

REL: January 4, 2019

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

---

2170710

---

**Russell Alan Thomas**

**v.**

**Angel Mount Thomas**

**Appeal from Shelby Circuit Court  
(DR-16-900711)**

THOMAS, Judge.

Russell Alan Thomas ("the former husband") and Angel Mount Thomas ("the former wife") were married in July 2005. In December 2011, they were divorced by a judgment of the Shelby Circuit Court ("the trial court"). Although the former

2170710

wife complied with the requirement in the 2011 divorce judgment that she convey her interest in the parties' former marital residence to the former husband by quitclaim deed, she never left the former marital residence. Instead, she continued to reside there with the former husband and the parties' child, whose custody had been awarded to the former husband in the 2011 divorce judgment.

In November 2016, the former wife filed a complaint in the trial court seeking a divorce from the former husband and custody of the parties' child. In her complaint, the former wife alleged that she and the former husband "were married, by common law, between December 2011 and November 2015."<sup>1</sup> The former husband moved to dismiss the former wife's complaint; in his motion, he sought an evidentiary hearing on the issue of the existence of a common-law marriage. The trial court held an evidentiary hearing on February 23, 2017, solely on

---

<sup>1</sup>As we have before recognized, this court may consider claims that a common-law marriage exists if that marriage was entered into before January 1, 2017. See Dunning v. Mayhew, 240 So. 3d 616, 616 n.1 (Ala. Civ. App. 2017). This is so because Ala. Code 1975, § 30-1-20, provides that "[n]o common-law marriage may be entered into in this state on or after January 1, 2017," but that "[a]n otherwise valid common-law marriage entered into before January 1, 2017, shall continue to be valid in this state."

2170710

the issue of whether the parties had entered a common-law marriage, after which it determined that the parties had been married at common law. The trial court then concluded the proceedings by holding an evidentiary hearing on November 9, 2017, on the issue of custody, after which it entered a divorce judgment divorcing the parties and awarding custody of the parties' child to the former wife. The former husband timely filed a postjudgment motion, which the trial court denied after a hearing. The former husband then timely filed a notice of appeal to this court.

On appeal, the former husband argues first that the trial court erred by concluding that the parties had entered into a common-law marriage. He also contests the award of custody to the former wife. Because we find the first issue to be dispositive, we consider only whether the evidence presented at trial supports the trial court's conclusion that the parties entered into a common-law marriage. See Favorite Mkt. Store v. Waldrop, 924 So. 2d 719, 723 (Ala. Civ. App. 2005) (pretermittting discussion of certain issues in light of dispositive nature of another issue).

"The Alabama Supreme Court stated in Lofton v. Estate of Weaver, 611 So. 2d 335, 336 (Ala. 1992):

""Courts of this state closely scrutinize claims of common law marriage and require clear and convincing proof thereof." Baker v. Townsend, 484 So. 2d 1097, 1098 (Ala. Civ. App. 1986), citing Walton v. Walton, 409 So. 2d 858 (Ala. Civ. App. 1982). A trial judge's findings of facts based on ore tenus evidence are presumed correct, and a judgment based on those findings will not be reversed unless they are found to be plainly and palpably wrong. Copeland v. Richardson, 551 So. 2d 353, 354 (Ala. 1989). The trial court's judgment must be viewed in light of all the evidence and all logical inferences therefrom, and it "will be affirmed if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment." Adams v. Boan, 559 So. 2d 1084, 1086 (Ala. 1990) (citation omitted).'

"Clear and convincing evidence is

""[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

""§ 6-11-20[(b)](4), Ala. Code 1975.'

2170710

"L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002).

"In Alabama, recognition of a common-law marriage requires proof of the following elements: (1) capacity; (2) present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and (3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation. Stringer [v. Stringer], 689 So. 2d [194,] 195 [(Ala. Civ. App. 1997)], quoting Crosson v. Crosson, 668 So. 2d 868, 870 (Ala. Civ. App. 1995), citing Boswell v. Boswell, 497 So. 2d 479, 480 (Ala. 1986). Whether the essential elements of a common-law marriage exist is a question of fact. Stringer, supra, citing Johnson v. Johnson, 270 Ala. 587, 120 So. 2d 739 (1960), and Arrow Trucking Lines v. Robinson, 507 So. 2d 1332 (Ala. Civ. App. 1987). Whether the parties had the intent, or the mutual assent, to enter the marriage relationship is also a question of fact. See Mickle v. State, 21 So. 66 (1896).'

"Gray v. Bush, 835 So. 2d 192, 194 (Ala. Civ. App. 2001)."

Melton v. Jenkins, 92 So. 3d 105, 106-07 (Ala. Civ. App. 2012) (emphasis added).

The former husband argues on appeal that the trial court erred in concluding that the parties had been married at common law. His chief contention is that the former wife did not present clear and convincing evidence to establish that

2170710

the parties had entered into a common-law marriage.<sup>2</sup> He first complains that the former wife failed to present sufficient evidence that they entered into a "present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships" at any time after the 2011 divorce and before he left the former marital residence in November 2014 to cohabit with another woman. Gray v. Bush, 835 So. 2d 192, 194 (Ala. Civ. App. 2001). The former husband further argues that the former wife did not present clear and convincing evidence of public recognition of their relationship as a marriage. After reviewing the evidence presented, we reverse the trial court's judgment divorcing the parties and, specifically, its determination that the parties entered into a common-law marriage.

According to the testimony presented at trial, the former husband had asked the former wife to vacate the former marital residence after the 2011 divorce; however, the testimony indicates that she was not financially capable of leaving immediately after the divorce, so the former husband allowed

---

<sup>2</sup>We note that the former husband does not challenge the fact that the parties had the capacity to enter into a common-law marriage, and we will not further address that element.

2170710

her to continue living in the former marital residence. The parties filed their tax returns in 2012 and 2013 as "married filing jointly"; in 2014, the former wife filed her tax return as "married, filing separately." Between 2013 and 2015, the former wife included the former husband as her spouse on health insurance provided by her employer; although the former wife testified that the former husband had utilized that insurance and specifically said that he had used the benefit to purchase glasses in 2014, the former husband denied doing so and said that he had paid for his glasses with his mother's credit card.

In October 2013, the former husband left the marital residence for approximately two weeks. During that time, he engaged in a relationship with A.S., a woman he had met online. He returned to the former marital residence, however, because, he said, he wanted to be a father to the parties' child and the former wife's daughter from a previous relationship. He explained that he would never abandon the children. After he returned, he said, "it was tense." According to the former husband, the former wife was always arguing with him and "was not happy" about his relationship

2170710

with A.S. He testified that she had made comments to the effect that she could not do anything about his relationship with A.S. because he and she were divorced. The former husband said that he told the former wife that he intended to continue his relationship with A.S. He testified that he did not believe that he was committing adultery because he did not believe that he and the former wife were married.

The former husband left the former marital residence a second time in November 2014. He left Alabama and went to New Hampshire, Michigan, and Ohio. He had continued his relationship with A.S., and, in fact, he moved in with her at some point after leaving Alabama. According to the former husband, he had intended to leave Alabama for good when he left in November 2014. He explained that he had planned to settle in Ohio, to help the former wife and the parties' child relocate to Ohio in a separate residence, and to assist the parties' child in being able to attend Ohio State University without paying out-of-state tuition. However, after the former wife sought and received ex parte custody of the parties' child when she initiated an action for a divorce in



2170710

October 2015,<sup>3</sup> the former husband returned to Alabama, with A.S. and their infant child.<sup>4</sup>

The former husband produced several text messages and electronic-mail ("e-mail") messages exchanged between him and the former wife in 2013 and 2014. In an e-mail exchange in October 2013, the wife complains about the former husband's relationship with A.S.: "Guess [we] can't call it an affair can we .... Why did you take me out to dinner for our 'anniversary' if you were 'dating' someone else?" The former husband answered: "To see if there was anything still there."

---

<sup>3</sup>According to the information in the record, the October 2015 action initiated by the former wife was transferred from the Jefferson Circuit Court to the trial court in December 2015 and was dismissed without prejudice by the trial court that same month because the 2015 divorce complaint failed to mention that the parties had been previously divorced and failed to rely on the theory that they had remarried at common law. The child was placed in the custody of the former husband at that time, in compliance with the provisions of the 2011 divorce judgment. The former wife then initiated in the trial court an action seeking to modify the 2011 divorce judgment; according to statements on the record during the several hearings in this matter, the modification action was placed on the trial court's administrative docket pending the outcome of this action.

<sup>4</sup>By the time of the November 2017 evidentiary hearing on the custody issue, the former husband and A.S. had two children.

2170710

In the 2014 exchanges, the former wife questions the former husband about his dislike of the institution of marriage and about why he refused to remarry her despite her apparent repeated requests that he do so. In June 2014, the former wife states in one e-mail message: "Thanks for being honest with me about not wanting to marry me, I won't ask again." In another, she says that "[a]ll my friends know not to bring up a wedding or getting married to me because it is a painful subject for me to even think about." In a June 2014 text message, she complains to the former husband: "You don't want to marry me ... again." The former husband stated in his various e-mail responses to the former wife in June 2014 that "I do love you. I can say that. If that's not enough, it's just not enough. I can't force any more," "I'm tired of having this conversation every single day. I don't believe in marriage. Never have. Still don't," and "Do what you want. But I'm not going to be forced into doing something that I don't want to do. Stay and work together or go and find someone to marry. What other options are there? But having this conversation daily is already old."

2170710

The former wife did not challenge the authenticity of the e-mail or text-message exchanges presented by the former husband. She admitted that the issue of remarriage had "come up" between the parties after the 2011 divorce. Although she stated that the former husband had "agreed to a ceremony a few times," she admitted that he had told her that he did not want to get remarried and that he did not like the institution of marriage. When asked upon what date she had considered them to have been married at common law, the former wife stated that she had no particular date in mind; instead, she testified, she had "assume[d] since we filed our taxes as married the same year that we supposedly got divorced, that it didn't count as divorce anymore."

As further evidence of the common-law marriage, the former wife also contended that she and the former husband had continued to celebrate their original marriage anniversary and that he still wore his wedding ring. In his testimony, the former husband denied that they had celebrated their anniversary every year and explained that, the one year that they had gone to a high-priced restaurant on their original anniversary date, it was a coincidence that they had gone on

2170710

that date. He also explained that he wore more than one ring, that he sometimes wore the ring the parties considered his wedding ring, but that he often wore that ring on his right hand. The parties both admitted that they had resumed a sexual relationship at some point after the 2011 divorce and that they had lived together and shared expenses and divided household duties, at least until the former husband moved out of the former marital residence in November 2014. The former husband stopped paying the mortgage payments on the former marital residence at some point after November 2014, and the former wife and the parties' child moved out of that house in or around April 2015.

Although some of the evidence presented supports one or more of the elements required to establish a common-law marriage, we cannot agree with the trial court that the evidence clearly and convincingly established that the parties entered into a "present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships." Gray, 835 So. 2d at 194. The e-mail and text-message exchanges between the parties establish that the former wife desired to remarry but that the former husband did

2170710

not. Specifically, the communications between the former wife and the former husband in the summer of 2014 demonstrate that the former wife still desired to remarry the former husband, indicating quite clearly that she did not think that they were, in fact, remarried. Meanwhile, the responses of the former husband clearly indicate his intent not to enter into another marriage with the former wife. See id. at 197 (determining that the evidence failed to support a conclusion that the alleged common-law husband had had a present intent "to permanently enter the marriage relationship to the exclusion of all others" when the alleged common-law husband "affirmatively denied such an intention when confronted"). The testimony and documentary evidence further indicates that the former husband entered into a relationship with another woman in October 2013 and that that relationship continued in 2014 and to the date of trial. See id. (commenting that the fact that "several witnesses testified that [the alleged common-law husband had] maintained relationships with other women at the time he also maintained one with [the woman claiming to be his common-law wife]" prevented finding clear and convincing evidence of a present intent "to permanently

2170710

enter the marriage relationship to the exclusion of all others"). Furthermore, the former wife's communications with the former husband indicated that she understood in 2013 that the parties were still divorced and that the former husband's decision to pursue a relationship with A.S. was therefore not adultery.

These facts prevent the conclusion that the former husband had an intent at any pertinent time "to permanently enter the marriage relationship to the exclusion of all others." Id. The same facts establish that the former wife understood that the parties remained divorced in 2013 and 2014. Accordingly, we reverse the judgment of the trial court divorcing the parties. See Burnette v. Tighe, 162 So. 3d 911, 915 (Ala. Civ. App. 2014), overruled on other grounds by Ex parte F.T.G., 199 So. 3d 82 (Ala. Civ. App. 2015); Stringer v. Stringer, 689 So. 2d 194, 197 (Ala. Civ. App. 1997) ("The trial court had subject matter jurisdiction to grant the parties a divorce only if the parties were, in fact, married."); see also Ala. Code 1975, § 30-2-1.

Furthermore, because the trial court lacked subject-matter jurisdiction to divorce the parties, it also lacked

2170710

authority to consider the custody of the parties' child anew under the best-interest standard. Because the record reflects that a separate modification action initiated by the former wife was placed on the trial court's administrative docket pending the outcome of this divorce action, see note 3, supra, and because the parties indicated an intent to pursue that action if, in fact, they were not married at common law, the former wife remains free to pursue that action, if she desires. Until such time as any custody-modification action is litigated, the child-custody provisions of the 2011 divorce judgment remain effective.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman and Donaldson, JJ., concur.

Moore, J., concurs in the result, with writing.

2170710

MOORE, Judge, concurring in the result.

I concur fully with the main opinion's reversal of the trial court's judgment insofar as it determined that the parties were married at common law and to the extent that it divorced the parties. I concur in the reversal of the judgment to the extent that it reversed the modification of custody but for reasons different than those expressed by the main opinion.

With regard to custody, the main opinion concludes that the trial court "lacked authority to consider the custody of the parties' child anew under the best-interest standard."

\_\_\_ So. 3d at \_\_\_. However, our supreme court has held:

"[A] pleading which, upon its face, concerns the welfare of a minor child is sufficient to invoke the equity jurisdiction of the court. Tcherneshoff v. Tcherneshoff, 283 Ala. 700, 220 So. 2d 888 (1969), and courts do not merely have jurisdiction over the custody of minor children, but also have jurisdiction over the care of minor children. Ayers v. Kelley, 284 Ala. 321, 224 So. 2d 673 (1969); Chandler v. Whatley, 238 Ala. 206, 189 So. 751 (1939).

"Second, when a proceeding is instituted to determine the custody of a minor child, that child immediately becomes a ward of the court. Department of Pensions and Security v. Oswald, 275 Ala. 63, 152 So. 2d 128 (1963); Esco v. Davidson, 238 Ala. 653, 193 So. 308 (1940). The well-being of the minor child is of paramount consideration, Ayers v.



Kelley, supra, and thus, once equity jurisdiction of the court is invoked, any matter affecting a child may become the subject of chancery jurisdiction. Ayers v. Kelley, supra. This premise is based on the familiar principle that '[e]quity grants full relief when it has jurisdiction on any equitable ground to grant relief. Having assumed jurisdiction of a part, the court will determine all interrelated equities of the whole. Equity delights to do justice and not by halves.' Moore v. Moore, 255 Ala. 393, 51 So. 2d 683 (1951). In other words, when a court of equity takes jurisdiction for one purpose, it will extend that jurisdiction so as to do complete justice with respect to matters which directly result from its decree. Hall v. Hall, 280 Ala. 275, 192 So. 2d 727 (1966); Lamar v. Lamar, 263 Ala. 391, 82 So. 2d 558 (1955). Applying these principles, it is apparent that a court of equity, in Alabama, is authorized to mold its decree in order to adjust the equities of the parties and meet the necessities of each situation. First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 (Ala. 1982), cert. denied, 461 U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983)."

Ex parte Handley, 460 So. 2d 167, 169 (Ala. 1984).

In this case, Angel Mount Thomas ("the mother") filed a complaint for a divorce and asked that the custody of the parties' child be awarded to her. Although the parties had not, in fact, been remarried at common law, the trial court had the equity jurisdiction to "mold its decree" to address the situation, including determining the custody of the child. Id. Therefore, I cannot agree with the conclusion in the main

2170710

opinion that the trial court lacked the authority to enter an order affecting custody in this case.

Russell Alan Thomas ("the father") argues on appeal that, because there was no common-law remarriage, the trial court should have applied the custody-modification standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). Although the trial court did not specifically state which custody-modification standard it used, it appears that the parties proceeded under the understanding that, if the parties were, in fact, remarried, the best-interest standard applied. In fact, the father argued to the trial court that the mother had claimed a common-law remarriage in order to gain the benefit of the less stringent best-interest standard. In this case, because there was a previous award of physical custody to the father, the McLendon standard applies. See, e.g., Smith v. Smith, 865 So. 2d 1207 (Ala. Civ. App. 2003). Because it appears that the trial court applied the best-interests standard, I would reverse the trial court's judgment and remand this cause with instructions that it reconsider the issue of custody in light of the proper standard.