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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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J.S.S.

v.

D.P.S.

**Appeals from Shelby Circuit Court
(DR-11-900581.01 and DR-11-900581.02)**

MOORE, Judge.

J.S.S. ("the father") appeals from a judgment entered by the Shelby Circuit Court ("the trial court"), in case number DR-11-900581.01 and case number DR-11-900581.02, to the extent the judgment declined to modify the physical custody of E.S.

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("the child"), the father's child with D.P.S. ("the mother") and declined to hold the mother in contempt. In appeal number 2170865, involving the contempt issues, we affirm the judgment; in appeal number 2170866, involving the custody-modification issues, we remand the case to the trial court for further proceedings.

Procedural History

On February 15, 2013, the parties were divorced by a judgment of the trial court that incorporated an agreement between the parties. That agreement provided that the mother would exercise sole legal and sole physical custody of the child and that the father would have specified visitation and reasonable telephone contact with the child.

On September 11, 2014, the father filed a verified petition for a rule nisi; that petition was assigned case number DR-11-900581.01. He alleged, among other things, that the mother had failed to allow him his visitation periods with the child, had failed to allow him reasonable telephone contact with the child, and had failed to provide him notice of her relocation with the child. He amended his petition on October 27, 2014.

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On December 10, 2014, the mother filed a petition for a modification of the father's visitation; that petition was assigned case number DR-11-900581.02. On April 22, 2015, the father moved to consolidate the actions; that motion was granted on April 24, 2015. On August 7, 2015, the father filed, in case number DR-11-900581.02, a counterpetition to modify custody, visitation, and child support. The mother answered the counterpetition on August 12, 2015.

On February 10, 2016, the father filed a motion requesting, among other things, that the trial court hold the mother in contempt for denying his weekend visitation and telephone contact with the child.

On March 11, 2016, the trial court entered an order stating that the father would have "the care, custody, and control" of the child "for an uninterrupted period of twelve (12) consecutive days." The trial court reserved the issue of contempt for the trial on the father's petition for a rule nisi, the mother's petition to modify, and the father's counterpetition to modify.

On March 28, 2016, the father filed a verified motion for contempt; he alleged that the mother had denied him his

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"spring break" visitation with the child. On May 18, 2016, the father filed a second verified motion for contempt, alleging, among other things, that the mother had failed to allow him visitation or telephone contact with the child; he amended that motion on June 1, 2016.

On March 16, 2017, the trial court entered an order awarding the father pendente lite sole physical custody of the child and awarding the mother supervised visitation. On March 20, 2017, the mother moved to set aside that order. On April 26, 2017, the trial court entered an order setting aside the March 16, 2017, order.

After a trial, the trial court entered a judgment, in both case number DR-11-900581.01 and case number DR-11-900581.02, on February 25, 2018, stating, among other things:

"The Court finds that the [father] met his burden of proof under the McLendon^[1] standard to warrant a change in custody. Accordingly, the [father's] petition to modify custody is hereby GRANTED. The parties shall share joint custody of the minor child and the Mother shall have primary, physical custody with the Father having Shelby County standard visitation which shall be filed into AlaCourt as an exhibit incorporated herein. However, the standard visitation shall be expanded on the Father's weekends from Thursday after school until Sunday evenings at 6:00 p.m. Additionally, the

¹See Ex parte McLendon, 455 So. 2d 863 (Ala. 1984).

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Father shall have an extra two weeks of visitation during the first calendar year after the entry of this Order."

The trial court also denied the father's petition for a rule nisi and his various contempt motions.

On March 26, 2018, the father filed a postjudgment motion requesting that the trial court enter specific findings of fact and conclusions of law. That same day, the father also filed a motion to alter, amend, or vacate the trial court's judgment. On May 8, 2018, the trial court entered an order amending its judgment by setting forth specific times for the father's telephone visitation with the child and stating that the father "shall be notified of all extracurricular activities of the minor child and shall be allowed to attend any practices, games, recitals and/or performances whether or not it is his custodial time." On June 18, 2018, the father filed a notice of appeal referencing both actions. This court docketed two separate appeals and, subsequently, consolidated the appeals.

Discussion

I. Custody (Appeal No. 2170866)

On appeal, the father first argues that the trial court erred in declining to award him sole physical custody of the child. He points out that the trial court specifically found that he had met his burden under Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), but did not modify the physical custody of the child. "[T]he 'McLendon standard' applies when deciding whether a provision in a divorce judgment awarding one parent sole physical custody of a child should be modified." Gallant v. Gallant, 184 So. 3d 387, 394 (Ala. Civ. App. 2014).

"The burden set out in McLendon requires the parent seeking a custody change to demonstrate that a material change in circumstances has occurred since the previous judgment, that the child's best interests will be materially promoted by a change of custody, and that the benefits of the change will more than offset the inherently disruptive effect resulting from the change in custody. Ex parte McLendon, 455 So. 2d at 866."

Dean v. Dean, 998 So. 2d 1060, 1065 (Ala. Civ. App. 2008).

Although the trial court did modify legal custody and the father's visitation with the child, "[t]he McLendon standard ... does not govern legal-custody or visitation issues." Gallant, 184 So. 3d at 400. Therefore, we conclude that the

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trial court's judgment is inconsistent to the extent that it held that the father had met his burden of proof under the McLendon standard but declined to modify physical custody of the child.² We therefore remand this cause to the trial court for 28 days for the trial court to correct its judgment to state either (1) that the McLendon standard was not met and, therefore, physical custody remains with the mother or (2) that the McLendon standard was met and, therefore, physical custody is modified and, if so, setting out the terms of the custody modification.

II. Contempt (Appeal No. 2170865)

The father next argues that the trial court exceeded its discretion in declining to hold the mother in contempt for interfering with his visitation, for denying him telephone access to the child, for failing to notify him of her

²We note that the trial court's comments at the postjudgment hearing indicate that, although there might have been a material change in circumstances, it did not find that a change of physical custody would be in the best interests of the child. Specifically, the trial court stated:

"... [T]aking this child and putting this child in [the father's] custody full time and giving mom visitation was not the thing to do in this case.

"... I think she's not obeyed the order, I'm just not going to use the child to punish."

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relocations with the child, and for failing to appear at certain hearings.

"The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence." Poh v. Poh, 64 So. 3d 49, 61 (Ala. Civ. App. 2010). "To hold a party in contempt under either Rule 70A(a)(2)(C)(ii) or (D), Ala. R. Civ. P., the trial court must find that the party willfully failed or refused to comply with a court order." T.L.D. v. C.G., 849 So. 2d 200, 205 (Ala. Civ. App. 2002).

The father argues that the mother denied him visitation on several occasions. The mother, however, testified that, in 2014, she had taken the child to the hospital after he had stated that the father had hurt his "bottom." On that occasion, the child had a scratch in his rectal area, and the Department of Human Resources ("DHR") had been notified. The mother testified that there had been a safety plan instituted, by agreement of the mother, the father, and DHR, pursuant to

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which the father's visitation with the child was suspended.³ The mother also stated that she had not allowed the father to exercise his "spring break" visitation in 2016 because the parties' agreement that had been incorporated into the divorce judgment provided for spring break visitation once the child began preschool; according to the mother, the child was in day care, not preschool, in 2016. The mother also testified that she had not allowed the father to exercise certain visitation in 2016 after a woman that the father had had a relationship with informed her that the father, who has a history of drug use, had begun using drugs again. The father was awarded compensatory visitation time by the trial court, and the mother testified that there had been no issues with visitation since 2016. Based on the mother's explanations for the visitation issues, the fact that the father had been awarded compensatory visitation, and the mother's testimony indicating that there had been no issues with visitation since 2016, we cannot conclude that the trial court exceeded its discretion

³The mother testified that she had not personally contacted DHR. DHR ultimately found the allegations against the father to be "not indicated."

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in declining to enter a contempt finding against the mother on this point.

The father also argues that the mother had interfered with his telephone contact with the child. The mother, however, testified that she had not intentionally interfered with the father's telephone contact with the child; rather, she said, sometimes they were busy when the father called or sometimes the child, who was six years old at the time of the trial, had not wanted to talk on the telephone. The divorce judgment awarded the father only "reasonable" telephone contact. Considering the circumstances and the fact that the trial court amended the judgment to allow specific periods of telephone visitation, we cannot conclude that the trial court erred in not holding the mother in contempt on this point.

The father also argues that the trial court erred in not holding the mother in contempt for failing to notify him of various relocations and for failing to appear for certain hearings. We note, however, that the father has not cited this court to evidence indicating that the mother's alleged failures were willful. See Rule 28(a)(10), Ala. R. App. P. (requiring an appellant's argument on appeal to be supported

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"with citations to ... parts of the record relied on"). Therefore, we cannot hold the trial court in error on these points.

Conclusion

Based on the foregoing, we affirm the judgment to the extent that it denied the father's petition for a rule nisi and his various contempt motions. As to the custody-modification action, we remand the case to the trial court to clarify its judgment regarding the physical custody of the child in accordance with this opinion. Due return shall be made to this court within 28 days of the date of this opinion.

The father's request for an attorney's fee on appeal is denied.

2170865 -- AFFIRMED.

2170866 -- REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.