**REL: June 25, 2021**



# ALABAMA COURT OF CIVIL APPEALS

## OCTOBER TERM, 2020-2021

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## 2200103

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**W.M.**

**v.**

**B.J.B.**

**Appeal from Madison Juvenile Court**
**(JU-14-412.02)**

EDWARDS, Judge.

A 2015 dependency and custody judgment entered by the Madison Juvenile Court ("the juvenile court") placed H.V. ("the child") in the

custody of B.J.B. ("the maternal great-grandmother"). In that judgment, W.M. ("the paternal grandmother") was awarded visitation as often as the parties could agree but, in no event, less than every other weekend and other specified holiday visitation. In September 2019, the paternal grandmother filed a petition in the juvenile court seeking a modification of the 2015 judgment and requesting that she be awarded custody of the child. The paternal grandmother's modification petition was based on allegations that the child had suffered severe bruises caused by either the maternal great-grandmother or the child's half siblings, whom the maternal great-grandmother had adopted; that the maternal great-grandmother had failed to adequately supervise the child and his half siblings; that the maternal great-grandmother had begun suffering from extreme forgetfulness; that the maternal great-grandmother was also caring for her husband, who suffers from Alzheimer's disease, and would lock her husband and the children in the house when she left; and that the maternal great-grandmother's house had electrical problems that might create a fire hazard.

During the pendency of the paternal grandmother's modification action, the paternal grandmother filed a motion seeking to have the maternal great-grandmother held in contempt for failing to comply with the visitation provisions of the 2015 judgment. At the trial, which was held on July 31, 2020, the juvenile-court judge stated on the record at least five times that he wanted to see how the school year started with virtual learning, as a result of the COVID-19 pandemic, before he made his decision about custody. He also stated that "if there's any problems I assume that either attorney is going to let me know what's going on, if it's not working," that "if there's a problem, you need to let me know," that "[i]f you detect a problem, I need you to let me know," and that "if there's a problem[,] I need the lawyers to let me know, and I assume that you'll let me know." However, the juvenile court did not enter an order instructing the parties to submit evidence regarding the child's grades or conduct at school.

On September 15, 2020, the maternal great-grandmother filed a "Notice to the Court" ("the notice") in which she summarized the child's progress in reading after the completion of a summer reading program,

explained the delays in sharing virtual-school information with the paternal grandmother, listed the child's grades, included statements indicating that the child's maternal great-aunt had reported "significant progress" in the child's education, and informed the juvenile court that the child had been diagnosed with attention-deficit/hyperactivity disorder and was currently in the process of having his medication adjusted to better address that condition. The notice was not verified or even signed by the maternal great-grandmother.[1] The paternal grandmother moved to strike the notice, arguing that it was unsworn, contained self-serving and unsubstantiated statements, contained hearsay, and was not subject to cross-examination. The juvenile court denied the motion to strike on September 18, 2020, stating in its order that it had "told both sides to submit any updates of the progress/regress of the child's learning, with a cutoff of September 8, 2020. The [paternal grandmother] presented

[1]As a result, the statements contained in that notice were merely statements of the maternal great-grandmother's counsel and therefore are not evidence. See S.B.H. v. R.P., 278 So. 3d 1237, 1242 (Ala. Civ. App. 2018) (quoting Tucker v. Nixon, 215 So. 3d 1102, 1105 (Ala. Civ. App. 2016)).

nothing for consideration, while [the maternal great-grandmother] offered a report dated September 14th."

On September 23, 2020, the juvenile court entered a judgment, which it had rendered on September 18, 2020, denying the paternal grandmother's request for a modification of the child's custody; it amended the judgment that same day to provide specific directions regarding the information relating to the child's medical care and education that the maternal great-grandmother was to provide to the paternal grandmother.[2] The paternal grandmother filed a postjudgment motion on October 6, 2020, in which, among other things, she again asserted that the notice was due to be stricken, that she should have at the least been given the

[2]The juvenile court did not expressly address the paternal grandmother's contempt motion in the judgment, but it had indicated at trial that the maternal great-grandmother had, at most times, permitted the paternal grandmother to exercise visitation in excess of the periods provided in the 2015 judgment, and it admonished the parties to work together for the benefit of the child; the judgment ordered the parties to cooperate and contained the following statement: "COOPERATION BETWEEN THE PARTIES IS ESSENTIAL." (Capitalization in original.) Thus, we consider the juvenile court to have implicitly declined to hold the maternal great-grandmother in contempt and conclude that the juvenile court's judgment is final.

opportunity to respond to the notice after the juvenile court denied her motion to strike, and that the juvenile court improperly considered the information in the notice as evidence because the notice was not verified and had been presented to the juvenile court outside open court, which deprived her of the right to cross-examine the maternal great-grandmother about the information contained in the notice.

The juvenile court set a hearing on the paternal grandmother's postjudgment motion for October 23, 2020, which was after the date the paternal grandmother's postjudgment motion would be deemed denied by operation of law. See Rule 1(B), Ala. R. Juv. P. (providing that a postjudgment motion directed to a juvenile court's judgment must be ruled on within 14 days or it is deemed to be denied by operation of law). At the October 23, 2020, hearing, the juvenile court stated on the record that it had considered information contained in records from the Department of Human Resources ("DHR") indicating that the child had been "coached" regarding allegations against the maternal great-grandmother when it reviewed those records in camera "to see if [it] was going to give them in discovery." The juvenile court had determined that the DHR records were

not relevant and, thus, had not permitted the paternal grandmother to subpoena them. Although the juvenile court purported to make small amendments regarding the sharing of information between the parties in a postjudgment order entered on October 26, 2020, that order was a nullity. See M.A.J. v. S.B., 99 So. 3d 1244, 1246 (Ala. Civ. App. 2012). The paternal grandmother filed a timely notice of appeal on October 28, 2020.

On appeal, the paternal grandmother makes two arguments in favor of reversal. She first contends that she presented sufficient evidence to meet the test for the modification of custody set out in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). She also challenges the juvenile court's consideration of information contained in the notice submitted to the juvenile court by the maternal great-grandmother and in the DHR records that it had reviewed in camera.

In support of her argument that the juvenile court impermissibly considered the factual statements contained in the notice submitted by the maternal great-grandmother, the paternal grandmother relies on Rogers v. Rogers, 307 So. 3d 578 (Ala. Civ. App. 2019), which involved the

consideration of a guardian ad litem's report that was submitted after the close of the evidence. As the paternal grandmother correctly argues, both this court and our supreme court have previously explained that a trial court's judgment should be " 'based on evidence produced in open court lest the guarantee of due process be infringed.' " Ex parte R.D.N., 918 So. 2d 100, 104 (Ala. 2005) (quoting Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982)); see also Rogers, 307 So. 3d at 588 & 592 (quoting R.D.N. and Berryhill, respectively); Rule 43(a), Ala. R. Civ. P. ("In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided in theses rules."). In Rogers, we determined that the trial court's reliance on a guardian ad litem's report submitted after the close of the evidence was error because the mother in that case had been unable to respond to certain facts stated and opinions expressed by the guardian ad litem through cross-examination or otherwise and that the consideration of the report therefore violated the due-process rights of the mother. Rogers, 307 So. 3d at 592. We also determined that the error was prejudicial to the mother because the trial court had necessarily relied on the information in the guardian ad litem's report to conclude

that the mother's boyfriend was a drug addict and that he posed a danger to the children because no testimonial or documentary evidence admitted at trial could have supported those factual determinations. Id.

Although the notice submitted by the maternal great-grandmother in the present case was not the report of a guardian ad litem, the notice, like the report at issue in Rogers, contained unsworn factual statements regarding the child's progress in virtual school, his improvement in reading, and his conduct, which had become an issue in the previous school year. The paternal grandmother was not permitted to cross-examine the maternal great-grandmother about those statements or to object to the hearsay contained in the notice. At the tardy hearing on the paternal grandmother's postjudgment motion, the juvenile court stated the following on the record:

> "Let me say this. I do remember saying that my concern was and still my biggest concern in this case was whether [the maternal great-grandmother] was going to be able to oversee and ensure that [the child] was doing the virtual schooling. And when we left out of here, which I think we had our hearing the week before school [began], I said I'm going to keep this open until the end of August and I need to see something. And I appreciate what you did submit. ...

> "....
>
> "... What I had been looking for was more the -- what she sent you initially -- or afterwards, which was the progress report, that's what I was hoping to see, that would have been the deciding factor for me, whether he could do the school."

(Emphasis added.)

The juvenile court repeated on the record several times during the trial and during the postjudgment hearing that it considered vitally important the ability of the maternal great-grandmother to ensure that the child attended and met the requirements of virtual school. The juvenile court also stated that the school issue was "a deciding factor" in its decision. Thus, it appears that, like the situation in Rogers, the juvenile court in the present case necessarily considered at least part of the information contained in the notice in making its decision, despite the fact that it stated in its tardy postjudgment order that "[t]he post-hearing update motion filed by the [maternal great-grandmother] did not change or [a]ffect the Court's ultimate decision to leave the custody of the ... child with the [maternal great-grandmother]."[3]

[3]The record does not contain the progress report to which the juvenile court alluded at the postjudgment hearing. Based on statements

We have not overlooked the fact that the juvenile court orally solicited posttrial submissions from the parties. We realize that the maternal great-grandmother was merely attempting to comply with the oral pronouncements of the juvenile court regarding its desire for information concerning the child's progress in virtual school. However, as the paternal grandmother points out, the juvenile court failed to enter an order directing the parties to submit evidence after the trial, much less setting out the parameters for the submission of that evidence. Although a juvenile court can most certainly leave the evidence open and permit posttrial evidentiary submissions, it can do so only in a manner that protects the due-process rights of the parties. That is, unless the parties agreed to submit testimony in a different manner than "orally in open court," see Rule 43(a) (providing that "nothing contained in this paragraph shall prevent the parties from taking testimony by agreement in a manner different from herein provided ...."), like through affidavits, the juvenile

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made by the maternal great-grandmother's attorney, a "comprehensive progress report" from the child's school had been shared with the paternal grandmother's counsel.

court should have set an evidentiary hearing at which the further evidence it desired relating to the child's progress in school could have been presented by the parties through documents and the testimony of any witnesses they found necessary.

The paternal grandmother also contends that the juvenile court committed error by considering information it gleaned from its in camera inspection of DHR's records that it concluded were not relevant to the proceedings. The paternal grandmother had subpoenaed certain records relating to the child from DHR, and DHR had objected to that subpoena. Once the juvenile court determined that the records were not relevant, DHR did not produce those records to the paternal grandmother and those records were not submitted as evidence by either party. However, at the postjudgment hearing, the juvenile court indicated that it "wrote down all the stuff [it] remembered from the testimony, things that were asserted, some not proven, and things that were said." The juvenile court continued, recounting certain of the testimony, and the following colloquy occurred:

> "THE COURT: I knew about the prior complaints that [the paternal grandmother] had filed on the [maternal great-grandmother]. And I knew from reading all the reports that I had to go through and decided we wouldn't use in this case, the professionals believe that [the child's] being coached. And he certainly wouldn't be coached by [the paternal grandmother] against the [paternal grandmother]. They think he's being coached. They think he's easily manipulated.
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> "[COUNSEL FOR PATERNAL GRANDMOTHER]: That was in the DHR records?
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> "THE COURT: Uh-huh. Not once, not twice.
>
> "[COUNSEL FOR THE PATERNAL GRANDMOTHER]: The ones that weren't offered into evidence?
>
> "THE COURT: Uh-huh. But I had to consider them to see if I was going to give them in discovery.
>
> "[THE GUARDIAN AD LITEM]: Those are the records submitted for in camera inspection?
>
> "THE COURT: That's right. Every time there was a complaint made against [the maternal great-grandmother] it came back that [the child] had been coached, every single instance."

At no time did the paternal grandmother object to the juvenile court's admitted consideration of DHR's records. By the time the juvenile court had disclosed that it had considered the fact that DHR had determined that the child had been coached, the judgment had been

entered and the paternal grandmother's postjudgment motion had, in fact, been denied by operation of law. Arguably, the paternal grandmother should have filed a Rule 60(b)(4), Ala. R. Civ. P., motion to argue that the juvenile court had violated her due-process rights by relying on evidence it had excluded from being discovered based on what the juvenile court stated was its lack of relevance. Her failure to have done so prevents our consideration of the issue as a basis for reversal. S.J. v. Limestone Cnty. Dep't of Hum. Res., 61 So. 3d 303, 306 (Ala. Civ. App. 2010) (quoting Smith v. State Dep't of Pensions & Sec., 340 So. 2d 34, 37 (Ala. Civ. App. 1976)) (" 'It has long been the law in this state that constitutional questions not raised in the court below will not be considered for the first time on appeal.' "); see also Rogers, 307 So. 3d at 588 n.2 (indicating that a timely objection to the improper consideration of a guardian ad litem's report is necessary to preserve the issue for appellate review). However, in light of the fact that we are reversing the juvenile court's judgment based on its consideration of the factual statements contained in the notice, we take this opportunity to remind the juvenile court that it may

not consider information of any kind that is not evidence before it when making its decision.

Having concluded that the juvenile court's consideration of the information contained in the notice submitted by the maternal great-grandmother violated the principle that judgments should be based on evidence presented in open court and that, as a result, the juvenile court violated the due-process rights of the paternal grandmother, we need not consider whether the evidence presented to the juvenile court was sufficient to entitle the paternal grandmother to a modification of the child's custody, and we therefore pretermit consideration of that issue. See P.S. v. Jefferson Cnty. Dep't of Hum. Res., 143 So. 3d 792, 798 (Ala. Civ. App. 2013) (pretermitting discussion of further issues in light of the dispositive nature of another issue).

Based on the foregoing, we reverse the judgment of the juvenile court and remand the cause for a new trial. See Rogers, 307 So. 3d at 593.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

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