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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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M.D.

v.

E.F.

**Appeal from Jefferson Juvenile Court
(CS-14-900450.01)**

MOORE, Judge.

M.D. ("the mother") appeals from a judgment entered by the Jefferson Juvenile Court ("the juvenile court") in a custody-modification case initiated by E.F. ("the father"). We affirm the judgment in part and reverse it in part.

Procedural History

On March 26, 2015, the juvenile court entered a judgment, based on an agreement between the parties, establishing the father's paternity of V.F. ("the child"), awarding the parties joint legal custody of the child, awarding the mother "primary" physical custody of the child,¹ and awarding the father visitation with the child.

On March 2, 2017, the father filed a verified petition for a modification of the custody of the child and requesting that the juvenile court hold the mother in contempt for interfering with his visitation rights. On March 22, 2017, the father amended his petition to include requests to hold the mother in contempt on multiple new bases. On April 5, 2017, the mother answered the petition. That same day, the mother filed a motion requesting that a guardian ad litem be appointed for the child; that motion was granted on April 6, 2017, with the mother being ordered to pay \$900, and the father being ordered to pay \$600, toward the guardian ad litem's fee. Also, on September 20, 2017, the juvenile court

¹We interpret that provision as awarding the mother sole physical custody of the child. See, e.g., Smith v. Smith, 887 So. 2d 257, 262 (Ala. Civ. App. 2003).

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entered an order stating: "Upon this Court's own motion, [an in] camera interview with the minor child will take place on September 25, 2017 @ 13:30 pm in courtroom 540."

After a trial that was held over several days, the juvenile court entered a judgment on August 9, 2018, awarding the parties joint legal custody of the child, awarding the father "primary" physical custody of the child,² and awarding the mother supervised visitation with the child. The juvenile court further stated that, "once the [child's] therapist has cleared it, the mother shall have standard visitation." On August 19, 2018, the mother filed a postjudgment motion. The father filed a postjudgment motion on August 23, 2018. On August 28, 2018, the juvenile court amended the judgment and specifically stated that the contempt issues were moot. On September 5, 2018, the mother filed her notice of appeal to this court.

Discussion

On appeal, the mother first argues that the juvenile court erred in modifying the custody of the child and in ordering her visitation to be supervised. We note, however,

²We interpret that provision as awarding the father sole physical custody of the child. See note 1, supra.

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that on September 20, 2017, the juvenile court entered an order for an in camera interview with the child to take place on September 25, 2017. Moreover, at the May 16, 2018, trial proceedings, the juvenile court indicated that it would be conducting another in camera interview of the child. The record does not, however, contain a transcript of either of those interviews. "In the absence of a transcript of an in camera interview with a child, a reviewing court must assume that the evidence the trial court received during that interview is sufficient to support that court's judgment." J.S. v. L.M., 251 So. 3d 61, 68 (Ala. Civ. App. 2017). Accordingly, we must affirm the juvenile court's judgment with regard to the modification of custody and the requirement that the mother's visitation be supervised.

The mother next argues that the juvenile court erred in giving the child's therapist the authority to determine the mother's visitation rights. We note that the juvenile court's judgment, as amended, provides, in pertinent part: "[T]he Mother's visitation shall remain supervised until the therapist is of the opinion to move forward from supervised to

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unsupervised. Then Standard Visitation Schedule attached shall become effective." This court has explained:

""[T]he trial court is entrusted to balance the rights of the parents with the child's best interests to fashion a visitation award that is tailored to the specific facts and circumstances of the individual case." Ratliff [v. Ratliff], 5 So. 3d [570,] 586 [(Ala. Civ. App. 2008)] (quoting Nauditt v. Haddock, 882 So. 2d [364,] 367 [(Ala. Civ. App. 2003)]) (emphasis added). That judicial function may not be delegated to a third party. See, e.g., M.R.J. v. D.R.B., 34 So. 3d 1287 (Ala. Civ. App. 2009) (reversing as an improper delegation of judicial authority a trial court's visitation judgment in which the mother's visitation was at the sole discretion of the child's guardian ad litem). A trial court is not empowered to delegate its judicial functions even to another governmental agency. Hall v. Hall, 717 So. 2d 416 (Ala. Civ. App. 1998) (a trial court cannot delegate the decision whether to terminate father's supervised visitation to those who would decide whether father would be prosecuted for sexual abuse). See also Sloand v. Sloand, 30 A.D.3d 784, 816 N.Y.S.2d 603 (N.Y. App. Div. 2006) (affirming that portion of the trial court's order awarding supervised visitation to mother, but reversing as an improper delegation of judicial authority that portion of the order delegating to the child's therapist the authority to expand or reduce mother's access to child)."

Pratt v. Pratt, 56 So. 3d 638, 644 (Ala. Civ. App. 2010).

Moreover,

"[i]t is well settled that the law disfavors judgments that provide for the automatic change of physical custody upon the occurrence of some future event because such provisions are 'premised on mere speculation of what the best interests of the

children may be at a future date.' Hovater v. Hovater, 577 So. 2d 461, 463 (Ala. Civ. App. 1990) (holding that a custodial reversionary clause based on the mother's remaining in a certain school district was of no effect). See also Korn v. Korn, 867 So. 2d 338, 345 (Ala. Civ. App. 2003) (reversing a judgment that set forth an automatic reversion of custody to the former husband if the former wife left the United States). This court has applied the same principle to an automatic modification of visitation when there was no evidence indicating that there would be a change in circumstances warranting a modification of visitation at some future time. See Long v. Long, 781 So. 2d 225 (Ala. Civ. App. 2000) (reversing a judgment that automatically removed the restriction requiring the mother's visitation to be supervised after the passage of six months). But see Kovakas v. Kovakas, 12 So. 3d 693, 698 n.5 (Ala. Civ. App. 2008) (indicating that an automatic modification of the father's visitation when the child began kindergarten was distinguishable from Hovater and Korn, supra, because those cases involved an automatic modification of custody as opposed to an automatic modification of visitation)."

Hodgins v. Hodgins, 84 So. 3d 116, 126-27 (Ala. Civ. App. 2011).

Because the provision in the juvenile court's judgment giving the child's therapist the discretion to determine when the mother's visitation with the child is "to move forward from supervised to unsupervised" violates the principles set forth in both Pratt and Hodgins, supra, we reverse that portion of the juvenile court's judgment and remand the case

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with instructions that the juvenile court strike that provision from its judgment. We note that the mother is permitted to file a petition for modification based upon changed circumstances in the future.

The mother also argues that the juvenile court erred in failing to order the father to pay a portion of her attorney's fees. "Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney." Figures v. Figures, 624 So. 2d 188, 191 (Ala. Civ. App. 1993). Although, as the mother points out, the father's income is greater than hers, we note that the father prevailed on his petition for a modification of custody. Therefore, we cannot conclude that the juvenile court erred in declining to order the father to pay a portion of the mother's attorney's fees.

The mother further argues that the juvenile court erred in ordering her to pay a disproportionate amount of the guardian ad litem's fee. However, as the juvenile court

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noted, the mother requested the appointment of a guardian ad litem for the child. Moreover, as we noted previously, the father prevailed on his petition for a modification of custody. Therefore, we cannot conclude that the juvenile court erred on this point.

Conclusion

Based on the foregoing, we reverse the juvenile court's judgment to the extent that it provides that the mother's visitation would change from supervised to unsupervised standard visitation at the discretion of the child's therapist. The judgment is affirmed in all other respects.

The mother's request for an attorney fee on appeal is denied.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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