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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2190857

David Michael Keel

v.

Terri Tucker Keel (Jones)

Appeal from Tuscaloosa Circuit Court
(DR-20-228.01)

HANSON, Judge.

This appeal arises from a civil action initiated in April 2019 by David Michael Keel ("the father") seeking to modify the child-custody provisions of a judgment entered on July 19, 2011, by the Chilton Circuit

Court that divorced the father and Terri Tucker Keel, now known as Terri Jones ("the mother"), and, in pertinent part, awarded the mother physical custody of the parties' two minor children. Although the father filed his complaint in the court that had rendered the 2011 judgment, the mother filed a motion seeking to transfer the case to Tuscaloosa County on the authority of Ala. Code 1975, § 30-3-5, because, she said, she and the children had resided in Tuscaloosa County for more than three years preceding the commencement of the father's modification action. Although the Chilton Circuit Court entered an order denying the motion to transfer, this court, on mandamus review of the venue issue, issued a writ compelling that court to vacate that order, see Ex parte Keel (No. 2180991, Oct. 11, 2019), 312 So. 3d 810 (Ala. Civ. App. 2019) (table), and the modification action was then transferred to the Tuscaloosa Circuit Court ("the trial court"), in which court the mother filed an answer to the father's complaint denying the father's entitlement to relief and a counterclaim seeking an upward modification of the father's child-support obligation. The trial court, on the motion of the father, appointed a guardian ad litem to represent the interests of the children.

The trial court conducted an ore tenus proceeding on July 15, 2020, during which the parties testified in open court and the trial court conducted an in camera interview with the older of the two children that was held outside the presence of counsel for the parties and, pursuant to the direction of the trial court, was conducted off the record notwithstanding the presence of a court reporter at the interview. At the close of the ore tenus proceeding, the trial court solicited submissions from counsel for the parties and from the guardian ad litem, stating:

> "THE COURT: All right. Let me just say this, I will issue an order, what I need for you all to do, the attorneys, if you all will give me, [counsel for the father], if you will give me a proposed order of what you would like.
>
> "[Counsel for the father]: Yes, sir.
>
> "THE COURT: [Counsel for the mother], if you will do that as well and, [guardian ad litem], <u>if you would just send me your response. Don't efile it. Email them, to me in [Microsoft] Word form. I want you all to send them to me at the same time.</u>"

(Emphasis added.) After the trial court had ended its concluding remarks about its impending consideration of the parties' positions, the guardian ad litem asked for clarification of what the trial court was seeking:

> "[Guardian ad litem]: Your Honor, may I approach? Your Honor, may I approach and ask [a] question?
>
> "THE COURT: Yes, you can.
>
> "[Guardian ad litem]: Do you want me to send you a Word format or email my position?
>
> "THE COURT: You can just email me. That will be fine.
>
> "[Guardian ad litem]: Do you want me to do that prior or does it matter?
>
> "THE COURT: As soon as possible. Once I get them all in, then I'll consider them and, hopefully, I can get an order entered.
>
> "(END OF PROCEEDINGS)"

The trial court entered a judgment two days later that provided, in pertinent part:

> "... In order to modify the preexisting custody judgment entered on July 19, 2011, the [father] must demonstrate that there has been a material change in circumstances, that the proposed change in custody will materially promote the children's best interests, and that the benefits of the change will more than offset the inherently disruptive effect caused by uprooting the children. The Court notes that this standard, as set forth in [Ex parte McLendon], 455 So. 2d 863 (Ala. 1984), requires that a heavy burden be met. Based upon the matters presented, the Court does not find that the burden of proof as required by [Ex parte McLendon] has been met; therefore, the [father]'s Petition to Modify Custody is hereby denied.

> "... The Court finds that there has been a material change in circumstances and that child support is due to be modified. The [father] shall pay to the [mother] the sum of [$]1,212.76 per month as child support for the care and maintenance of the ... children beginning August 1, 2020, and continuing on the first day of each month thereafter until the ... children are emancipated or until further order of this Court. Said amount is in compliance with Rule 32 of the Alabama Rules of Judicial Administration. ..."

The father, following the denial of his motion filed pursuant to Rule 59, Ala. R. Civ. P., seeking a new trial or to alter, amend, or vacate the judgment, appealed from the trial court's judgment.

The father's first argument on appeal concerns the conduct of the guardian ad litem. He initially asserts that, per the father's own testimony, the older of the two children had expressed a desire to live with him, and he infers that the guardian ad litem necessarily breached a duty owed to the child in formulating a recommendation regarding custody. The father further intimates, citing the contentions of his own postjudgment motion in support, that the older child had "heavily relied" on alleged remarks by the guardian ad litem that she would urge the trial court to make a custody change and that she would question the older child during his in camera interview.

However, after making those points, the father simultaneously acknowledges in his brief the principle that a judicially appointed guardian ad litem "is an officer of the court appointed to protect the child's interests and is not bound by the child's expressed preferences." 1 Judith S. Crittenden & Charles P. Kindregan, Jr., Alabama Family Law § 14:4 (2d. ed. 2015); accord Jones v. McCoy, 150 So. 3d 1074, 1080 (Ala. Civ. App. 2013) (noting that "the role of the guardian ad litem is to zealously advocate for the best interests of the child and not necessarily to represent the position of the child in relation to the litigation"). In the absence of any evidentiary indication[1] tending to show that the guardian ad litem acted in a manner that was not in the best interests of the child, we are in no position to reverse the judgment reached by the trial court as to the proper custodial disposition of the older child.[2]

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[1]We would here reiterate that the contentions of counsel in a motion, such as the postjudgment motion filed in this case, are not themselves evidence, no matter how zealously stated. See Bo.S. v. Be.S., 293 So. 3d 946, 954 n.4 (Ala. Civ. App. 2019), and Ex parte Merrill, 264 So. 3d 855, 860 n.4 (Ala. 2018).

[2]In a footnote to his appellate brief, the father, for the first time, contends that the failure to transcribe the testimony of the older child given during his in camera interview was erroneous because he had

The father next contends that the guardian ad litem was impermissibly allowed to make a recommendation regarding custody on an ex parte basis, citing Ex parte R.D.N., 918 So. 2d 100 (Ala. 2005), for the proposition that accepting a guardian ad litem's custody recommendation in an ex parte manner amounts to a due-process violation. As the portion of the trial transcript we have quoted above indicates, however, the trial court expressly notified counsel for both parties on the record that it would accept and consider, via email, any "response" of the guardian ad litem to the proposed judgment forms that had been sought from, and were to be transmitted by, the parties' attorneys. The father's counsel could have lodged any objection to that proposed course of action before the end of the ore tenus proceeding, but did not do so, and the father neither cited Ex parte R.D.N. nor raised any

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requested that a court reporter be present during the interview. Although Alabama law is clear that a party's consent to an in camera interview may properly be subjected to the condition of a court reporter's presence, any error in conducting such an interview contrary to that condition is waived if it is not raised in the trial court, either after the interview or via a postjudgment motion. See Reuter v. Neese, 586 So. 2d 232, 235 (Ala. Civ. App. 1991).

due-process objection to the trial court's procedure in his postjudgment motion. As the mother correctly notes, "a timely objection to the improper submission of a guardian ad litem's recommendation is required to preserve the issue for appeal," Rogers v. Rogers, 307 So. 3d 578, 588 n.2 (Ala. Civ. App. 2019), and we cannot conclude that the father has properly preserved the issue of the propriety of the guardian ad litem's having been permitted to email a "response" directly to the trial court in this case.

Although we conclude that no reversible error is presented as to the trial court's judgment declining to modify custody of the children, we reach a contrary result as to the father's challenge to the propriety of the child-support award of $1,212.76[3] per month. The record reflects that the standardized "Child-Support Guidelines" form (Form CS-42) prepared by the trial court in conformity with Rule 32(E), Ala. R. Jud. Admin., determined the mother's monthly gross income to be $3,213, an amount that mirrors the amount of "employment income" the mother claimed to

[3]We note the provisions of Rule 32(C)(3), Ala. R. Jud. Admin., under which "[a]ll dollar amounts used in child-support calculations ..., including the recommended child-support order, shall be rounded to the nearest dollar."

earn per month on her "Child-Support-Obligation Income Statement/Affidavit" (Form CS-41); however, the Form CS-42 overlooks the mother's disclosure of $785 per month as estimated "self-employment income" she received from various parcels of real property titled in her mother's name. Although the father submitted into evidence federal-income-tax forms jointly filed by the mother and her husband for the calendar years 2018 and 2019, each of which indicate the existence of potential deductible losses that might properly have offset the gains of the mother, the mother has conceded in her appellate brief that her monthly gross income amounts to $3,998, i.e., the sum of the amounts disclosed on her Form CS-41. See Ala. R. Jud. Admin., Rule 32(B)(1) and (B)(2)(a) (defining "income" as "actual gross income of a parent" and "gross income" as including "income from any source"). Thus, as was the case in J.B. v. Jefferson County Department of Human Resources, 252 So. 3d 674, 676 (Ala. Civ. App. 2017), " '[t]he posture of the case is in effect a confession of error on the part of the appellee[] and a joinder therein by the appellant' " (quoting Payton v. Sexton, 273 Ala. 224, 225, 137 So. 2d 747, 748 (1962)).

Based upon the foregoing facts and authorities, the judgment of the Tuscaloosa Circuit Court is affirmed except as to the award of child support. As to that award, we reverse the judgment, and we remand the cause "for the trial court to properly determine the father's child-support obligation in compliance with Rule 32, Ala. R. Jud. Admin." Hyche v. Hyche, 226 So. 3d 673, 680 (Ala. Civ. App. 2016).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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