REL: October 9, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190029

Spencer Chase Rogers

v.

Erika Ashley Hartsock

Appeal from Shelby Circuit Court
(DR-16-900640.01)

HANSON, Judge.

This appeal arises from a civil action seeking, among other things, modification of certain provisions of a 2017 judgment of the Shelby Circuit Court ("the divorce judgment") dissolving the marriage of Erika Ashley Hartsock ("the

mother") and Spencer Chase Rogers ("the father"). The divorce judgment incorporated an agreement of the mother and the father that had provided, among other things, that the mother would have sole physical custody of their child, H.S.R. ("the child"),[1] subject to the father's right to alternating-weekend visitation with the child under the supervision of either the father's mother ("the paternal grandmother") or "an individual agreed upon by the parties." As to legal custody, the divorce judgment incorporated the parties' agreement that, although designating the mother and the father as joint legal custodians, provided that the mother "shall be the tie breaker for any academic, medical, religious, etc. decisions in which the parties cannot agree upon." There is no indication in the record that any appeal was taken from the divorce judgment.

The mother initiated the modification action in the Shelby Circuit Court in April 2018, averring, in the pertinent

[1]The provision of the parties' agreement that was incorporated into the divorce judgment used the now obsolete term "primary physical custody" to describe the mother's custodial relationship to the child, a term that we construe as having awarded the mother sole physical custody under Ala. Code 1975, § 30-3-151(5). See Clark v. Clark, 292 So. 3d 1054, 1057 n.1 (Ala. Civ. App. 2019).

part of her complaint,[2] that the father had exposed the child to an unsafe environment stemming from his use of illicit drugs, that the father had consistently left the child with the paternal grandmother without utilizing his visitation rights, that the father had been arrested by police officers on various occasions since the divorce judgment had been entered, and that the father had "displayed a complete lack of effort to maintain a parental relationship with the ... child." The mother requested that the trial court modify the custody provisions of the divorce judgment so as to expressly award her, among other things, sole legal custody of the child. Subsequently, the mother, with leave of the trial court, amended her complaint to request that the paternal grandmother be removed as an authorized person to supervise the father's visitation with the child; the mother averred that the paternal grandmother had failed to adequately supervise previous visitation sessions, that the paternal grandmother's health was in decline, and that the paternal

[2]The mother also sought leave to relocate with the child to Kentucky, which claim was later voluntarily dismissed, and sought enforcement of the father's child-support obligations, which relief was granted but is not an issue in this appeal.

grandmother had both been victimized by and had condoned criminal conduct (including the use of illicit substances) allegedly committed by the father. The father filed an answer generally denying the pertinent allegations of the mother's complaint.

An ore tenus proceeding was held in August 2019 at which the trial court denied the father's pretrial oral request to assert a counterclaim seeking unsupervised visitation[3] and then heard testimony from the mother, the father, and the paternal grandmother. The trial court thereafter entered a judgment that, in pertinent part, modified the divorce judgment so as to expressly designate the mother as the sole legal custodian of the child and to delete the portion of the divorce judgment designating the paternal grandmother as authorized to supervise the father's potential future visitation sessions;[4] the provision allowing the parties to agree upon a third party to provide such supervision was left undisturbed. The father appealed from the modification

[3]No issue has been raised in this appeal concerning the correctness of that ruling.

[4]The father's right to future supervised visitation was made expressly conditional upon his passing random drug tests.

judgment, challenging the modifications as to visitation supervision and the designation of the mother as the sole legal custodian of the child.

The father first argues that the trial court erred in modifying the divorce judgment so as to remove the paternal grandmother as a designated supervisor of the father's visitation. The father posits that that change to the divorce judgment amounts to a modification of his visitation rights that necessitated that the mother, as the requesting party, show both a material change in circumstances and that the proposed change in visitation would serve the child's best interests under such cases as Griffin v. Griffin, 159 So. 3d 67 (Ala. Civ. App. 2014), and H.H.J. v. K.T.J., 114 So. 3d 36 (Ala. Civ. App. 2012).

However, neither Griffin nor H.H.J. involved a mere change in the identity of persons authorized by a trial court to provide supervision of visitation sessions,[5] and we have not located other Alabama caselaw equating such a change with

[5]Although Tanner v. Tanner, 241 So. 3d 28, 30-31 (Ala. Civ. App. 2017), did involve such a supervisor change, this court summarily affirmed that aspect of judgment in that case based upon a lack of evidence to support the appellant's argument on the issue.

a modification of a party's visitation rights. Rather, it appears that a change of identity of visitation supervisors is, in American jurisprudence, a matter within the discretion of the pertinent trial court such that an appellate court will reverse a trial court's determination on the issue only upon a showing of abuse of that discretion. Bacon v. Bacon, 536 So. 2d 1080, 1080 (Fla. Dist. Ct. App. 1988) (appealing party sought "reversal of an order denying her motion to change the supervisor of [the] appellee's restricted visitation with their children," but appellate court affirmed because, it determined, "the trial court did not abuse its discretion in denying the motion as presented"); In re L.S., No. 28475, Dec. 19, 2018 (Ohio Ct. App. 2018) (not published in North Eastern Reporter) (removal of two visitation supervisors for "repeated disregard" of previous orders held not to be an abuse of discretion).

Did the trial court abuse its discretion in modifying the divorce judgment to remove the paternal grandmother as an authorized visitation supervisor? A review of the evidence persuades this court that no such abuse occurred. The mother testified that she had known the paternal grandmother to

alternately dismiss the father from her home and invite him to return to her home on several occasions, even during the parties' marriage,[6] and the mother opined that she did not believe that the paternal grandmother was capable of adequate supervision of the child's visitation with the father. The paternal grandmother, for her part, testified that, after the divorce judgment had been entered, the father had taken a watch from her, prompting her to refer the father for criminal charges, including making a request in November 2018 of the presiding district attorney that the father be imprisoned.[7] Notwithstanding her earlier request that the father be imprisoned, however, the paternal grandmother subsequently requested in May 2019 that he be released from his

[6]To the extent that the father claims that that testimony is incompetent because it refers to matters that existed at the time of the entry of the divorce judgment, we note that the custody and visitation provisions of the divorce judgment were a product of the mother's and the father's agreement rather than an ore tenus proceeding and that the trial court could thus properly have considered facts in the modification action that the court had not had the opportunity to consider in entering its divorce judgment. See, e.g., Wilson v. Wilson, 408 So. 2d 114, 116 (Ala. Civ. App. 1981), and Sain v. Sain, 426 So. 2d 853, 854 (Ala. Civ. App. 1983).

[7]Selected portions of the record in that theft proceeding were admitted into evidence as the mother's Exhibits 2 and 7.

incarceration so that he could provide care for her. The paternal grandmother further admitted that she had instigated, at various other times, theft and domestic-violence charges against the father that she had later caused to be dropped and that she had herself brought and then dismissed protection-from-abuse claims against the father, yet she testified that that history nonetheless "equate[d] to a stable environment and relationship between" the two of them.

According to the paternal grandmother, at the time of her request that the father be imprisoned, she had been "very, very, very sick" with end-stage kidney disease, had been malnourished, had been "just barely alive" and "on death's door," and had been in need of kidney dialysis to remove 50 pounds of fluid from her body. The paternal grandmother testified that she had been undergoing kidney dialysis three days per week for over four hours at a remote location, which experience she described as "quite taxing on the body" and as equivalent to "running a marathon without your feet moving," but indicated that her May 2019 request to have the father released from imprisonment had been made in the hope that he could help the paternal grandmother undergo less taxing

dialysis treatment in her home. Regardless of that stated intent, the father admitted that he had, as of the time of trial in August 2019, not undergone the six-week training program necessary to qualify him to administer dialysis to the paternal grandmother in a home setting. In addition to having end-stage kidney disease, the then 69-year-old paternal grandmother testified that she had experienced problems with her heart and had had a cardiac pacemaker implanted to address atrial fibrillation. Notwithstanding the evidence of those health conditions, the paternal grandmother opined that she was capable of resuming supervision of the father's visitation with the then six-and-a-half-year-old child.

In Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981), our supreme court listed, among the multiple factors to be considered in assessing the best interests of a child in a custody contest, "the characteristics of those seeking custody, including [their] age, character, stability, [and] mental and physical health." Similarly, it follows that a trial court considering whether to select a person as a lay supervisor of visitation rights to be exercised by a noncustodial parent -- a parent who, by implication, has been

found unfit to exercise those visitation rights in the absence of supervision by another fit adult -- should have the discretion to consider the age, health, and stability of the proposed supervisor. The trial court in this case had the advantage of being able to personally observe any effects of age upon the paternal grandmother in open court as she testified, an advantage that this court lacks, and the trial court expressly noted in its judgment the paternal grandmother's health concerns and her having alternately expelled the father from, and having allowed his return to, her home. We thus conclude that the trial court did not abuse its discretion, based on the evidence in this case, in concluding that the paternal grandmother should not continue as a designated supervisor of the father's visitation with the child.[8]

The second and final issue raised by the father attacks the propriety of the provision of the modification judgment designating the mother as the sole legal custodian. As a threshold matter, our review of the divorce judgment leads us

[8]Of course, the mother and the father retain the power to subsequently agree that the paternal grandmother can again supervise the father's visitation.

to question whether the trial court's modification judgment has truly affected any substantial legal rights the father may have had under the divorce judgment. In Gallant v. Gallant, 184 So. 3d 387 (Ala. Civ. App. 2014), this court construed a judgment that, while stating that two parents of minor children had "'co-equal responsibility for reaching decisions regarding major areas that touch upon the health, education and/or welfare of th[ose] children'" and that the parent entitled to visitation was "'to be given the opportunity to provide meaningful input into those areas,'" determined that the children's physical custodian was "'vested ... with the final authority to make such determinations and or decisions'" if the parents were "'unable to reach a consensus.'" 184 So. 3d at 403 (emphasis added in Gallant). This court, after considering the meaning of the term "joint legal custody" in Alabama law (as defined in Ala. Code 1975, § 30-3-151(2)), agreed in Gallant with the proposition that the physical custodian in that case had been made the sole legal custodian of the children because the parent entitled to visitation had not been afforded "final authority over any aspect of the children's lives." Id.

Similarly, in this case, although the divorce judgment incorporated the parties' agreement that designated both the father and the mother as legal custodians, the divorce judgment named the mother as the "tie breaker" in the event of any future disputes regarding decisions affecting the child. Stated another way, the parties' divorce judgment, like the judgment under review in Gallant, did not vest in the father "final authority over any aspect of the [child]'s li[fe]," 184 So. 3d at 403, and the mother has, in actuality, been the sole legal custodian of the child since the entry of the divorce judgment. Because the father did not appeal from the divorce judgment, and did not assert a claim in the modification action seeking a change in the legal-custody provisions of the divorce judgment, we conclude that the mother's status as sole legal custodian of the child cannot properly be challenged in this appeal. See Tanner v. Tanner, 241 So. 3d 28, 30 n.2 (Ala. Civ. App. 2017) (noting that propriety of supervised visitation was an "issue determined in [a] previous judgment, which was not appealed [and] could not be challenged on appeal in [a] subsequent action," citing Stack v. Stack, 646 So. 2d 51 (Ala. Civ. App. 1994)); see also Moorer v. Moorer, 487 So.

2d 947, 948 (Ala. Civ. App. 1986) (holding that award of periodic alimony rather than child support in divorce judgment "was a question that was ripe for appeal upon the entry of" that judgment and could not be raised in an appeal taken from a subsequent judgment declining to modify that award).

Even if the legal-custody issue were properly before the court in this appeal, however, we would not be inclined to reverse the judgment under review on the basis of the arguments presented by the father. For example, the father cites Gallant, supra, for the proposition that, for legal custody to be modified, a party must show that there has been "a material change in circumstances." He asserts that no such material change was demonstrated because, he says, the mother knew during their marriage that the father had been addicted to and had abused controlled substances.

However, this court pointed out in Gallant that the material-change principle first arose in child-custody caselaw in an effort to mitigate the strict application of the doctrine of res judicata, i.e., of claim-preclusion and issue-preclusion principles, so as to allow consideration by courts of equity of "the shifting nature of the needs of a growing

child." 184 So. 3d at 392. Given that origin of the "material change" principle, it follows that, as our supreme court noted in Sparkman v. Sparkman, 217 Ala. 41, 114 So. 580 (1927), it is improper to mechanistically "limit the inquiry in subsequent [custody] proceedings solely to changed conditions of the parties" -- it is more correct to say that, "[i]f pertinent facts existing at the time of the former [judgment] have come to light, ... the court, with the interest of the infant as the guiding star, should hear and consider them." 217 Ala. at 43, 114 So. at 581. In particular, when an existing custody judgment is not the result of contested litigation, but is instead a product of an agreed settlement between custodial contestants, the material-change rule is no bar in a modification proceeding to consideration of facts and circumstances in existence at the time of the entry of the existing custody judgment. See, e.g., Keeton v. Keeton, 472 So. 2d 1082, 1083-84 (Ala. Civ. App. 1985) (holding that, when existing custody judgment had been "rendered by consent and agreement of the parties," it was proper for trial court considering modification of that judgment to allow into evidence testimony concerning "events,

facts, and circumstances which occurred ... before the ... judgment"; citing Anonymous v. Anonymous, 277 Ala. 634, 173 So. 2d 797 (1965)); see also note 6, supra.

In this case, although the mother was shown to have been aware of the father's drug use and addiction during their marriage, the trial court did not take into consideration any such conduct of the father in entering the divorce judgment based upon the parties' agreement. The mother was thus not precluded from adducing and relying upon evidence of the father's abuse of illicit drugs as a basis for seeking a change in the child's legal-custody arrangements -- for example, photographs she introduced into evidence that were taken at the time of her discovery of the father on April 3, 2018, in an unconscious state behind the steering wheel of a motor vehicle in the presence of a "meth pipe" and a small bag holding a white substance that, the father admitted, "more than likely" was "drugs." Similarly, although the mother admitted that the father had "continued to get arrested" after the birth of the child, the trial court did not consider any criminal record of the father in entering the divorce judgment, and the mother was thus not precluded from adducing

and relying upon evidence in the modification action indicating that the father had been found guilty by the Shelby District Court in January 2019 on a charge of second-degree theft of property and by the Jefferson District Court in February 2019 on one charge of unlawful possession of controlled substances (heroin and/or methamphetamine) and two charges of possession of forged instruments.

"'To modify legal custody, the trial court need only find that the best interests of the child are served by the modification,'" a determination that "is within the sound discretion of the trial court" and will not be reversed "unless the judgment is plainly or palpably wrong." T.C.S. v. D.O., 156 So. 3d 418, 421-22 (Ala. Civ. App. 2014) (emphasis omitted; quoting Harris v. Harris, 775 So. 2d 213, 215 (Ala. Civ. App. 1999), and citing Hodgins v. Hodgins, 84 So. 3d 116, 125 (Ala. Civ. App. 2011)). It follows, then, that an appellate court should not deem "plainly or palpably wrong" a judgment that does not, in actuality, constitute a modification of an existing legal-custody judgment in favor of either party, and we conclude that the father has not demonstrated any error on the part of the trial court that has

prejudiced his substantial rights so as to warrant reversal of the judgment under review as to the issue of legal custody. See Rule 45, Ala. R. App. P.

AFFIRMED.

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