Rel: August 14, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190281

Michael Stoddart

v.

Corrina Marie Stoddart

Appeal from Autauga Circuit Court
(DR-17-900135)

THOMPSON, Presiding Judge.

Michael Stoddart ("the father") and Corrina Marie Stoddart ("the mother") each sought to modify the provision in their 2016 divorce judgment that awarded them joint legal and

physical custody of their child ("the child").[1] The mother also sought permission to move with the child to San Antonio, Texas. The father objected to the proposed relocation. After an evidentiary hearing, the Autauga Circuit Court ("the trial court") denied the father's request to modify custody of the child, awarded the mother sole physical custody subject to the father's visitation, and granted the mother's request to move with the child to San Antonio.

The record indicates the following. The mother was on active duty in the United States Air Force Reserve when the parties married. The child was born in November 2014. At that time, the family resided in Autauga County. Subsequent to the child's birth, the parties separated and divorced, and the mother moved to Elmore County until she deployed to Iraq and Kuwait on June 26, 2017. That assignment lasted six months, and the mother returned to the United States in late December 2017 or early January 2018. The child lived with the father throughout the mother's deployment. On May 26, 2017,

[1]The divorce judgment was entered by the Talladega Circuit Court on August 12, 2016. The parties appear to have resided in Autauga County during the marriage. The record does not explain why the divorce action was litigated in Talladega County.

the parties entered into an agreement, which was not filed in the trial court, purporting to "amend" some of the provisions of the divorce judgment. One of the provisions included in the agreement stated that the equal parenting time outlined in the divorce judgment was to continue "indefinitely." However, the agreement continued, "[i]n the case of either parent moving out of logical distance to share said parenting plan, the mother will retain full legal and physical custody of the child." The father testified that, after the document was signed and notarized, the mother "basically changed some things in that agreement without showing me." He said that he did not realize that the provision about relocating had been added to the agreement when he signed it.

On August 17, 2017, the father filed in the trial court a petition seeking to hold the mother in contempt and a modification of custody of the child. The mother was served upon her return from her deployment in late December 2017 or early January 2018. On February 9, 2018, the mother filed a verified answer to the father's petition and a counterclaim in which she also sought a custody modification. After the

litigation began, the mother, through her attorney, notified the father of her intent to relocate to San Antonio.

Evidence adduced at the modification hearing showed that both parties had remarried. The child was four years old at the time of the hearing. The father and his wife live in Prattville with the father's five-year-old stepchild, the one-year-old child he had had with his wife, and, every other week, the child. The father testified that the house in which he currently lives has two bedrooms and two baths and has adequate room for the five-member family to live.

The father works for a construction company and testified that his extended family lives in and around Autauga County. He explained that he intended to enroll the child in a kindergarten program through a Prattville church. He said that he did not believe that it would be in the child's best interest to leave her extended family and move to San Antonio. When asked whether he thought the move would have a "devastating" impact on the child, he said that he believed that it would.

The mother testified that she intended to move for "better opportunity." She explained that her brother-in-law

and sister-in-law live in the same general area as the mother in San Antonio and that her extended family lives in Oklahoma, about a four-hour drive from San Antonio. The parties agreed that the drive from Autauga County to San Antonio is approximately 12 hours. Other than the child, the mother said, she has no ties to Alabama. Her childhood friend, who testified on behalf of the mother, lives in Austin, Texas.

The mother told the trial court that the school systems in the San Antonio area are "significantly better" than those in Autauga County. She explained that the child had been accepted at the School of Science and Technology, a charter school in San Antonio that, she said, has a 100% acceptance rate among its graduates who apply to college, although she recognized the child would be starting at the school in kindergarten. Nonetheless, the mother said, the school begins preparing the children for college even at that young age. The mother said that, because her husband had enlisted in the Air Force in Texas, 120 credit hours of the child's college education in Texas would be paid for, which is not the case in Alabama.

The mother further explained that there was "overall just a better atmosphere for [the child] and for myself [in Texas]. I had a job opportunity that I could not pass up." The mother testified that the job she had obtained in San Antonio was as a registered nurse in the surgical-trauma intensive-care unit at University Hospital. She also remained a member of the Air Force Reserve. The mother told the trial court that, once her probationary period was over, her shift at the hospital would be 7:00 p.m. to 7:00 a.m. three nights a week. While she worked, she said, her husband, who was attending the San Antonio Police Academy, would be home to care for the child, although she conceded that, after he graduated from the academy, he might be assigned to work the night shift. If that occurred, the mother said, her unit director had agreed to place the mother on the day shift "to offset whatever schedule he's working."

The mother said that she has no children other than the child and that her husband has no children of his own. They had purchased a four-bedroom, three-bath home in San Antonio. She agreed with the father's testimony that her husband is the person who usually drives the child to custody exchanges with

the father. The mother explained that, in her new job, she was on a probationary status and "follow[ed] a different nurse's schedule." She said that she did not want the father to lose any of his visitation time because of her schedule, which included most weekends. The mother told the trial court that she wanted the father to have as much contact as possible with the child. The mother suggested that the parties alternate major holidays and stated that the father, his wife, and their children were welcome to stay at the mother's house whenever they wanted to visit the child and that she had offered to let them stay at the house.

Evidence of text exchanges between the parties and their respective testimony indicated that they have had a contentious relationship since they divorced. The mother testified that, while the joint-custody arrangement was in effect, she had not wanted to change the amount of time the father had to spend with the child but had wanted to change the exchange day so that she would be able to make the drive from San Antonio and not lose time with the child because of "drill weekends" with her reserve unit. She said that the father would not cooperate with her or with her attorney on

that issue. In the text exchanges, portions of which were read into the record, the father used threatening and abusive language and said to the mother, among other things, that she "did not deserve to be [the child's] mom."

The father testified that the mother had not contacted the child regularly while she was deployed. However, the mother said that her "primary source of contact" with the child during that time was through the child's day care, that she tried to contact the child every day, and that she had had "regular, consistent contact" with the child throughout her deployment.

Both parties had witnesses testify regarding their parenting ability, and each party said the other was a good parent, although the father took exception with some of the mother's conduct.

On September 18, 2019, the trial court entered a judgment awarding the mother sole physical custody of the child, subject to the father's "free and liberal visitation," and granting the mother's request to move to San Antonio. Both parties filed motions to alter, amend, or vacate the judgment. After a hearing on the motions, the trial court entered an

order on November 19, 2019, amending the Thanksgiving holiday schedule, clarifying which party was responsible for providing transportation of the child for visitations, and ordering the father to pay the mother child support in the amount of $513 per month. The father filed a renewed motion to alter, amend, or vacate the judgment on December 19, 2019. He then timely filed a notice of appeal to this court on December 30, 2019, the 41st day after the entry of the November 19, 2019, order.

On appeal, the father argues that the trial court did not have jurisdiction over the mother's counterclaim for custody because the mother did not pay a filing fee. Alabama law does not support the father's contention.

In Hudson v. Hudson, 178 So. 3d 861, 868-69 (Ala. Civ. App. 2014), this court explained:

> "In Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010), our supreme court addressed the requirement that a counterclaim plaintiff pay a filing fee in support of a counterclaim, pursuant to § 12-19-71(a)[, Ala. Code 1975]. The supreme court recognized:
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> > "'Although § 12-19-70[, Ala. Code 1975,] expressly requires that the docket fee must be "collected from [the] plaintiff at the time [the] complaint is filed," ... the legislature has not expressly provided that a filing fee must be collected at the time a counterclaim is filed.... Therefore, when Rudolph delivered the

> counterclaim to the clerk, the counterclaim was "filed" and became a part of the action over which the trial court had jurisdiction....
>
> "'Therefore, the trial court did not err by reinstating Rudolph's counterclaims on the condition that she pay the filing fee.'

"46 So. 3d at 414. ...

> "We read Espinoza as holding that the failure to pay a filing fee does not divest the trial court of jurisdiction over a counterclaim."

In applying Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010), to the facts of Hudson, a domestic-relations case, this court explained:

> "In this case, the father did not move the trial court to stay the proceedings on the counterclaims filed by the mother until she paid a filing fee. In fact, the father did not even mention the nonpayment of the filing fee to the trial court, raising the issue for the first time on appeal. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ('This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.'); and Gotlieb v. Collat, 567 So. 2d 1302, 1304 (Ala. 1990) ('This Court cannot put a trial court in error for failing to consider evidence or accept arguments that, according to the record, were not presented to it.'). The father is not allowed to raise that nonjurisdictional issue in this court only after receiving an adverse judgment below. See Hicks v. Hicks, 130 So. 3d 184, 194 (Ala. Civ. App. 2012) (Thompson, P.J., dissenting),

> cert. denied, 130 So. 3d 194 (Ala. 2013). Therefore, we reject any contention that the trial court acted without jurisdiction in ruling on the mother's counterclaims."

178 So. 3d at 869.

In the current case, the mother does not dispute the father's contention that she did not pay a filing fee when she filed her counterclaim for custody modification. However, the record demonstrates that, as was the case in Hudson, the father did not raise this issue in the trial court. Because the trial court's jurisdiction to consider a counterclaim is not affected by the mother's failure to pay a filing fee, and because this issue was not raised below, we will not consider this issue on appeal. See Hudson, supra.

The father also contends that the trial court abused its discretion by allowing the mother to move with the child to San Antonio. Our standard of review regarding this issue is well settled.

> "The judgment was issued based upon ore tenus proceedings. Where the trial court's findings are based on evidence received ore tenus,
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> > "'"[o]ur standard of review is very limited.... A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, ... and we will not reverse unless

> the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow."'
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> "Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994) (citations omitted) (quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993)). 'It is our duty to affirm the trial court's judgment if it is fairly supported by credible evidence, "regardless of our own view of that evidence or whether we would have reached a different result had we been the trial judge."' Griggs v. Griggs, 638 So. 2d 916, 918-919 (Ala. Civ. App. 1994) (quoting Young v. Young, 376 So. 2d 737, 739 (Ala. Civ. App. 1979))."

Sankey v. Sankey, 961 So. 2d 896, 900-01 (Ala. Civ. App. 2007).

The presumption of correctness afforded the trial court's factual findings

> "'can be overcome when there is an absence of material evidence to support the trial court's factual findings. Means v. Means, 512 So. 2d 1386 (Ala. Civ. App. 1987). Thus, while issues concerning child custody are within the sound discretion of the trial court, that judgment will be reversed if it is so unsupported by the evidence that it is plainly and palpably wrong. Hermsmeier [v. McCoy, 591 So. 2d 508] at 509 [(Ala. Civ. App. 1991)]; Glover v. Singleton, 598 So. 2d 995 (Ala. Civ. App. 1992).'"

L.S. v. A.S., 272 So. 3d 169, 179 (Ala. Civ. App. 2018)(quoting Vick v. Vick, 688 So. 2d 852, 855 (Ala. Civ. App. 1997)). Additionally, this court reviews the trial court's conclusions of law and its application of law to the facts under the de novo standard of review. Espinoza v. Rudolph, 46 So. 3d at 412.

Regarding this issue, the father specifically argues that the mother failed to meet her burden of overcoming the presumption set forth in the Alabama Parent-Child Relationship Protection Act ("the Act"), §§ 30-3-160 through -169.10, Ala. Code 1975, that the move to Texas would not be in the child's best interest.

> "Section 30-3-169.4[, Ala. Code 1975,] places the initial burden of proof on the party seeking the change in principal residence. If the party seeking the change in principal residence meets his or her burden of proving that the change in residence is in the child's best interest, the burden then shifts to the nonrelocating party to demonstrate how the change in residence is not in the child's best interest. See § 30-3-169.4, Ala. Code 1975."

Clements v. Clements, 906 So. 2d 952, 957 (Ala. Civ. App. 2005).

The Act provides that, "[i]n determining whether a proposed or actual change of principal residence of a minor

child should cause a change in custody of that child, a court may take into account all factors affecting the child." § 30-3-169.3(a), Ala. Code 1975. The Act enumerates the following 17 specific nonexclusive factors to be considered:

> "(1) The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate with the child and with the non-relocating person, siblings, and other significant persons or institutions in the child's life.
>
> "(2) The age, developmental stage, needs of the child, and the likely impact the change of principal residence of a child will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
>
> "(3) The increase in travel time for the child created by the change in principal residence of the child or a person entitled to custody of or visitation with the child.
>
> "(4) The availability and cost of alternate means of communication between the child and the non-relocating party.
>
> "(5) The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
>
> "(6) The preference of the child, taking into consideration the age and maturity of the child.
>
> "(7) The degree to which a change or proposed change of the principal residence of the child will

result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child.

"(8) The extent to which custody and visitation rights have been allowed and exercised.

"(9) Whether there is an established pattern of conduct of the person seeking to change the principal residence of a child, either to promote or thwart the relationship of the child and the non-relocating person.

"(10) Whether the person seeking to change the principal residence of a child, once out of the jurisdiction, is likely to comply with any new visitation arrangement and the disposition of that person to foster a joint parenting arrangement with the non-relocating party.

"(11) Whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the change of principal residence of the child and the child, including, but not limited to, financial or emotional benefit or educational opportunities.

"(12) Whether or not a support system is available in the area of the proposed new residence of the child, especially in the event of an emergency or disability to the person having custody of the child.

"(13) Whether or not the proposed new residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, which does not have an adequately functioning legal system, or which otherwise presents a substantial risk of specific and serious harm to the child.

> "(14) The stability of the family unit of the persons entitled to custody of and visitation with a child.
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> "(15) The reasons of each person for seeking or opposing a change of principal residence of a child.
>
> "(16) Evidence relating to a history of domestic violence or child abuse.
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> "(17) Any other factor that in the opinion of the court is material to the general issue or otherwise provided by law."

Id.

In this case, because the mother has relocated to Texas, the father has remained in Autauga County, and the child has now reached school age, the previous custody arrangement pursuant to which the child spent every other week with each parent is no longer workable. Thus, a modification of the custody award set forth in the divorce judgment was necessary. The mother testified that the child and she would have better opportunities in San Antonio. She explained that the science and mathematics charter school the child would attend in San Antonio was "significantly better" than the schools in Autauga County and, she said, its graduates all attended college. She also testified that, under a state program for which her husband qualified, a large portion of the cost of the child's

postminority education in Texas would be covered. The father did not rebut the mother's testimony and offered no evidence regarding the quality of the education the child would receive in Autauga County. He said that the child was scheduled to attend a pre-kindergarten program through a local church.

The mother also testified that, although she had worked as a nurse at a hospital in Montgomery, the opportunity to work as a trauma nurse in San Antonio was a good one for her career. Furthermore, her husband had recently separated from the Air Force and was attending the San Antonio police academy. The employment prospects for the mother and her husband in San Antonio were good, she said.

The mother testified that she has in-laws in San Antonio and that her close childhood friend lives in Austin. The mother also has family in Oklahoma and has no family of her own in Alabama. The father has extended family with whom the child is close in the Prattville area. The mother testified that she wanted the child to maintain a relationship with the father and the father's extended family. The father offered no similar testimony regarding encouraging a relationship between the child and the mother and the mother's family. The

mother also testified that the house she and her husband had purchased in San Antonio was a four-bedroom home in which the child would have her own bedroom. The father testified that he and his wife and three children, including the child, live in a two-bedroom house and that there is adequate room for everyone.

Additional evidence adduced at trial indicated that the mother and the father do not have an amicable relationship. The father has a tendency to use language demeaning the mother. The trial court reasonably could have determined that, given the father's attitude toward the mother, the mother is more likely to preserve the relationship between the child and the father than the father is to encourage a good relationship between the mother and the child. Furthermore, the child was just beginning school and had not yet developed strong ties with friends and had not become involved in school, school activities, or extracurricular activities. The trial court had the opportunity to observe the demeanor of the parties. The presumption in favor of the trial court's factual findings under the ore tenus standard is based on the trial court's unique position to directly observe the

witnesses and to assess their demeanor and credibility. "This opportunity to observe witnesses is especially important in child-custody cases. 'In child custody cases especially, the perception of an attentive trial judge is of great importance.' Williams v. Williams, 402 So. 2d 1029, 1032 (Ala. Civ. App. 1981)." Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001). See also Clark v. Clark, 292 So. 3d 1054, 1059 (Ala. Civ. App. 2019).

Based on the record before us and considering the factors set forth in § 30-3-169.3(a), Ala. Code 1975, we conclude that the trial court could have reasonably concluded that the mother met her burden of demonstrating that moving to San Antonio with the child was in the child's best interest and that the father failed to prove that the relocation was not in the child's best interest. Accordingly, we will not reverse the judgment of the trial court as to this issue.

The father also argues that this cause must be remanded so that the trial court can complete a CS-42 child-support-guidelines form showing the figures it used to calculate the father's child-support obligation, as required by Rule 32, Ala. R. Jud. Admin. The mother concedes that a CS-42 form is

not included in the record but asserts that the error is simply a "clerical error" that can be remedied through the filing of a motion pursuant to Rule 60(a), Ala. R. Civ. P.

The application of Rule 32, Ala. R. Jud. Admin., is mandatory. Smith v. Smith, 587 So. 2d 1217 (Ala. Civ. App. 1991).

> "'Rule 32(E), Ala. R. Jud. Admin., states that "[a] standardized Child Support Guidelines form and a Child Support Obligation Income Statement/Affidavit form shall be filed in each action to establish or modify child support obligations and [that those forms] shall be of record and shall be deemed to be incorporated by reference in the court's child support order." ... The filing of the child-support-guidelines forms required under Rule 32(E) is mandatory. Martin v. Martin, 637 So. 2d 901 (Ala. Civ. App. 1994). This court has consistently held that the failure to file the required child-support-guidelines forms in compliance with Rule 32(E) where child support is made an issue on appeal is reversible error. Holley v. Holley, 829 So. 2d 759 (Ala. Civ. App. 2002); Gordon v. Gordon, 804 So. 2d 241 (Ala. Civ. App. 2001); and Martin v. Martin, supra.'"

Morrow v. Dillard, 257 So. 3d 316, 326 (Ala. Civ. App. 2017) (quoting Wilkerson v. Waldrop, 895 So. 2d 347, 348–49 (Ala. Civ. App. 2004))(emphasis omitted).

This court may affirm a child-support award if the forms required by Rule 32 are not contained in the record but this court is still able to determine, from the evidence in the

record, how the trial court reached its child-support calculation. Hayes v. Hayes, 949 So. 2d 150, 154–55 (Ala. Civ. App. 2006). In this case, the record does not contain evidence of the mother's income. We are unable to discern from the record how the trial court reached its determination that the father's child-support obligation was to be $513 each month. The appellate briefs of the parties also failed to provide us with guidance as to how that figure was reached. Because the record does not contain a CS–42 form setting forth the method by which the trial court determined child support, this court is unable to adequately review the father's argument on appeal. Accordingly, we reverse the judgment as to this issue and remand the case for the trial court to enter a child-support judgment that complies with Rule 32, Ala. R. Jud. Admin. Treadway v. Treadway, [Ms. 2190133, June 19, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020).

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

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