REL: March 26, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190669

Tommie L. Wright

v.

Patricia Small Wright-White

2190707

Patricia Small Wright-White

v.

Tommie L. Wright

Appeals from Shelby Circuit Court
(DR-03-67.02)

MOORE, Judge.

In appeal number 2190669, Tommie L. Wright ("the father") appeals from a judgment entered by the Shelby Circuit Court ("the trial court") to the extent that it modified his child-support obligation. In appeal number 2190707, Patricia Small Wright-White ("the mother") cross-appeals from that same judgment to the extent that it denied her request for an attorney's fee. With respect to the father's appeal and the mother's cross-appeal, we affirm the judgment.

Background

The parties were divorced by a judgment entered by the trial court on November 18, 2004. Among other things, the divorce judgment ordered the father to pay $1,300 per month in child support to a special-needs trust ("the trust") created for the benefit of the parties' son, Thomas, a disabled person born on June 6, 1993, and ordered that that provision was to continue in effect after Thomas attained the age of majority. Upon receipt of the monthly payments, the trustee was to distribute the $1,300 to the mother. The father was awarded weekend visitation with Thomas, which, according to the divorce judgment, also served as "mandatory

respite care" for Thomas -- i.e., it served to provide the mother temporary relief from caring for Thomas; in the event the father did not exercise that visitation, he was required to pay for "respite care."

On November 6, 2017, the father filed a petition to modify his child-support obligation because, he said, Thomas had begun receiving Social Security benefits. That action was assigned case number DR-03-67.01.

On July 2, 2019, the mother filed a petition for a rule nisi and for modification of the father's child-support obligation ("the mother's action"); the mother's action was assigned case number DR-03-67.02. The father filed an answer in the mother's action on July 9, 2019. Upon the mother's motion, case numbers DR-03-67.01 and DR-03-67.02 were consolidated. On January 3, 2020, the trial court dismissed the father's modification action, i.e., case number DR-03-67.01.

After a trial, the trial court entered a judgment on March 9, 2020, in the mother's action, denying the mother's request for a rule nisi, increasing the father's child-support obligation to $3,000 per month, and awarding the mother $10,000 in attorney's fees. With regard to the modification of the father's child-support obligation, the trial court found:

> "At the time of the parties' original divorce, the [father] was visiting [Thomas] on a regular basis. This Court has observed [Thomas] and has concluded therefrom that considerable special care of [Thomas] is needed and respite care for the caretaker is very important. Because [the father] took [Thomas] with him on occasions of his visits, [the mother] was provided with some needed respite from the constant care and attention needed by that child. Since the [father] moved to Tennessee, and especially since about 2014, the [father's] visits with [Thomas] have effectively ceased, leaving the [mother] without the periods of respite which she was receiving when [the father] was exercising visitation. While [the father] is not obligated by court order or otherwise to provide respite care, the fact of his having essentially ceased visitation with [Thomas] under the circumstances of this case constitutes such a change of circumstances as would justify an increase of child support which would provide [the mother] the ability to pay for some degree [of] respite care."[1]

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[1]We note that neither party has challenged the trial court's finding that the father was not required to visit Thomas after he attained the age of majority. Moreover, the parties tried the case under the theory that the father was not required by the provisions in the divorce judgment to visit or to pay for respite care after Thomas reached the age of majority; in fact, the mother's attorney expressly stated as much at the trial. Therefore, we will review this case under that theory. See, e.g., Vulcraft, Inc. v. Wilbanks, 54 Ala. App. 393, 395, 309 So. 2d 105, 106 (Civ. 1975) ("It is the law in Alabama that a case will not be reviewed in the appellate court on a theory different from that on which it was tried below. ... Furthermore, as in this instance when parties adopt a theory for trial and the case is tried with that understanding, the courts, on appeal, accept the view that the pleadings present that theory. ...").

The father filed a postjudgment motion on March 24, 2020. On May 1, 2020, the trial court entered an order granting the father's postjudgment motion, in part, by vacating the award of attorney's fees to the mother; the trial court denied the postjudgment motion in all other respects. The father filed his notice of appeal on June 5, 2020, and the mother filed her notice of cross-appeal on June 19, 2020.[2]

Facts

Thomas was 26 years old at the time of the trial. The mother testified that Thomas has spastic quadriplegia, a type of cerebral palsy. According to the mother, Thomas cannot walk or talk and needs assistance for all of his daily living activities.

The mother testified that, since the father moved to Tennessee in 2009, he had not visited regularly with Thomas and that he had not visited with him hardly at all since Thomas had become an adult, so he was no longer providing respite care for Thomas. She testified that respite-care providers cost between $17.50 and $24.00 per hour and that

[2]The appeal and the cross-appeal were consolidated by this court ex mero motu.

she needed 96 hours, or 4 days, of respite care to be provided to Thomas per month. At trial, the mother specifically requested that the trial court order the father to pay $1,700 toward the cost of respite care, an amount that she had actually paid for such care in one month and that she characterized as "a very conservative estimate." The mother testified that Medicaid will assist with respite care if she obtains care through one of two companies that have a contract with the State of Alabama, but, she said, she had been unable to obtain care from either of those companies. The mother testified that the only way to hire 24-hour care for Thomas in order for her and her current husband to take a vacation would be to place Thomas at a nursing home for $200 to $300 per day. She testified that the person she hires must be able to feed and bathe Thomas, to give him his medications, to brush his teeth, to assist with entertaining him, to interact with him, and to provide him companionship.

The parties' combined adjusted gross monthly income exceeds the uppermost limit of the Rule 32, Ala. Jud. Admin., child-support guidelines. The mother's gross monthly income is $11,578.28, and the father's gross monthly income is $11,356.

The mother submitted a budget of Thomas's expenses, which, including the $1,700 for respite care, total $4,030.99. The expenses in the budget included one-third of the mother's household bills, Thomas's medical co-pays, and expenses for Thomas's personal care, an automobile, automobile insurance, gas, entertainment, groceries/food, and incidentals.

The mother testified that the trust was initially funded with money awarded as damages in a lawsuit concerning Thomas's traumatic birth. According to the mother, at the time of the trial in this action, there was approximately $375,000 in the trust. The mother testified that she had submitted requests for reimbursement to the trustee for respite care, as well as for "wheelchair accessories, personal items, [and] personal care items not covered by insurance such as diapers." She had also purchased handicapped-accessible vans using trust funds. The mother testified that she does not submit requests to the trustee for reimbursements for all of Thomas's expenses because, she said, she is "trying to stretch the trust money to last [Thomas's] lifetime." She also testified that both she and the father have life-insurance policies insuring their lives that list the

trust as the beneficiary. Thomas also receives Supplemental Security Income ("SSI") from the Social Security Administration.

Discussion

I. The Father's Appeal

On appeal, the father argues that there was no material change in circumstances to justify an increase in his child-support obligation for Thomas. However, it was undisputed that the father had effectively ceased exercising his visitation with Thomas after moving to Tennessee, leaving the mother with the need for respite care for Thomas. "Respite care" is temporary care provided to a dependent person in relief of a family caregiver who otherwise provides constant care for that person. See Saundra L. Theis et al., Respite for Caregivers: An Evaluation Study, 11 Journal of Cmty. Health Nursing 31, 32 (1994). In the child-support context, respite care is a type of child-care cost that is to be considered when computing the child-support obligation of each parent. See McIntosh v. Landrum, 377 S.W.3d 574 (Ky. Ct. App. 2012). Respite care is considered a benefit to a child in need of specialized supervision. See In re Marriage of Aiken, 194 Wash. App. 159, 174, 374 P.3d 265, 273

(2016). When a noncustodial parent who is providing respite care to a disabled child ceases to visit with the child so that the custodial parent is compelled to seek alternative respite care, thereby increasing the cost of child care, a material change of circumstances has occurred warranting modification of child support. See, e.g., Kuttas v. Ritter, 879 So. 2d 3, 5 (Fla. Dist. Ct. App. 2004) (concluding that a father's out-of-state move and "his concomitant inability to exercise weekend visitation" to provide respite care for a disabled child constituted a substantial change of circumstances warranting modification of child-support award to account for costs of substitute respite care).

Alabama law currently recognizes that a trial court may order a parent to contribute to the support of a disabled adult child. See Ex parte Brewington, 445 So. 2d 294 (Ala. 1983); see also Knepton v. Knepton, 199 So. 3d 44, 47 (Ala. Civ. App. 2015) (recognizing that Ex parte Brewington remains "good law"). Ordinarily, any modification of a parent's postminority-support obligation would be achieved through the application of the child-support guidelines in Rule 32. See DeMo v. DeMo, 679 So. 2d 265, 267 (Ala. Civ. App. 1996). However, in cases like this, in

which the parents' combined adjusted gross monthly income exceeds $20,000, Rule 32(C)(1) provides that the trial court may use its discretion in determining the amount of child support to be awarded and that that determination should be guided by two factors: (1) the reasonable financial needs of the child and (2) the resources of the parents to meet those needs. See generally McGowin v. McGowin, 991 So. 2d 735, 741 (Ala. Civ. App. 2008).

In this case, the trial court determined that Thomas needed respite care and ordered the father to pay $1,700 per month to contribute to the cost of that care. We find that the trial court properly exercised its discretion in making both determinations. The evidence showed that Thomas had received respite care from the father, that the father was no longer willing to provide that care, and that the mother had to arrange for alternative respite care. The mother testified as to the cost of that care and requested that the trial court order the father to pay $1,700 per month, which was "a very conservative estimate," to cover those costs. The record does not support the father's argument that appropriate respite care could have been secured at a lesser cost.

The father does not argue that he cannot afford to pay the additional $1,700 per month for respite care. He maintains, however, that the trial court should have reduced his obligation to account for the financial resources available to Thomas to pay for his own respite care. The father argues that the trial court should have determined that Thomas can contribute to his own respite-care costs through his SSI benefits and the trust fund. This court has held, however, that because "SSI benefits are a supplement to income, not a substitute for it," SSI benefits cannot be considered a financial resource for a child to be credited against a parent's child-support obligation. Lightel v. Myers, 791 So. 2d 955, 960 (Ala. Civ. App. 2000). Therefore, the trial court did not err in failing to treat the SSI benefits as a resource available to Thomas to pay for his own respite care. With regard to the trust, the father testified that the mother is the primary trustee of the trust and that she has the right to make decisions regarding the trust. The mother testified that any funds in, and any funds to be deposited into, the trust must last the entirety of Thomas's life, and, she said, she is trying to stretch those funds so that they last. Based on the evidence concerning the purpose of the trust and the

discretion that the mother, as the primary trustee, has over distributions, we cannot conclude that the trial court erred in failing to treat the trust as a financial resource for the payment of respite care or that the trial court erred in failing to order the mother to diminish the funds available in the trust to pay for respite care. See, e.g., Cutts v. Trippe, 208 Md. App. 696, 704-05, 57 A.3d 1006, 1011 (2012) (determining that a trust, over which an adult child had no control, was not to be considered in determining whether the adult child met the qualifications of being destitute such that the adult child was entitled to child support and noting that the adult child's mother, " 'who is the trustee, may legitimately exercise her discretion not to distribute trust funds in order to ensure that the financial means to support [the adult child] continue to exist when [the adult child's] parents are no longer able to provide support' "); compare Goetsch v. Goetsch, 66 So. 3d 788 (Ala. Civ. App. 2011) (holding that trust fund intended to defray costs of beneficiary's educational expenses should be considered financial resource of beneficiary when determining amount needed to meet beneficiary's postminority educational expenses).

The father next argues that the trial court erred in failing to order the mother to contribute to the cost of respite care. We agree with the general propositions that both parents have an obligation to support their child and that, in determining the parties' child-support obligations, the incomes of both parents must be considered. See, e.g., Young v. Young, [Ms. 2180190, Feb. 7, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020) (Moore, J., concurring in the result). See also Williamson v. Williamson, 391 So. 2d 115 (Ala. Civ. App. 1980); and Taylor v. Taylor, 408 So. 2d 117, 119 (Ala. Civ. App. 1981). However, we do not believe that those general propositions require reversal of the judgment in this case. The mother testified that it cost approximately $4,031 per month to care for Thomas, including the cost of respite care. However, the mother did not include in that estimate the value of the constant care she provides to Thomas to meet his special needs. The trial court was within its discretion to conclude that the mother was already providing valuable support to Thomas to which the father was not contributing and that it would be equitable that the father should bear the entire costs of paying for the respite care necessitated by his decision to move to Tennessee and

terminate visitations with Thomas. See McIntosh v. Landrum, 377 S.W.3d at 577 (affirming a judgment requiring noncustodial parent to pay 100% of the expenses for respite care incurred by the custodial parent as a result of the noncustodial parent's decision to move away and cease visitation with the child). Therefore, we cannot conclude, even when considering the mother's income, that the trial court erred in modifying the father's child-support obligation to require the father to pay $1,700 per month for respite care.

II. The Mother's Cross-Appeal

On cross-appeal, the mother argues that the trial court erred in declining to award her an attorney's fee.

> "Whether to award an attorney fee in a domestic relations case is within the sound discretion of the trial court and, absent an abuse of that discretion, its ruling on that question will not be reversed. Thompson v. Thompson, 650 So. 2d 928 (Ala. Civ. App. 1994). 'Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney.' Figures v. Figures, 624 So. 2d 188, 191 (Ala. Civ. App. 1993). Additionally, a trial court is presumed to have knowledge from which it may set a reasonable attorney fee even when there is no evidence as to

> the reasonableness of the attorney fee. Taylor v. Taylor, 486 So. 2d 1294 (Ala. Civ. App. 1986)."

Glover v. Glover, 678 So. 2d 174, 176 (Ala. Civ. App. 1996). In the present case, the mother succeeded on her claim for a modification of the father's child-support obligation. However, the trial court heard evidence indicating that the mother earns slightly more than the father. Therefore, the trial court could have properly concluded that each party had the ability to pay his or her own attorney's fees. Although the mother argues that the trial court must have intended for her to request reimbursement for her fees from the trust, the judgment does not so require. Therefore, we cannot conclude that the trial court exceeded its discretion on this issue.

The mother also argues that, because the father asserted that the mother should use the funds in the trust to pay for Thomas's increased expenses, Thomas and/or the trust should have been added as an indispensable party. The mother cites Gonzalez v. Gonzalez, 291 So. 3d 890 (Ala. Civ. App. 2019) , in support of her argument. In Gonzalez, this court explained:

> " ' "Indispensable parties" are persons who not only have an interest in the controversy but an interest of such a nature that a final [judgment] cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' Frander & Frander, Inc. v. Griffen, 457 So. 2d 375, 377 (Ala. 1984) (quoting 1 Champ Lyons, Alabama Practice, Rules of Civil Procedure, at 389 (1973))."

219 So. 3d at 893. This court held in Gonzalez that a child with special needs was an indispensable party because the former husband in that case had "sought to regain ownership of the life-insurance policy that he had transferred to the trust" established for the benefit of the child in that case, and the trial court had granted the father's requested relief. Id. In this case, however, the trial court did not determine that the mother was required to pay for Thomas's respite care using funds in the trust, and we have determined that the trial court did not exceed its discretion on that point. Therefore, we cannot conclude that there was any prejudicial error resulting from Thomas's or the trust's not being added as a party to this action. See Rule 45, Ala. R. App. P.

Conclusion

Based on the foregoing, we affirm the judgment of the trial court in all respects.

2190669 -- AFFIRMED.

2190707 -- AFFIRMED.

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