord." M.D.K., 647 So. 2d at 765. The outcome of this case will certainly "discourage parents from seeking assistance from grandparents to insure that the children have adequate care." Id.

'materially promotes' the child's best interest and welfare." 455 So. 2d at 866. Thus, the father was required to show that a change in the children's custody would promote the children's best interests and offset the inherent disruption in the children's lives naturally caused by a change in custody.

In my opinion, the trial court's conclusion that the father failed to meet the burden imposed by Ex parte McLendon is plainly and palpably wrong. The father unquestionably established a material change in circumstances. The facts and circumstances underlying the custodial agreement have markedly changed -- the father completed his surgical-residency program and has now embarked on a career as a surgeon. See K.U. v. J.C., 196 So. 3d 265, 270 (Ala. Civ. App. 2013). He has never been considered unfit to care for the children, and, in fact, the evidence indicates that the custodial agreement was based on his temporary inability to care for the children because of the excessive work hours required by his then soon-to-be-completed surgical residency.

Furthermore, I believe that the father established that the children's welfare would be materially promoted by a change in custody. I note that the maternal grandparents and the father are not involved in

a mere visitation dispute, which I recognize could not properly serve as a basis to modify custody. See Brooks v. Brooks, 991 So. 2d 293, 301 (Ala. Civ. App. 2008) (stating that "visitation disputes, alone, are not a sufficient basis upon which to modify an existing custody judgment"). After reviewing the extensive record in this case, it is my opinion that the great weight of the evidence and undisputed testimony clearly established that the children's welfare would be materially promoted by returning their custody to the father and that the trial court erred in determining otherwise. Thus, I respectfully dissent from the main opinion's affirmance of that part of the judgment at issue in appeal number 2210339, i.e., that part of the judgment denying the father's request for a modification of custody.