REL: August 27, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200211

Jessica Dyan Chance

v.

Christopher Dominic Jenkins

Appeal from Montgomery Circuit Court
(DR-12-900661.05)

HANSON, Judge.

This appeal arises from a civil action brought in May 2020 against Jessica Dyan Chance ("the mother") in the Family Court Division of the

Montgomery Circuit Court ("the trial court") by Christopher Dominic Jenkins ("the father"). In his initial complaint, the father sought modification of the custody and child-support provisions of a divorce judgment that had originally been entered by the trial court in February 2013 but had also been the subject of several previous modification and enforcement actions. The father averred that the parties' three children had been placed in the physical custody of the mother; the oldest child, K.A.J., had reached the age of majority before the commencement of the father's modification action, while the middle child, S.J.J., was born in mid-July 2002 and the youngest child, C.J.J., was born in December 2005. The father further alleged that the mother had abused alcohol; had regularly left her residence at night and had failed to return until the next morning; and had, during the father's visitation with C.J.J., filed a false report with law-enforcement officers indicating that the father had kidnapped C.J.J. The father expressly sought both a pendente lite and a permanent custody change as to C.J.J., claiming that a material change in circumstances had occurred with respect to C.J.J. and that the benefit of awarding the father custody of C.J.J. would outweigh any disruptive

effects therefrom. The father also filed a motion seeking the immediate transfer of custody of C.J.J. and an order restraining the mother from removing C.J.J. from the father's care; that motion was supported by affidavits of the father and his counsel.

The trial court entered an order granting the father's motion for an immediate transfer of custody of C.J.J. and restraining the mother from removing C.J.J. from the father's home in Maryland on June 5, 2020, pending further orders of the trial court; the trial court confirmed those rulings in orders entered on June 8 and July 2, 2020. After the mother had retained counsel, who then filed an answer on behalf of the mother to the father's complaint, the trial court set the case for a September 24, 2020, trial. The mother filed a motion requesting that the interlocutory orders previously entered in the action be set aside and a separate motion seeking the imposition of sanctions against the father, to which motion the father responded and sought a finding of contempt against the mother for allegedly having failed to pay attorney's fees awarded to the father in January 2018 in a previous modification action (case no. DR-12-900661.03). After the father had moved for the consolidation of a

protection-from-abuse ("PFA") action commenced in June 2020 by the mother in Macon County with the modification action, and the trial court had acted on that motion,[1] the mother's counsel was permitted to withdraw from representing her.

The father, after having obtained leave of court, amended his complaint to seek findings of contempt against the mother based upon her having purportedly failed to pay moneys due under previous judgments of the trial court and to request both recoupment of child support paid with respect to K.A.J. during her minority and reimbursement of child support paid to the mother during the pendency of the modification action. The mother, through a second attorney, filed an answer denying the father's claims. The father also filed a motion seeking the imposition of sanctions against the mother, asserting that she had appeared remotely for her deposition, which was conducted using videoconferencing technology, in the presence of other laypersons and in an apparently

[1]Although the trial court's order on that motion does not appear in the record, both the trial transcript and the judgment indicate that the PFA action was deemed consolidated with the father's modification action.

intoxicated state and that she had failed to produce requested documents or to give testimony in response to questioning by the father's counsel.

The trial court held an ore tenus proceeding over two days in September and October 2020, during which testimony was given by the mother, the father, K.A.J., C.J.J. (in camera), three Tuskegee municipal police officers, and two public-school employees from Macon County (where C.J.J. had previously attended school). The trial court rendered and entered a judgment in November 2020 that, in pertinent part, awarded the father physical custody of C.J.J. and S.J.J., subject to the mother's visitation; concluded that, because no minor children had actually been living with the mother during the pendency of the action,[2] she was to repay the father the $2,460 in child support that she had received from him after he had filed his complaint in May 2020; directed that the mother pay the father child support of $449 per month on a prospective basis starting in December 2020; awarded the father $1,976.86 as fees and costs based upon the mother's failures to allow

[2]C.J.J. had lived with the father since May 2020 and S.J.J. began attending college in Maryland in August 2020.

discovery; determined that the mother had failed to present evidence to support her PFA claim that she had initially brought in Macon County; and ruled that the mother's commencement of that action and her contempt of court warranted an attorney-fee award to the father of $8,500. The trial court's judgment expressly or implicitly denied all other relief, including the father's reimbursement claim as to child support paid with respect to K.A.J. and his contempt claim directed to the mother's purported violations of provisions of previous judgments. The mother, acting pro se, appealed from the judgment; however, after her appeal had been dismissed by this court for failure to comply with orders of this court, the mother retained a third attorney, who successfully moved for reinstatement of the appeal, and the appeal has been submitted for decision on only the brief submitted by the mother's new counsel.

Among other things, the mother asserts on appeal that the trial court erred in awarding physical custody of C.J.J. to the father. She focuses her argument upon the alleged existence of justifications for her behavior on May 21, 2020, which was the date of S.J.J.'s high-school graduation, asserting that the father's custody claim was "based largely

on [that] incident of inappropriate alcohol use by" the mother. However, the mother's argument fails to take into account the testimony given by then-14-year-old C.J.J. himself at trial, which indicated that the mother, on the date in question, had been "drunk" to the point of "falling out on the floor," had argued with the father, had "tr[ied] to call the police and lie and say that [the father] had a weapon," and had taken C.J.J.'s house key and expelled him from the mother's home. C.J.J. further testified that the mother's "drunk" periods included "every other day ... through the week" and "on the weekends" and that the mother had operated a motor vehicle while intoxicated with C.J.J. as a passenger; additionally, according to the father, the mother's past alcoholic binges had impelled her to spend moneys intended for the children's private-school tuition payments, resulting in their expulsion from private school and their return to public school in Macon County.

C.J.J. further testified that the mother had "hit" him "with her fist" on several occasions. In contrast, C.J.J. testified that the father "doesn't hit or [any]thing like that," that the father had "help[ed] with homework a lot" and had provided supplemental lessons on weekends, and that the

father "drives regularly" and "doesn't drink." C.J.J. expressed in his testimony a desire to live with the father, identifying the Maryland neighborhood where he had been living as a "very quiet ... area" with "better" schools; the father added that C.J.J.'s academic grades had improved from "40s" and "50s" while he was in Alabama to a "B" average while he had been living with the father.

> "In situations in which ... a previous judicial determination [as to] physical custody [favors] one parent, the other parent, in order to obtain a change in custody, must meet the burden set out in Ex parte McLendon, [455 So. 2d 863 (Ala. 1984)]. See Scholl v. Parsons, 655 So. 2d 1060, 1062 (Ala. Civ. App. 1995). 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.
>
> "When, as here, the trial court enters a judgment following an ore tenus proceeding, but does not make any express findings of fact, this court indulges the requisite presumptions that the trial court made those findings necessary to support its judgment and that those findings are correct. See Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001). Additionally, we note that the preference of a child whose custody is at issue 'is an important factor for the trial court to consider in a custody modification case,' although that

> preference is not controlling. S.R. v. S.R., 716 So. 2d 733, 735-36 (Ala. Civ. App. 1998)."

Dean v. Dean, 998 So. 2d 1060, 1064-65 (Ala. Civ. App. 2008). In Dean, this court affirmed a judgment changing custody in a case in which, among other things, there was evidence indicating that the child at issue had expressed a preference to be placed in the custody of the petitioning parent and that the responding parent had been involved in substance abuse, which parallels the situation in this case.

Further, Alabama's Custody and Domestic or Family Abuse Act ("the Act"), Ala. Code 1975, § 30-3-130 et seq., speaks to situations in which a child's custody is in dispute and one or more contestants has perpetrated domestic or family violence. Under the Act, a "determination ... that domestic or family violence has occurred"[3] (1) "raises a rebuttable presumption ... that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the

[3]As noted in Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001), "the Act contains no provision requiring a trial court to make an express finding as to whether abuse has occurred"; thus, a trial court need not do so. See also id. at 638-39.

location of that parent's choice, within or outside the state" (Ala. Code 1975, § 30-3-133) and (2) "constitutes a finding of change in circumstances" (Ala. Code 1975, § 30-3-134). Thus, in Williams v. Williams, 812 So. 2d 352 (Ala. Civ. App. 2001), this court cited the Act in affirming a judgment changing certain minor children's physical custody from their father to their mother, noting the presence in the record of testimony from the oldest child regarding the father's having "consistently exercised excessive discipline on the children, such as slapping them across the face." 812 So. 2d at 355.

In this case, the record indicates that C.J.J. was hit with a closed fist by the mother, and his testimony was corroborated by that of K.A.J., who testified to having been bitten, having been hit in the face, and having had her hair pulled by the mother, convincing K.A.J. to relocate to Maryland with the father. In contrast, the mother failed to demonstrate to the satisfaction of the trial court that the father had himself committed any such act of violence since the entry of the most recent custody judgment involving the parties. The father testified that he had physically intervened at the mother's house on the morning of May 21, 2020, when

the mother, who was in an inebriated state and agitated, twisted S.J.J.'s arm, and he added that his involvement in that respect was limited to protecting S.J.J. from the mother's actions. Thus, the trial court's determination that custody of C.J.J. should be awarded to the father is supported by the evidence of record and, being consistent with the standard set out in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), is due to be affirmed.

The mother has also sought to overturn the trial court's custody award as to S.J.J., asserting voidness. However, after the mother filed her notice of appeal, S.J.J. attained the age of 19 years. Because S.J.J. "is now an adult (see § 26-1-1, Ala. Code 1975), her custody is no longer the subject of controversy, and this court cannot grant effective relief," and the mother's "contention that the trial court erred" as to S.J.J.'s custody "is therefore moot." Faust v. Knowles, 96 So. 3d 829, 832 (Ala. Civ. App. 2012).[4]

[4]We note that no issue has been raised on appeal concerning the mother's prospective child-support obligation. Cf. Faust, 96 So. 3d at 832 (declining to address appellate challenge to prospective child-support award, which challenge had been conditioned on reversal as to moot

The mother further contends that the trial court's "overpayment" determination as to child support is void because, she says, she was entitled to receive child-support payments during the pendency of the father's modification action. The mother overlooks the trial court's authority to modify "[t]he provisions of any judgment respecting child support ... as to installments accruing after the filing of the petition for modification." Rule 32(A)(3)(a), Ala. R. Jud. Admin.[5] In that respect, her purely legal challenge to the award in this case parallels that rejected by this court in Bosarge v. Bosarge, 267 So. 3d 868 (Ala. Civ. App. 2018):

> "The mother ... argues that the trial court did not have the authority to modify the father's child-support obligation retroactively to the date the father had filed his petition for a modification. The mother points out that past-due installments of child support become enforceable money judgments. ... However, those past-due installments become

---

custody issue).

[5]Because the trial court's authority to retroactively modify child-support installments under Rule 32(A)(3)(a) is in no way dependent on the validity of any pendente lite order, this court need not accept the mother's invitation to consider the propriety of the pendente lite orders of the trial court in this case. Compare Person v. Person, 236 So. 3d 90, 97 (Ala. Civ. App. 2017) (indicating that an ex parte pendente lite order may properly be reviewed on appeal "to the extent that the final judgment depends on the validity of [such] an ex parte pendente lite order").

final judgments only when they mature before the filing of a petition to modify the child-support obligation. Ex parte State ex rel. Lamon, 702 So. 2d 449, 450-51 (Ala. 1997); see also State ex rel. Pritchett v. Pritchett, 771 So. 2d 1048, 1051 (Ala. Civ. App. 2000); Hartley v. Hartley, 42 So. 3d 743, 745 (Ala. Civ. App. 2009) ('[C]hild-support payments that mature or become due before the filing of a petition to modify are not modifiable.'). Alabama law provides that a modification of child support may be effective as of the date of the filing of a modification petition. Rule 32(A)(3), Ala. R. Jud. Admin. ('The provisions of any judgment respecting child support shall be modified only as to installments accruing after the filing of the petition for modification.'). This court has explained that applying a child-support modification retroactively is a matter within the trial court's discretion:

> "'Whether to make a parent's child-support obligation retroactive to the date the petition to modify was filed is a decision committed to the sound discretion of the trial court. ...
>
> > "'"The trial court may exercise its discretion in setting the effective date of a modification, but it is not bound to modify as of the date of the filing of the petition. ... This matter is within the sound discretion of the trial judge, whose decision will not be disturbed unless it was ... unsupported by the evidence [so] as to be palpably wrong, manifestly unjust, or plainly erroneous. . . ."
>
> "'....'

> "....
>
> > "The mother in the current case argues only that the trial court lacked the authority to retroactively modify the father's child-support obligation. As already explained, Rule 32(A)(3) and Alabama caselaw do not support that argument. ... The mother does not argue that the trial court abused its discretion in retroactively modifying the father's child-support obligation; in other words, she does not argue that the evidence did not support the amount of the child-support obligation or that the facts do not support a retroactive application of the new child-support amount. Arguments not asserted in an appellant's brief are deemed waived."

267 So. 3d at 870 (quoting Walker v. Lanier, 221 So. 3d 470, 472 (Ala. Civ. App. 2016), quoting in turn Rogers v. Sims, 671 So. 2d 714, 716-17 (Ala. Civ. App. 1995)). Because the mother has failed to argue that the trial court did not properly exercise the discretion that it clearly had to retroactively alter the father's child-support obligation as to payments accruing after the filing of his May 2020 modification complaint -- by which time, the evidence indicates, none of the parties' three children was living with the mother -- we conclude that the trial court's judgment is due to be affirmed as to the child-support issue.

The remaining argument to be addressed in the mother's brief concerns the cost and fee awards to the father. The trial court's judgment

specifies two separate awards. The first is a $1,976.86 award of fees and costs attributed to the mother's failures to allow discovery. As to that award, we note that the father was questioned at trial and testified to the mother's failure to participate at her deposition and to produce requested papers, and the mother admitted that she had not provided any documents to the father's counsel; Rule 37(d), Ala. R. Civ. P., provides that, when a party fails to respond to production requests propounded pursuant to Rule 30(b)(6) or Rule 34, Ala. R. Civ. P., a trial court has the power to "require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure," and we perceive no abuse of discretion as to that award, which was supported by affidavits filed by the father and his counsel.

However, in addition to that award, the trial court directed the mother to pay the father an additional $8,500 in attorney's fees, which award apparently springs not from any equitable authority that court might otherwise have had in a custody-modification action (as the mother suggests) but, instead, from that court's judgment as to the PFA claim

that the mother originally brought against the father in Macon County.[6] In pertinent part, the trial court's judgment states that the mother "did not present evidence to support her" PFA claim and that that claim "is hereby denied"; the judgment then recites that, "[b]ecause of [the] behavior of the [mother] to commence this action and because of her contempt," the mother "is ordered to pay the [father]'s attorneys' fees in the amount of $8,500.00." However, the only contempt claims brought by the father in this action involved (1) the mother's alleged failure to comply with provisions of previous modification judgments directing her to pay costs and attorney's fees, which contempt claims the trial court expressly denied in its November 2020 judgment, and (2) the mother's noncompliance as to discovery, which was fully addressed by the trial court in its $1,976.86 fee and cost award previously discussed. Thus, in this particular case, the $8,500 award must stand, if at all, upon the mother's having made a PFA claim against the father and the trial court's

[6]At the behest of the father, the mother's Macon County PFA petition was allowed into evidence as a documentary exhibit at trial; that exhibit reflects that the mother acted pro se in asserting that claim.

having the authority to impose an $8,500 attorney-fee award as a sanction therefor.

As we have noted, the father filed a motion in the trial court requesting that that court consolidate the mother's Macon County PFA action and his modification action. The electronic case-action-summary sheet in this case indicates that the father filed that motion on July 17, 2020, and that an order on the matter of consolidation was rendered and entered on July 27, 2020. Although this court is aware of no mechanism by which a circuit court in Montgomery County may unilaterally effect the transfer of an action that is pending on the docket of a circuit court in Macon County, there are means by which the mother's PFA claim could have been ordered transferred to the trial court pursuant to an assertion, in a motion or a responsive pleading filed by the father in the PFA action brought in Macon County, that Macon County was an improper or inconvenient venue and/or that the mother should have asserted her PFA claim as a counterclaim in the father's modification action in Montgomery County. See generally Ala. Code 1975, §§ 6-3-21 et seq. and § 6-5-440. Moreover, trial counsel for the mother elicited testimony from the mother

concerning her PFA claim against the father, without objection from the father, and the trial court could properly have deemed the mother's answer to the father's complaint to have been amended to include that affirmative claim. See Rule 15(c), Ala. R. Civ. P. Because the mother has not contended or demonstrated that the trial court erred in assuming jurisdiction over the mother's PFA claim, we will not assume that its having done so was erroneous. " ' "It is the duty of ... the appellant[ ] to demonstrate an error on the part of the trial court; [an appellate] court will not presume such error on the part of the trial court." ' " Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (quoting D.C.S. v. L.B., 4 So. 3d 513, 521 (Ala. Civ. App. 2008), quoting in turn G.E.A. v. D.B.A., 920 So. 2d 1110, 1114 (Ala. Civ. App. 2005)).

Having assumed jurisdiction over the mother's PFA claim, the trial court had the concomitant authority, under the Alabama Litigation Accountability Act ("the ALAA"), Ala. Code 1975, § 12-19-270 et seq. to "assess attorneys' fees and costs against any party ... if [that] court, upon ... its own motion, f[ound] that ... [a] party ... asserted any claim ... therein[] that is without substantial justification" or if that claim "was

interposed for delay or harassment." Ala. Code 1975, § 12-19-272(c).[7] However, § 12-19-273, Ala. Code 1975, a part of the ALAA, requires that, when a trial court "exercise[s] its sound discretion" to award costs or attorney's fees under the ALAA, the court "shall specifically set forth the reasons for such award and shall consider" 12 factors identified by our legislature, including:

> "(1) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted;
>
> "(2) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;
>
> "(3) The availability of facts to assist in determining the validity of an action, claim or defense;

---

[7]That said, the ALAA also provides that "[n]o party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorneys' fees unless the court finds that the party clearly knew or reasonably should have known that [the party's] ... claim was without substantial justification." Ala. Code 1975, § 12-19-272(e). We assume, without deciding, that the election of the mother's attorney to present evidence regarding her PFA claim at trial rendered that subsection inapplicable notwithstanding her pro se status at the time that she first asserted her PFA claim in Macon County.

"(4) The relative financial position of the parties involved;

"(5) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

"(6) Whether or not issues of fact, determinative of the validity of a parties' claim or defense, were reasonably in conflict;

"(7) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

"(8) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

"(9) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;

"(10) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

"(11) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

> "(12) The period of time available to the attorney for the party asserting any defense before such defense was interposed."

In this case, the trial court made none of the findings set forth in § 12-19-273 to justify its $8,500 award, an amount described by the mother in her appellate brief as "arbitrary and not based upon any testimony nor upon any affidavit filed of record"; the mother's appellate brief further indicates that, as to the fourth factor specified, the $8,500 award did not take into consideration her ability to pay and that the father's financial circumstances vastly eclipse her own. Because "[a] trial court's failure to specifically set forth reasons for the amount of its award under the ALAA is reversible error," Mahoney v. Loma Alta Prop. Owners Ass'n, 72 So. 3d 649, 654 (Ala. Civ. App. 2011), we reverse the trial court's $8,500 award and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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