REL: September 20, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180521

S.D.B.

v.

B.R.B.

Appeal from Clay Circuit Court
(DR-09-14.02)

MOORE, Judge.

S.D.B. ("the mother") appeals from a judgment entered by the Clay Circuit Court ("the trial court") in a postdivorce contempt and modification action. We affirm the judgment in part and reverse it in part.

Facts and Procedural History

The mother and B.R.B. ("the father") were divorced by a judgment entered by the trial court in 2007. It is undisputed that the mother was awarded "primary" physical custody of the parties' child, G.B. ("the child"), whose date of birth is March 15, 2007, and that the father was awarded visitation with the child.[1]

According to the father, after the parties divorced, he began using marijuana. The mother testified that, less than a year after the divorce judgment was entered, the father was arrested, and, she said, his arrest prompted her to file a petition to modify the father's visitation at that time. The child's paternal grandmother testified that, in 2010, the father had experienced psychiatric problems. The mother testified that, at one point, the paternal grandmother had telephoned her to come pick up the child because the father had a gun and was about to commit suicide. The paternal grandmother testified that, following that incident, the father had been hospitalized for three to four weeks and that

[1]We interpret the award of "primary" physical custody to the mother as an award of sole physical custody of the child. See, e.g., Smith v. Smith, 887 So. 2d 257, 262 (Ala. Civ. App. 2003).

he had gone to the Cheaha Mental Health Center for several months after he was released from the hospital.

In May 2010, the trial court entered a judgment modifying the father's visitation with the child based on an agreement entered between the parties. The modification judgment provided that the father would have visitation supervised by his parents for six months, during which period he would be subjected to drug testing. The modification judgment provided that, if the drug tests the father submitted to produced positive results, the father's visitation with the child would be suspended until a hearing could be held. The modification judgment allowed for unsupervised visitation at the end of the six-month period in the event the supervised visits during that period were "successful." The father testified that, in January 2011, he had tested positive for marijuana and "benzoids." The parties disputed whether, at that point, the father had progressed to exercising unsupervised visitation. The father testified that, upon his testing positive and pursuant to the modification judgment, his visitation was suspended pending a hearing, which, he said, was never held. The mother testified that, until this most recent modification

action was commenced, the father had had no court-ordered visitation with the child since 2011. Both parties testified, however, that the mother had allowed the father to visit with the child after 2011 despite the fact that his visitation had been suspended.

The father testified that, at some point, he had been charged with a drug-related crime and had been placed in a pretrial-diversion program called "drug court." He testified that he had been expelled from that program after he was charged with the additional crime of criminal trespass. According to the father, he was subsequently placed on probation, but, he said, he had violated the terms of his probation and, therefore, had been incarcerated from May 2013 until March 2015.

The father testified that he had continued to exercise visitation with the child every other weekend, supervised by the paternal grandmother, even after his visitation was suspended, until he went to prison in May 2013. The mother, however, testified that she had stopped voluntarily allowing the father to visit with the child in November 2012 because he

had taken the child around his girlfriend, who, she said, had been facing criminal charges of her own.

The father admitted that he had not sent the child any cards while he was in prison, not even at Christmas. He testified that the paternal grandmother had been allowed to visit with the child over a few weekends after the father went to prison. The paternal grandmother, however, testified that the last time she had seen the child was in February 2013. The mother testified that she had decided to cut ties with the father's side of the family in 2013; she confirmed that the child had had no contact with the father's family since February 2013.

According to the father, when he was in prison, the mother had filed more than one petition to terminate his parental rights. The mother testified that she had filed a petition to terminate the father's parental rights in March 2013; according to the mother, that petition had been granted, but, she said, the judgment granting that petition had been reversed on appeal. She testified that she had filed a second petition to terminate the father's parental rights around August 2014, but that petition had been denied. The father

testified that the mother had lived in Clay County most of the time he was in prison. The mother testified that the father had not informed her where he was incarcerated. She testified that, toward the end of 2014, she had moved to South Carolina with the child because her husband, whom she had married in 2012, had obtained a job there.

The father testified that, after he was released from prison in March 2015, he attempted to resume visiting with the child, but, he said, he had been unable to locate the child. He testified that, because the mother had moved with the child to South Carolina while he was incarcerated, he had had no way to find them.

On July 11, 2016, the father filed in the trial court a petition alleging that the mother was in contempt for failing to give the father written notice of her intent to move the child out of state and for failing to allow the father to visit with the child ("the 2016 action"). Although the father testified that it had taken him a year to obtain service on the mother in the 2016 action, the case-action-summary sheet indicates that the mother was served in January 2017, approximately six months after the father filed his petition.

The mother testified that the 2016 action was the first request by the father that he be allowed to exercise his visitation with the child.[2]

On February 22, 2017, the mother answered the petition and counterclaimed, requesting the trial court to suspend the father's visitation, to increase the father's child-support obligation, to find the father in contempt for failing to pay child support, and for "any other relief ... [to which the] Mother may be entitled." The father filed a reply to the counterclaim on March 22, 2017.

According to the father's filings in the trial court, on January 9, 2018, the trial court, based on an agreement of the parties, orally ordered that the father be allowed to exercise visitation with the child for two hours in a public place every other weekend and to have telephonic visits with the child twice per week. The father testified that he had begun

[2]At one point, the trial court entered an order transferring the 2016 action to a South Carolina court based upon a determination that the South Carolina court had jurisdiction over the case; however, upon reconsideration, the trial court vacated that order. See Ex parte Rich, 953 So. 2d 409, 411 (Ala. Civ. App. 2006) (authorizing a trial court that has mistakenly relinquished jurisdiction over a child-custody proceeding to a foreign court to rescind that order).

driving over five hours to South Carolina to visit with the child beginning in November 2017.

The mother testified that the child had not seen the father since the child was 5 years old; the child was 11 at the time of the trial. She testified that, when she told the child that he had to visit the father, he was afraid. She testified that the child had told her that he did not want to visit the father, but, she said, she had told the child that he had to go. She testified that she was opposed to visitations between the father and the child because the child does not want to visit and because of the father's past actions and drug-abuse history. She testified, however, that she did not feel like she had interfered with the father's visits or that she had exercised any undue influence over the child.

The father testified that, during his first two-hour visit with the child, the child had told him that he did not want to talk to him. He testified that, on that occasion, the mother had asked the child what he wanted to do and that the child had answered that he wanted to leave. He testified that the mother had thereafter left with the child. The mother

testified that she had been "advised that [the child] had a choice" whether or not he stayed at the visits. The father admitted that, at the time of that visit, the child had not seen him in seven years and that the child hardly knew who he was.

On January 19, 2018, after the father's first two-hour visitation with the child, the father filed a motion requesting that the trial court hold the mother in contempt for failing to allow him visitation in accordance with the parties' 2018 agreement. On February 19, 2018, the mother filed a motion requesting that the trial court hold the father in contempt for failing to pay child support and for bringing his son from a previous relationship ("the half brother") to his visitations with the child; she also requested that the trial court suspend the father's visitation with the child pending a final hearing.

The father testified that, at his second two-hour visitation with the child, the mother had not been present but that the child's stepfather had been present. According to the father, the child had opened up and had talked and laughed when the stepfather had left the table.

The father testified that, most weeks, he had received two telephone calls from the child. He testified that the child does not talk much during those telephone calls, and, he said, the child had stated that he did not want to talk to the father. The mother testified that, on some occasions, the child had been upset after the telephone calls with the father.

The mother testified that, after the two-hour visits with the father began, the child had started acting out in class and his grades had dropped. She testified that, before the visits, the child had made good grades and had had no trouble with conduct. The mother testified that the child had told her that the changes in his grades and conduct were because of his having to visit the father.

The father testified that the child had told him that the child's stepfather is his dad and that the father is his "biological father." He also testified that the child appears to love his stepfather. The father testified, however, that the child remembers the father and has memories of his childhood with the father. According to the father, the child had told him that he is a bad influence and that he will try

to make the child not love his stepfather. The mother testified that the child had not been told that by anyone in her house. The mother testified that the child calls his stepfather "Daddy" but that she had not told him to do so.

The father testified that he lives in New Site with his girlfriend, his girlfriend's three daughters, and the half brother. He testified that he had lived with his girlfriend for two and a half to three years at the time of the trial. He admitted that they had separated for a period of months and that she had had him arrested for strangulation and assault. He also admitted that the police report from that incident stated that his girlfriend had had swelling and bruising on her body but that she had denied that the father had caused those injuries.

The father testified that he had tried to get the child to talk to the half brother, but, he said, the child had not wanted to talk to him. The father admitted that the half brother had been suspended from school multiple times.

According to the father, the mother of the half brother had accused the half brother of sexually abusing his younger sister. He testified that the Department of Human Resources

had investigated that allegation and had subsequently closed the investigation without finding any indication that that abuse had occurred.

The mother testified that, when the child was five years old, she had caught the child about to put his mouth on his cousin's private part. She testified that she had informed the child that that behavior was not appropriate and had asked the child where he had seen that behavior. According to the mother, the child had thereafter told her that the half brother had done that to him. The mother testified that she was concerned about the child's being around the entire environment created by the father's family.

The father testified that, other than a June 15, 2015, child-support payment, the last time he had paid child support was before he went to prison. He admitted that, at the time of trial, he owed approximately $14,400 in past-due child support.

The child testified that he loves his "mom and dad," referring to the mother and his stepfather. He testified that he does not like the father anymore. He testified that he had heard that the father had done bad things and had been in

jail, that the father had hurt the half brother, and that the half brother had begun doing bad things. He testified that his family had not told him those things but that he had been told those things when he had been visiting in Alabama. He testified that the father had informed him that he had smoked marijuana.

The child testified that he hates visiting with the father. He testified that the father makes him feel bad because the father always tries to say that his stepfather is not the child's dad. He testified that he thinks of the stepfather as his dad and that he wants his stepfather to adopt him.

After hearing all the evidence, the trial court entered a judgment on May 3, 2018, providing, in pertinent part:

> "This case came for hearing upon dual motions for Contempt on April 10, 2018[,] from both the [father] and the [mother]. [The mother] was also heard on a motion to suspend visitation. ... Extensive testimony was taken from both [p]arties, and an in camera interview was held with the ... child at issue. After careful review of the pleadings, and of the testimony, this Court finds that there is sufficient evidence to conclude that the relationship between the ... child and the ... [f]ather has suffered from parental alienation from the [mother].

"After consideration of all the pleadings, the various hearings held, and all sworn testimony and all other evidence presented at all hearings, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

"1. The [father] shall have visitation every other weekend [with] the [child].

"2. Both [p]arties shall travel and meet halfway, in Covington, Georgia. The [p]arties shall decide upon a designated area. [The father] shall pick up the child on Saturday at 12:00 PM, and return him to the same location at 4:00 PM of the same day, beginning May 05, 2018. The [father] and the ... child shall have four hours together unencumbered, to begin to reestablish their relationship and remedy the parental alienation.

"3. In three (3) months time, beginning August 4, 2018[,] the [father] will travel to South Carolina every other weekend for overnight visits with the ... child, beginning at 12:00 PM on Saturday[] and returning the child at 10:00 AM on Sunday. The [father] will secure suitable lodgings for these visits.

"4. Beginning October 6, 2018, the [p]arties will meet at a designated area in Ashland, Alabama every other Saturday morning by 9:00 AM to exchange the child for the weekend. The ... child will accompany [the father] to his home in New Site, Alabama and will be returned to the designated area by 2:00 PM Sunday. The Court is aware that the [mother] has family in Clay Co[unty] and that this arrangement is not detrimental to either [p]arty.

"5. The [mother] shall place the ... child in counseling with a Licensed Professional Counselor that specializes in children.

> "6. [The father] will pay child support in the amount of $250.00 to [the mother]'s counsel, ... until such a time as a review is held in this case. Child support for the months of November through April will be paid to [the mother]'s counsel upon execution of this Order.
>
> "7. The parties shall refrain from negative or derogatory comments about the opposing party while in the hearing and or presence of the minor child. Neither will they allow anyone else to do so while in the company of the child. To insure compliance with this Order, this case will be set for review on the 9th day of October, 2018."

On May 29, 2018, the mother filed a "motion to alter, amend, or vacate [the judgment] or, in the alternative, [for] a new trial." On May 29, 2018, the father filed an objection to the mother's motion and requested that the trial court hold the mother in contempt for her failure to abide by the trial court's May 3, 2018, judgment. On May 30, 2018, the trial court entered an order denying the mother's postjudgment motion and setting the father's motion for contempt for a hearing. The trial court further stated:

> "This case started as a Contempt Petition when [the mother] violated prior Orders of this Court by violating the relocation act by moving the child to South Carolina and denying [the father] of his right to visit with [the] child or to inform the father and his family of the child['s] whereabouts.[3] In

[3]We do not reach the question whether the provisions of the Alabama Parent-Child Relationship Protection Act, § 30-3-

> its Order dated January 22, 2018, this Court issued very specific instructions as to telephone contact and visitation. It appears [the mother] is allowing the child to dictate what contact he has with [the] father. The Court realized that this reunion between father and son would not be easy and that is why counseling was Ordered. In its Order dated May 3, 2018, this Court Ordered [the mother] to place the child in counseling with a Licensed Professional Counselor that specializes in children[;] this [the mother] has apparently failed to do. As the Court is unfamiliar with any child counselors in South Carolina, it is hereby Ordered that [the mother] immediately contact Ms. Margie G. Gilbert at Gilbert & Brown Counseling and Consulting Services, LLC [in] Birmingham, ... to arrange counseling for the ... child. All parties will follow any and all recommendations made by Ms. Gilbert. Any change for a more centralized location for counseling will be heard at the time of the contempt hearing. The Hearing for Contempt is hereby set for August 14, 2018[,] at 9:00 am ...."

On May 30, 2018, the mother answered the father's motion for contempt and filed an amendment to her May 29, 2018, postjudgment motion. On May 31, 2018, the mother filed a motion requesting the trial court to reconsider its May 30, 2018, order. On June 5, 2018, the trial court granted the mother's motion to reconsider, stating, in part: "This Court[']s Order dated May 30, 2018, ordering counseling with Margie Gilbert and setting [the father's] Petition for Contempt on August 14, 2018, is hereby set aside." That same

---

160 et seq., Ala. Code 1975, are applicable under these facts.

day, the trial court denied the mother's amendment to her May 29, 2018, motion. On July 2, 2018, the mother filed her notice of appeal to this court, which was docketed as appeal number 2170888.[4]

Discussion

On appeal, the mother first argues that the trial court exceeded its discretion in awarding the father visitation with the child. Specifically, she argues that she did not alienate the child from the father and that the trial court should have suspended the father's visits; she also argues that, even if a visitation award is appropriate, the frequency of the visitation is an abuse of discretion considering the distance between the parties' residences.

[4]On February 28, 2019, this court dismissed that appeal as arising from a nonfinal judgment because competing contempt claims remained pending before the trial court, see Decker v. Decker, 984 So. 2d 1216 (Ala. Civ. App. 2007). On March 5, 2019, the trial court purported to enter a judgment disposing of the outstanding contempt claims, and the mother filed a notice of appeal from that judgment, which was docketed as appeal number 2180521, i.e., the present appeal. That judgment was, however, entered before this court's certificate of judgment was issued in appeal number 2170888, and, thus, was a nullity. See Raybon v. Hall, 17, So. 3d 673, 674 (Ala. Civ. App. 2009). This court reinvested the trial court with jurisdiction to reenter its judgment, and, on July 1, 2019, the trial court entered a final judgment disposing of all the remaining claims.

> "'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.'"

Burgett v. Burgett, 995 So. 2d 907, 912 (Ala. Civ. App. 2008) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)). "[V]isitation rights are a part of custody determinations. ... Both visitation and custody determinations are subject to the same standards of review." Denney v. Forbus, 656 So. 2d 1205, 1206 (Ala. Civ. App. 1995).

> "The trial court has broad discretion in determining the visitation rights of a noncustodial parent, and its decision in this regard will not be reversed absent an abuse of discretion. Alexander v. Alexander, 625 So. 2d 433, 435 (Ala. Civ. App. 1993). Every case involving a visitation issue must be decided on its own facts and circumstances, but the primary consideration in establishing the visitation rights accorded a noncustodial parent is always the best interests and welfare of the child."

Carr v. Broyles, 652 So. 2d 299, 303 (Ala. Civ. App. 1994).

> "There are circumstances where it is reasonable, equitable and to the best interest of children that they not be required to visit with a non-custodial parent because of their unwillingness or fear to do so. Such a determination could be made by a trial court in a case where the evidence reasonably satisfied that court that it was not in the best

> interest of children to be made to visit with a non-custodial parent where they were so unwilling to visit that parent that adverse psychological damage would result and that no good would result from forced visitation. However, such a case is rare and the exception, for it is an extreme decision that restricts an otherwise relatively qualified parent from visiting his or her child.
>
> "On the other hand, regardless of a child's fears and wishes, a trial court may, and normally should, require visitation even if it is forced upon a child, for the desires of a child might be given absolutely no credence in visitation litigation when the trial court is reasonably satisfied from the evidence that a child is merely parroting the wishes of the custodial parent, or that the child is too immature to form a considered opinion, or where the child expresses fears or unwillingness to visit without any reasonable basis or foundation."

Hagler v. Hagler, 460 So. 2d 187, 189 (Ala. Civ. App. 1984); see also Clark v. Blackwell, 624 So. 2d 610, 611 (Ala. Civ. App. 1993) ("[T]hough it is an exceptional case, there are circumstances where it is reasonable and in the best interests of the child not to be required to visit a non-custodial parent because of the child's unwillingness or fear; however, it is an extreme decision that restricts an otherwise relatively qualified parent from visiting his child.").

In Clark, this court affirmed a judgment ordering visitation between a father and his children against the wishes of the children, noting that there was disputed

evidence concerning the fitness of the father. In the present case, the trial court received conflicting evidence from which it could have concluded that, despite his past problems and his living situation at the time of the trial, the father was fit to exercise visitation with the child but that the child was resisting visitation based, at least in part, on the mother's admitted desire that no visitation occur. Although the mother denies that she had alienated the child from the father, the trial court reasonably could have inferred from the evidence and its firsthand observations of the witnesses that the mother had, in fact, contributed to the child's fear and dislike of the father. See T.N.S.R. v. N.P.W., 170 So. 3d 684, 687 (Ala. Civ. App. 2014) (defining "parental alienation" to include "'[a] situation in which one parent has manipulated a child to fear or hate the other parent'" (quoting Black's Law Dictionary 1288 (10th ed. 2014))). We cannot conclude that, in light of all the evidence, the trial court erred in declining to make the "extreme decision" of denying the father visitation with the child. Clark, 624 So. 2d at 611; Hagler, 460 So. 2d at 189. See also Burgett, 995 So. 2d at 912 (explaining that the trial court "'hear[d] the evidence and

observe[d] the witnesses,'" and, therefore, "'is in the best position to make a custody determination'" (quoting Ex parte Bryowsky, 676 So. 2d at 1324)).

With regard to the mother's objection to the visitation schedule, we note that she specifically argues that it is not in the child's best interest for the child to have to travel 10 hours round-trip every other weekend to visit with the father. She cites Freebeck v. Freebeck, 258 So. 3d 1138, 1142 (Ala. Civ. App. 2018), in which this court held that the "wife's argument challenging the trial court's visitation provision [was not] without probable merit" "[c]onsidering that both parties had agreed that traveling [16 hours round-trip] to the husband's residence in Alabama more than once per month was not in the best interests of the children." She also cites two cases in which this court concluded that bimonthly airplane travel was not in the best interests of the children involved in those cases. See Carr v. Howard, 777 So. 2d 738, 742 (Ala. Civ. App. 2000), and L.M. v. K.A., 177 So. 3d 1174, 1182 (Ala. Civ. App. 2015). In addition, she cites Mann v. Mann, 725 So. 2d 989, 993 (Ala. Civ. App. 1998), in which this court concluded that it was not in the best

interests of the children in that case, who were ages four and two years, to spend eight hours in a vehicle on the weekends that they were to visit with their father.

In the present case, however, there was no agreement between the parties that bimonthly travel was not in the best interests of the child like there was in Freebeck. Moreover, the distance the child in the present case is required to travel (10 hours round-trip) is considerably less than the 16 hours the children in Freebeck were required to travel. In addition, there is no airplane travel involved in this case like in Carr v. Howard and L.M., and the child in this case is not a preschool-aged child as was the child in Mann. In this case, the trial could have concluded that regular visitation periods were necessary in order to reestablish a relationship between the child and the father and that the distance between the parties' residences was not so great as to be detrimental to the child's best interests. Therefore, we cannot conclude that the trial court exceeded its discretion on this point.

The mother also argues that the trial court erred in ordering the father to pay child support for only "the months

of November through April" instead of ordering him to pay the entire undisputed arrearage amount.

> "'Although child support is paid to the custodial parent, it is for the sole benefit of the minor children.' State ex rel. Shellhouse v. Bentley, 666 So. 2d 517, 518 (Ala. Civ. App. 1995). 'Parental support is a fundamental right of all minor children.... The right of support is inherent and cannot be waived, even by agreement.' Ex parte University of South Alabama, 541 So. 2d 535, 537 (Ala. 1989)."

Floyd v. Edmondson, 681 So. 2d at 583, 585 (Ala. Civ. App. 1996).

As noted previously, the father admitted that, other than a June 15, 2015, child-support payment, the last time he had paid child support was before he went to prison in May 2013. He further admitted that he owed approximately $14,400 in past-due child support at the time of trial. The trial court nevertheless ordered the father to pay back child support for only "the months of November through April." Because the father had undisputedly accumulated an arrearage since May 2013, the trial court erred in not ordering the father to pay the total arrearage amount.

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it determined the father's child-support arrearage, and we remand the cause for the trial court to recalculate the father's child-support arrearage in accordance with this opinion. The trial court's judgment is affirmed in all other respects.

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

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