REL: September 24, 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

SPECIAL TERM, 2021

2200120

Christopher Allen Wallace

v.

Kimberly Michelle Wallace

Appeal from Baldwin Circuit Court
(DR-09-509.04)

EDWARDS, Judge.

In July 2009, Christopher Allen Wallace ("the father") and Kimberly Michelle Wallace ("the mother") were divorced by a judgment of the

Baldwin Circuit Court ("the trial court"). Pursuant to that judgment, the parties were awarded joint legal custody and the mother was awarded "primary physical custody" of the parties' three children, C.A.W., K.M.W., and C.D.W. ("the children"). In September 2011, the trial court modified the divorce judgment to award the father sole physical custody of the children.

In March 2019, the father, in substantial compliance with Ala. Code 1975, § 30-3-165, a part of the Parent-Child Relationship Protection Act ("the PCRPA"), codified at Ala. Code 1975, § 30-3-160 et seq., notified the mother of his intent to move from Baldwin County to North Carolina to undertake new employment. The mother then filed in the trial court a verified petition seeking a modification of the 2011 custody judgment and, pursuant to Ala. Code 1975, § 30-3-169, an objection to the proposed change of the principal place of residence of the children. On the same date the mother filed her objection to the children's relocation, the trial court entered an ex parte order prohibiting the children from leaving the State of Alabama. The father filed a motion seeking approval of the children's relocation pending a trial in the matter, and the trial court set

a hearing on that motion. On May 13, 2019, after an evidentiary hearing, the trial court entered a temporary order granting the mother's objection pending a trial and prohibiting the children from being removed from the State of Alabama.

After a trial on the mother's objection and petition to modify custody, which was held over two separate days in December 2019 and in June 2020, the trial court entered on July 15, 2020, a judgment awarding the mother sole physical custody of the children. The father filed a timely postjudgment motion, in which he argued, among other things, that the trial court had erred in failing to allow the parties' 14-year-old daughter, K.M.W. ("the daughter"), to testify to her "strong desire to relocate to North Carolina," to establish the "stark difference in lifestyles between the two homes," and to prove that the mother had failed to properly supervise the oldest child on a cruise vacation, resulting in his "having unprotected sex." The trial court granted the father's motion in part, awarding the father visitation with the children for the entirety of the week of Thanksgiving and addressing a matter relating to child support, but otherwise denied the motion. The father then timely appealed.

On appeal, the father raises two arguments. He first argues that he met his burden of rebutting the presumption against relocation set out in Ala. Code 1975, § 30-3-169.4, a part of the PCRPA. Specifically, he contends that he presented sufficient evidence indicating that the relocation would be in the children's best interest by presenting, among other evidence, evidence regarding his involvement in the children's lives, the mother's lack of significant involvement with the children's schooling and extracurricular activities, and the opportunities that the move to North Carolina would provide the children. The father also challenges the trial court's refusal to allow him to call the daughter as a witness. We find the father's second argument dispositive of this appeal.

At the close of the testimony on the second day of the two-day trial, the following occurred:

> "THE COURT: All right. So let's talk about whether or not I'm going to talk to a teenager.
>
> "COUNSEL FOR THE FATHER: Yes.
>
> "THE COURT: Because I might and I might not. We all know that, that I might and I might not because teenagers don't run my world not even at my house.

"COUNSEL FOR THE FATHER: No, Your Honor, they do not. However in the list of the reasons for relocation falling squarely within that one of many -- and there's about 18 to 20 reasons of which this court can consider [set out in Ala. Code 1975, § 30-3-169.3], is a child's desire and their input to that. And I would offer the [daughter] because it does fall in the criteria and I'm offering her testimony. I'm not sure -- she may go against me. I don't know but my understanding is that this testimony of the [daughter] would be relevant to reaching a conclusion by this court. It's done for that purpose.

"THE COURT: Okay.

"COUNSEL FOR THE FATHER: I don't talk to children in advance.

"THE COURT: What do you say, [counsel for the mother], because I feel like that can be done by proffer.

"COUNSEL FOR THE MOTHER: How old is [the daughter]?

"COUNSEL FOR THE FATHER: 14?

"THE FATHER: She'll be 15 in July.

"COUNSEL FOR THE FATHER: She'll be 25 [sic] in July.

"COUNSEL FOR THE MOTHER: Judge, I hate to see any child take a witness stand in a domestic matter regardless of the nature. And I understand what [counsel for the father's] saying about this statute and he's correct.

"THE COURT: But I mean if there is some 18 that is like 1 out of 18.

"COUNSEL FOR THE MOTHER: Right. Right. This is a young lady who is in a difficult stage in life. I don't see anything good coming out of her testifying in a case involving her mom and dad. And as we all know many times children of that age are not in a position to make the best decision.

"THE COURT: Well, and I will also tell you that I have concerns about it being electronic right now as well. But that's not my primary concern. Because I don't know who's with the child, okay? And I try to make an effort for children to be not with any of these grown ups that have control of their everyday life. But --

"COUNSEL FOR THE FATHER: Judge, if we want to suspend this for 30 minutes I can make the [daughter] available at my office.

"THE COURT: No. No, no, no. Y'all can proffer it. I am willing to accept proffers.

"COUNSEL FOR THE FATHER: Do you want to exclude the parents from the courtroom while I make that proffer?

"THE COURT: Yes. I'm fine with that, yes. All right. Y'all step on out. It won't be very long. It's okay.

"(PROFFER OF IN CAMERA TESTIMONY.)

"THE COURT: So are we ready to proffer? And this would be the daughter --

"COUNSEL FOR THE FATHER: I will qualify because --

"THE COURT: -- the middle child who is a daughter.

"COUNSEL FOR THE FATHER: She is. She is the daughter. She's the middle child.

"THE COURT: And a flute player.

"COUNSEL FOR THE FATHER: And in submitting a proffer I'm a little off from doing what I can be at full proffer in that I intentionally don't speak to children in advance about their testimony. I never want it to appear coached. I don't like to meet them is all, okay?

"THE COURT: Because you already have enough children.

"COUNSEL FOR THE FATHER: I have enough children and so -- and sometimes I'll not talk about my children on the record. Okay. So what I'm going to say is that my understanding as it pertains to this child, [the daughter], the one who has -- who is 14, she requested to testify. She wanted to be able to express to the court her desire to move to North Carolina. She's very close with her father. She's very close with her stepmother. She loves her mother very much. She does not enjoy her household when she's at her mother's, especially when [her mother's husband] is there. He belittles her faith. He doesn't [want] her involved in her various --he mocks her activities she's involved in, the flute, the church which are very much -- which are very important to her. She's allowed to, not only, do well in the activities when she's at her father's home, she's excelled over the years. She's honors band, first chair, all by the time she's 14 years of age, in flute to the

point that my client has made sure that she has had extra lessons, so that she can maintain her chair as well as being able to potentially get scholarships in the future. [The daughter] believe[s] that, you know, she has seen -- she has been to North Carolina as the visits were allowed by this court. She likes the idea of school system. She's going to be there. She likes the home that the children are going to have. She wants -- she does not want to be apart from any of her siblings. She wants all 5 of her siblings that she considers it all of her family, of 7 to be together with their father. She enjoys the fact that her father he used to have to work long hours and mandatory overtime is now more in- -- now available to be part of her life as she's only got about four of five more years that she's going to be at home. She wants to continue that relationship and that is what I believe her testimony would be. If -- she would give it probably in a more impassioned 14 or 15 year old version than I can give. She might --

"THE COURT: Very few people can do that other than 14 or 15 year old girls. You are correct.

"COUNSEL FOR THE FATHER: She might even say things I would not have her say as a 14 or 15-year-old. But as a general rule I believe that to be what her testimony would be if I was allowed to give that. And I would -- I have to say for the record I would in fact -- I do want to state my objection to only being able to proffer it. I think the live testimony of [the daughter], this issue for this case is relevant.

"THE COURT: Thank you. [Counsel for the mother], do you [have] any proffer as to what you would go into?

"COUNSEL FOR THE MOTHER: Not necessarily a proffer, but a response. And I respect [counsel for the father's] position because he's kind of like me we generally don't meet

with children when it comes to litigation. There is no sense in putting them in the middle of this. Which means the only information [counsel for the father] would have would probably come from his client, most probably. And this is, you know, this is obviously emotionally driven.

"THE COURT: Well, I mean, all [domestic-relations] cases ... [are] somewhat emotionally driven.

"COUNSEL FOR THE MOTHER: And I'm trying to be respectful to both parties. Both parties have issues but this guy is pretty good at giving people options, either/or situations that if he doesn't get a response doing it his way, that's our position. I'm sure [the daughter] is a very nice young lady. I'm sure she may be mature for her age but, Judge, we all know a teenager can change their mind at the drop of a hat based on who knows what. And under -- based on circumstances none of us understand because they are at that age. So, Your Honor, that is our position in this. I think Your Honor has always done a great job of making rulings in cases like this without involving the children, frankly.

"COUNSEL FOR THE FATHER: I just --

"THE COURT: Probably because I see so many children.

"COUNSEL FOR THE FATHER: You do. And these children under -- I think it's undisputed that under [the father's] care, custody, and control since they modified the custody the children have done well. Not only have they done well, but they have excelled. And he just wants to carry that on for the next part. Unfortunately he has to relocate. There is no plan B.

> "THE COURT: All right. You want to invite everybody back in ...."

In Ex parte Harris, 461 So. 2d 1332 (Ala. 1984), our supreme court explained that a trial court could not decline to hear the testimony of a child in a divorce case merely on the basis that it was distasteful to allow a child to testify regarding a custody matter. Our supreme court explained:

> "Initially, we agree with the Court of Civil Appeals' statement of the law that 'a trial court may not prohibit a witness from testifying in a divorce case solely because the proposed witness is a child of the parties even though calling children to testify against one of their parents in a divorce case is distasteful and should be discouraged.' Harris v. Harris, [461 So. 2d 1330 (Ala. Civ. App. 1984)].
>
> "The general rule is that 'a party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleading.' Bole v. Bole, 76 Cal. App. 2d 344, 172 P.2d 936 (1946).
>
> "In Kreutzer v. Kreutzer, 226 Or. 158, 359 P.2d 536 (1961), the Oregon Supreme Court stated:
>
> > " 'Consequently, the right of the defendant to call the children to the stand and to elicit testimony from them material to the issues was precisely the same as it would have been in the

> case of any other competent witness. This is, of course, a fundamental right. In divorce cases, it seems to be uniformly held that the court has no authority to exclude the testimony of children of the parties of tender years if they are otherwise competent witnesses.'
>
> "Id., [226 Or. at 161,] 359 P.2d at 537 (citations omitted). Many other jurisdictions that have considered this issue have followed this general principle. See e.g. Annot. 2 A.L.R.2d 1029-1032 (1948); Crownover v. Crownover, 33 Ill. App. 3d 327, 337 N.E.2d 56 (1975); Louks v. Louks, 345 Ill. App. 185, 102 N.E.2d 364 (1951); Chavigny v. Hava, 125 La. 710, 51 So. 696 (1910); Powell v. Powell, 198 Miss. 301, 22 So. 2d 160 (1945); Ames v. Ames, 231 Mich. 347, 204 N.W. 117 (1925); Morrone v. Morrone, 44 N.J. Super. 305, 130 A.2d 396 (1957); Schafer v. Schafer, 243 Or. 242, 412 P.2d 793 (1966); Nichols [v.] Fleischman, 67 Or. App. 256, 677 P.2d 731 (1984); Callicott v. Callicott, 364 S.W.2d 455 (Tex. Civ. App. 1963); Helper v. Helper, 195 Va. 611, 79 S.E.2d 652 (1954).
>
> "In Alabama, there is no statutory prohibition against children testifying in a divorce case so long as they are otherwise competent to testify. Testimony of competent children in a divorce action must be admitted, if relevant, otherwise admissible, and not merely cumulative. In this case, so far as it appears, the fifteen-year-old son would have been able to understand the nature of the oath and would likewise have been competent to testify. Ala. Code 1975, § 12-21-165."

Ex parte Harris, 461 So. 2d at1333-34.

This court has applied the principles recognized in Ex parte Harris to reverse judgments relating to custody in cases in which the trial courts

at issue in those cases refused to allow a child to testify. See Bebee v. Hargrove, 607 So. 2d 1270 (Ala. Civ. App. 1992), and Ellison v. Ellison, 628 So. 2d 855 (Ala. Civ. App. 1993); but see Vincent v. Askew, 628 So. 2d 679, 681 (Ala. Civ. App. 1993) (affirming a custody judgment despite the trial court's failure to allow a six-year-old child to testify without reference to the principles recognized in Ex parte Harris only three months before the issuance of the opinion in Ellison), and Gandy v. Gandy, 370 So. 2d 1016, 1019 (Ala. Civ. App. 1979) (affirming a custody judgment despite the failure of the trial court to allow a nine-year-old child to testify based on the trial court's "concern[] with the possibility that the wife had molded the testimony of a child of impressionable age" and "recogniz[ing] the psychological implications to a child attendant in probing this sensitive issue" before the issuance of the decision in Ex parte Harris).

The trial court did not specifically state its reason for refusing to allow the daughter to testify, but it appeared to adopt those reasons stated by the mother's counsel and to indicate that, if the preference of the daughter was only one factor of several, it might not need to consider the daughter's testimony on that issue. Furthermore, it appears that the trial

court believed that an offer of proof would suffice as a replacement for the testimony of the daughter. However, our supreme court explained in Ex parte Harris that "[a]n offer of proof, although preserving the record on appeal, is an insufficient substitute for the witness's testimony." 461 So. 2d at 1334.

To determine whether the trial court erred in refusing to allow the daughter to testify, we must consider whether the daughter's testimony was relevant, whether it was otherwise admissible, and whether it was merely cumulative. Id. As recited above, the father's counsel presented a proffer of the expected testimony of the daughter, and that testimony would have been relevant to the decision on the mother's modification petition, see Rule 401, Ala. R. Evid. (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), even before the enactment of the PCRPA and the inclusion of the specific factors set out in Ala. Code 1975, § 30-3-169.3. Our supreme court long ago instructed trial courts making custody determinations

> "to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; ... and any other relevant matter the evidence may disclose."

Ex parte Devine, 398 So. 2d 686, 696-97 (Ala. 1981) (emphasis added). However, in this particular case, which is governed by the PCRPA, a specific provision of the PCRPA requires the trial court to consider "[t]he preference of the child, taking into consideration the age and maturity of the child." § 30-3-169.3(a)(6). See Toler v. Toler, 947 So. 2d 416, 421 (Ala. Civ. App. 2006) (indicating that a trial court's consideration of the several factors enunciated in § 30-3-169.3(a) is required by the statute). Certainly, we recognize that a child's wishes regarding custody are not necessarily determinative, but the stated preference of a child of sufficient age and maturity should be given "'much weight,' " Toler, 947 So. 2d at 422 (quoting Brown v. Brown, 602 So. 2d 429, 431 (Ala. Civ. App. 1992)),

which is impossible if the trial court refuses to allow the child to testify to establish his or her maturity and make known his or her desires regarding custody.

Having determined that the daughter's testimony would have been relevant, we next consider whether it was otherwise admissible. The mother's counsel lodged no objection to the testimony other than to indicate that it might be distasteful to allow the daughter to be "put[] ... in the middle of this" by requiring her to testify in a custody case and that it was possible that the daughter's desires might vacillate "at the drop of a hat based on who knows what." Those objections, if in fact they are objections, do not appear to address the admissibility of the daughter's testimony. At best, those "objections" go to the weight the trial court should accord the testimony and, in fact, are the very reasons for refusing to allow children to testify rejected by Ex parte Harris and its progeny. Not surprisingly, no one questioned the daughter's competence to be a witness. See Rule 601, Ala. R. Evid. ("Every person is competent to be a witness except as otherwise provided in these rules."); Ala. Code 1975, § 12-21-165 (stating that "[p]ersons who have not the use of reason, such as

... children who do not understand the nature of an oath, are incompetent witnesses" and providing that "[t]he court must, by examination, decide upon the capacity of one alleged to be incompetent from ... infancy"). Thus, the daughter being competent to testify and the mother not having made any objection to the admissibility of the daughter's testimony, her testimony would have been admissible. See Ex parte Neal, 423 So. 2d 850, 852 (Ala.1982) ("The trial court is not in error if inadmissible [evidence] comes in without objection and without a ruling thereon appearing in the record. The [evidence] is thus generally admissible and not limited as to weight or purpose.").

Finally, we consider whether the testimony of the daughter would have been cumulative. We note that "[a] party has a fundamental right to introduce evidence which is competent, otherwise admissible, and relevant to the material issues being tried. Accordingly, any doubt as to whether the testimony was cumulative should be resolved in favor of the party who would call the witness to the stand." Ex parte Harris, 461 So. 2d at 1334-35. The parties' respective counsel lodged several hearsay objections when either parent was asked questions that would call for a

response requiring the parent to reiterate what any of the children might have said. Thus, other than the proffer, the evidence at trial does not directly reveal that the daughter's testimony would necessarily be that she desired to relocate to North Carolina with the father or why she might prefer being in the father's custody over that of the mother's. Although there were a few statements indicating that the daughter might not get along with the mother's husband, that she was very close to the father's wife, and that she had lofty goals that might be better attained with access to the opportunities available to her in North Carolina, we cannot say that the daughter's testimony would have been so cumulative that the trial court could properly exclude her testimony. Furthermore, like our supreme court has said,

> "[d]espite the offer of proof, we are unable in hindsight to determine that the [daughter's] testimony would have been merely cumulative. We cannot conclusively determine everything that the child would have testified to on the stand. In the present case, most of the evidence presented by the parties was in conflict. Arguably, the [daughter's] testimony may have helped to resolve or corroborate the issues in dispute."

Id. at 1334.

Having concluded that the testimony of the daughter was relevant, otherwise admissible, and not cumulative, we must also conclude that the refusal of the trial court to permit the daughter to testify was not harmless error. See id. at 1335. Accordingly, we reverse the judgment of the trial court, and we remand the cause with instructions that it hold a new trial. See, e.g., Holly v. Huntsville Hosp., 865 So. 2d 1177, 1188 (Ala. 2003) (reversing a judgment and remanding the cause for a new trial because the exclusion of evidence and other errors "probably injuriously affected the substantial rights of the [appellants]").

REVERSED AND REMANDED WITH INSTRUCTIONS.

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