REL: September 16, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210466

Taylor Gurganus

v.

Austin Jacob Clay

Appeal from Walker Circuit Court
(DR-20-115)

MOORE, Judge.

Taylor Gurganus ("the mother") appeals from a judgment of the Walker Circuit Court that, among other things, awarded custody of A.G.-C. ("the child"), who was born on August 25, 2020, to Austin Jacob Clay

("the father"), subject to the mother's right to visitation. We affirm in part and reverse in part.

Procedural History

On August 31, 2020, the father filed in the Winston Juvenile Court a "verified petition to establish paternity, support, and for primary physical care" of the child. Specifically, he sought an award of joint custody of the child. The father asserted, among other things, that he was a resident of Winston County and that the mother was a resident of Walker County. On September 8, 2020, the mother filed a motion to transfer the case to the Walker Juvenile Court; she asserted that both she and the child were residents of Walker County and that venue was proper in Walker County. On that same date, the Winston Juvenile Court entered an order transferring the case to the Walker Juvenile Court. On October 14, 2020, the father filed in the Walker Juvenile Court a motion to set an immediate hearing. On October 19, 2020, however, the Walker Juvenile Court, on its own motion, entered an order concluding that the case was a custody dispute between the mother and

the father, rather than a child-support case, as it had been docketed, and it transferred the case to the Walker Circuit Court ("the trial court").

A trial was conducted on February 8, 2022. That same day, the trial court entered an order, which contains the following findings of fact:

> "[The father] and [the mother] are the parents to [the child], born 08/25/2020. In reaching a decision regarding the legal and physical custody of [the child], the parties stood on an equal footing such that neither parent enjoyed a favorable presumption. The paramount and controlling concern of the court was the best interest of the child.
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> "[The father] has worked for the same employer for several years and has lived in the same residence for several years. If [the father] needs help with [the child], he has a large extended family living within close proximity to him. [The father] has had a limited time with [the child] but he has not [been] shown to be a danger to the child.
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> "The court does not doubt [the mother's] love for [the child], but she has issues that are concerning. The first is [the mother] has a pattern of marrying or dating individuals, getting pregnant, and having a child. Then, because she is not happy which is a fleeting moment in time, she divorces the father or leaves the father of the child. She elevates her need for happiness over a child's need for an active full time father.
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> "The next issue is [the mother's] moving without a stable home. When she met [the father], [the mother] lived with her parents in Parrish, AL. Only a few months after meeting [the father], she moved to Haleyville, AL, to live with [the father].

> After a couple months, [the mother] became pregnant with [the child] and being unhappy, she left the father ... to move back to Parrish with her parents. Sometime after moving in with her parents, [the mother] met her current boyfriend and taking her two children, quickly moved to Cleveland, AL, to live with her boyfriend.
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> "[The mother] does not see a problem moving in with different men based on her happiness. Her personal stability is controlled by an emotion instead of making appropriate and well-thought-out decisions that are consistent with her well-being and more importantly, her children's best interest. [The mother's] current living arrangement is only stable based on a boyfriend's whims. A boyfriend who has no commitment to [the mother] and the children other than he has allowed them to move into his house.
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> "Lastly, [the mother] does not have immediate family members within a short distance to help her with [the child]. From the testimony, [the mother's] involvement with her family is only when she moves in with her parents after a failed relationship.
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> "[The father] is employed with Exxel Outdoors, LLC. He makes $2,947.00 gross a month. [The mother] is employed at Sunbridge Home Healthcare, Inc. grossing $1,365.00 a month. [The child's] health insurance needs are covered by government programs. Even though [the mother] receives child support for her first child, she has most of th[at] child's expenses to maintain. The court will impute a pre-existing child support obligation to her.
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> "Taking the totality of the circumstances, the court finds [the child's] best interest is served by [the father] having sole legal and sole physical custody of the child."

The trial court awarded the father sole legal and sole physical custody of the child, and it awarded the mother "reasonable and liberal parenting time with [the child] based on [the mother's], [the father's], and the child's schedules," to "include weekends, occasional weeknights," "major holidays and birthdays, as well as extended periods of time in the summer." The trial court specified, however, that, if the parties could not agree on a visitation schedule, the mother would have a right to visitation with the child on the first weekend of every month, during spring and fall breaks from school in odd-numbered years, alternating weeks during the summer, and during certain specified times on holidays and special events.

On February 10, 2022, the mother filed a postjudgment motion challenging the sufficiency of the evidence in support of the judgment; the trial court denied that motion on March 3, 2022. The mother timely filed her notice of appeal to this court.

Facts

The father testified that, when he first met the mother, she was residing in Parrish with her mother. According to the father, the mother

had then moved in with him at his residence that he rents in Haleyville, where, at the time of the trial, he had resided for four years. The father stated that he and the mother had dated for eight or nine months and that the mother had continued to reside with him until a month or two before they broke up, when, he said, the mother, who was already pregnant with the child, returned to live with her mother in Parrish. According to the father, for the first three months following the child's birth, the mother had allowed him to visit with the child at his residence for two hours at a time, but, he said, after that three-month period, the mother had allowed him to visit with the child for two hours at a time only at her mother's house. The father testified that there had been an argument between the parties and that the mother had not allowed him to see the child for four months. He stated that, after the parties were in court the last time, when the child was approximately nine months old, the mother had allowed him to exercise visits with the child for a full day. He testified that, beginning in January 2022, the mother had allowed him to have the child for full weekends. The father testified that the mother had denied his requests for additional visitation with the child.

He stated that, although there had been no issues in exchanging the child, the mother had insisted that he, rather than any of his family members, be the one to pick up the child.

The father admitted that he had not financially supported the child, but he testified that he had purchased diapers, wipes, and clothes for the child and had offered to pay the mother's bills. He stated that he earns $13 per hour working 48 hours per week at Exxel Outdoors, LLC, in Haleyville, where he had worked for 4 years at the time of the trial. The father testified that the child has her own bedroom, with her own bed and toys, at his house. He stated that his mother, his father, and his brother live less than a mile away from him and that his mother would care for the child while he was at work.

According to the father, he and the mother talk at least every other day and he checks up on the child. The father admitted that he needed more parenting time to develop a bond with the child. He stated that he did not know where the child goes to the doctor and that he had not attended the child's doctor visits. The father admitted further that he had not attended any parenting classes other than the cooperative

parenting class that the trial court had directed him to attend and that he had never had a small baby in the house full time. The father sought joint custody of the child, with the parties exercising equal parenting time.

The mother testified that she was living in Parrish with her parents when she met the father and that she had lived with him for only a month before moving back to live with her parents. She testified that they had separated because she "felt like [she] was only there to, like, take care of the house, and [the father] didn't really show affection and [she] was just not happy." According to the mother, she had not denied the father visitation with the child; however, she admitted that she had limited the duration of the father's visitations in the three months following the child's birth because she had been breast-feeding the child. She stated that, when the child was three months old, the father had begun yelling at her during a visit with the child and that she had told him that he could leave if he was going to continue being disrespectful. The mother testified that, afterward, the father had not seen the child "for four months on his own choices," but, she stated, when the child was 9 or 10

months old, the father had been allowed to visit from 9:00 a.m. until 5:00 p.m. every other Saturday, that the father and the child were visiting every other weekend at the time of the trial, and that she was willing to work with the father. According to the mother, she had not required the father to pick up the child, but she had pointed out to him that he brought his entire family to every visit, rather than spending one-on-one time with the child. She stated that she "ha[s] no problem with" the father's mother. The mother testified that the child deserves to know the father. She stated that she had asked the father to help with day-care expenses for the child, but, she said, he had not offered her any money. She admitted, however, that he had offered to pay a bill or buy diapers in the past.

The mother stated that she has a five-year-old daughter with her ex-husband and that the child and that sibling are very close and attached to one another. According to the mother, she had moved from her parents' house to a home in Cleveland that is owned by her fiancé, who she had known for over a year at the time of the trial and had been dating for six months before moving in with him on November 19, 2021.

She stated that she and her fiancé planned to marry on January 28, 2023. The mother testified that the children love Cleveland, that they had never been happier, and that the child's sibling was excelling in school. Although the mother admitted she had no family in Cleveland, she testified that she has friends in Cleveland, that her fiancé has family nearby, that her parents are an hour away and visit every other weekend, and that she has an aunt that lives 20 minutes away. The mother testified that, at the time of the trial, she had been working at a home-health company for one week and was earning $10.50 per hour. She stated that her hours vary and that, at the time of the trial, she had only two clients. The mother stated that the child attends day care in Cleveland at a cost of $125 per week and that the child has Medicaid health coverage.

Jurisdiction

The mother first argues that the trial court lacked jurisdiction to consider the father's paternity petition. She cites former §12-15-31(2), Ala. Code 1975, former § 12-15-30(b)(1), Ala. Code 1975, and this court's opinion in L.L.M. v. J.M.T., 964 So. 2d 66 (Ala. Civ. App. 2007), which

applied those former statutes, in support of her assertion. In 2008, however, the legislature enacted the new Alabama Juvenile Justice Act ("the Act"), § 12-15-101 et seq., Ala. Code 1975, which amended and renumbered those provisions. Currently, the Act provides in § 12-15-115(a)(6), Ala. Code 1975, that a juvenile court shall "exercise original jurisdiction" of, among other civil proceedings, "[p]roceedings to establish parentage of a child pursuant to the Alabama Uniform Parentage Act, Chapter 17 of Title 26." Thus, the Winston Juvenile Court had jurisdiction to consider the father's August 31, 2020, petition.

Section 26-17-605, Ala. Code 1975, a part of the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, provides that

> "[v]enue for a proceeding to adjudicate parentage is in the county of this state in which:
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> "(1) the child resides;
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> "(2) the defendant resides;
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> "(3) a proceeding for probate or administration of the presumed or alleged father's estate has been commenced; or

> "(4) the plaintiff resides, only if the circumstances in subdivisions (1), (2), or (3) do not apply."

Rule 82(d)(1), Ala. R. Civ. P., provides, in pertinent part, that, "[w]hen an action is commenced laying venue in the wrong county, the court, on timely motion of any defendant, shall transfer the action to the court in which the action might have been properly filed and the case shall proceed as though originally filed therein." See also Rule 1(A), Ala. R. Juv. P. (directing that, if no procedure is specifically provided in the Alabama Rules of Juvenile Procedure, the Alabama Rules of Civil Procedure shall be applicable). In light of the mother's assertions in her motion to transfer the case that both she and the child resided in Walker County, we conclude that the Winston Juvenile Court properly transferred the case to the Walker Juvenile Court.

Following that transfer, the Walker Juvenile Court, on its own motion, transferred the case to the trial court based on its determination that the case had been improperly docketed. The mother argues that, because the father's petition was within the exclusive jurisdiction of the juvenile court, the transfer of the case to the trial court is void. As

discussed above, however, § 12-15-116(a)(6) currently provides that juvenile courts shall exercise original jurisdiction -- rather than exclusive jurisdiction, as the former statutes provided -- over paternity actions. Section 26-17-104, Ala. Code 1975, a part of the AUPA, provides, in pertinent part, that "[a] circuit or district court of this state or any other court of this state, as provided by law, shall have original jurisdiction to adjudicate parentage pursuant to [the AUPA] and may determine issues of custody, support, and visitation incidental to a determination of parentage." In Ex parte F.T.G., 199 So. 3d 82, 86 (Ala. Civ. App. 2015), this court confirmed that, "under present law, juvenile courts, district courts, and circuit courts have concurrent jurisdiction to adjudicate issues of parentage and to adjudicate issues of custody, visitation, and child support incidental to an adjudication of parentage."

Although the mother's reliance on our former statutes is misplaced, the mother is correct that the Walker Juvenile Court, like the Winston Juvenile Court, had original jurisdiction to adjudicate the issues raised in the father's petition, which sought an award of child support and custody pursuant to a determination of parentage. See L.R.S. v. M.J.,

229 So. 3d 772, 776 (Ala. Civ. App. 2016) (confirming that juvenile courts have jurisdiction to award child support in parentage actions). Nonetheless, the Walker Juvenile Court, on its own motion, transferred the father's petition to the trial court, pursuant to § 12-11-11, Ala. Code 1975, which allows for the transfer of a case to the proper court "[w]herever it shall appear to the court that any case filed therein should have been brought in another court in the same county." The mother did not object to that transfer.

In L.R.M. v. D.M., 962 So. 2d 864, 868-69 (Ala. Civ. App. 2007), the Cherokee Circuit Court "severed and transferred" the issues of custody, visitation, and child support regarding a child born before the parties married to the Cherokee Juvenile Court while retaining jurisdiction over the divorce action from which those issues were severed, and it transferred the divorce action to its inactive docket. This court noted that, although the Cherokee Circuit Court's conclusion that it did not have jurisdiction to entertain the issues that it had severed and transferred "arguably was erroneous," neither party had objected to the severance and transfer, neither party had challenged the Cherokee

Juvenile Court's subject-matter jurisdiction over those issues, and the Cherokee Juvenile Court had jurisdiction over paternity actions and custody-related issues raised in conjunction with a paternity action. Id. at 868 n.2. This court then proceeded to consider the appeal and the cross-appeal from the judgment entered by the Cherokee Juvenile Court on those severed and transferred issues.

In Brock v. Herd, 187 So. 3d 1161, 1162 (Ala. Civ. App. 2015), this court considered an appeal in a case in which the grandparents of the child at issue had filed in the Talladega Juvenile Court a petition seeking an adjudication of paternity of the child and custody of the child. The Talladega Juvenile Court had transferred the petition to the Talladega Circuit Court, which entered a judgment on the petition. Id. On appeal, this court confirmed the jurisdiction of the Talladega Circuit Court to adjudicate the child's paternity, observing that § 12-15-115 does not indicate that a juvenile court's jurisdiction to establish the paternity of a child born out of wedlock is exclusive. Id. at 1163-64.

Like in L.R.M. and Brock, the trial court in the present case had jurisdiction to consider the issues raised in the father's petition. Because

the mother failed to object to or to challenge as erroneous the Walker Juvenile Court's transfer of the action to the trial court, this court may not consider the mother's argument alleging error as to that transfer that has been raised for the first time on appeal. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ("[An appellate] court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court."). Accordingly, we proceed to consider the merits of the mother's appeal.

Standard of Review

This court outlined the standard of review applicable to the present case in Treadway v. Treadway, 324 So. 3d 842, 848-49 (Ala. Civ. App. 2020):

> "'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. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), wherein this Court, quoting Phillips v. Phillips, 622 So. 2d 410,

412 (Ala. Civ. App. 1993), set out the well-established rule:

> "'"'Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989), and Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988), and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow. Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990); Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985).'"'

"Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996). We also note that, '[w]hen a trial court does not make specific findings of fact concerning an issue, an appellate court will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous.' McGough v. McGough, 710 So. 2d 452, 453 (Ala. Civ. App. 1997) (citing Ex parte Bryowsky, 676 So. 2d at 1324). '[T]he resolution of conflicting evidence is within the exclusive province of the trial court ....' Hedgemon v. United Parcel Serv., Inc., 832 So. 2d 656, 659 (Ala. Civ. App. 2002).

> "'"When the trial court makes an initial custody determination, neither party is entitled to a presumption in his or her favor, and the 'best interest of the child' standard will generally apply. Nye v. Nye, 785 So. 2d 1147 (Ala. Civ. App. 2000); see also Ex parte Byars, 794 So. 2d 345 (Ala. 2001). In making an initial award of custody based on the best interests of the children, a trial court may consider factors such as the '"characteristics of those seeking custody, including age, character, stability, mental and physical health ... [and] the interpersonal relationship between each child and each parent."' Graham v. Graham, 640 So. 2d 963, 964 (Ala. Civ. App. 1994) (quoting Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981)) .... Other factors the trial court may consider in making a custody determination include 'the sex and age of the [children], as well as each parent's ability to provide for the [children's] educational, emotional, material, moral, and social needs.' Tims v. Tims, 519 So. 2d 558, 559 (Ala. Civ. App. 1987). The overall focus of the trial court's decision is the best interests and welfare of the children."

"'Steed v. Steed, 877 So. 2d 602, 604 (Ala. Civ. App. 2003).

> "'Furthermore, when evidence is presented ore tenus, the trial court is "'unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility.'" Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007) (quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). Therefore, a presumption of correctness attaches to a trial court's factual findings premised on ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008).'
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> "Bedard v. Bedard, 266 So. 3d 1113, 1123-24 (Ala. Civ. App. 2018)."

Analysis

The mother argues on appeal that the trial court erred in awarding the father sole legal and sole physical custody of the child and in allowing her to exercise visitation with the child only one weekend per month.[1]

[1]The mother also argues in her initial brief on appeal that the trial court erred in denying her postjudgment motion without first conducting a hearing. The father asserts in his responsive brief that a hearing was conducted on the mother's postjudgment motion on March 3, 2022, and the mother acknowledges in her reply brief that a hearing did, indeed, occur. Thus, we consider the mother to have abandoned the argument regarding the trial court's failure to conduct a hearing on her postjudgment motion.

The mother first asserts that the trial court's findings regarding the mother's romantic relationships warrant reversal because, she says, no evidence was presented indicating that her conduct had had any detrimental effect on the child. We note, however, that, contrary to the mother's argument, the trial court's judgment is not based on any alleged misconduct by the mother but, rather, on the mother's lack of stability, which is among those factors a trial court may consider in making an initial award of custody. See Treadway, supra.

The mother further asserts that the trial court's award of sole physical custody to the father is not supported by the evidence presented, and, in support of her position, she relies on evidence regarding the father's lack of parenting experience, his failure to support the child financially before the filing of his petition, and his intention to leave the child in the care of his mother when he is working. The mother is correct that the father admitted that he had never had a small child living in his home, that he had not taken parenting classes beyond those ordered by the trial court, that the child would be cared for by the father's mother during the father's working hours, and that the father had not yet

developed a bond with the child. The trial court was also presented with testimony, however, indicating that the father had exercised increasing periods of visitation with the child, that the mother did not have any problems with the father's mother, and that the father had completed a parenting class. Although the father admitted that he had not paid regular monetary support for the child, he testified that he had offered to pay the mother's bills and that he had provided a number of items for the child. The father also testified that, for the 4 years preceding the trial, he had been employed by the same employer and was earning approximately $624 per week and that he had rented and lived in the same house during that same 4-year period, thereby demonstrating that the father could offer the child stability.

Although the mother points to evidence indicating that the mother has a good support system in Cleveland, that she and the child are happy and well taken care of, and that the child is bonded to the child's sibling, this court cannot reweigh the evidence on appeal. See Treadway, supra. "In instances where the evidence shows that either parent is an appropriate custodian of the minor children, the appellate court is bound

to defer to the trial court's custody decision based on the trial court's observations of the witnesses, its credibility determinations, and its resolution of conflicting evidence." Bates v. Bates, 678 So. 2d 1160, 1162 (Ala. Civ. App. 1996). Because the parties stood on equal footing and evidence was presented from which the trial court could have determined that awarding sole physical custody of the child to the father was in the child's best interest, we are bound to affirm the trial court's award of sole physical custody of the child to the father.

The mother also argues on appeal that the trial court erred in awarding her visitation with the child on only the first weekend of every month because, she says, that amount of visitation is inadequate to sustain the close bond that she has developed with the child.

In its judgment, the trial court specifically encouraged the parties to agree to a liberal visitation schedule for the mother, indicating its determination that the mother should have frequent and continuing meaningful visitation with the child. Nevertheless, the trial court entered a specific minimum schedule that does not guarantee the liberal visitation intended by the trial court. The many references to school and

school breaks in the schedule shows that the schedule was not designed for a two-year-old child with no educational responsibilities to consider and who, presumably, would have more need and more time to visit with a noncustodial parent.

"In exercising its discretion over visitation matters, '"[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."'" Pratt v. Pratt, 56 So. 3d 638, 641 (Ala. Civ. App. 2010) (quoting Ratliff v. Ratliff, 5 So. 3d 570, 586 (Ala. Civ. App. 2008), quoting in turn Nauditt v. Haddock, 882 So. 2d 364, 367 (Ala. Civ. App. 2003) (plurality opinion)). When a trial court determines that it is in the best interest of a child to have liberal visitation with a noncustodial parent, it should tailor its order to assure that the noncustodial parent is guaranteed sufficient time and access with the child. "The trial court and this court must consider whether the arrangements for visitation properly ensure that the children have meaningful involvement with the noncustodial parent." Davis v. Davis, 317 So. 3d 47, 59 (Ala. Civ. App. 2020). In Speakman v. Speakman, 627

So. 2d 963 (Ala. Civ. App. 1993), this court considered what it determined to be an unreasonable award of visitation. This court reversed the judgment to the extent that it awarded the father in that case visitation with his child, at most, only two days each month until the child reached the age of three, concluding that the amount of visitation awarded to the father was not reasonable and did not allow the father the opportunity to maintain a meaningful relationship with the child. Id. at 965.

Like in Speakman, we conclude that, in light of the child's age, the child's close relationship with the mother and the child's sibling, and the trial court's stated intention that the mother receive liberal visitation with the child, the trial court's limited award of visitation is not properly tailored to the facts and circumstances of this particular case as they existed at the time of the entry of the judgment and that, therefore, that award amounts to an abuse of discretion. Accordingly, we reverse the trial court's judgment to the extent that it awarded the mother visitation with the child only one weekend each month, and we remand the case with instructions for the trial court to set a more reasonable and expanded visitation schedule between the mother and the child that

ensures the mother and the child the opportunity to maintain and promote their existing bond.

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

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