Rel: July 19, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180203

L.M.F.

v.

C.D.F. and C.F.

Appeal from Cullman Juvenile Court
(JU-12-481.03)

THOMPSON, Presiding Judge.

On June 6, 2017, C.D.F. ("the paternal grandfather") and his wife, C.F. (hereinafter referred to collectively as "the petitioners"), filed in the Cullman Juvenile Court ("the juvenile court") a petition seeking an award of custody of

B.N.F. ("the child"). The record demonstrates that the child's parents are unable to care for the child. A June 16, 2014, judgment of the juvenile court awarded custody of the child to L.M.F. ("the paternal grandmother"). That June 16, 2014, judgment specified that it was based upon an agreement of the parties to that action, i.e., the paternal grandmother and the child's parents. The action from which the June 16, 2014, judgment resulted was assigned case number JU-12-481.01.

In 2016, the Cullman County Department of Human Resources ("DHR") initiated a dependency action, which was assigned case number JU-12-481.02. As a part of that action, the child was removed from the paternal grandmother's home based on allegations that the paternal grandmother was using illegal drugs. The record indicates that the child was placed in the home of the petitioners.

On June 6, 2017, the petitioners, proceeding pro se, filed the petition that initiated the current action, case number JU-12-481.03. The petitioners alleged that the paternal grandmother had used illegal drugs and that, as a result, the child had been placed in their home by DHR and had remained there since November 2016. On June 15, 2017, the

juvenile court entered a pendente lite order in this action specifying that the petitioners and the paternal grandmother would share joint physical custody of the child, alternating weekly, pending a final hearing on the petition. On July 26, 2017, the paternal grandmother, who was also proceeding pro se, moved to dismiss the petitioners' action. She later filed a motion seeking an immediate return of custody of the child to her, and she also amended her motion to dismiss.

On August 9, 2018, the juvenile court entered a judgment in case number JU-12-481.02 dismissing that dependency action and relieving DHR from providing further services to the family.

On September 27, 2018, the juvenile court entered an order in this action denying the paternal grandmother's motion to dismiss the petitioners' claims. The juvenile court conducted a hearing in this action on November 14, 2018.

On November 15, 2018, the juvenile court entered a judgment in which it modified the June 16, 2014, custody determination; it awarded custody of the child to the petitioners and awarded the paternal grandmother visitation

with the child. The paternal grandmother, proceeding pro se, timely appealed.

The grandmother argues that the petitioners sought to modify the final custody judgment that had awarded her custody of the child. In an action seeking to modify a final custody award entered in a dependency action, a party must meet the evidentiary standard set forth in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). In this case, the petitioners' June 6, 2017, petition contained allegations apparently similar to those contained in DHR's 2016 petition. However, the juvenile court dismissed DHR's dependency action. After DHR's dependency action was dismissed, the juvenile court scheduled a hearing on "the grandparents' petitions for custody." In its November 15, 2018, judgment, the juvenile court stated that the matter was before it on the petitioners' "petition for custody." The juvenile court made findings that both the paternal grandmother's and the paternal grandfather's substance-abuse issues were in the past. However, the juvenile court did not mentioned the McLendon standard or any other standard in its November 15, 2018, judgment. Given the foregoing, we conclude that the paternal grandmother is

correct that this matter was in the nature of a custody dispute and was not a dependency action. See J.A.P. v. M.M., 872 So. 2d 861, 866 (Ala. Civ. App. 2003) (action was in the nature of a custody dispute rather than a dependency action).

The paternal grandmother argues on appeal that the juvenile court erred in conducting the hearing without first swearing in the parties and in entering the judgment without any evidentiary support. In her appellate brief, the paternal grandmother cites L.W. v. Cullman County Department of Human Resources, 181 So. 3d 1070 (Ala. Civ. App. 2015). In that case, L.W., the mother, argued that the juvenile court had erred in entering a judgment awarding custody of her minor child to a third party. The mother argued that she had not received notice of the proceedings and that the juvenile court had not received any evidence at the hearing conducted before it entered its judgment. The appellee in that case, the Cullman County DHR, conceded that "the judgment was entered in a manner inconsistent with the mother's due-process rights." L.W. v. Cullman Cty. Dep't of Human Res., 181 So. 3d at 1071. Accordingly, this court reversed the judgment and remanded the cause to the juvenile court. L.W. v. Cullman Cty. Dep't of

Human Res., supra. Given the foregoing, the paternal grandmother's arguments on appeal are sufficient to raise a due-process argument.

In this case, only the parties, the guardian ad litem, and the attorney appointed in DHR's dependency action to represent the father were present at the November 14, 2018, hearing. The father's attorney, who appeared without his client, made a representation regarding the father's whereabouts at the time of the hearing and was excused from the proceeding. The guardian ad litem arguably made a few representations, or at least summaries of the parties' positions, to the juvenile court. "The unsworn statements, factual assertions, and arguments of counsel are not evidence." Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005). Thus, any arguments or representations made by the father's attorney or by the guardian ad litem before the juvenile court did not constitute evidence. Ex parte Russell, supra; Ex parte Dean, 137 So. 3d 341, 347-48 (Ala. Civ. App. 2013).

The parties themselves appeared before the juvenile court pro se. They were not sworn in to testify. The paternal

grandmother characterizes the hearing as a discussion before the juvenile court that was composed of "just general comments" by the parties. The record supports that characterization of the hearing.

The hearing began as an unsuccessful effort by the juvenile court to encourage the parties to reach an agreement concerning custody of the child, and those efforts continued well into the hearing. Also, throughout most of the hearing, the guardian ad litem encouraged the parties to reach an agreement as well, and he attempted to facilitate their settling the dispute.

Although the efforts of the juvenile court and the guardian ad litem might have been well-intentioned, it was not the role of the juvenile court or the guardian ad litem to mediate a settlement between the parties in lieu of the scheduled evidentiary hearing; it does not appear that the parties agreed to such an arrangement.

Other than the attempts to have the parties reach a settlement, much of the remainder of the hearing involved the juvenile court's and the parties' discussion of the parents' circumstances, both past and present, and their mutual hopes

that the parents could adjust their circumstances to properly meet the needs of the child. During the hearing, the parties also talked about their concerns about the difficulties of managing the holidays when sharing custody of a young child. The juvenile court then discussed with the parties a number of local holiday events that children would enjoy. Throughout the hearing, the parties and the juvenile court consistently spoke over each other and interrupted each other. The juvenile court also made reference to having governed these parties' disputes, or the actions involving DHR, for a number of years, to being familiar with past reports from DHR and a court-appointed special advocate, and to having spoken in chambers with the guardian ad litem before the hearing.[1]

[1]This was not the only reference made during the hearing to an ex parte communication between the juvenile court and the guardian ad litem. Although the paternal grandmother has not raised an argument pertaining to what appear to be ex parte communications between the juvenile court and the guardian ad litem, we note those ex parte communications as a further indication of the irregularities in the hearing and the lack of evidence upon which the judgment was based. See, e.g., Ex parte R.D.N., 918 So. 2d 100, 105 (Ala. 2005) ("[I]n these circumstances, the trial court's ex parte communications with the guardian ad litem and its reliance upon her recommendation, given to the court as part of an ex parte communication, violated the fundamental right of the father to procedural due process under the Alabama and United States Constitutions.").

In this case, although the parties received notice that the case was "set for a trial on the grandparents' petitions for custody on November 14, 2018," the juvenile court conducted the hearing more in the nature of a discussion. The parties were all pro se, and none were sworn in. Thus, there is no consequence, in the form of being subject to an allegation of perjury, for any false or misleading statements the parties might have made before the juvenile court. See Ex parte Williams, 268 Ala. 535, 539, 108 So. 2d 454, 459 (1958) (If "the statement is not under oath the maker of it does not make himself liable to the penalties for perjury if the statement be untrue.").

> "The taking of some kind of an oath has always been prerequisite to the consideration of any testimony offered in a court of justice. That rule is recognized in this state by Code 1923, § 76549 [now codified at § 12-21-135, Ala. Code 1975], which provides: 'All testimony, except as otherwise directed, must be given in open court on the oath or affirmation of the witness.' 'The casuistical position that an oath does not increase the obligation to speak the truth is not a maxim of the common law.' Jones on Ev. par. 2089. The oft-repeated expression: 'I was talking then, but swearing now,' is familiar to all lawyers, and has been frequently alluded to in the law books and in literature, since as a result of teaching such a philosophy Socrates was caused to drink the hemlock for having taught such a doctrine to the youth of Athens. For the reason that such a doctrine has

> always more or less permeated the human mind, a man of the most exalted virtue, though judges and jurors might place the utmost confidence in his declarations, cannot be heard in a court of justice without an oath. Atwood v. Welton, 7 Conn. 66 [(1828)]."

Murphy v. State, 25 Ala. App. 237, 239, 144 So. 114, 116 (1932).

Equally important, the parties were given no opportunity to subject each other to cross-examination. See Kellum v. Jones, 591 So. 2d 891, 893 (Ala. Civ. App. 1991) ("The father had his day in open court. He was informed of the claim against him. He had opportunity to present evidence in defense and to cross-examine witnesses against him. He was represented by competent counsel. All of these rights being present, we fail to find a denial of due process."); B.D.S. v. Calhoun Cty. Dep't of Human Res., 881 So. 2d 1042, 1056 (Ala. Civ. App. 2003) (the mother was not denied due process when she had the opportunity to cross-examine witnesses).

The parties were entitled to a properly conducted evidentiary hearing rather than a mere discussion occurring after the juvenile court's and the guardian ad litem's efforts at settlement were unsuccessful.

> "'[T]he constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard. The right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the right to introduce evidence at a meaningful time and in a meaningful manner. It also includes the opportunity to cross-examine witnesses and to be heard on questions of law. The violation of a litigant's due process right to be heard requires reversal.'"

Johnson v. Johnson, 88 So. 3d 335, 340 (Fla. Dist. Ct. App. 2012) (quoting Vollmer v. Key Dev. Props., Inc., 966 So. 2d 1022, 1027 (Fla. Dist. Ct. App. 2007)) (internal citations and quotation marks omitted in Johnson) (emphasis added). See also Wood v. Tucker, 231 Pa. Super. 461, 463, 332 A.2d 191, 192 (1974) ("'In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' Goldberg v. Kelly, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed.2d 287 (1970)."). In Tecce v. Hally, 106 A.3d 728, 731 (Pa. Super. Ct. 2014), the parties to a divorce action that did not involve claims of child custody appeared, with their attorneys, at a hearing on the merits. Neither of the parties was placed under oath, although both gave unsworn oral

statements. The wife appealed, arguing that the trial court in that case had erred in not taking any sworn testimony. The appellate court noted that the proceeding before the trial court had been "profoundly flawed," 106 A.2d at 729, and that the failure to swear in the parties had resulted in there being no evidence to support the judgment. 106 A.2d at 731. Although that court affirmed the judgment on the basis that the parties and their attorneys had not objected, the court stated that the failure to take evidence was "so fundamentally flawed" as to "offend[] fundamental fairness." Tecce v. Hally, 106 A.2d at 732.

Rule 43(a), Ala. R. Civ. P., provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided in these rules." See also Ex parte R.D.N., 918 So. 2d 100, 104 (Ala. 2005) ("In Ex parte Berryhill, 410 So. 2d 416, 418 (Ala. 1982), we held: 'The fundamental principle is that the decision of a court must be based on evidence produced in open court lest the guarantee of due process be infringed.'").

In this case, the parties had a right to present sworn evidence and testimony before the juvenile court, and they

could and should have been sworn in and allowed to call witnesses in support of their positions. The nature of the proceeding is significant in this case, because it involves custody of a young child. The best interests of the child are always the courts' primary consideration. "It is the court's duty to scrupulously guard and protect the interests of children. And in the context of child-custody proceedings, the dominant consideration is always the best interest of the child." Ex parte Fann, 810 So. 2d 631, 638 (Ala. 2001).

The parties in this action were not represented by counsel. We recognize that the "[r]ules governing the operation of the courts of this state are no more forgiving to a pro se litigant than to one represented by counsel." Lockett v. A.L. Sandlin Lumber Co., a Div. of Stringfellow Lumber Co., 588 So. 2d 889, 890 (Ala. Civ. App. 1991). However, in this case, the parties' failure to assert their right to have a full evidentiary hearing and their inability to present evidence impacted not only their own due-process rights to present evidence at the hearing, but also their ability to protect the child. The issues before the juvenile court

concern the safety and welfare of a young child.[2] "It is the function of the courts of this state to protect the children before them." Ex parte Marshall Cty. Dep't of Human Res., 234 So. 3d 519, 522 (Ala. Civ. App. 2016) (Thompson, P.J., dissenting). The child was not a party to the custody action below. However, the failure to allow sworn testimony and the presentation of evidence under the facts of this case impacts the safety and welfare of the child.

"'"[D]ue process of law means notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing."'" M.H. v. Jer. W., 51 So. 3d 334, 337 (Ala. Civ. App. 2010) (quoting Neal v. Neal, 856 So. 2d 766, 782 (Ala. 2002), quoting in turn Frahn v. Greyling Realization Corp., 239 Ala. 580, 583, 195 So. 758, 761 (1940)). The nature of the hearing below was so irregular and replete with error that the paternal grandmother might not have realized that the November 14, 2018, discussion before the juvenile court was a proceeding that the juvenile court considered to

[2]The allegations in the juvenile court indicate that both the paternal grandmother and the paternal grandfather have had significant substance-abuse problems. The juvenile court stated in its judgment that it believed that those problems were in the past.

be the "trial" of the matter. The ruling of the juvenile court, i.e., the custody-modification judgment, affects the parties' respective burdens in any future proceedings concerning the child. Given the flawed nature of the proceedings in this case, the serious due-process issues presented, and the vital importance of protecting the best interest of the child in custody matters, we conclude that the juvenile court erred in modifying custody of the child without first conducting an evidentiary hearing. The judgment is reversed and the cause remanded for the juvenile court to properly conduct an evidentiary hearing on the petitioners' claim. C.E. v. M.G., 169 So. 3d 1061, 1067 (Ala. Civ. App. 2015); M.E. v. Jefferson Cty. Dep't of Human Res., 148 So. 3d 737, 740-41 (Ala. Civ. App. 2014).

REVERSED AND REMANDED WITH INSTRUCTIONS.

Hanson, J., concurs.

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

Edwards, J., concurs in the judgment of reversal but dissents from the rationale, with writing, which Donaldson, J., joins.

EDWARDS, Judge, concurring in the judgment of reversal but dissenting from the rationale.

I concur in the main opinion's conclusion that the November 15, 2018, judgment of the Cullman Juvenile Court ("the juvenile court") must be reversed. However, I do not agree with the rationale for that reversal expressed in the main opinion. I also do not agree that a new trial must be held. Instead, I would reverse the judgment and remand the cause, instructing the juvenile court to enter an order denying what I construe to be a dependency petition filed by C.D.F. ("the paternal grandfather") and C.F. ("the paternal stepgrandmother") and dismissing the action as required by Ala. Code 1975, § 12-15-310(b) ("If the juvenile court finds that the allegations in the petition have not been proven by clear and convincing evidence, the juvenile court shall dismiss the petition.").

The handwritten petition filed in the juvenile court on June 6, 2017, by the paternal grandfather and the paternal stepgrandmother sought custody of B.N.F. ("the child") based on facts relating to the conduct of his custodian, L.M.F. ("the paternal grandmother"), including allegations that the

paternal grandmother had tested positive for methamphetamine and marijuana on a drug test and that drug paraphernalia had been found in her home in an area accessible by the child; the petition was assigned case number JU-12-481.03. The paternal grandmother, who had received custody of the child by virtue of a 2014 judgment of the juvenile court, denied the allegations of the petition. The same facts recounted in the paternal grandfather and the paternal stepgrandmother's petition had given rise to a dependency petition filed in the juvenile court in 2016 by the Cullman County Department of Human Resources ("DHR"); DHR's petition had been assigned case number JU-12-481.02, and the record reflects that the paternal grandfather and the paternal stepgrandmother had been awarded placement of the child by DHR. The record also indicates that DHR's petition was dismissed. Because of the nature of the allegations raised by the paternal grandfather and the paternal stepgrandmother in their petition, I would treat that petition as a dependency petition rather than a petition to modify custody. See L.R.S. v. M.J., 229 So. 3d 772, 776 (Ala. Civ. App. 2016) ("A juvenile court has exclusive original

jurisdiction over petitions alleging the dependency of a child.").

The juvenile court set the paternal grandfather and the paternal stepgrandmother's petition for a trial to be held on November 14, 2018. The parties, who were all pro se at that time, appeared before the juvenile court on November 14, 2018, for the trial. The transcript of the November 14, 2018, trial does not reflect that the juvenile court swore in any party. However, the juvenile court questioned the parties, and they testified about the child's school progress and her routine, the child's relationship with her sibling, and their opinions regarding their relative fitness as custodians. After the conclusion of the trial, the juvenile court entered a judgment awarding custody of the child to the paternal grandfather and the paternal stepgrandmother. The judgment did not explicitly find the child to be dependent.

The main opinion concludes that the juvenile court's failure to conduct a formal trial and its failure to swear in the parties merits reversal. However, we have explained that the failure to take sworn testimony is not reversible error if no objection to the failure to swear the witnesses is made

before the trial court. Williams v. Harris, 80 So. 3d 273, 277-78 (Ala. Civ. App. 2011).

> "The plain language of Rule 603[, Ala. R. Evid.,] mandates that an oath be administered before a witness is allowed to testify. However, both federal courts and Alabama courts have held that the failure to give such an oath or affirmation is deemed waived if not objected to in the trial court. Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986); Saxton v. State, 389 So. 2d 541, 543 (Ala. Crim. App. 1980) ('If a witness is allowed to give evidence before the jury without first being lawfully sworn, it is the duty of the judge, as soon as it is called to his attention, to immediately administer a proper oath to the witness.'); and United States v. Odom, 736 F.2d 104, 115 (4th Cir. 1984). More specifically, the Court of Criminal Appeals has held that, 'just as a defendant may waive any impediment to a witness's capacity to testify by failing to object, Conner v. State, 52 Ala. App. 82, 87, 289 So. 2d 650 (1973), cert. denied, 292 Ala. 716, 289 So. 2d 656 (1974), so may he waive the failure to place a witness under oath by the failure to object.' Merton, 500 So. 2d at 1306; Green v. State, 586 So. 2d 54, 55 (Ala. Crim. App. 1991) ('By failing to object, the appellant waived the issue of any alleged failure to place the witnesses under oath. Merton v. State, 500 So. 2d at 1306.'). The requirement that a party must object to any unsworn testimony at trial is not a novel concept. See Murphy v. State, 25 Ala. App. 237, 239-40, 144 So. 114, 116-17 (1932) ('wherever it appears that a witness is not so sworn (or affirmed), and the party against whom the witness is offered makes timely objections, such testimony must be excluded').
>
> "Moreover, the federal courts also follow the line of reasoning that failure to object waives any issue regarding the admissibility of unsworn

> testimony. See United States v. Perez, 651 F.2d 268, 273 (5th Cir. 1981) ('It has long been the general rule that even a failure to swear a witness may be waived. This may occur either by knowing silence and an attempt to raise objection after verdict or by the mere failure of counsel to notice the omission before completion of the trial.' (footnotes omitted)). Therefore, established Alabama caselaw and federal caselaw interpreting Rule 603 do not support Williams's contention that the failure to administer an oath to a witness renders such witness's testimony inadmissable, absent an objection in the trial court."

Williams, 80 So. 3d at 277-78.

No party objected to the failure of the juvenile court to swear in the parties before they, at the juvenile court's direction, began informing the juvenile court "what [they] think [it] need[s] to hear." "[I]t is well settled that '[r]ules governing the operation of the courts of this state are no more forgiving to a pro se litigant than to one represented by counsel.'" L.M. v. Shelby Cty. Dep't of Human Res., 999 So. 2d 505, 507 (Ala. Civ. App. 2008) (quoting Lockett v. A.L. Sandlin Lumber Co., 588 So. 2d 889, 890 (Ala. Civ. App. 1991)). Thus, the parties' unsworn statements were admissible evidence presented to the juvenile court.

Furthermore, "'[i]t 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.'" S.J. v. Limestone Cty. Dep't of Human 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)) (declining to entertain an argument that a mother's due-process rights had been violated when the mother failed to assert that argument before the trial court); accord E.P. v. Etowah Cty. Dep't of Human Res., 42 So. 3d 1250, 1255 (Ala. Civ. App. 2010) ("Generally, any allegations as to procedure -- whether of the presence of improper procedure or the absence of proper procedure -- must be raised by timely objection or by a timely posttrial motion."). The paternal grandmother appeared on the date set for trial, participated in the proceedings before the juvenile court, and did not object, either at the trial or after the trial via a postjudgment motion, to the juvenile court's failure to hold a more conventional trial. Thus, this case is quite unlike L.W. v. Cullman County Department of Human Resources, 181 So. 3d 1070 (Ala. Civ. App. 2015), because, unlike the mother in that case, the paternal grandmother had notice of the nature of the proceedings -- the case was set for a trial on the

petition filed by the paternal grandfather and the paternal stepgrandmother. In addition, the paternal grandmother appeared before the juvenile court on the date of the trial setting and failed to object to any lack of procedural due process in the juvenile court at any time. Any error that might be premised on the paternal grandmother's failure to present evidence or to cross-examine the paternal grandfather or the paternal stepgrandmother was therefore waived. See Calvert & Marsh Coal Co. v. Pass, 393 So. 2d 955, 958 (Ala. 1980) ("The failure of [a party] to ... request cross-examination of [a witness] amounted to an implied waiver of the right.").

Notwithstanding the foregoing, the paternal grandfather and the paternal stepgrandmother, as the petitioning parties, had the burden of establishing a basis for their request for custody, i.e., that the child was dependent in the care of the paternal grandmother because of her alleged drug use. See § 12-15-310(b) (requiring the juvenile court to take evidence when the allegations of a dependency petition are denied by the respondent custodian). The paternal grandfather testified that the child had seen her father arrested at the paternal

grandmother's house and said that the child "will be ... exposed to too much"; he also said that the child lacked stability in the home of the paternal grandmother. The paternal stepgrandmother testified vaguely about the fitness of the paternal grandmother's home, stating that "there's been fighting, there's been cops called." In its judgment, the juvenile court, perhaps relying in part on the record of the DHR action, determined that the paternal grandmother no longer had an issue with illegal drug use, thus determining that clear and convincing evidence did not support the allegations of the petition. See § 12-15-310(b).

Although "this court has held that when the evidence in the record supports a finding of dependency and when the trial court has made a disposition consistent with a finding of dependency, in the interest of judicial economy this court may hold that a finding of dependency is implicit in the trial court's judgment," J.P. v. S.S., 989 So. 2d 591, 598 (Ala. Civ. App. 2008), in my view, the testimony presented to the juvenile court failed to establish that the child was dependent based on the conduct of the paternal grandmother and therefore could not support an implicit finding of dependency.

Accordingly, I would reverse the judgment of the juvenile court and remand the cause with instructions that the juvenile court deny the paternal grandfather and the paternal stepgrandmother's petition and dismiss their action.

Donaldson, J., concurs.