REL: October 30, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190369

C.B.

v.

J.W. and C.W.

Appeal from Lee Juvenile Court
(JU-09-267.07)

EDWARDS, Judge.

In October 2019, C.B. ("the father") filed a complaint in the Lee Juvenile Court ("the juvenile court") seeking an award of specific unsupervised visitation with his daughter, J.L. ("the child"), who is in the custody of J.W. and C.W. ("the

custodians").[1] The record reflects, and the parties agree, that the father had previously been awarded supervised visitation with the child to occur every other week for a period of 1.5 hours at a private visitation center ("the visitation center").[2] After a trial held in November 2019, the juvenile court entered a judgment on January 21, 2020, denying the father's request for unsupervised visits and terminating the father's existing visitation with the child.[3] The father timely appealed that judgment to this court.

The record reflects that, as of May 2019, the father had been participating in supervised visits at the visitation

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[1]The record reflects that the custodians are not biologically related to the child. Instead, they are the paternal grandparents of the child's older half siblings. However, the testimony at trial indicates that the child was placed in the legal and physical custody of the custodians in March 2019.

[2]It is unclear whether the visitation center utilized was Keeping Families Connected ("KFC") or Children and Family Connection ("CFC"). The testimony indicates that the father visited at CFC, but the juvenile court's judgment indicates that visitation occurred at KFC. Thus, we refer to the entity only as "the visitation center."

[3]The judgment specifically states: "Visits with the father are not ordered at this time. Any visits allowed by the custodians must be supervised by a responsible adult approved by the custodians and should not be enforced against the will of the child."

center for approximately five years. However, the visitation center terminated the father's right to visit there in May 2019 based upon actions of the father that, presumably, had violated the visitation center's rules. The basis for the termination of the father's right to visit by the visitation center is not entirely clear from the record because no representative of the visitation center testified. The testimony relating to the termination of the father's right to visit at the visitation center indicates that the father's conduct that allegedly prompted the visitation center's decision was his getting upset when a visitation supervisor corrected him about asking a personal question of the child.

The juvenile court's judgment indicates that the father had suffered a brain injury at some point in the past and that he had a history of mental-health and substance-abuse issues. However, the judgment further notes that the father's substance-abuse issues "seem[] to be a thing of the past and his mental health seems to have improved somewhat." The father admitted that he had abused drugs in the past and that he had been under the care of mental-health professionals.

The father presented the testimony of, and a psychological evaluation authored by, Dave P. Walker, a licensed psychologist. Walker testified that he had evaluated the father in July and August 2019. According to Walker, the father had suffered from major depressive disorder that was in full remission after treatment and the continued use of prescribed medication for his condition; he also noted that he found no basis to suggest that the father suffered from a substance-abuse problem. According to Walker, he found that the father suffered from no pathology that would bar visiting with an 11-year-old female child. Upon questioning by the juvenile court, Walker testified that he had observed no symptomology of borderline personality disorder in the father and that he had not been made aware that the father had been diagnosed with that disorder.[4] Walker further admitted that he had not received a certified copy of the father's treatment records from his treating mental-health professional despite having requested those records; instead, Walker said, the

[4]The record contains no evidence indicating that the father had been diagnosed with borderline personality disorder.

father had provided him with an uncertified copy of those records.

The father testified that he had begun visiting with the child at the visitation center in March 2014. He said that his visits with the child had been good but that he desired to have unsupervised visits. He explained that he is a good person and desired to be a good father and to provide a home for the child. He said that J.W. was obsessed with the child, that the custodians wanted to make the child their child, and that they intimidated and influenced her. He said that, on one occasion, he had hugged the child and that J.W. had insisted on pulling the child away to get a snack because, the father said, J.W. was uncomfortable with the father showing the child affection.

According to the father, the visitation center imposed restrictions upon what he could talk to the child about during visits, and he stated that he "can't talk to her about anything." The father testified that, at the last visit in May 2019, he had asked the child if she had seen an accident on her way to the visit and that, when she responded that she had not seen the accident, he had remarked that she must have

come to the visit a different way. According to the father, that prompted the visitation supervisor to reprimand him about asking personal questions. The father testified that he knew where the custodians lived, so, he said, he had informed the visitation supervisor that his question and comment would not have yielded personal information to which he was not already privy. The father indicated that he had remained calm during the exchange with the visitation supervisor. Upon further questioning by the juvenile court, the father then accused the Lee County Department of Human Resources ("DHR") of being prejudiced against fathers, accused various persons of presenting lies to the juvenile court, and accused the visitation supervisor of terminating his visits with the child out of spite because, he said, the visitation supervisor "had an ax to grind" over his reporting to her supervisor that she appeared to have been recording an earlier visit on her cellular telephone. He said that he should be permitted to visit with the child unsupervised because he had met all the requirements DHR had imposed on him, because he is a good person and wants to be a good father to the child, and because he has a suitable residence for her to visit.

C.W. testified that the child did not want to visit with the father and that she had had to make the child attend visits. She commented that the child never asked about the father or asked to contact him. She explained that the child had "improved" after the visits with the father had ended in May 2019 because, C.W. said, the child was no longer exposed to "the drama." When asked what "drama" the child was exposed to, C.W. indicated that the father would grab the child and hold her when she wanted to get away and would upset and confuse the child when he would whisper to her things like "it won't be long" and "I got your room fixed up." When asked if the father had been forceful with the child, C.W. said that he had held the child when she wanted to go but that he had let her go. According to C.W., the child had been very upset after the last visitation with the father. However, C.W. admitted that she could not recall the last time she had taken the child to see her counselor and that she had not done so after the May 2019 visitation.

The child, who was 11 years old at the time of trial, testified that she had visited with her father at the visitation center. Although she admitted that the visits were

"fun sometimes," she also described the visits as "kind of boring" and said that her father sometimes made her do things she did not want to do, such as watching a documentary or listening to him read Bible verses during visits. The child admitted that, before the last visitation in May 2019, visits were "fine ... he didn't really act like that, though. But it was just normal."

The child stated that the father "kind of gets obsessive and manipulative sometimes." To illustrate her comment, she explained that he would show her pictures of his house and her bedroom there, that he would tell her she would visit soon, and that he had once whispered in her ear that he wanted her to be on "his side." She also complained that the father "tells her things" and does not ask her what she wants. When asked her opinion about increasing visits with her father, the child responded: "I don't think I'd like visiting, like, at his house or anything. Maybe just -- maybe just like before." The juvenile-court judge asked her if she wanted to visit the father at all, to which she replied "[n]o"; however, she also stated that she would prefer to visit the father perhaps once a month or every other month and maybe on or around holidays

like Christmas. She said that she "just want[ed] to stay with [the custodians]."

The child's testimony about the last visit at the visitation center in May 2019 was quite similar to the father's. She said that the father had asked about the wreck, that she had answered that she had not seen it, and that he had said that "you must have come a different route." According to the child, the visitation supervisor had warned the father about asking personal questions at that point. She said that the father became mad and defensive and started "acting out in front of everyone." She said that it had made her uncomfortable and that she had "just sat there."

The child also explained that, at the last court hearing, the father had hugged her and would not let her go. She stated that "[p]eople got kind of mad at him, and it was kind of a scene, kind of." When questioned about whether she had been bothered because the father had held her or whether she had been bothered because he had made a scene, the child answered rather evasively, stating: "It bothered me that he was just holding on to me because -- my mom also has kind of addiction problems."

At the close of the trial, the juvenile-court judge remarked that there had been no evidence presented indicating that increased or unsupervised visitation would be in the child's best interest. The juvenile-court judge made it clear that he would award only supervised visitation. In addition, the juvenile-court judge noted: "I think it would be good to have some contact at this point ..., but I am honestly not sure how to do that given that, apparently, the bridge has been burned with [the visitation center]."

The father first argues that, to the extent his visitation rights might have been terminated in a previous action, case number JU-09-267.06, his due-process rights were violated in that action and that, as a result, the juvenile court impermissibly placed the burden of proof on the father in this action. The father contends that, because his preexisting supervised-visitation rights were either not extinguished or were improperly extinguished in the previous action, which apparently resulted in a judgment awarding permanent custody to the custodians and relieving DHR of supervision, he was not required to prove that a material change of circumstances had occurred or that an award of

visitation was in the best interest of the child. Although we agree in principle that the father was not required to establish that his preexisting supervised visitation would be in the child's best interest, see N.T. v. P.G., 54 So. 3d 918, 920 (Ala. Civ. App. 2010) (noting that, "[o]n a petition to modify visitation, a court does not reexamine the evidence to determine if its original judgment was correct; rather, it decides whether modification is warranted based on changed circumstances"), the father's complaint instituting this action sought a change in his visitation from supervised visitation to an award of specific, unsupervised visitation. The father had previously been awarded only supervised visitation, so the father bore the burden of proving a material change of circumstances necessitating a change in the existing visitation award and that his requested change in visitation was in the best interest of the child. See H.H.J. v. K.T.J., 114 So. 3d 36, 41 (Ala. Civ. App. 2012) ("The father, as the party seeking to remove the restriction on his visitation with the child, had the burden of demonstrating that there had been a material change in circumstances since the entry of the [most recent custody] judgment and that the

best interests and welfare of the child warrant the modification."). On appeal, the father neglects to make an argument supported by legal authority that he presented sufficient evidence to entitle him to a modification of the existing supervised-visitation award, and he has therefore waived any such argument. Legal Sys., Inc. v. Hoover, 619 So. 2d 930, 931 (Ala. Civ. App. 1993) ("When an appellant fails to argue an issue in its brief, that issue is waived and cannot be considered on appeal.").

To the extent that the father argues that the juvenile court improperly terminated his visitation despite the fact that the custodians had not requested a modification of visitation, we again agree in principle that due process requires that a party receive notice of a request to terminate visitation and have the opportunity to present evidence on that issue. See, e.g., Young v. Corrigan, 253 So. 3d 373, 380 (Ala. Civ. App. 2017); Myers v. Myers, 206 So. 3d 649, 651 (Ala. Civ. App. 2016) (quoting Carden v. Penney, 362 So. 2d 266 (Ala. Civ. App. 1978)). However, although the custodians did not file a counterclaim requesting that the father's visitation be terminated, the issue was raised during the

trial by questioning posed by the father's attorney. Counsel for the father asked C.W. whether she was "saying that the [father] should not visit with [the child]," to which C.W. replied, "[y]es, I am saying that." At the conclusion of C.W.'s testimony, the juvenile-court judge asked, without objection, if she had anything else to say, to which C.W., who appeared pro se, responded:

> "[The child] is better the way her situation is now, Judge. I think she's happy and content; and she hasn't had to deal with all this drama of going to visits, not knowing how its going to be, not knowing what she's going to be told. 'Are you coming home with me?' and all this kind of stuff -- it's just put a lot of mixed feelings in her.
>
> "And now she feels relieved and calm. You know, it's stability without all this -- told -- told stuff that, you know, 'You come in here. You're going with me.' All this stuff, it just puts a lot of worry on her."

Although the custodians did not file a counterclaim seeking termination of the father's visitation, we cannot conclude that the juvenile court's judgment violated the father's due-process rights.

> "[W]here an issue not pleaded by a party is tried before the trial court without an objection by another party, that issue is deemed to have been tried by the implied consent of the parties. Rule 15(b), Ala. R. Civ. P.; Hosea O. Weaver & Sons, Inc. v. Towner, 663 So. 2d 892 (Ala. 1995)."

A.L. v. S.J., 827 So. 2d 828, 833 (Ala. Civ. App. 2002). In A.L., we determined that an intervening paternal grandmother's unpleaded claim for custody had been tried by the implied consent of the parties when the grandmother, through her testimony, sought an award of custody of the child. A.L., 827 So. 2d at 833. In the present case, the father's counsel asked C.W. if she thought that the child should not have visitation with the father, and C.W. answered in the affirmative. C.W., who proceeded pro se at trial, stated that the child was better off with the situation remaining as it currently was at the time of trial, which was that the child had not visited with the father since May 2019. Thus, C.W. requested that the child not be forced to resume visits with the father, and, because the father failed to object, the issue was tried by the implied consent of the parties.

The father next argues that the record does not contain sufficient evidence to support the conclusion that his right to visit with the child should have been terminated.[5] In its

[5]We note that the custodians had the burden of establishing that termination of the father's visitation rights was warranted. H.H.J., 114 So. 3d at 41 (indicating that the party seeking a modification of a visitation provision must establish a material change in circumstances

judgment, the juvenile court found that the father's "interactions with the child have been characterized as not healthy," which, the juvenile court said, was supported by the father's demeanor in court and "the child's characterization of him as obsessive, manipulative, overly touchy, and forceful during his visits with her."[6] Based upon those findings, the juvenile court concluded that the father had not proven that it was "in the child's interest to force increased exposure to her father upon her." The juvenile court then stated that "[v]isits with the father are not ordered at this time."[7]

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and that the proposed change in visitation is in the best interest of the child).

[6]Other than the repeated testimony about the embrace at the last court hearing, the record does not contain any testimony indicating that the father was "overly touchy." The testimony regarding the father's forcefulness was confined to the answer to the question posed to C.W., which is quoted above.

[7]Although the judgment provides that the custodians could allow supervised visits at their discretion if the child is willing to visit, the father was awarded no right to visit with the child that he could enforce. See B.F.G. v. C.N.L., 204 So. 3d 399, 406 (Ala. Civ. App. 2016) (noting that, "[b]ecause the trial court has already denied the father the right to visitation, its concession that the mother could exercise discretion to allow the father and the child to visit operates only to allow visitation to which the father does not have a right").

> "'It is well settled that matters regarding both custody and visitation rest soundly within the discretion of the trial court, and that judgments regarding those matters will not be disturbed on appeal absent an abuse of discretion. A trial court's determination regarding visitation must be affirmed absent a finding that the judgment is unsupported by credible evidence and that the judgment, therefore, is plainly and palpably wrong. Visitation cases require an examination of the facts and circumstances of the individual situation, which the trial court is able to observe.'

"Denney v. Forbus, 656 So. 2d 1205, 1206 (Ala. Civ. App. 1995) (citations omitted).

"Nevertheless, the law presumes that it is in the best interest of a child to have complete and unrestricted association with his or her parents. See Jackson v. Jackson, [999 So. 2d 488, 494 (Ala. Civ. App. 2007)] (quoting Johnita M.D. v. David D.D., 191 Misc. 2d 301, 303, 740 N.Y.S.2d 811, 813 (Sup. Ct. 2002)). When the parents are deemed fit and proper persons, the parents should have reasonable visitation rights. Naylor v. Oden, 415 So. 2d 1118 (Ala. Civ. App. 1982). As we have recently noted, the reasonableness of visitation rights and any restrictions on visitation depend on the circumstances of the case. Jackson, [999] So. 2d at [494]. In deciding appropriate restrictions on visitation, '[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.' Nauditt v. Haddock, 882 So. 2d 364, 367 (Ala. Civ. App. 2003).

"A trial court exceeds its discretion when it selects an overly broad restriction on visitation

> that does more than address a particular threat to the best interests of the child and thereby unduly infringes upon the parent-child relationship. Jackson, [999] So. 2d at [495]. In Alabama, a total denial of visitation rights has been upheld only rarely. Compare Baugh v. Baugh, 567 So. 2d 1358 (Ala. Civ. App. 1990) (this court affirmed a divorce judgment denying the father any visitation with his 7-year-old child because he was incarcerated and serving a 20-year prison sentence), with In re Norwood, 445 So. 2d 301 (Ala. Civ. App. 1984) (reversing the trial court's judgment that failed to award some restricted or limited visitation privileges to mother who had recently been released from prison for killing the child's father)."

V.C. v. C.T., 976 So. 2d 465, 468-69 (Ala. Civ. App. 2007) (per Moore, J., with Presiding Judge Thompson and Judge Pittman concurring in the result).

Furthermore,

> "[i]n light of the strong public policy favoring visitation, ... in cases where a final judgment (as opposed to a pendente lite order) indefinitely divesting a parent of all visitation rights is entered, that judgment should be based on evidence that would lead the trial court to be reasonably certain that the termination of visitation is essential to protect the child's best interests. Thus, notwithstanding the discretionary role of our learned trial judges, this court will continue to carefully scrutinize judgments divesting parents of all visitation rights with their children. See In re Norwood, 445 So. 2d 301, 303 (Ala. Civ. App. 1984) (reversing judgment denying all visitation to child's mother) ...."

M.R.D. v. T.D., 989 So. 2d 1111, 1114 (Ala. Civ. App. 2008).

We find V.C. instructive. The facts of V.C. are much more compelling than those present in this case. The juvenile court in V.C. "heard testimony indicating that the mother and the child's maternal grandmother had engaged in a physical altercation in front of the child on one occasion and that the mother had used curse words in the presence of the child or when referring to the child on one occasion," which resulted in a judgment suspending the mother's visitation with the child. V.C., 976 So. 2d at 469. However, this court concluded that those facts were not sufficient to support a suspension of the mother's visitation, noting that less drastic means than suspending all contact between the mother and the child could have better addressed the concerns raised by the mother's behavior. Id.

The testimony in the present case indicates that the father might have become upset with or even angry with the visitation supervisor when she reprimanded him about asking personal questions of the child, but no one testified that his behavior escalated to include profane language or a physical altercation either in or out of the presence of the child. The father apparently made the child upset or uncomfortable at

times when he told her that he had a room ready for her and that she would be able to come and visit him at his home soon, and he appeared to have forced some unwanted physical contact upon the child by expressing affection through hugging despite the child's desire to avoid an embrace. Although the record contains generalized testimony from the child indicating that she was uncomfortable in the father's presence on some occasions and C.W.'s repeated complaint that the father caused "drama" of some unspecified sort and made the child upset, no evidence suggested that the child suffered any significant or lasting emotional upset from any contact with the father; in fact, it appeared that the custodians had not taken the child to counseling even after the May 2019 visit, presumably because she did not require it.

The father had been awarded supervised visitation in the past, so his mental-health issues, whatever they may have been, and which the juvenile court noted had improved, were not an impediment to visitation. The evidence presented at trial did not indicate that he posed a threat of harm to the child such that all visitation between them should be foreclosed. Based upon the juvenile-court judge's own remarks

at the close of the trial, it appears that the reason visitation was not ordered was because the visitation center had terminated its relationship with the father based on a disagreement between him and a visitation supervisor, the extent of which, based on the testimony contained in the record, appears to have been rather minimal.

Upon our careful scrutiny of the juvenile court's judgment, we must conclude that the evidence simply does not support the determination that "the termination of [the father's supervised] visitation is essential to protect the child's best interests." M.R.D., 989 So. 2d at 1114. Accordingly, as we did in V.C., we reverse the judgment of the juvenile court insofar as it declined to award the father some form of supervised visitation with the child. On remand, the juvenile court is instructed to reinstate the father's supervised visitation.[8]

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

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[8]We recognize that the juvenile court cannot force the visitation center to supervise the father's visits. The parties are encouraged to locate an alternate location or an alternate supervisor for the father's visits.