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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

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M.G.D.

v.

C.B. and J.L.B.

**Appeal from Shelby Juvenile Court
(JU-13-729.01, JU-13-730.01, and JU-13-731.01)**

PITTMAN, Judge.

M.G.D. ("the mother") appeals from a judgment of the Shelby Juvenile Court to the extent that the judgment awards C.B. and J.L.B. ("the grandparents") visitation with the

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mother's three children and prohibits the mother from being under the influence of alcohol while in the presence of the children and from allowing members of the opposite sex to be with the mother in the children's presence after 11:00 p.m. We affirm the judgment in part, reverse it in part, and remand the cause to the juvenile court.

Facts and Procedural History

The mother and the children's father were divorced in 2009, and the father was awarded primary physical custody of the children at that time. The father died in December 2013, and the grandparents subsequently filed a petition alleging that the children were dependent and requesting the juvenile court to award custody of the children to the grandparents.

The juvenile court entered an ex parte order restraining the mother from removing the children from the juvenile court's geographical jurisdiction without first obtaining permission from the juvenile court. The mother appealed, and this court held that the juvenile court's order was void, instructed the juvenile court to vacate the order, and dismissed the mother's appeal. M.G.D. v. L.B., 164 So. 3d 606 (Ala. Civ. App. 2014).

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On July 29, 2014, while the mother's first appeal was pending, the juvenile court entered an order based on an agreement between the grandparents and the mother ("the July 29 order"). The July 29 order was signed by all the parties, including the mother, and it vested custody of the children in the mother and awarded the grandparents visitation with the children. An exhibit to the July 29 order set forth a schedule for the grandparents' visitation with the children and was initialed by all parties, including the mother. After this court dismissed the mother's first appeal, however, the juvenile court entered an order stating that the July 29 order was vacated and of no effect.

In October 2014, the mother filed a motion for a summary judgment. In her motion, the mother argued that there was no evidence indicating that the children were dependent. The mother also stated in her motion that, "upon information and belief, the grandparents are seeking only to have court ordered visitation with the minor children." The mother argued, however, that the grandparents were not entitled to visitation because, the mother asserted, the mother had encouraged a relationship between the children and the

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grandparents and the children would not be harmed by the lack of court-ordered visitation. The mother also submitted an affidavit in which she attested that, in her opinion, it would not be in the children's best interests for the juvenile court to mandate visitation with the grandparents.

In November 2014, the juvenile court entered a judgment finding that the children were not dependent and granting the mother's motion for a summary judgment on that issue. The juvenile court, however, also awarded the grandparents visitation rights and included essentially the same visitation schedule that had been incorporated into the July 29 order. The mother filed a postjudgment motion requesting the juvenile court to alter, amend, or vacate its judgment, which the juvenile court denied. The mother timely appealed.

Analysis

Grandparent Visitation

The mother argues that the juvenile court did not have jurisdiction to award grandparent visitation. In support of her argument, the mother relies on J.A. v. C.M., 93 So. 3d 953 (Ala. Civ. App. 2012). That case, however, involved an award of visitation rights to a maternal aunt, not to a grandparent.

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Section 30-3-4.1, Ala. Code 1975, gives grandparents a right to seek, and courts the authority to award, grandparent visitation.¹

Moreover, § 12-15-115(a)(10), Ala. Code 1975, gives juvenile courts jurisdiction over "[p]roceedings to establish grandparent visitation when filed as part of a juvenile court case involving the same child." In D.E.C.C. v. K.N.R., 51 So.

¹In Ex parte E.R.G., 73 So. 3d 634 (Ala. 2011), our supreme court held the prior version of § 30-3-4.1 to be unconstitutional. The legislature, however, amended that statute after the supreme court issued its opinion in E.R.G. Although this court recently held that the amended version of § 30-3-4.1 also is unconstitutional, Weldon v. Ballow, [Ms. 2140471, October 30, 2015] ___ So. 3d ___ (Ala. Civ. App. 2015), the mother in the instant appeal, which was filed before Weldon was released, has not challenged the constitutionality of § 30-3-4.1. See generally J.B. v. J.M., 175 So. 3d 170 (Ala. Civ. App. 2015) (stating that the constitutionality of the amended version of § 30-3-4.1 had not been challenged and, therefore, the court would presume that the statute was constitutionally valid); J.P. v. R.L.P., [Ms. 2140168, June 12, 2015] ___ So. 3d ___ (Ala. Civ. App. 2015) (refusing to address the constitutionality of the grandparent-visitiation act when the appellant did not raise the issue in the lower court); Tripp v. Owens, 150 So. 3d 208 (Ala. Civ. App. 2014) (declining to consider the constitutionality of the grandparent-visitiation act because the issue was not properly raised in the trial court). After this court released Weldon, we invited the parties in this appeal to submit briefs regarding what effect, if any, Weldon should have on this appeal. We have not been presented with convincing arguments that Weldon should be applied in this case or that Weldon would support reversal of the juvenile court's grandparent-visitiation award.

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3d 1068 (Ala. Civ. App. 2010), this court acknowledged that "a juvenile court considering an allegation of dependency [has] jurisdiction over a claim seeking grandparent visitation when that claim [is] asserted as part of a dependency action." 51 So. 3d at 1070 (citing K.R.D. v. E.D., 622 So. 2d 398 (Ala. Civ. App. 1993)). "[T]his court has held that the juvenile court has jurisdiction to award grandparent visitation where the child was before the juvenile court on the grandparents' dependency/custody petition and the grandparents had sought visitation in the event that the juvenile court did not find the child dependent." J.D.R. v. M.M.E., 898 So. 2d 783, 785 (Ala. Civ. App. 2004) (citing K.R.D. v. E.D., supra) (emphasis added). Thus, our statutes and caselaw allow a juvenile court to award grandparent visitation even if the juvenile court finds that a child is not dependent, and the determination that a child is not dependent and the dismissal of a dependency petition does not affect a claim requesting grandparent visitation.² "[A]bsent a specific claim for

²The dissent opines that K.R.D. and cases that rely on it for the proposition that a juvenile court has jurisdiction over a grandparent-visitiation claim after determining that a child is not dependent were wrongly decided and should not be followed. This court, however, has not been asked to revisit

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grandparent visitation," however, a juvenile court does not have jurisdiction to consider such visitation, even in an action alleging dependency. 51 So. 3d at 1071.

There is no dispute in the present case that the juvenile court considered a verified allegation of dependency and, thus, had before it a juvenile-court case involving the children. The issue is whether a claim for grandparent visitation had been sufficiently asserted as part of the case so as to confer subject-matter jurisdiction on the juvenile court under § 12-15-115(a)(10). Section 12-15-115(c), Ala. Code 1975, provides that, with one exception not applicable in this case, "[a]ll civil cases before the juvenile court shall be governed by the laws relating thereto and shall be initiated by filing a petition or complaint with the clerk of the juvenile court." "Petition" and "complaint," as those terms are used in § 12-15-115, are not defined.

those cases. See generally Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) ("[Appellate courts] are not inclined to abandon precedent without a specific invitation to do so. 'Stare decisis commands, at a minimum, a degree of respect from [an appellate court] that makes it disinclined to overrule controlling precedent when it is not invited to do so.'" (quoting Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002))).

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Although the petition alleging dependency did not request grandparent visitation, it appears from other filings in this case that the issue of grandparent visitation was raised. Specifically, in the July 29 order, which was signed by the grandparents and the mother, the juvenile court awarded the grandparents specific visitation rights based on an agreement of the parties. The visitation schedule filed as an exhibit to that order also was initialed by all parties. Moreover, the grandparents later filed a motion for clarification regarding the July 29 order, in which they specifically asserted that they had reached an agreement with the mother to allow the grandparents visitation with the children. Although the juvenile court set aside the July 29 order because it had been entered while the mother's first appeal was still pending, the referenced filings clearly indicate that grandparent visitation had been made a part of this juvenile case. Indeed, after arguing in her motion for a summary judgment that the children were not dependent, the mother herself acknowledged that the grandparents were seeking court-ordered visitation with the children. The juvenile court recognized as much in its final judgment, noting that "the

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issue of grandparent visitation was properly raised in this matter." Based on the various filings and admissions of record in this case, we conclude that proceedings to establish grandparent visitation were sufficiently commenced as part of a juvenile-court case involving the children and that the juvenile court had subject-matter jurisdiction to consider grandparent visitation. The mother makes no other substantive arguments regarding the award of grandparent visitation. Accordingly, we affirm the juvenile court's judgment insofar as it awarded grandparent visitation.

Propriety Language

The mother asserts that the juvenile court "also impeded on the rights of the mother by inserting the standard 'propriety' language" regarding male guests and being under the influence of alcohol in the presence of the children. We agree. Section 12-15-310(b), Ala. Code 1975, requires a juvenile court to dismiss a petition alleging that a child is dependent if the court finds that the allegations in the petition have not been proven by clear and convincing evidence. In J.A., this court held that, after a juvenile court had determined that the children at issue were not

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dependent, the juvenile court could not grant a maternal aunt visitation rights or "otherwise 'affect the custody' of the children" and that the juvenile court's only option was to "dismiss the dependency petition and to allow the custody of the children to be returned to the mother and the father." 93 So. 3d at 955. Because the juvenile court in the instant case determined that the children were not dependent, there is no legal basis for the court's directives to the mother regarding male guests or alcohol use. Accordingly, we reverse the juvenile court's judgment as to this issue, and we remand the cause for the juvenile court to amend its judgment to remove those directions.

Failure to Hold a Hearing
on the Mother's Postjudgment Motion

Finally, the mother asserts that the juvenile court erred in allegedly failing to hold a hearing on the mother's postjudgment motion.³ In Chism v. Jefferson County, 954 So. 2d 1058 (Ala. 2006), our supreme court acknowledged that the

³There appears to be some confusion as to whether a hearing was actually scheduled. The juvenile court's order denying the mother's postjudgment motion indicates that the parties failed to appear for a scheduled hearing. The mother, however, asserts that no hearing was ever scheduled and that no notice of a hearing was issued.

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failure to conduct a hearing on a postjudgment motion under Rule 59(g), Ala. R. Civ. P., is not reversible error if there was no probable merit in the motion or if the appellate court resolves the issues presented in the motion adversely to the movant as a matter of law. 954 So. 2d at 1086. Because we have determined, as a matter of law, that the juvenile court had jurisdiction to consider the grandparent-visitation issue, the failure to hold a hearing on that particular argument is not reversible.

This court also has stated that "any such error [in failing to hold a hearing on a postjudgment motion] 'is reversible error only if it "probably injuriously affected substantial rights of the parties.'" "DWOC, LLC v. TRX Alliance, Inc., 99 So. 3d 1233, 1236 (Ala. Civ. App. 2012) (quoting Kitchens v. Maye, 623 So. 2d 1082, 1088 (Ala. 1993), quoting in turn Greene v. Thompson, 554 So. 2d 376, 380-81 (Ala. 1989)). Because we have agreed with the mother's legal argument regarding the "propriety" language included in the juvenile court's judgment, and because we have concluded that the inclusion of such language was error, we conclude that the

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failure to hold a hearing on that particular argument has not injuriously affected substantial rights of the mother.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thomas, Moore, and Donaldson, JJ., concur.

Thompson, P.J., dissents, with writing.

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THOMPSON, Presiding Judge, dissenting.

M.G.D. ("the mother") and the children's father were divorced by a July 3, 2009, judgment of the Shelby Circuit Court ("the circuit court"), and the circuit court awarded the father custody of the children. Thus, by virtue of the custody award in the divorce judgment, the circuit court maintained continuing jurisdiction over the issues of custody and visitation of the children. See Ex parte K.S.G., 645 So. 2d 297, 299 (Ala. Civ. App. 1992) ("[W]hen a circuit court acquires jurisdiction over the issue of child custody pursuant to a divorce action, it thereafter retains jurisdiction over that issue to the exclusion of the juvenile court."). An exception to the circuit court's maintaining exclusive jurisdiction over children subject to its custody determination is when the children are alleged to be dependent in an action filed in a juvenile court. Id.

After the death of the father, the children's paternal grandparents filed a dependency petition in the Shelby Juvenile Court ("the juvenile court"), alleging that the children were dependent because, they said, the mother could not provide adequate care of the children. It is undisputed

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that the paternal grandparents later asserted a claim for grandparent visitation. A juvenile court has jurisdiction to consider a claim for grandparent visitation "when filed as part of a juvenile court case involving the same child." § 12-15-115(a)(10), Ala. Code 1975. However, in its November 24, 2014, judgment, the juvenile court determined that the children were not dependent. After the juvenile court made that determination, it had no basis upon which to take any further action with regard to the children, and the action was due to be dismissed. "Once the juvenile court decided that the case would not be decided on dependency principles, the juvenile court had no jurisdictional basis for determining custody of the child." T.B. v. T.H., 30 So. 3d 429, 432 (Ala. Civ. App. 2009). See also C.C. v. B.L., 142 So. 3d 1126, 1129 (Ala. Civ. App. 2013) ("Because the juvenile court determined that the child was not dependent, it correctly determined that it lacked jurisdiction to enter a judgment affecting custody and visitation matters regarding the child."); and K.C.G. v. S.J.R., 46 So. 3d 499, 504 (Ala. Civ. App. 2010) ("[O]nce the juvenile court recognized that the case did not involve a question of dependency, it lost jurisdiction over the

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remaining subject matter, i.e., the dispute over the custody of the child.").

To the extent that K.R.D. v. E.D., 622 So. 2d 398 (Ala. Civ. App. 1993), and the cases that rely on it hold that a juvenile court has jurisdiction over a grandparent-visitation claim when the juvenile court would not otherwise be able to exercise jurisdiction over the children, I believe those cases were incorrectly decided. I conclude that the phrase "as part of a juvenile court case involving the same child" in § 12-15-115(a)(10) refers to situations such as when a child's parents are unmarried and his or her custody or paternity is at issue or when a child is actually found to be dependent by the juvenile court; in other words, it refers to situations in which a juvenile court may properly exercise jurisdiction over a child. I do not agree with K.R.D. and other similar precedent, or with the main opinion, that the juvenile court could maintain jurisdiction under § 12-15-115(a)(10) merely because the paternal grandparents had alleged dependency as a part of their request for visitation. The dependency allegation was sufficient to invoke the jurisdiction of the juvenile court, but that dependency allegation did not provide

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a basis that would allow the juvenile court to make a visitation determination after it was determined that the children were not dependent. The holding of the main opinion allows the paternal grandparents to bypass the circuit court, which has continuing jurisdiction over the children in this case, and possibly the more stringent custody standards applicable to proceedings in that court.

At the time this action was initiated, § 30-3-4.1, Ala. Code 1975, provided a method by which grandparents could seek visitation with their grandchildren under certain situations.⁴ I agree that, at that time, a claim under § 30-3-4.1 could be initiated in the juvenile court in some circumstances. However, I conclude that, in this case, the juvenile court could exercise jurisdiction over the grandparent-visitation claim only if it could otherwise properly exercise jurisdiction over the children at the time it entered its judgment. Because I conclude that the juvenile court lacked jurisdiction to enter its judgment, I would dismiss the

⁴That statute was recently declared unconstitutional by this court in Weldon v. Ballow, [Ms. 2140471, Oct. 30, 2015] __ So. 3d __ (Ala. Civ. App. 2015). A petition for a writ of certiorari was filed in the Alabama Supreme Court on November 13, 2015, but, as of the date of this writing, our supreme court has not yet decided whether to grant that petition.

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appeal. For that reason, I pretermitt any discussion of whether the holding of Weldon v. Ballow, [Ms. 2140471, Oct. 30, 2015] ___ So. 3d ___ (Ala. Civ. App. 2015), should apply to govern the claim in this case.