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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200869

B.W.

v.

S.S.

2210104

S.S.

v.

B.W.

Appeals from Marshall Juvenile Court
(JU-08-63.03)

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MOORE, Judge.

In appeal number 2200869, B.W. ("the mother") appeals from a judgment entered by the Marshall Juvenile Court ("the juvenile court") denying her petition seeking a modification of her visitation award with C.S. ("the child") and a finding of contempt against S.S. ("the father"). In appeal number 2210104, the father appeals from an October 26, 2021, order of the juvenile court denying his motion filed pursuant to Rule 60(b)(4), Ala. R. Civ. P. We consolidated the appeals ex mero motu.

Procedural History

On February 17, 2011, the juvenile court entered a judgment based on an agreement between the mother and the father. The February 17, 2011, judgment declared that the child was dependent pursuant to former § 12-15-1(10), Ala. Code 1975 (the predecessor to § 12-15-102(8)a., Ala. Code 1975), and awarded sole legal and sole physical custody of the child to the father. It also awarded the mother visitation with the child as follows:

"3. The mother ... is awarded visitation with the minor child. At the present time, that visitation will be on Wednesday and alternate Sundays of each week. At the

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present time, the Wednesday visits will be from 9:00 a.m. until 2:00 p.m., and every other Sunday from 8:30 a.m. until 6:30 p.m. In the event the mother obtains employment that would interfere with the mid-week visit, that visit would begin at 6:00 p.m. and end 30 minutes before the child's normal bedtime. Any lost time will be added to the alternate Sunday visits.

"4. At such time as the mother's home life has stabilized, the mother may petition the court without the payment of an initial filing fee to review and extend her visitation rights with the minor child.

"5. The court's standard custody and visitation order is attached to this judgment. The parties are ordered to abide by the general terms and relocation requirements of such order."

On November 24, 2020, the mother filed a petition in the Marshall Circuit Court seeking an order modifying her visitation award. In response to a motion filed by the father, the mother's petition was transferred to the juvenile court on January 25, 2021. The juvenile court promptly set the matter for a hearing and appointed a guardian ad litem to represent the child. On March 29, 2021, the mother filed an amended petition, asserting that the father had failed to allow her to visit with the child in violation of the February 17, 2011, judgment, and seeking, in addition to an order modifying her visitation award, "an order of civil and

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criminal contempt; an order of enforcement to compel compliance; [and] a period of incarceration for each period of visitation missed"

A trial was conducted on June 24, 2021. On July 2, 2021, the juvenile court entered a judgment finding that the mother had failed to prove that a material change in circumstances had occurred since the entry of the February 17, 2011, judgment, thereby denying the mother's petition for a modification of her visitation award. The July 2, 2021, judgment also directed the mother and the father to "comply with the visitation as previously ordered on February 17, 2011, or as they mutually agree" and noted that, because of the child's age, "the parties should consider [the child's] wishes in deviating from the set schedule." The July 2, 2021, judgment provided further that "[a]ll other relief not granted is hereby denied."

The mother filed a postjudgment motion on July 9, 2021, arguing, among other things, that the juvenile court had erred by concluding that there had been no material change of circumstances and by failing to make findings regarding civil or criminal contempt. The juvenile court entered an order on July 12, 2021, setting that motion for a hearing on

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July 21, 2021. On July 14, 2021, the mother filed a motion to reset the hearing, asserting that the "matter needs to be heard on or before [July 23, 2021,] or otherwise denied by operation of law"; in response to that motion, the juvenile court entered an order rescheduling the hearing for July 20, 2021.¹

The juvenile court entered an order in response to the mother's postjudgment motion on July 29, 2021. The July 29, 2021, order purports to find that the child is no longer dependent, to relinquish further jurisdiction of the case, and to address the mother's contempt claim. The order also purports to modify the mother's visitation award with the child, due to the child's age and the resulting inability of the mother to exercise her right to visit with the child on Wednesdays because of the child's attending school.

¹We note that the mother's motion and the juvenile court's order rescheduling the hearing do not appear in the record on appeal. However, "a court may take judicial notice of its own records." City of Mobile v. Matthews, 220 So. 3d 1061, 1063 (Ala. Civ. App. 2016). Accordingly, we take judicial notice of those filings, which appear in the record in appeal number 2210104, the father's appeal from the denial of his Rule 60(b) motion.

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The mother filed her notice of appeal to this court on August 3, 2021; that appeal was assigned case number 2200869. On October 13, 2021, the father filed a motion in this court seeking leave to file a Rule 60(b) motion in the juvenile court and requesting, among other things, that this court hold the mother's appeal in abeyance pending resolution of that motion by the juvenile court and remand jurisdiction of the case to the juvenile court for the limited purpose of resolving his Rule 60(b) motion. This court entered an order on October 15, 2021, that granted the father leave to file a Rule 60(b) motion in the juvenile court.

The father's Rule 60(b) motion was filed in the juvenile court and challenged the juvenile court's July 29, 2021, postjudgment order as being void for lack of jurisdiction. The juvenile court entered an order denying the father's Rule 60(b) motion on October 26, 2021. The father filed a timely notice of appeal to this court; that appeal was docketed as appeal number 2210104.

Facts

The father testified that, following the entry of the juvenile court's February 17, 2011, judgment, he had allowed the mother to exercise

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additional visitation beyond what was awarded in that judgment, including overnight visits. He stated, however, that, after June 5, 2020, he had no longer complied with the February 17, 2011, judgment with regard to visitation and that he had, instead, required that the mother's visitation with the child be supervised and had no longer allowed overnight visitation. According to the father, he had learned that the child had used a vaping device, and, he said, he had believed that the child had obtained that device from the mother. He testified that he had initiated an arrest warrant against the mother on that basis in the summer of 2020. The father presented text messages in which he had asked the mother why she would tell the child to lie to the Marshall County Department of Human Resources ("DHR") with regard to vaping, to which she had responded via text message: "That was wrong of me, and I'm not afraid to admit that."

The mother testified that she had been married to Br.W. for five years at the time of the trial and that they lived together with two of her four children, one of whom is the child of Br.W. She stated that the child and her fourth child both live primarily with their respective fathers.

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Br.W. testified that he was married to the mother when he tested positive for methamphetamine in August 2016. The mother testified that she had been arrested for child endangerment after the father had submitted a private warrant for her arrest. The mother admitted that she had told the child to lie to DHR and to tell DHR that he had not used a vaping device. According to the mother, the police had visited her home on June 5, 2020, with a search warrant and took all the electronics from the home, including the child's cellular telephone. The mother testified that Br.W. had been arrested that day for illegal possession of testosterone, which, she said, she had known him to use illegally.

The child, who was 13 years old at the time of the trial, testified outside of the presence of the mother and the father. He testified that he gets along with the mother's other children "pretty well." When asked whether he felt himself to be in danger from anybody in the mother's household during his visits, the child named Br.W. With regard to Br.W., the child testified: "When we would go out, it just seemed like we were going to get into a lot of trouble just how they act." He stated that, although Br.W. "was never drunk," Br.W. had driven a vehicle while

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drinking. The child also stated that Br.W.'s drinking in his presence bothered him. The child also testified that the mother drives really fast and that she smokes cigarettes, which, the child said, concerned him regarding the mother's health. He also stated that he did not like being around the smoke. The child testified that he was present at the mother's house on June 5, 2020, when Br.W. was arrested. He admitted that the mother had instructed him to lie about the vaping device. The child testified further that the mother and Br.W. had had arguments, during which he had heard screaming coming from the room in which the mother and Br.W. were in, and that that had made him uncomfortable. The child testified that he loves both the mother and the father and that he missed the mother.

The father testified that he had felt that he needed to withhold visitation from the mother after the police had visited the mother's home and that he had reduced the amount of visitation that he had allowed the mother because of the vaping, the drinking, and the drug use in her home and because the mother had instructed the child to lie to DHR.

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Before we consider the merits of the mother's appeal, we consider the father's argument that the juvenile court's July 29, 2021, postjudgment order is void.

"The proper standard of review of the denial of a Rule 60(b)(4)[, Ala. R. Civ. P.,] motion is as follows:

" " "The standard of review on appeal from the denial of relief under Rule 60(b)(4) is not whether there has been an abuse of discretion. When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside. A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process.' " "

"Bank of America Corp. v. Edwards, 881 So. 2d 403, 405 (Ala. 2003) (quoting Image Auto, Inc. v. Mike Kelley Enters., Inc., 823 So. 2d 655, 657 (Ala. 2001), quoting in turn Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991)); Ex parte N.B., 66 So. 3d 249, 254 (Ala. 2010)."

Looney v. State, 60 So. 3d 293, 296 (Ala. Civ. App. 2010).

The father argues that the mother's July 9, 2021, postjudgment motion was denied by operation of law on July 23, 2021, in accordance with Rule 1(B), Ala. R. Juv. P. That rule provides, among other things,

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that all postjudgment motions shall not remain pending in the juvenile court for more than 14 days unless, within that time, that 14-day period is extended. The father asserts that, because the juvenile court's July 29, 2021, postjudgment order was entered outside the 14-day period provided in Rule 1(B), that order is a nullity. See, e.g., Moragne v. Moragne, 888 So. 2d 1280, 1282 (Ala. Civ. App. 2004) (holding that an order entered after the 90-day period for ruling on the parties' postjudgment motions had expired was a nullity). We agree.

Although the juvenile court did not expressly address the mother's claim for contempt against the father in its July 2, 2021, judgment, the juvenile court directed that "[a]ll other relief not granted is hereby denied." Because the juvenile court's July 2, 2021, judgment implicitly denied the mother's contempt claim, it is a final judgment. The father is correct that the 14-day period during which the mother's postjudgment motion remained pending in accordance with Rule 1(B) was not extended and, thus, that motion was denied by operation of law on July 23, 2021. Because the juvenile court's July 29, 2021, postjudgment order was entered without jurisdiction, that order is void. See D.K.M. v. R.M., 57 So.

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3d 770, 772-73 (Ala. Civ. App. 2010) (concluding that an order entered in a juvenile court more than 14 days after the filing of a postjudgment motion was entered without jurisdiction and would not support an appeal). We therefore reverse the juvenile court's October 26, 2021, order and remand the cause with instructions that the juvenile court grant the father's Rule 60(b)(4) motion and vacate its July 29, 2021, postjudgment order. Because the mother's notice of appeal was filed on August 3, 2021, within the 14-day period for timely filing of a notice of appeal following the denial of her postjudgment motion by operation of law on July 23, 2021, see Rule 4(a)(1), Ala. R. App. P., we proceed to consider the mother's arguments on appeal as they relate to the juvenile court's July 2, 2021, judgment.

Appeal Number 2200869

The mother first argues on appeal that the juvenile court erred in denying her petition to modify her visitation award with the child. Our standard of review of the juvenile court's judgment is as follows:

"Visitation is a matter within the discretion of the trial court. E.W. v. Montgomery County Dep't of Human Resources, 602 So. 2d 428 (Ala. Civ. App. 1992). The court's discretion is

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guided by what will protect and enhance the best interests and welfare of the child. Id. The court's decision regarding visitation will not be reversed absent an abuse of discretion or a showing that it is plainly in error. Id."

Long v. Long, 781 So. 2d 225, 226 (Ala. Civ. App. 2000). This court has confirmed that "'visitation judgments may always be modified based on a subsequent material change of circumstances and upon proof that the modification would be in the best interests of the child.'" Hoag v. Stinson, 268 So. 3d 66, 69 (Ala. Civ. App. 2018) (quoting Y.N. v. Jefferson Cnty. Dep't of Hum. Res., 67 So. 3d 76, 85-86 (Ala. Civ. App. 2011)).

The mother argues before this court, as she did before the juvenile court, that a material change of circumstances had occurred since the entry of the juvenile court's February 17, 2011, judgment, including the age of the child, the child's relationship with his siblings that had been born since the entry of the February 17, 2011, judgment, the mother's marriage to Br.W., the mother's purchase of a residence, the father's having voluntarily increased the mother's visitation award with the child before later withdrawing that visitation, and the mother's exercise of physical custody of two of her four children and visitation with another of

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her children. She further asserts that a modification of her visitation award would be in the child's best interest because, she says, the child testified that he had enjoyed spending more time with the mother, that he felt safe in the home of the mother and Br.W., and that he has a good relationship with Br.W. and his siblings.

Despite the mother's characterization of the child's testimony, when determining whether to modify the visitation award, the juvenile court could have considered the child's statements that he had felt himself to be in danger from Br.W. at times, that he did not always feel stable in the presence of the mother and Br.W., that he does not like Br.W.'s drinking in his presence, that he has heard the mother and Br.W. argue, and that the mother smokes. The child testified that he had been at the mother's home when police had entered and arrested Br.W. and that the police had taken all the electronics from the home, including the child's phone. He also admitted that the mother had instructed him to lie to DHR. Even if the juvenile court considered evidence indicating that the mother had not intentionally allowed the child to vape, it is undisputed that the child had obtained the vaping device from the mother's home. The mother admitted

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that Br.W. had been arrested, and Br.W. admitted that he had tested positive for methamphetamine in August 2016 while he was married to the mother. Even assuming the mother is correct that a material change of circumstances has occurred, the juvenile court could have determined from the evidence presented that a modification of the visitation award was not in the child's best interest. Accordingly, the juvenile court's judgment is affirmed on this issue.

To the extent the mother argues that the juvenile court's judgment wrongfully allows the father unilateral decision-making authority over her visitation with the child, we note that that argument was primarily directed to a provision in the juvenile court's July 29, 2021, postjudgment order, which we have already determined is void. We note further that, although the juvenile court's July 2, 2021, judgment provides that the parties shall comply with the visitation as ordered in the February 17, 2011, judgment "or as they mutually agree," that statement does not allow for the father to deny the minimum visitation awarded to the mother in the February 17, 2011, judgment. "[A] judgment awarding visitation that guarantees the noncustodial parent a specified visitation schedule, while

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granting the custodian discretion to allow for additional visitation, does not necessarily violate the rights of the noncustodial parent." Pratt v. Pratt, 56 So. 3d 638, 644 (Ala. Civ. App. 2010). Accordingly, we affirm the juvenile court's judgment as to this issue.

The mother last argues that the juvenile court erred in declining to hold the father in civil or criminal contempt. At the trial, the father's counsel argued, with regard to the mother's claim for contempt, that the father was "asking the court to deny any requested relief on the contempt allegations" "because there has not been adequate notice provided to the father by means of a nisi order providing you know the potential term of incarceration and/or fines for the alleged contempt." At the close of the trial, the father's counsel asserted that Dreading v. Dreading, 84 So. 3d 935 (Ala. Civ. App. 2011), supported the father's position that "there must be specific notice through a Rule Nisi order of contempt [describing] the adverse consequences that somebody might face in order to be held in contempt." The mother's attorney responded as follows:

"There are two types of contempt. One is civil and one is criminal. The one that he is talking about that requires those kind of notices is the criminal contempt. And, he might be

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right in there. I did not request a Rule 70[, Ala. R. Civ. P.,] order issue, but I did amend seeking a civil contempt citation ... to compel [the father] and hold something over his head to get him in compliance and that is all we are seeking here."

Thus, the mother abandoned her claim for criminal contempt at that time.

Her claim for civil contempt, however, remained pending.

"The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence.' Poh v. Poh, 64 So. 3d 49, 61 (Ala. Civ. App. 2010). 'To hold a party in contempt under either Rule 70A(a)(2)(C)(ii) or (D), Ala. R. Civ. P., the trial court must find that the party willfully failed or refused to comply with a court order.' T.L.D. v. C.G., 849 So. 2d 200, 205 (Ala. Civ. App. 2002)."

J.S.S. v. D.P.S., 281 So. 3d 434, 437-38 (Ala. Civ. App. 2019).

The mother cites only C.N.M. v. J.D.D., 258 So. 3d 348 (Ala. Civ. App. 2018), in support of her argument that the juvenile court abused its discretion in declining to find the father in contempt "despite the overwhelming evidence of his conduct in the denial of the visits without leave of court." The mother's brief at 32. In C.N.M., this court affirmed a finding of contempt against C.N.M. because she had failed to allow J.D.D. to exercise his court-ordered visitation with the parties' child. 258

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So. 3d at 352-53. There is no indication in C.N.M. that C.N.M. had declined to allow J.D.D. to exercise visitation based on concerns related to the child's safety. In the present case, however, there was testimony indicating that the father had declined to allow the mother to exercise visitation with the child following Br.W.'s arrest in the child's presence, the child's having obtained a vaping device from the mother, and the mother's having instructed the child to lie to DHR.

In J.S.S., supra, this court concluded that the Shelby Circuit Court had not exceeded its discretion in declining to enter a contempt finding against D.P.S. despite her having failed to allow J.S.S. visitation with the parties' child at certain times. 281 So. 3d at 438. This court observed that D.P.S. had withheld visitation when, among other things, the woman with whom J.S.S. had a relationship had informed her that J.S.S. was using drugs again. Id. We determined that, based on D.P.S.'s explanations for the visitation issues, which had included concerns for the safety of the parties' child, the fact that J.S.S. had been awarded additional visitation to compensate for the visitation he had lost, and D.P.S.'s indication that there had been no issues with visitation in quite a while, the Shelby

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Circuit Court had not exceeded its discretion in declining to make a finding of contempt. Id.

Like in J.S.S., the father's actions in the present case appear to have been in response to concerns for the child's safety. "When evidence in a contempt case is presented ore tenus to the trial court, the trial court's finding regarding contempt is presumed correct." Gilbert v. Nicholson, 845 So. 2d 785, 791 (Ala. 2002). The mother fails to cite any authority in which this court has reversed a judgment denying a motion for contempt with circumstances similar to those existing in the present case. See Rule 28(a)(10), Ala. R. App. P. Because this court cannot substitute our judgment for that of the juvenile court and because it appears that the juvenile court acted within its discretion in denying the mother's motion for contempt in accordance with J.S.S., the juvenile court's judgment is affirmed as to this issue.

Conclusion

Because the mother has failed to raise any arguments in appeal number 2200869 that merit reversal of the juvenile court's July 2, 2021, judgment, that judgment is affirmed. In appeal number 2210104, we

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reverse the juvenile court's order denying the father's Rule 60(b)(4) motion and remand the cause with instructions that the juvenile court vacate its July 29, 2021, postjudgment order and grant the father's Rule 60(b) motion.

2200869 -- AFFIRMED.

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

Edwards, J., concurs in the result, without writing.

2210104 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

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