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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Charlett Kay Mitchell

v.

Richard Wayne Mitchell

Appeal from Madison Circuit Court  
(DR-13-900288.02)

MOORE, Judge.

Charlett Kay Mitchell ("the mother") appeals from a judgment of the Madison Circuit Court ("the trial court") to the extent that it denied her

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claim for a modification of her visitation with her son ("the child"). We reverse the trial court's judgment.

### Procedural History

The procedural history pertinent to the issue on appeal is as follows. In 2015, the trial court entered a judgment precluding any visitation between the mother and the child based on the mother's drug abuse.<sup>1</sup> On June 17, 2019, the mother filed a petition in the trial court against Richard Wayne Mitchell ("the father"), seeking to modify the 2015 judgment to provide her with the legal right to visitation with the child. The father filed an answer to the mother's petition on August 22, 2019, contesting the claim.<sup>2</sup>

After conducting a trial on the visitation dispute on July 8, 2020, the trial court entered a final judgment on July 10, 2020, denying the

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<sup>1</sup>That judgment does not appear in the record, but the parties agree as to its content.

<sup>2</sup>The father also filed a counterclaim seeking to hold the mother in contempt based on an alleged child-support arrearage, which the trial court ultimately adjudicated in his favor.

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mother's claim for a modification of visitation. The judgment provides, in pertinent part:

"In support of her petition for modification of her visitation, [the mother] asserts that she has undergone successful rehabilitation from her addiction to opiates such that she should have unsupervised visitation pursuant to an established schedule. [The mother's] efforts in this regard are certainly commendable. However, the Court cannot order a change in visitation 'absent a determination by the court that the modification would serve the best interests of the child.' Matter of Paternity of A.R.R., 634 N.E. 2d 786 (Ind. App. 1994) (quoted with approval in Hall v. Hall, 717 So. 2d 416 (Ala. Civ. App. 1998)). The record herein permits no such determination. Accordingly, [the mother's] petition for modification is DENIED."

The mother filed a motion to alter, amend, or vacate the trial court's judgment on August 8, 2020. Following a hearing, the trial court entered an order on September 1, 2020, denying the mother's postjudgment motion. The mother filed her notice of appeal to this court on October 10, 2020.

#### Issue on Appeal

The mother appeals to this court seeking to reverse the judgment denying her visitation-modification claim. The mother contends that the

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evidence does not sustain the continuing denial of visitation between her and the child.

### Facts

The mother testified that she is a recovering drug addict; that her drug of choice had been Percocet, an opiate and strong painkiller; and that it was not a good idea for her to care for the child when she was on that medication. The mother stated, however, that she had been in recovery and had been opiate-free for almost four years and that she had made the decision to become opiate-free because of the child. According to the mother, she takes a number of medications, including Suboxone, which is prescribed by her physician as part of her recovery to prevent her from taking opiates. She testified that she has to take a monthly drug screen and to participate in monthly counseling sessions as requirements associated with her Suboxone regimen. The mother submitted as exhibits copies of her recent drug-test results, which were all negative for opiates. The mother testified that, at the time of trial, she was residing with her mother and her father in Hazel Green and was employed as an accountant, working Monday through Friday from 8:00 a.m. to 3:30 or

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4:00 p.m. She stated that she has a driver's license and a working, safe vehicle. According to the mother, the things that she was doing at the time of the trial were sufficient to allow her to maintain her sobriety, her job, and her health.

The mother testified that the father had allowed her to contact the child by telephone, and, she said, she attempts to contact the child every day at 6:00 p.m. She testified that the father is a decent father and that, although she disagrees with some of his actions, she believes that he has the child's best interest at heart. She stated that she had last seen the child approximately a month before the trial at her brother's house. She stated that she was there with her brother ("the maternal uncle") and his wife ("the maternal aunt"), her mother and father, and the child. The mother stated that she had not consulted the father regarding that visit with the child, that she and the father were not at that time or at the time of the trial on speaking terms, and that the child had been under the maternal uncle's care at the time. She testified that she also had not consulted the father regarding that visit with the child because she felt that he would not have agreed to allow her to visit.

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The mother's mother testified that, with the exception of prescription medications, she considered her home to be a drug-free environment; she also testified that she would not tolerate any recreational or illicit drug use in her home. She stated that the mother had lived with her for almost five years and that she had seen improvements in the mother's physical condition during that time. The mother's sister also testified that she had observed improvements in the mother's life over the five years preceding the trial.

The father testified that the child was entering the sixth grade and had been improving academically. He stated that the child was enrolled in karate and had signed up for flag football. The father stated that the child had begun seeing a counselor in May 2019 because the child's attitude had changed and the child had begun exhibiting behaviors that the father felt the child would need help with beyond what the father could offer and because the father felt the child needed somebody neutral that he could talk to. He stated that the child's counseling had ceased in March 2020 because of the COVID-19 pandemic. According to the father, he had hired a tutor to help the child bring his grades up from November

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2018 through December 2019 because the child had been struggling with his school work; the father said that the tutoring had helped and that the child's grades had improved.

According to the father, the maternal uncle had agreed to watch the child through the summer of 2020 while the father was working. He stated that, at the time of the trial in July 2020, the child was staying with the maternal uncle and the maternal aunt Monday through Friday of each week and with the father on the weekends. The father testified that, before the COVID-19 pandemic, the child had gone to the maternal uncle's house almost every weekend because the maternal uncle lives on the lake and, he said, the child "thinks the world of [the maternal] aunt and [the maternal] uncle." He stated that the maternal uncle and the maternal aunt are responsible and good people. According to the father, the child had also been able to see the mother's parents and the mother on occasion at the maternal uncle's house, and, he said, he did not have any objection to that as long as any visitation between the child and the mother was supervised by the maternal uncle or the maternal aunt. When asked if he has trust issues with the mother, the father answered in the

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affirmative because, he said, she is an addict and she had been on drugs for at least 12 years and maybe longer. He stated that, based on his past experiences with the mother, she could not be trusted and he could not believe her.

The father testified that the mother has telephone contact with the child, that she telephones the child every night at 6:00 p.m., and that whether the child talks to the mother is at the child's discretion. He stated that, in the beginning, he had required the child to talk to the mother and that that had not worked out well for the child. He stated that the child had recently gotten a cellular telephone of his own, that the father had shared the child's telephone number with the mother, that the mother phones the child directly, and that the child has the capability of phoning the mother when he wants to talk to her. The father testified that he felt it was a good thing for the child to have the freedom to call the mother when he wants to talk to her.

#### Standard of Review

"The trial court has broad discretion in deciding on visitation rights of the noncustodial parent. Wallace v. Wallace, 485 So. 2d 740 (Ala. Civ. App. 1986). This discretion



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applies to modification proceedings as well as to the original custody proceeding. Id. 'When the issue of visitation is determined after oral proceedings, the trial court's determination of the issue will not be disturbed absent an abuse of discretion or a showing that it is plainly in error. Andrews v. Andrews, 520 So. 2d 512 (Ala. Civ. App. 1987).' Dominick v. Dominick, 622 So. 2d 402, 403 (Ala. Civ. App. 1993)."

Flanagan v. Flanagan, 656 So. 2d 1228, 1230 (Ala. Civ. App. 1995).

### Discussion

We begin our analysis at the same point the mother begins her argument, pointing out the unusual nature of the 2015 judgment, which completely barred any visitation between the mother and the child. The public policy of this state strongly favors providing noncustodial parents reasonable rights of visitation with their children. See Naylor v. Oden, 415 So. 2d 1118, 1120 (Ala. Civ. App. 1982). Under applicable caselaw, a trial court can deny visitation between a noncustodial parent and his or her child only in extreme cases, K.E. v. Marshall Cnty. Dep't of Hum. Res., 125 So. 3d 722, 728 (Ala. Civ. App. 2013), when presented with "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."

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M.R.D. v. T.D., 989 So. 2d 1111, 1114 (Ala. Civ. App. 2008). In barring the mother from having any visitation with the child, the trial court must have been convinced that any lesser restriction would not have been sufficient to prevent the child from being harmed by the mother. See id.

The mother concedes that she could not challenge the correctness of the 2015 judgment in the visitation-modification action because, as she acknowledges, "[o]n a petition to modify visitation, a court does not reexamine the evidence to determine if its original judgment was correct." N.T. v. P.G., 54 So. 3d 918, 920 (Ala. Civ. App. 2010). A final judgment establishing visitation restrictions is res judicata as to the facts before the court at the time of its entry. See Hoag v. Stinson, 268 So. 3d 66, 69 (Ala. Civ. App. 2018). The mother suggests, however, that, when considering a petition to modify a judgment denying visitation, a trial court should favor restoration of visitation rights in order to promote the public policy of encouraging meaningful relationships between noncustodial parents and their children.

In Bosarge v. Bosarge, 267 So. 3d 868 (Ala. Civ. App. 2018), the Mobile Circuit Court modified a divorce judgment that had limited Mr.

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Bosarge to supervised visitation with his children to allow unsupervised visitation after a period. In affirming the judgment, this court stated:

"The legislature of this state has expressed the view that "[i]t is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children," as well as "to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage." Ala. Code 1975, § 30-3-150. Although not directly applicable to modification judgments, see Ala. Code 1975, § 30-3-157, that statute is consistent with the common-law principle that a noncustodial parent should generally be afforded "reasonable rights of visitation" with his or her children, Naylor v. Oden, 415 So. 2d 1118, 1120 (Ala. Civ. App. 1982).'

"S.M.M. v. J.D.K., 208 So. 3d 1118, 1122 (Ala. Civ. App. 2015)."

267 So. 3d at 871-72. Bosarge does not provide for any presumption in favor of a petitioner in an action seeking restoration of unrestricted visitation; instead, it holds only that, in some circumstances, a judgment eliminating a visitation restriction comports with the general public policy encouraging noncustodial parents to share in the upbringing of their

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children. Bosarge does not relax the burden of proof on a petitioner who is seeking restoration of suspended visitation rights.

On the other hand, the law also does not impose a heavier burden on a noncustodial parent whose visitation rights have been suspended by a previous judgment. Nothing in Alabama law affords a judgment suspending visitation rights any greater effect than any other judgment regulating visitation rights. The judgment is final and conclusive as to the rights of the parties and the interests of the child at the time, but only so long as the facts existing at the time of its entry remain without material change. Hoag, 268 So. 3d at 69 (citing E.F.B. v. L.S.T., 157 So. 3d 917 (Ala. Civ. App. 2014)). A judgment suspending visitation is not permanent and irrevocable and may be modified when the material circumstances have changed so that the suspension no longer serves the best interest of the child. See McKinney v. Alabama Dep't of Pensions & Sec., 475 So. 2d 568, 570 (Ala. Civ. App. 1985); see also Ex parte Snider, 929 So. 2d 447, 458 n.9 (Ala.2005) (citing T.K.T. v. F.P.T., 716 So. 2d 1235, 1239 (Ala. Civ. App. 1998)). A noncustodial parent who is seeking to restore visitation rights that were suspended by an earlier judgment bears

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the same burden of proof as any other petitioner seeking modification of visitation. See Hoag, supra.

"[T]he party seeking to remove [a] restriction on ... visitation with [his or her] child, ha[s] the burden of demonstrating that there ha[s] been a material change in circumstances since the entry of the divorce judgment and that the best interests and welfare of the child warrant the modification."

H.H.J. v. K.T.J., 114 So. 3d 36, 41 (Ala. Civ. App. 2012).

The parties are not in dispute as to whether the mother proved a material change of circumstances. The record indicates that, in 2015, the mother was abusing Percocet, an opiate pain medication, which impaired her ability to safely and normally interact with the child. At the time of the modification trial in 2020, the mother had recovered from her opiate addiction, had not illegally used drugs in four years, and had committed to an opiate-free lifestyle, as confirmed by the testimony of her mother and her sister. As part of her recovery, the mother submits to monthly drug screening and counseling. The mother submitted as exhibits copies of her recent drug-test results, which were all negative for opiates. The mother testified that, at the time of trial, she was residing with her mother and her father in Hazel Green and was employed as an

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accountant, working Monday through Friday from 8:00 a.m. to 3:30 or 4:00 p.m. She stated that she has a driver's license and a working, safe vehicle. According to the undisputed testimony of the mother, her recovery regimen was sufficient to allow her to maintain her opiate-free status, her job, and her health. Although the father testified that he did not trust the mother because of their past problems, the father did not dispute that the mother had overcome her drug problem. The trial court specifically commended the mother on her rehabilitation efforts, indicating that it found that the mother had, in fact, reformed from the condition that had led to the suspension of her visitation in 2015, which is sufficient to constitute a material change of circumstances. See, e.g., In re Jessica D. v. Michael E., 182 A.D.3d 643, 122 N.Y.S.3d 711 (2020); Walsh v. Jones, 263 N.C. App. 582, 824 S.E.2d 129 (2019).

The trial court denied the mother's petition on the ground that she did not sufficiently prove that visitation would serve the best interest of the child. However, in addition to proving that she had rehabilitated herself so that her drug addiction no longer presented a threat to the child, the mother presented evidence indicating that she was already in

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near daily communication with the child, that the child asked about her and initiated telephone calls to her, that she had personally interacted with the child on several occasions in a positive manner, and that the father, who was in a position to assess the matter, did not object to allowing the mother supervised visitation with the child. That evidence indicates that the child was seeking a relationship with the mother, that their interactions since 2015 had been beneficial to the child, and that some form of visitation would be in the child's best interest.

The law presumes that it is in the best interest of a child to have visitation with a fit parent. See C.B. v. J.W., [Ms. 2190369, Oct. 30, 2020] \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2020). Having determined that the mother had overcome her drug addiction, so that the only impediment to visitation had been ameliorated, and considering further that the father did not present any countervailing evidence indicating that the child would be harmed by awarding the mother visitation with the child, the trial court should have modified the 2015 judgment to allow the mother reasonable visitation with the child. See Naylor v. Oden, 415 So. 2d 1118, 1120 (Ala. Civ. App. 1982) ("[W]here the parents are deemed fit and

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proper persons, the ... parents should have reasonable rights of visitation.").

The record does not contain sufficient evidence to support a finding that it would be in the best interest of the child to continue to deny the mother any enforceable legal right to visit with the child. The trial court exceeded its discretion in denying the mother's petition to modify the 2015 judgment. For the foregoing reasons, we reverse the judgment insofar as it denied the mother's petition to modify visitation. We remand the case for the trial court to enter a new judgment awarding the mother such visitation as it determines serves the best interest of the child.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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