REL: August 5, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210201

James Shackelford

v.

Tammy Shackelford

Appeal from Tuscaloosa Circuit Court
(DR-14-383.02)

MOORE, Judge.

James Shackelford ("the father") appeals from a judgment entered by the Tuscaloosa Circuit Court ("the trial court") insofar as it denied his request to modify the custody of J.S. ("the child") or to increase his

visitation time with the child and denied his request to hold Tammy Shackelford ("the mother") in contempt of court. We affirm.

Procedural History

On or about January 8, 2018, the trial court entered a judgment in case number DR-14-383 in which it stated that it had "previously entered an order divorcing the parties and addressing the disposition of the other issues relating to the dissolution of the parties' marriage." The judgment awarded sole physical custody of the parties' then minor children, J.D.S., I.S., and the child, to the mother; ordered the father to pay child support; and awarded the father visitation with J.D.S., I.S., and the child.[1]

Subsequently, the father filed a petition seeking to modify the January 2018 judgment and requesting that the mother be held in contempt, and the mother filed a counterclaim for contempt; that action was assigned case number DR-14-383.01. On November 10, 2020, the

[1]The January 2018 judgment stated that the parties had a fourth minor child, N.S., at the time the divorce action was initiated; however, that child had attained the age of majority before the January 2018 judgment was entered.

trial court entered a judgment in case number DR-14-383.01 ("the November 2020 judgment") that, among other things, noted that J.D.S. had attained the age of majority,[2] modified the father's child-support obligation, found both the father and the mother in contempt of court, denied the father's request to modify custody, suspended the father's visitation with I.S. unless I.S. agreed to visit, and declined to modify the father's visitation with the child. The trial court specifically found, in part:

> "The parties' minor children harbor very strong negative feelings and opinions against their father. The father argues these feelings are the result of parental alienation by the mother. The court is not convince[d] of this conclusion. While it is clear that the mother has put forth little or no effort to forge a relationship between the father and the children, the court is convince[d] that the father's own actions have caused the children to develop such a strong animosity toward him. For instance, the children have witnessed their father in a drunken rage on a number of occasions; [have] observed the police called to their home when the father was outside naked causing a disturbance; three of the children were constantly forced to shower with the father until the time when one of

[2]The November 2020 judgment also stated that N.S. had attained the age of majority. As noted previously, however, N.S. had attained the age of majority before the entry of the January 2018 judgment. See note 1, supra.

> them was at least 11 years of age; [have] been the victims of physical violence by the father; [have] had the police called on them while the father was exercising his visitation; [have] been taken out of state without informing them ahead of time where they would be going; and [have been] deprived of having phones and access to friends or family during his visitation times."

On August 12, 2021, nine months after the entry of the November 2020 judgment, the father filed an unsigned petition seeking, among other things, to modify the child's custody or his visitation time with the child and requesting that the mother be held in contempt of court for interfering with his relationship with the child, for interfering with his visitation time, and for failing to allow him to transport the child to extracurricular activities; the petition was assigned case number DR-14-383.02. The father also asserted that the custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), was unconstitutional.[3] On October 22, 2021, the father filed a motion seeking

[3]The father also sought modifications of his alimony obligation and of his child-support obligation because I.S. had obtained the age of majority since the entry of the November 2020 judgment. Those issues, however, are not before this court on appeal.

pendente lite custody of the child. The father asserted that a change in the child's custody was warranted because, he said, the mother was seeking to destroy his relationship with the child. The father's motion for pendente lite custody was denied on October 25, 2021.[4]

On November 1, 2021, a trial was conducted, at which ore tenus evidence was presented. The first witness called was J.D.S., the parties' adult son. The father's attorney attempted to elicit testimony from J.D.S. tending to show, among other things, that the mother had spoken negatively about the father in front of the children, had encouraged the child to fear the father, had encouraged the children to find loopholes in the trial court's orders so that they would not have to exercise visitation with the father, had talked about hiring hit men to murder the father, had brainwashed the child, and had shared information with the children concerning litigation between the mother and the father. The mother's attorney objected to those attempts, as well as to J.D.S.'s testimony about

[4]On November 1, 2021, the father refiled his petition with the signature in place. The next day, the trial court entered an order dismissing that petition and stating that a new filing fee must be paid.

those matters, on the grounds that J.D.S. had moved out of the mother's home shortly after the entry of the November 2020 judgment and that the introduction of any evidence that occurred before the entry of the November 2020 judgment was barred by the doctrine of res judicata. The father's attorney, however, elicited testimony indicating that J.D.S. had not moved out of the mother's home until December 2020. The trial court, therefore, allowed the father's attorney to introduce J.D.S.'s testimony but limited the testimony to events occurring after the entry of the November 2020 judgment of which J.D.S. had personal knowledge. Thus, the father's attorney elicited testimony from J.D.S. regarding the above-listed matters, subject to the limitation imposed by the trial court.

The father's attorney also attempted to introduce evidence in support of his contempt claim that indicated that the mother had interfered with the father's relationship with the child after he filed his August 2021 petition. For example, he attempted to admit evidence showing that the mother had interfered with the father's visitation at the child's birthday celebration on October 14, 2021. The trial court stated,

however, that it would not allow any evidence of events that allegedly occurred after the August 2021 petition was filed.

After the trial, the trial court entered a judgment on November 2, 2021, stating, in pertinent part:

> "1. The [father] has met his burden of proof that his child support obligation should be modified.
>
> "2. The [father] has failed to meet the [Ex parte] Mc[L]endon, 455 So. 2d 863 (Ala. 1984), burden of proof warranting a change in custody.
>
> "3. The [father] has failed to meet his burden of proof that it is in the best interests of the ... child to modify the current parenting schedule.
>
> "4. The [father] has failed to meet his burden of proof that the [mother] is in contempt.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> "1. The [father's] child support obligation is reduced to $536.13 per month. Said support obligation shall become effective on December 1, 2021[,] and due on the 1st day of each month thereafter.
>
> "2. All other requests for relief are hereby denied.
>
> "3. All previous Orders not in conflict with this Order remain in full force and effect."

(Capitalization in original.)

On November 29, 2021, the father filed an offer of proof consisting of proposed testimony by J.D.S. and of evidence allegedly demonstrating the contemptuous acts that the mother had allegedly committed after he had filed the August 2021 petition. On November 30, 2021, the father filed a postjudgment motion. The father argued that the trial court had erroneously excluded the evidence referenced in the offer of proof, that the standard of proof required by Ex parte McLendon standard is unconstitutional, that the trial court had erred in determining that the McLendon standard had not been met, and that the mother's alienation of the child from the father warranted a change in the child's custody or in the father's visitation time with the child. The trial court denied the father's postjudgment motion on December 1, 2021. The father then filed his notice of appeal on December 1, 2021.

Discussion

I.

On appeal, the father first argues that the trial court improperly excluded evidence during the trial.

> "A trial court has great discretion in determining the admissibility of evidence, and its rulings will not be reversed on appeal absent an abuse of discretion. Williams v. Hughes Moving & Storage Co., 578 So. 2d 1281, 1285 (Ala. 1991); Roberts v. Public Cemetery of Cullman, Inc., 569 So. 2d 369, 373 (Ala. 1990). Further, the appellant must establish that the error was prejudicial before the trial court's judgment will be reversed on that basis. American Furniture Galleries, Inc. v. McWane, Inc., 477 So. 2d 369, 373 (Ala. 1985)."

Grayson v. Dungan, 628 So. 2d 445, 447 (Ala. 1993).

A.

The father first argues that the trial court erred in excluding portions of J.D.S.'s testimony. Specifically, he argues that the trial court should have allowed J.D.S. to testify that J.D.S. had discovered, after the entry of the November 2020 judgment, that the mother had "engaged in a strategy to brainwash, gaslight, manipulate and abuse [J.D.S.] and [the child]." The father argues that the trial court's decision to limit J.D.S.'s testimony to events that occurred after the entry of the November 2020 judgment was erroneous. As noted previously, however, the trial court permitted the father to introduce testimony by J.D.S. alleging that the mother had brainwashed the child and had attempted to alienate the child from the father while J.D.S. had continued to live in the house with

the mother for a short period after the entry of the November 2020 judgment. Having reviewed the proposed testimony by J.D.S. in the father's offer of proof and considering his arguments on appeal, we conclude that any evidence that was excluded would be cumulative to the evidence already admitted. "[T]his Court will not reverse a trial court's refusal to admit otherwise admissible evidence if the same facts are shown at trial by other means. In short, a trial court's failure to admit cumulative evidence is merely harmless error." City of Gulf Shores v. Harbert Int'l, 608 So. 2d 348, 354 (Ala. 1992). Accordingly, we conclude that any error on the part of the trial court regarding this issue was harmless.

B.

The father next argues that the trial court erred by excluding evidence of the allegedly contemptuous conduct committed by the mother that, he asserts. occurred after the filing of his August 2021 petition. The father argues that his August 2021 petition was sufficient under Rules 8 and 70A, Ala. R. Civ. P., to provide the mother with notice that he was seeking to hold the mother in contempt for conduct occurring before and

after the date he filed the August 2021 petition. Rule 8(a) provides, in part: "A pleading which sets forth a claim for relief ... shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Rule 70A(c)(1), Ala. R. Civ. P., provides, in pertinent part:

> "A proceeding based on constructive contempt, whether criminal or civil, shall be subject to the rules of civil procedure. The proceeding shall be initiated by the filing of a petition seeking a finding of contempt.... The petition shall provide the alleged contemnor with notice of the essential facts constituting the alleged contemptuous conduct."

Rule 15(d), Ala. R. Civ. P., however, provides, in pertinent part:

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

In the present case, even assuming that the father's initial pleading, i.e., his August 2021 petition, complied with Rule 8 and Rule 70A, the father sought to hold the mother in contempt for "occurrences or events which ... happened since the date of the [filing of the petition]," and, therefore, he was required to file a supplemental pleading pursuant

to Rule 15(d). In Gardner v. Hokenson, No. 2019-410, Feb. 5, 2021 (Vt. 2021) (not reported in Atlantic Reporter), a three-justice panel of the Supreme Court of Vermont stated that, even considering Vermont's "liberal pleading standard requiring only short and concise averments giving fair notice of the grounds upon which the complaint is based," the trial court in that case had acted within its discretion in excluding evidence of the defendants' actions that had occurred after the filing of the amended complaint. Similarly, in the present case, given the father's failure to comply with Rule 15(d), we conclude that the trial court acted within its discretion when it declined to admit evidence allegedly indicating that instances of contempt had occurred after the filing of the father's August 2021 petition.

II.

The father next argues that the McLendon standard is unconstitutional and contrary to public policy. He specifically asserts that the McLendon standard violates the doctrines of equal protection, due process, and separation of powers. He also argues that the McLendon standard is in conflict with the public policy espoused in Ala.

Code 1975, § 30-3-150. We note, however, that in Gallant v. Gallant, 184 So. 3d 387, 395 (Ala. Civ. App. 2014), this court addressed those same arguments at length and concluded that the McLendon standard did not violate any of the aforementioned constitutional principles or public policy. Based on the reasoning set forth in Gallant, we conclude that the father's argument on this point is without merit.

III.

The father next argues that the mother's "determination to destroy the parent child relationship justifies a transfer of custody" or, at least, an increase in his visitation time.

> "'"When evidence in a child custody case has been presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct. The trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing."'
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> "Burgett v. Burgett, 995 So. 2d 907, 912 (Ala. Civ. App. 2008) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)).
>
> "....

"In order to obtain a custody modification, the [father] was required to meet the burden set out in Ex parte McLendon, [455 So. 2d 863 (Ala. 1984)]. That standard and its application is well established.

> "'"In situations in which the parents have joint legal custody, but a previous judicial determination has granted [sole] physical custody to 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."

"'Dean v. Dean, 998 So. 2d 1060, 1064-65 (Ala. Civ. App. 2008).

"'In order to prove a material change of circumstances, the noncustodial parent must present sufficient evidence indicating (1) that there has been a change in the circumstances

> existing at the time of the original custody judgment or that facts have been revealed that were unknown at the time of that judgment, see Stephens v. Stephens, 47 Ala. App. 396, 399, 255 So. 2d 338, 340-41 (Civ. App. 1971), and (2) that the change in circumstances is such as to affect the welfare and best interests of the child. Ford v. Ford, 293 Ala. 743, 310 So. 2d 234 (1975). The noncustodial parent does not have to prove that the change in circumstances has adversely affected the welfare of the child, but he or she may satisfy the first element of the McLendon test by proving that the change in circumstances materially promotes the best interests of the child. Id.'
>
> "C.D.K.S. v. K.W.K., 40 So. 3d 736, 739-740 (Ala. Civ. App. 2009). Regarding the burden placed on the parent seeking to modify custody, this court has stated: '"'[T]his is a rule of repose, allowing the child, whose welfare is paramount, the valuable benefit of stability and the right to put down into its environment those roots necessary for the child's healthy growth into adolescence and adulthood.'"' Pitts v. Priest, 990 So. 2d 917, 922 (Ala. Civ. App. 2008) (quoting Ex parte McLendon, 455 So. 2d at 865, quoting in turn Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976))."

S.L.L. v. L.S., 47 So. 3d 1271, 1278-79 (Ala. Civ. App. 2010). Additionally, "[w]e note that there must be a change in circumstances to warrant a modification of visitation." Long v. Long, 781 So. 2d 225, 227 (Ala. Civ. App. 2000).

In support of his custody-modification argument, the father cites, among other cases, C.J.L. v. M.W.B., 879 So. 2d 1169, 1180 (Ala. Civ. App. 2003), in which this court affirmed a judgment entered by the Montgomery Circuit Court modifying custody of the children in that case. This court held in C.J.L. that the case concerned more than a visitation dispute because the mother had "ma[de] what have been determined to be unfounded accusations against the father, [had denied] the father any contact with the children, and ... [had] campaign[ed] to undermine the father's parental role." 879 So. 2d at 1180. A psychologist testified that the mother's conduct had "endangered the children's well-being " and was "'tantamount to abuse.'" Id.

In the present case, the father presented evidence tending to show that, like the mother in C.J.L., the mother in this case had repeatedly attempted to alienate the child from the father. The mother, on the other hand, testified that she had tried not to speak negatively about the father in front of the child. In fact, she testified that she did not speak to the child about the father other than to tell the child when he had visitation with the father. She admitted that she had joked to a friend about having

a hit man murder the father but stated that she had not made that joke since the November 2020 judgment was entered. She testified that, when the father calls the child, the child asks her if he has to answer, and that she answers in the affirmative. I.S., one of the parties' children who still lives at home with the mother, testified that J.D.S. had not been at home much after the entry of the November 2020 judgment and that J.D.S. had been untruthful in the two years leading up to the trial. She testified that, since November 2020, the mother had not spoken negatively about the father, attempted to brainwash the child, talked about hiring a hit man, interfered with the father's visitation, shared information about court proceedings, or tried to find loopholes in the court orders. According to I.S., the mother does not speak about the father other than to say when the child has visitation with the father. She testified that the mother tells the child that he needs to go to his visitations with the father and that he has to answer the telephone when the father calls.

Considering the application of the ore tenus standard of review in this case, in which the evidence was sharply disputed, we conclude that the trial court could have properly determined that the father had not

met his burden of showing that a material change in circumstances had occurred since the entry of the November 2020 judgment. Because proof of a material change in circumstances is required for a modification of custody or visitation, see S.L.L., 47 So. 3d at 1278-79, and Long, 781 So. 2d at 227, we conclude that the trial court did not err in denying the father's August 2021 petition to the extent it sought to modify custody of the child or to increase the father's visitation time with the child.

IV.

The father's final argument is that the trial court erred in declining to find the mother in contempt because, he says, there was undisputed evidence indicating that the mother had violated the trial court's orders. We note, however, that the trial court did not make specific findings of fact in its judgment, and the father did not challenge in his postjudgment motion the sufficiency of the evidence with respect to contempt. "[I]n a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review." New

Props., L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004). Accordingly, we cannot consider the father's argument on this issue.

Conclusion

Based on the foregoing, we affirm the trial court's judgment on all the issues presented by the father in this appeal.

AFFIRMED.

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

Edwards, J., concurs in the result, without opinion.