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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190068 and 2190069

Aysha Machado

v.

Peter Machado

**Appeals from Madison Circuit Court
(DR-13-900272.01 and DR-13-900272.02)**

MOORE, Judge.

Aysha Machado ("the mother") appeals from a judgment entered by the Madison Circuit Court ("the trial court") in postdivorce proceedings involving her and Peter Machado ("the father").

Procedural History

The parties were divorced by a judgment entered by the trial court in 2013. The divorce judgment awarded the father sole physical custody of the parties' older child, R.M., and awarded the mother sole physical custody of the parties' younger child, L.M. ("the child"). The divorce judgment did not require either party to pay child support, but it did order the father to pay the mother periodic alimony. On May 2, 2018, the mother filed in the trial court a petition to modify child support ("the child-support action"), alleging that the parties' older child had reached the age of majority and requesting that the trial court order the father to pay child support for the child, who was still a minor and who remained in the mother's physical custody.

On October 10, 2018, the father filed in the trial court a petition to modify the custody of the child and to modify his periodic-alimony obligation; he also requested that the trial court hold the mother in contempt for failing to pay certain medical expenses of the child ("the modification action").

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The trial court consolidated the two actions and tried them together based on the petitions and answers thereto. The trial court entered a single judgment referencing both the child-support action and the modification action on September 9, 2019. That judgment provides, in part:

"1) [The mother] presented claims for child support for the ... child. ... When she rested her case, counsel for [the father] moved for [a] judgment as a matter of law. The Court granted that motion on the record. Accordingly, [the child-support action is] dismissed.

"2) [The father] presented claims for termination of his alimony obligation to [the mother] and for modification of the Final Decree of Divorce previously entered between the parties to allow him to exercise joint physical custody of the ... child.

"Upon consideration of the evidence, it is ORDERED that [the father's] claim for termination of his alimony obligation is DENIED.

"It is further ORDERED that [the father's] claim for modification [of custody] is GRANTED. The Court finds that circumstances have materially changed since the entry of the initial custody order, and that exercise of joint physical custody by the parties would materially promote the best interests of the child. The Court further finds that the benefit to the child of the requested change in custody would substantially outweigh any potential disruption.

". . . .

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"Pursuant to Ala. Code [1975, §] 30-3-153, the parties shall confer by September 23, 2019[,] regarding a parenting plan. If agreement is reached on said plan, it should be submitted to the Court for incorporation into an order of modification. If no agreement is reached, the Court will implement a plan by separate order.

". . . .

"All claims not addressed herein are DENIED."

(Capitalization in original.)

On September 26, 2019, the mother filed a postjudgment motion. On October 2, 2019, each party submitted a proposed parenting plan. The mother's proposed parenting plan stated that the parties had been unable to reach an agreement on a final plan. On October 12, 2019, the mother filed her notice of appeal.¹ Appeal number 2190068 involves that part of the judgment addressing the child-support action; appeal number 2190069 involves that part of the judgment addressing the modification action.

¹Because the trial court had not entered a parenting plan as contemplated, the judgment was not final. See, e.g., A.C. v. C.C., 34 So. 3d 1281, 1286-87 (Ala. Civ. App. 2009). This court reinvested the trial court with jurisdiction to enter a final judgment, which the trial court did on July 9, 2020. This court resumed jurisdiction over the appeals following the denial of the mother's postjudgment motion.

Discussion

On appeal, the mother challenges the trial court's judgment to the extent that it denied her petition to modify child support and granted the father's petition to modify custody.

I. Custody

With regard to custody, this court has explained:

"After [sole physical] custody has been awarded [to the custodial parent] in a divorce judgment, the noncustodial parent seeking a change of custody must demonstrate (1) 'that he or she is a fit custodian'; (2) 'that material changes which affect the child's welfare have occurred'; and (3) 'that the positive good brought about by the change in custody will more than offset the disruptive effect of uprooting the child.' Kunkel v. Kunkel, 547 So. 2d 555, 560 (Ala. Civ. App. 1989) (citing, among other cases, Ex parte McLendon, 455 So. 2d 863, 865-66 (Ala. 1984) (setting forth three factors a noncustodial parent must demonstrate in order to modify custody))."

McCormick v. Ethridge, 15 So. 3d 524, 527 (Ala. Civ. App. 2008).

"'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)).

The mother testified that it had been extremely difficult to parent the child, who has autism, without family support and that she desired to move to California where her family lived. The father, on the other hand, testified that he wanted custody of the child. He testified that he was concerned that the child, who was 16 years old at the time of trial, was not progressing so that he could become an independent adult and that the child had become obese while in the mother's custody. The father testified that, although the child is nonverbal, the father had purchased an iPad tablet computer for the child that had enabled the child to communicate. He testified that, in his opinion, the child needs additional applied-behavioral-analysis ("ABA") therapy and physical therapy. According to the father, he had begun the process of taking course work to provide the child with ABA therapy himself. The father testified that the mother had vetoed his suggestions regarding additional therapy for the

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child. He also testified that the mother had refused to communicate with him for many months leading up to the trial.

Based on the foregoing evidence, the trial court could have concluded that the child's lack of progress and weight gain to the point of obesity, as well as the mother's difficulty in parenting the child, were material changes in circumstances. Moreover, the trial court could have determined that ordering the parents to share joint physical custody of the child would provide the mother with support while allowing the father more time to implement additional therapies to assist the child with becoming more independent, thus materially promoting the child's welfare and outweighing any disruption from the change. Although there was other evidence weighing against the change in custody, considering our ore tenus standard of review, Burgett, 995 So. 2d at 912, we cannot reweigh the evidence in this case. Therefore, we affirm the trial court's judgment as to the custody modification.

The mother also argues that the trial court erred in sustaining the objections of the father's attorney to the mother's responses while testifying, which the attorney argued

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were unresponsive. However, the mother has failed to explain how the sustaining of those objections prejudiced her case. "The burden of establishing that an erroneous ruling was prejudicial is on the appellant." Middleton v. Lightfoot, 885 So. 2d 111, 113-14 (Ala. 2003) (quoting Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991)). Because the mother has failed to meet her burden on this issue, we cannot reverse the judgment on this point.

II. Child Support

With regard to child support, the mother argues that the trial court erred in dismissing her action. When the mother rested her case at trial, the father moved to dismiss the child-support action, arguing that the mother had not proven that she had been awarded sole physical custody of the child in the divorce judgment and that the mother had not proven a material change of circumstances to support a child-support modification. The trial court granted the motion.² We agree

²In the judgment, the trial court indicated that it was dismissing the mother's child-support action pursuant to Rule 50, Ala. R. Civ. P. However, we conclude that the trial court dismissed the action pursuant to Rule 41(b), Ala. R. Civ. P. See, e.g., Feaster v. American Liberty Ins. Co., 410 So. 2d 399, 401 (Ala. 1982).

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with the mother that the trial court committed reversible error by granting the motion.

The father alleged in his modification petition that the mother had been awarded sole physical custody of the child in the divorce judgment. The mother admitted that allegation in her answer to the petition, thereby dispensing with any need for the mother to present evidence on that undisputed point. See, e.g., City of Dothan v. Eighty-Four West, Inc., 738 So. 2d 903, 904 n.1 (Ala. Civ. App. 1999) ("A fact admitted in the pleadings need not be proven by another party").

With regard to whether the mother proved a material change in circumstances, see Rule 32(A)(3)(b), Ala. R. Jud. Admin. ("A party seeking a modification of child support must plead and prove that there has occurred a material change in circumstances that is substantial and continuing since the last order of child support."), this court held in Cox v. Cox, 218 So. 3d 1215, 1218-19 (Ala. Civ. App. 2016), that when child support has previously been set at a reduced rate because of a split-custody arrangement and one of the children at issue subsequently reaches the age of majority, a material change in circumstances has occurred. In the present case, it

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was undisputed that the divorce judgment split the physical custody of the parties' two children, that no child support was ordered to be paid by either the mother or the father in the divorce judgment, and that the older child had reached the age of majority in 2018. Therefore, we conclude that the mother proved a material change in circumstances, and, thus, the trial court should not have dismissed her child-support action.

Accordingly, we reverse the judgment insofar as it dismissed the mother's child-support action, and we remand the cause for the trial court to adjudicate her child-support claim. We recognize that the trial court ultimately awarded the parties joint physical custody of the child, with the child residing with each parent on an alternating weekly schedule, which arrangement may constitute a ground for deviating from the Rule 32, Ala. R. Jud. Admin., child-support guidelines, see Rigby v. Rigby, 268 So. 3d 76, 87-88 (Ala. Civ. App. 2018), but that issue is one of fact for the trial court to determine. See Bonner v. Bonner, 170 So. 3d 697, 701 (Ala. Civ. App. 2015). On remand, the trial court should consider whether the child should receive financial support

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from the father while residing with the mother in order to assure that he receives the same level of care at all times or whether the joint-physical-custody arrangement warrants deviation from the child-support guidelines in whole or in part.

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it dismissed the mother's child-support action, and we remand the cause for consideration of her child-support claim in accordance with this opinion. The judgment is affirmed in all other respects.

The requests for attorney fees filed by the mother and the father are denied.

2190068 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2190069 -- AFFIRMED.

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