

Rel: March 12, 2021

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200089

A.B.

v.

A.A. and L.D.A.

**Appeal from Russell Juvenile Court
(JU-19-255.01)**

THOMPSON, Presiding Judge.

On December 4, 2019, A.A. ("the aunt") and L.D.A. ("the uncle") filed in the Russell Juvenile Court ("the juvenile court") a verified petition

2200089

seeking to have M.R.W. ("the child") declared dependent and seeking an award of custody of the child. The aunt and the uncle also sought an award of pendente lite custody of the child. In support of their dependency petition, the aunt and the uncle submitted letters of guardianship executed by the child's mother, A.B. ("the mother") , and issued to them on March 18, 2019, by the Russell Probate Court. The aunt and the uncle alleged in their verified dependency petition that the child had lived with them while the mother lived in another country, that the mother had had only limited communication with the child while living abroad, and that the mother's husband ("the stepfather") had been abusive to the child when the child had lived with the mother and the stepfather.¹ On December 19, 2019, the juvenile court awarded the aunt and the uncle emergency pendente lite custody of the child.

The juvenile court conducted an ore tenus hearing over the course of two days on the dependency petition. On August 16, 2020, the juvenile court entered a judgment finding the child dependent and awarding

¹The child has no identified father.

2200089

custody of the child to the aunt and the uncle. That judgment awarded the mother "reasonable visitation" upon whatever terms to which the parties could agree. The mother timely appealed.

On appeal, the mother first argues that she did not receive adequate notice of the nature of the ore tenus hearing and that, as a result, her due-process rights were violated. The mother contends that designating the hearing as a "dependency hearing" on scheduling notices did not afford her adequate notice that the juvenile court would also consider the issue of the custodial disposition of the child if the child was found to be dependent. Initially, we note that the mother did not assert before the juvenile court any argument that she was unaware that custody of the child would also be at issue during the dependency hearing, and, generally, this court may not consider an issue raised for the first time on appeal. Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala.1992). However, a judgment is deemed to be void if it is entered in a manner that is not consistent with the requirements of due process. M.G.D. v. L.B., 164 So. 3d 606, 611 (Ala. Civ. App. 2014); M.G. v. J.T., 90 So. 3d 762, 764 (Ala. Civ. App. 2012); and

2200089

M.H. v. Jer. W., 51 So. 3d 334, 337 (Ala. Civ. App. 2010). This court lacks jurisdiction over an appeal of a void judgment because a void judgment will not support an appeal. M.H. v. Jer. W., 51 So. 3d at 338. An appellate court may address an issue raised for the first time on appeal if it implicates the subject-matter jurisdiction of the court. Health Care Auth. for Baptist Health v. Davis, 158 So. 3d 397, 402 (Ala. 2013). Accordingly, because the due-process argument raised by the mother implicates the jurisdiction of this court over the mother's appeal, we address the mother's due-process argument asserted for the first time on appeal.

The mother correctly contends that this court has held that a parent is entitled to due process in any action involving the custody of his or her child. This court has explained:

""[A] parent is entitled to due process in proceedings involving the custody of a child." Strain v. Maloy, 83 So. 3d 570, 571 (Ala. Civ. App. 2011). In Strain v. Maloy, supra, this court explained:

""'In dealing with such a delicate and difficult question--the welfare of a minor child--due process of law in legal proceedings should be

2200089

observed. These settled courses of procedure, as established by our law, include due notice, a hearing or opportunity to be heard before a court of competent jurisdiction.'

"" Danford [v. Dupree], 272 Ala. [517,] 520, 132 So. 2d [734,] 735-36 [(1961)]. As this court has further explained:

"" "[P]rocedural due process contemplates the basic requirements of a fair proceeding including an impartial hearing before a legally constituted court; an opportunity to present evidence and arguments; information regarding the claims of the opposing party; a reasonable opportunity to controvert the opposition's claims; and representation by counsel if it is desired.'

"" Crews v. Houston Cnty. Dep't of Pensions & Sec., 358 So. 2d 451, 455 (Ala. Civ. App. 1978) (emphasis added)."

" '83 So. 3d at 571.' "

N.J.D. v. Madison Cnty. Dep't of Hum. Res., 110 So. 3d 387, 390-91 (Ala. Civ. App. 2012) (quoting Gilmore v. Gilmore, 103 So. 3d 833, 835 (Ala. Civ. App. 2010)).

2200089

In this case, the mother contends that she was not afforded due process because, she says, the scheduling notices issued by the juvenile court indicate that the court intended to conduct a "dependency hearing." The mother insists that those notices did not alert her to the fact that, if the child were found to be dependent, the juvenile court would make a custodial disposition of the child. In N.J.D., supra, this court explained the factors that must be considered in determining whether a parent has been afforded appropriate due process in the context of a custody-modification action:

" 'The Supreme Court of the United States in Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), discussing the concept of due process, observed:

'' "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.... Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain

in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U.S. at 442, 80 S. Ct. at 1515.

" Thus, in deciding whether a parent has a right to due process when a party to a proceeding to determine custody of his or her minor child, the court will consider three factors: the nature of the right involved, the nature of the proceeding, and the possible burden on the proceeding.'

" Thorne v. Thorne, 344 So. 2d 165, 169 (Ala. Civ. App. 1977)."

110 So. 3d at 391.

In N.J.D., supra, the Madison Juvenile Court entered judgments finding a father's children dependent and awarding custody to the children's maternal grandfather. In his appeal to the Madison Circuit Court ("the trial court"), the father received a notification that a "review" hearing was scheduled after the trial court had allowed the parties to obtain additional evidence to supplement evidence that had been presented to it in an earlier hearing. The father did not appear at that hearing, and his attorney argued before the trial court that, based on the

2200089

notice issued by the trial court indicating that a review hearing would be held, she was not aware that the trial court had intended to receive testimony or make a disposition at that hearing. N.J.D., 110 So. 3d at 389-90. No testimony was taken at the hearing, but the trial court entered judgments finding that the children remained dependent and awarding custody of the children to their maternal grandfather. On appeal, this court agreed with the father that the trial court had violated the father's due-process rights by failing to apprise him of the nature of the hearing, i.e., that the trial court had intended to make a custodial disposition of the children at issue in that case. N.J.D., supra.

Similarly, in C.E. v. M.G., 169 So. 3d 1061 (Ala. Civ. App. 2015), this court reversed a dependency judgment on due-process grounds. In that case, the father filed a September 8, 2014, dependency petition, and two days later the juvenile court in that case entered an order awarding the father temporary emergency custody of the parties' child and scheduling a hearing for the next day. At the September 11, 2014, hearing, the mother's attorney was late to court, and the juvenile court conducted the

2200089

hearing and entered a judgment finding the child dependent. This court reversed, concluding that the juvenile court had violated the mother's due-process rights by failing to afford her notice that it would consider the issue of the child's dependency at the September 11, 2014, hearing. C.E. v. M.G., 169 So. 3d at 1068. See also M.E. v. Jefferson Cnty. Dep't of Hum. Res., 148 So. 3d 747 (Ala. Civ. App. 2014) (reversing a judgment awarding custody in a dependency action when the notice provided by the court did not inform the mother that the hearing was a permanency hearing instead of a review hearing); and A.D.G. v. D.O., 160 So. 3d 783 (Ala. Civ. App. 2014) (reversing a custody award for lack of due process and notice when the form notice indicated that a hearing would be a "compliance/dispositional hearing" and the box next to the word "permanency" on the form notice was not checked).

However, in C.O. v. Jefferson County Department of Human Resources, 206 So. 3d 621 (Ala. Civ. App. 2016), this court rejected an argument that a juvenile court had violated a parent's due-process rights by failing to provide adequate notice. In that case, the juvenile court set

2200089

the dependency/custody matter "for trial," and the mother and the father failed to appear. C.O., 206 So. 3d at 623. The juvenile court conducted an evidentiary hearing, and it later entered a judgment finding the children dependent and awarding custody to an aunt. On appeal, the mother and the father argued, among other things, that their due-process rights had been violated because, they said, they were unaware that the scheduled hearing would address the issue of the permanent custody of the children. This court distinguished the facts of C.O., supra, from those of A.D.G. v. D.O., supra, M.E. v. Jefferson County Department of Human Resources, supra, and N.J.D. v. Madison County Department of Human Resources, supra, by pointing out that, unlike in those cases, the notice at issue in C.O. "did not state that the matter would be set only for a review hearing, i.e., a proceeding more akin to a pretrial information or planning proceeding." 206 So. 3d at 630. This court held that the notice setting the matter for trial "sufficiently apprised the mother and the father that the May 1, 2015, trial was to be an evidentiary hearing at which testimony would be taken and pursuant to which decisions affecting the substantive

2200089

rights of the parties could be made." C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d at 630.

In this case, on January 7, 2020, the juvenile court scheduled a "dependency hearing" for February 5, 2020. In response, on January 22, 2020, the mother filed a motion to continue, noting that the "first petition for child custody" had been pending since only December 5, 2019, and that the mother needed additional time to travel to the United States to attend the hearing.² Thus, it is clear that the mother understood the nature of the hearing. The juvenile court rescheduled the "dependency hearing" several times, often because of Covid-19 restrictions. On June 2, 2020, the juvenile court granted a motion filed by the mother and ordered that "this matter" would be heard via video-conferencing because the mother was unable to travel to the United States due to Covid-19 restrictions. That June 2, 2020, order also set forth expectations and requirements for the witnesses the parties intended to call, and it provided that the failure to provide a valid e-mail address to participate in the hearing via video-

²The mother was represented by different counsel than her appellate counsel in the juvenile court.

2200089

conferencing could result, among other things, in a loss of the right to custody or visitation.

At the beginning of the first of the two days of the ore tenus hearing, the juvenile court opened the hearing by stating: "We are here for final hearing in a dependency case." No party objected to that characterization of the hearing as a "final hearing." In a brief opening statement, the mother's attorney stated that the "custody issue" began when the mother mentioned to the aunt that she wanted to pick up the child and that the juvenile court should order that the child be returned to her. During the ore tenus hearing, the aunt asserted that she and the uncle were seeking an award of custody of the child. The mother defended the claims by presenting a number of witnesses on her behalf.

In this case, the dependency of the child and the mother's right to custody were at issue. See N.J.D., supra. The record in this case does not support a determination that the notice the mother received regarding the hearing in this matter did not inform her of the nature of the claims to be determined. The mother was fully informed that dependency was at issue

2200089

in a final hearing, and she fully participated in that hearing by cross-examining witnesses and presenting evidence on her own behalf.

"As this court has previously held, '[o]nce a child is found dependent, a juvenile court may proceed immediately to a dispositional hearing to determine the appropriate custodial arrangement for the child.' K.D. v. Jefferson Cty. Dep't of Human Res., 88 So. 3d 893, 897 (Ala. Civ. App. 2012) (citing § 12-15-311(a), Ala. Code 1975). The juvenile court, therefore, did not violate the mother's and the father's due-process rights when it scheduled a dependency trial and proceeded to a dispositional hearing after finding the children to be dependent."

C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d at 630. The mother has failed to demonstrate that the juvenile court violated her due-process rights by proceeding to the issue of the custodial disposition of the child after it determined that the child was dependent. C.O., supra. Accordingly, we affirm the trial court's judgment as to this issue.

The mother also challenges that part of the juvenile court's judgment awarding her visitation with the child. The mother contends that the juvenile court erred in awarding her visitation that is subject to approval by the aunt and the uncle rather than the juvenile court. The relevant part of the juvenile court's judgment states:

"[G]iven the mother's out-of-country living arrangements, it is impossible to outline a specific visitation schedule for the mother with the minor child. Therefore, the mother shall have reasonable visitation with the minor child when she returns to the United States upon any terms as the parties can agree so long as she provides at least one (1) week's notice of her intent to exercise visitation."³

Generally, an award of visitation to a noncustodial parent is within the juvenile court's discretion. Carr v. Howard, 777 So. 2d 738, 741-42 (Ala. Civ. App. 2000). However, a visitation award is improper and subject to reversal when that provision allows the custodian to determine the noncustodial parent's visitation schedule. Lee v. Lee, 49 So. 3d 211, 215 (Ala. Civ. App. 2010); A.M.B. v. R.B.B., 4 So. 3d 468, 471-72 (Ala. Civ. App. 2007).

³Additional visitation provisions contained in the August 16, 2020, judgment specify that the mother may not remove the child from the jurisdiction of the juvenile court, or from the United States, without prior approval of the juvenile court and of the aunt and the uncle. In addition, the juvenile court ordered that the stepfather not have contact with the child outside the presence of the aunt and the uncle and that the stepfather was prohibited from disciplining the child in any manner. The mother has not challenged on appeal those provisions of the visitation award. Therefore, any argument she might have raised with regard to those restrictions are waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982).

2200089

"[T]his court has also held that a trial court commits reversible error when it fails to provide a noncustodial parent with a 'sufficient, specified visitation schedule to rely upon, independent of the custodial parent's discretion.' Pratt v. Pratt, 56 So. 3d 638, 644 (Ala. Civ. App. 2010). We have further held that 'an order of visitation granting a custodian so much discretion over a visitation schedule that visitation could be completely avoided if the custodian so desired should be deemed to be an award of no visitation and to be in violation of the rights of the noncustodial parent.' Id. at 643-44."

C.W.S. v. C.M.P., 99 So. 3d 864, 869 (Ala. Civ. App. 2012). We note that this court has affirmed a visitation award providing for visitation upon the agreement of the parties but also establishing a minimum schedule of visitation if the parties were unable to agree. Burleson v. Burleson, 875 So. 2d 316, 320-21 (Ala. Civ. App. 2003).

We recognize the difficulty the juvenile court faced in trying to fashion a visitation award under the circumstances of this case, i.e., when the mother lives overseas and the frequency and duration of any visit to the United States is uncertain. See Lee v. Lee, 49 So. 3d at 215 ("Although we sympathize with the trial court's attempt to accommodate the mother's transient employment arrangements by encouraging the parties to amicably resolve visitation scheduling, that court cannot properly leave

2200089

the fundamental issue of visitation subject to a veto by the father or his designee."). However, our caselaw requires that, even though parties are encouraged to work together to allow for visitation, a minimum schedule of visitation must be contained in a custody-and-visitation judgment. See Burleson v. Burleson, supra; and Lee v. Lee, supra. Accordingly, we reverse that part of the juvenile court's August 16, 2020, judgment pertaining to visitation and instruct the juvenile court, on remand, to enter a visitation award in compliance with this opinion.

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

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