

Rel: July 29, 2022

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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

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R.N.C.

v.

A.V.P.

Appeal from Marshall Juvenile Court  
(CS-18-900033.01)

FRIDY, Judge.

R.N.C. ("the mother") appeals from a November 2, 2021, judgment of the Marshall Juvenile Court ("the juvenile court") that permitted A.V.P. ("the father") to have unsupervised visitation with A.H.P. ("the child"), the parties' child, beginning April 30, 2022. We reverse.

## Background

The child, who was four years old at the time of the trial, was born in June 2017. The mother and the father have never been married to each other, but the father's paternity is undisputed, and he has been adjudicated the child's father. On March 19, 2018, the juvenile court entered an order awarding the mother sole legal and physical custody of the child and permitting the father to have restricted, supervised visitation.<sup>1</sup> The father was awarded three hours of visitation on the first and third Saturday of each month. The father's grandparents were to supervise the visits, and, the judgment said, they were instructed that they must be able to "actually see" the father and the child at all times during the visits.<sup>2</sup>

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<sup>1</sup>The juvenile court also ordered the father to pay monthly child support of \$300. Although the father's child-support arrearage was an issue at trial, it is not an issue on appeal. Therefore, we will omit a discussion of the facts related to child support.

<sup>2</sup>The mother said that, initially, the father's visitation was supervised because, she said, he had choked her and, as a result, she had obtained a protection-from-abuse order against him, but then, she said, she "dropped" it. The father denied that there had been domestic violence between the mother and him. He explained that he had agreed to supervised visitation at first because the mother was still breastfeeding the child.

When the child reached the age of twelve months, the judgment said, the father's visitation was "to progress to be unsupervised" and was to follow the juvenile court's standard "restricted visitation with child under the age of three years." Pursuant to that schedule, the father was permitted visitation away from the mother's home from 10:00 a.m. to 6:00 p.m. the first and third Sunday of each month and on Christmas day, as well as two hours on the evening of the child's birthday.

The father testified that when the child was about two years old he began having unsupervised visitation. Sometimes the visitation was overnight, and other times it was for the weekend, he said. The parties agreed that, as the child grew older, the father began having unsupervised visitation with the child every other weekend, although they disagreed on when unsupervised visitation began. Regardless, on February 22, 2021, the mother filed a petition seeking to suspend the father's visitation with the child because, she said, the child had told her that the father had touched her inappropriately -- an allegation that the father adamantly denied.

At the trial on the mother's petition, the mother testified that in June 2020 the child told her that the father had touched her "too-too," i.e., her vagina, and that it had hurt. The mother said that the child had told her about six times that the father had touched her there. It is unclear from the record whether the mother meant that the child had been touched inappropriately six times or whether the child had told her of the same incident six times. The mother notified the Marshall County Department of Human Resources ("DHR") of the allegation.

Lindsey McKee, a DHR social worker, testified that DHR opened an investigation into the mother's allegation against the father, during which she interviewed the mother, the father, and the child's therapists. The result of the investigation was "not indicated," and the case was closed, McKee said. She added that she had no concerns with the child being around the father.

When the mother notified DHR of the child's statements, the child began going to the Child Advocacy Center ("CAC"), where, the mother said, she made the same disclosure. The mother said that the child also told other people, including friends and family, of the father's alleged inappropriate touching. M.H., a family friend, testified that the child

had told her of the inappropriate conduct on two occasions. Amanda Butler, a therapist at CAC, testified that the child, using the father's nickname, told her that the father had touched her "too-too." Butler said that she had a drawing of a girl and asked the child to place a Band-Aid on places she had boo-boos. The child put a Band-Aid on her arm, on her head, and over her groin area. The child told Butler she had hurt her arm in a fall and had bumped her head, but when Butler asked about the third Band-Aid over the groin, the child would not talk. The child attended CAC for about five months; according to the mother, CAC employees told the mother at the end of those five months that they could no longer help the child. The mother then sought therapy elsewhere for the child.

The mother said that she permitted the father to continue with weekend visitations because, she said, a social worker had told her that if she did not allow the father to visit, the mother could be held in contempt and could possibly lose custody of the child. If that were to happen, the mother testified, she believed that the child would be in more danger than she was in by continuing visitation.

In December 2020, the mother said, the child made another "disclosure" to her, leading the mother to speak with an attorney. At that point, the mother said, she made the decision not to send the child to the father's house anymore but offered him supervised visitation instead. She said that when she advised the father of her decision, he denied having had any improper contact with the child.

The father testified that he first learned of the allegations against him from DHR. He said that employees of DHR had interviewed him four times. He testified that he had not had inappropriate contact with the child. He explained that he had changed the child's diaper and had given her baths and that touch had been involved on those occasions but that he had not touched the child inappropriately or harmed her in any way.

The evidence indicates that, once the mother refused to allow the father to have unsupervised visitation after December 2020, the father had exercised visitation only three times: in March 2021, going to a park and visiting with the child for about an hour; in June 2021, going to a church where the child had her birthday party and visiting for about an hour and a half; and on July 4, 2021, again going to a park and

visiting with the child for about an hour. The father was not alone with the child during any of those visits. The mother said that she did not put a time restriction on the father for the first two visits but that, during the third visit, the friend with whom she had ridden had had to leave after about an hour.

The father did not see the child from July 2021 until the October 13, 2021, trial. He testified that he had sent text messages to the mother every other weekend asking her to meet him at a store at a certain time, apparently to exchange custody. He said that each time he had asked for visitation the mother had refused by replying with a text message telling him that he could exercise visitation but that it had to be supervised. The father said that he did not take advantage of the mother's offer because he believed that he was entitled to unsupervised visitation. He said that he made the March, June, and July visits because, he said, that was the only way he could see the child.

The mother acknowledged that she had received text messages from the father every other weekend asking for her to bring the child to a certain chain store. She said that she went to that location on October 1, 2021, but that the father was not there. From the parties' testimony,

it appears that the father moved and then changed the suggested meeting place to a different location of the chain store but that the mother had gone to the previously identified location.

On November 2, 2021, the juvenile court entered a judgment that, among other things, allowed the father three hours of supervised visitation on the first and third Saturday afternoon of each month. Beginning January 29, 2022, the father's visitation would expand to supervised visitation with the child for three hours on the first and third Saturday and Sunday of each month. Beginning on April 30, 2022, those visitations were to be unsupervised, and beginning on May 28, 2022, the father was to have unsupervised visitation on Saturday nights. As of July 29, 2022, the judgment said, the father was to begin receiving standard visitation. The judgment did not contain any findings of fact.

The mother filed a timely motion to alter, amend, or vacate the judgment, which the juvenile court denied. The mother timely appealed to this court.

### Standard of Review



"[V]isitation rights are a part of custody determinations.... Both visitation and custody determinations are subject to the same standards of review." S.D.B. v. B.R.B., 295 So. 3d 104, 112 (Ala. Civ. App. 2019) (quoting Denney v. Forbus, 656 So. 2d 1205, 1206 (Ala. Civ. App. 1995)). When evidence in a child custody-case has been presented ore tenus, the trial 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. Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994). This court's review of a judgment based on ore tenus evidence is limited, and such a judgment will not be reversed absent a showing that it is so unsupported by the evidence as to be plainly and palpably wrong. L.L.M. v. S.F., 919 So. 2d 307, 311 (Ala. Civ. App. 2005). In all matters of visitation, a trial court has broad discretion. Smith v. Smith, 887 So. 2d 257, 264 (Ala. Civ. App. 2003).

#### Analysis

The mother argues that the juvenile court erred by creating what she says is an automatic modification regarding visitation. Specifically,

she contends that the juvenile court improperly permitted the father to have unsupervised visitation after the passage of a set amount of time without any basis for doing so.

In support of her argument, the mother relies on Long v. Long, 781 So. 2d 225 (Ala. Civ. App. 2000), in which this court considered the automatic modification of the visitation provisions in a custody judgment. In Long, the trial court entered a judgment granting the mother in that case supervised visitation for six months, after which visitation was automatically modified to unsupervised visitation. The trial court did not impose any conditions or obligations for the mother to fulfill during that six-month period. This court reversed the judgment, explaining:

"There is no evidence to support an automatic modification from supervised visitation to unsupervised visitation after six months. There is no evidence to indicate that there would be any change of circumstances or conditions to warrant such a modification after six months. See Sullivan v. Sullivan, 631 So. 2d 1028 (Ala. Civ. App. 1993). Further, there is no basis to determine future events. Morrison v. Kirkland, 567 So. 2d 363 (Ala. Civ. App. 1990). We note that there must be a change in circumstances to warrant a modification of visitation. See Sullivan, 631 So. 2d 1028."

781 So. 2d at 227.

Similarly, in Hartin v. Hartin, 171 So. 3d 45, 48 (Ala. Civ. App. 2015), we reversed a judgment insofar as it automatically modified visitation from supervised to unsupervised visitation after the passage of six months. We observed that "the judgment did not indicate what circumstances or conditions the trial court contemplated would change as a result of the passage of six months." Id. at 48. Additionally, we noted that there was "no evidence indicating that the mere passage of six months would effect a change in any circumstances or conditions that would warrant a modification of the husband's supervised visitation to unsupervised visitation." Id.

In this case, the judgment provided that for six months, from November 2021 through April 2022, the father's visitation with the child was to be supervised. Unsupervised visitation was to begin on April 30, 2022, and standard visitation was to begin on July 29, 2022. As was the case in Hartin, the judgment does not indicate the juvenile court's rationale for allowing the expansion of the father's visitation rights during the time frame set forth or explain what circumstances would change during that time that would warrant a modification of the father's visitation. Accordingly, on the authority of Long, *supra*, and

Hartin, supra, we reverse the judgment of the juvenile court, and we remand the cause for entry of a new judgment consistent with this opinion.

Because we reverse the judgment on the basis that it improperly provides for the automatic modification of the father's visitation schedule after the passage of six months, we pretermite a discussion of the other issue the mother raised on appeal, i.e., whether the juvenile court erred in awarding the father unsupervised visitation.

REVERSED AND REMANDED.

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

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