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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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**Brooklyn Barkley (Wright)**

v.

**Dana Gulledge**

**Appeal from St. Clair Circuit Court  
(DR-20-900201)**

THOMPSON, Presiding Judge.

Brooklyn Barkley (Wright) ("the mother") appeals the judgment of the St. Clair Circuit Court ("the trial court") granting Dana Gulledge ("the paternal grandmother") visitation with E.C.W. ("the child"), who was born on September 21, 2017. We reverse and remand.

The record reflects that, after the mother gave birth to the child, the mother and Sammy Wright ("the father") permitted the child to visit with the paternal grandmother frequently and to stay overnight occasionally at the paternal grandmother's house. In late 2018, the mother and the father separated. The record reflects that, during the early part of the parents' separation, the child visited with the paternal grandmother frequently. However, after the father filed for a divorce, the mother started limiting the father's visitation and, consequently, the paternal grandmother's visitation with the child.

In early 2019, the mother filed a protection-from-abuse ("PFA") petition against the father, and in April 2019, a PFA order was entered prohibiting the father from communicating with the mother.<sup>1</sup> While the divorce action was pending, the father was awarded temporary supervised visitation with the child, and the mother agreed to allow those visitations to be supervised by the paternal grandmother. Evidence was presented indicating that, initially, those visits were for short periods but that, as time passed, the length of the father's supervised visits with the child increased and the child eventually spent weekends at the paternal

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<sup>1</sup>The record is unclear as to the facts underlying the PFA action.

grandmother's house. On August 6, 2019, the father died.<sup>2</sup> According to testimony, after the father's death the mother continued to allow the child to visit with the paternal grandmother. However, in October 2019, the mother stopped permitting the paternal grandmother to visit with the child.

On July 20, 2020, the paternal grandmother filed a petition asking the trial court to award her grandparent-visitation privileges with the child. The mother filed an answer. On December 1, 2020, the trial court entered a pendente lite order, awarding the paternal grandmother limited visitation with the child via telephone and "Facetime," a video conferencing service, and one three-hour in-person visit. On February 7, 2021, based upon an agreement between the parties, the trial court entered an order continuing the paternal grandmother's telephone, Facetime, and three-hour in-person visitations with the child. On May 13, 2021, the trial court entered a pendente lite order awarding the paternal grandmother three nine-hour visitation periods with the child.

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<sup>2</sup>Undisputed evidence was presented indicating that, when the father died, the divorce action was still pending, the father had a girlfriend, and the father's girlfriend was pregnant. On October 14, 2019, the father's girlfriend gave birth to the child's sibling.

On July 9, 2021, the trial court, based on an agreement between the parties, awarded the paternal grandmother three additional nine-hour visitation periods. The trial court also appointed a guardian ad litem to represent the child.

On August 16, 2021, the trial court conducted a hearing. The paternal grandmother testified that she and her husband had three children: two living children, ages 18 and 12 years old, and the deceased father. She testified that, from birth, the child had visited with her regularly and that she had supervised the father's court-ordered visits. The paternal grandmother explained that in October 2019, after the father's girlfriend had given birth to the child's sibling, communications between her and the mother broke down and her visits with the child ceased.

When asked about the breakdown in the relationship between the mother and her, the paternal grandmother testified that she believed that it had been caused by her visits with the father's girlfriend and the child's sibling. According to the paternal grandmother, she initially thought that the mother did not want the child to visit with her sibling, but, at the time of the hearing, she believed that the mother did not want

the child to have contact with the father's girlfriend.

The paternal grandmother testified that, because of the circumstances surrounding the father's death and the unexpected expense of paying for his funeral, she did not immediately file a petition for visitation when the mother stopped her visitations with the child; rather, she said, she waited, thinking that with the passing of time she and the mother could reestablish a relationship and agree to visitation. She stated that, when it became evident that the mother was not going to permit her to reestablish a relationship with the child and she had the financial means to file a petition, she decided to ask the trial court for visitation privileges with the child.

The paternal grandmother testified that the ordered visitations had gone well and that the child, who at the time of the hearing, was three years old, called her "Lollie" and was happy to visit with her. She testified that she had returned the child early to the mother a couple of times because the child had been tired or not feeling well. She agreed that if the trial court awarded her visitation with the child, she would notify the mother if the child became ill or if the child needed to be returned early.

The paternal grandmother explained that she loved the child and wanted to develop a long-term relationship with the child and wanted the child to have a relationship with the father's siblings. When asked why she thought visitation with the child was in the child's best interest, the paternal grandmother stated: " I think it's very important that [children] have grandparents, that they have parents, that they have, you know, siblings, cousins, you know, as many -- as much of a support system for people to love them that are available; they need that."

The mother testified that she and the child live with her partner and that she has allowed her partner and her parents to keep the child. She stated that, after the child was born, she and the father would leave the child with the paternal grandmother on "date nights" or when the paternal grandmother wanted to visit with the child. She explained that, after she and the father separated, she had allowed the paternal grandmother to continue to visit with the child and that, when the father's court-ordered visitations were initiated, she had agreed to allow the paternal grandmother to supervise the visits.

The mother testified that, after the birth of the child's sibling in October 2019, the paternal grandmother "abandoned" her relationship

with the child and did not attempt to resume the relationship until she filed her petition seeking grandparent-visitation privileges. The mother admitted, however, that, in December 2019, the paternal grandmother left Christmas gifts for the child on the mother's grandparents' porch. According to the mother, she stopped allowing the paternal grandmother to visit with the child because she did not want the child visiting with the father's girlfriend. The mother stated that she did not mind the child eventually having a relationship with the child's sibling, but she did not want the child exposed to the father's girlfriend because, she said, the father's girlfriend had expressed negative things about her that she did not want the child to hear.

The mother testified that she believed that the paternal grandmother loved the child and would not harm the child intentionally. The mother explained that she believed that it was important for the paternal grandmother to have a relationship with the child, but, she said, the child's "safety and her mental health and her well-being will always come first." The mother maintained that the child was not safe with the paternal grandmother because the paternal grandmother drank alcohol and had driven at excessive speeds with the child as a passenger. She

further testified that she believed that the visits between the paternal grandmother and the child should increase gradually over time from daytime visits to overnight visits. The mother admitted that the child had spent the night with her parents, but she maintained that she was not comfortable with the child spending the night with the paternal grandmother because, she said, the paternal grandmother had not had a consistent presence in the child's life. When the mother was asked what was her major concern with the child having overnight visits with the paternal grandmother, the mother responded:

"[The child] does do overnight visits with other family members. However, ... it doesn't always work out with them either. She is very clingy to me. She is a big homebody. She has -- you know, that's just how she is. And my concerns are that I'm pushing her in order to please [the paternal grandmother]. I'm pushing her out of her comfort zone and I'm not doing what's best for her and we're not doing what's best for her because we are trying to appease [the paternal grandmother]."

After considering the ore tenus evidence, the trial court, on August 23, 2021, entered a final judgment awarding the paternal grandmother visitation with the child. Specifically, the trial court found, among other things, that the paternal grandmother had an established relationship with the child, that "[t]he loss of an opportunity to maintain a significant



and viable relationship between [the paternal grandmother] and the child will likely cause harm to the child," and that "[g]ranting visitation between [the paternal grandmother] and [the child] will maintain strong family ties between [the child] and her father's family." The trial court, among other things, awarded the paternal grandmother regular overnight visitation with the child once every two weeks and on certain holidays, directing that the regular overnight visitation would increase to two-night visitation over time, and ordered each party to pay an attorney fee in the amount of \$600 to the guardian ad litem.

On September 21, 2021, the mother filed a postjudgment motion, arguing that the trial court's judgment was contrary to the law, was entered without evidentiary support, was against Alabama's public policy, was not based on clear and convincing evidence demonstrating that visitation with the paternal grandmother is in the best interests of the child, and was improper because the mother objected to the visitation. Additionally, the mother argued that because, she said, the paternal grandmother had not met her burden of proof, the paternal grandmother should pay all of the guardian ad litem's fees. On November 8, 2021,

after conducting a hearing to address the postjudgment motion,<sup>3</sup> the trial court entered an order denying the motion.

The evidence was presented to the trial court in an ore tenus proceeding; therefore, the trial court's judgment is presumed to be correct and will not be set aside on appeal absent a showing that its is so unsupported by the evidence as to be plainly and palpably wrong. Durham v. Heck, 479 So. 2d 1292 (Ala. Civ. App. 1985).

On appeal, the mother contends the trial court erred by concluding that visitation with the paternal grandmother was in the best interests of the child. Specifically, the mother contends that the paternal grandmother did not present sufficient evidence to overcome the "rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child." § 30-3-4.2(c)(1), Ala. Code 1975. The mother does not challenge the trial court's determination that the paternal grandmother had established a significant and viable relationship with the child; rather, she contends that the paternal grandmother failed to present clear and convincing evidence demonstrating that "[t]he loss of an opportunity to maintain a

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<sup>3</sup>A transcript of the hearing is not included in the record.

significant and viable relationship between [the paternal grandmother] and the child has caused or is reasonably likely to cause harm to the child." § 30-3-4.2(e)(2). According to the mother, although evidence was presented indicating that a relationship between the paternal grandmother and the child may be beneficial, the record does not contain any evidence indicating that the loss of a relationship with the paternal grandmother will likely cause harm to the child. Essentially, the mother contends that the paternal grandmother did not present clear and convincing evidence demonstrating that she had satisfied the requirements of § 30-3-4.2(e).

Section 30-3-4.2 provides, in pertinent part:

"(c)(1) There is a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child.

"(2) To rebut the presumption, the petitioner shall prove by clear and convincing evidence, both of the following:

"a. The petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation.

"b. Visitation with the petitioner is in the best interest of the child.

"....

"(e) To establish that visitation with the petitioner is in the best interest of the child, the petitioner shall prove by clear and convincing evidence all of the following:

"(1) The petitioner has the capacity to give the child love, affection, and guidance.

"(2) The loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child.

"(3) The petitioner is willing to cooperate with the parent or parents if visitation with the child is allowed."

"[T]he best-interest analysis set out in [§ 30-3-4.2] requires a showing of actual or reasonably expected harm to the child." Ex parte Gentry, 238 So. 3d 66, 78 (Ala. Civ. App. 2017). "Harm" is defined as "[a] finding by the court, by clear and convincing evidence, that without court-ordered visitation by the grandparent, the child's emotional, mental, or physical well-being has been, could reasonably be, or would be jeopardized." § 30-3-4.2(a)(2). "Clear and convincing evidence" is defined in § 6-11-20(b)(4), Ala. Code 1975, as "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high

probability as to the correctness of the conclusion." See also L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002).

In K.J. v. S.B., 306 So. 3d 896, 900-01 (Ala. Civ. App. 2020), this court explained:

""[P]roof that a grandparent has a close, beneficial relationship with a child is not equivalent to proof that the child will suffer harm if that relationship is limited or terminated," and "evidence of a beneficial relationship alone fails to rebut the presumption in favor of a fit parent's decision." Ex parte McElrath, 258 So. 3d 364, 369 (Ala. Civ. App. 2018)(quoting Ex parte Gentry, 238 So. 3d 66, 82 (Ala. Civ. App. 2017))."

A review of the record establishes that the trial court's judgment awarding the paternal grandmother visitation with the child is not supported by clear and convincing evidence. Ample evidence was presented indicating that a relationship between the paternal grandmother and the child would be beneficial. No evidence, however, was presented that the child would suffer harm, as defined in § 30-3-4.2(a)(2), if the child's relationship with the paternal grandmother was limited or terminated. Because the legislature has mandated that visitation with a grandparent cannot be imposed over the objection of a fit custodial parent without clear and convincing proof that the child will suffer harm if the grandparent's relationship is limited or terminated,

and because no evidence was presented indicating that the child would suffer such harm, we reverse the judgment insofar as it awards visitation to the paternal grandmother. See Ex parte Gentry, 238 So. 3d at 78 (holding that evidence of a beneficial relationship, including evidence that a fit parent believes a relationship between the grandparent and the child is valuable, will not rebut the presumption in favor of a fit parent's decision).

The mother further contends that the trial court exceeded its discretion by ordering her to pay one-half of the guardian ad litem's fee. Rule 17(d), Ala. R. Civ. P., requires that a trial court "ascertain a reasonable fee or compensation to be allowed and paid to [a] guardian ad litem for services rendered ..., to be taxed as a part of the costs ...." In T.C.M. v. W.L.K., 248 So. 3d 1 (Ala. Civ. App. 2017), this court noted that, usually, costs are taxed to the prevailing party but that a trial court may direct otherwise; consequently, the assessment of a guardian ad litem's fee and the taxation of costs are matters within the trial court's discretion. Because we are reversing the trial court's judgment awarding the paternal grandmother visitation, we also reverse the trial court's award of the guardian ad litem's fee and remand the case for the trial

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court to reassess the award of the guardian ad litem's fee considering this court's holding.

For the reasons expressed in this opinion, the trial court's judgment is reversed, and this case is remanded for proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

Moore, Edwards, Hanson, and Fridy, JJ., concur.