REL: September 6, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180278

H.A.S.

v.

S.F.

Appeal from Madison Juvenile Court
(JU-18-406.01)

PER CURIAM.

On March 5, 2018, S.F. ("the paternal grandmother") filed a petition in the Madison Juvenile Court ("the juvenile court") seeking to have M.G. ("the child") declared dependent. In her petition, the paternal grandmother alleged that H.A.S.

("the mother") could not provide a stable home for the child based on the mother's having allegedly been evicted from her most recent residence and based on her alleged choice to live in a housing project, which the paternal grandmother alleged was in "an inherently dangerous neighborhood," where the mother was not on the lease, creating further risk of eviction and homelessness. The paternal grandmother further alleged, "on information and belief," that the mother's then-boyfriend, Y.S., who the mother later married, had a history of drug use and possession. Finally, the paternal grandmother alleged that her son, A.G. ("the father"), who is the child's father, had been recently sentenced to life in prison. Thus, the paternal grandmother contended that the child was dependent and that the child's best interests would be served by placing her in the custody of the paternal grandmother.

On March 26, 2018, the paternal grandmother sought an emergency pickup order from the juvenile court. In her motion, the paternal grandmother alleged that the mother had been avoiding service of the summons and dependency petition, that the child was not currently living with the mother in the housing project but, instead, was living with the mother's

mother, A.A. ("the maternal grandmother"), and that the mother and her family had refused to allow the paternal grandmother contact with the child. The paternal grandmother also alleged that she was concerned that the child had apparently suffered an eye injury, possibly as a result of physical abuse, for which, the paternal grandmother further alleged, the mother was unable to provide medical care because the child had missed a scheduled appointment with an ophthalmologist when the maternal grandmother had had transportation issues on the date of the appointment. Thus, the paternal grandmother alleged that she was entitled to an emergency order of custody so that she could attend to the medical needs of the child.

The juvenile court did not grant the paternal grandmother's motion for emergency custody. The juvenile court instead set the matter for a pendente lite hearing. After the pendente lite hearing on April 4, 2018, the juvenile court entered an order placing temporary custody of the child with the paternal grandmother. That order noted that the Department of Human Resources ("DHR") had become involved in the matter and intended to file dependency petitions regarding the child and the child's younger half sibling ("the half

sibling"). In addition, the juvenile court ordered that DHR arrange the mother's visitation with the child concurrently with any visits arranged between the mother and the half sibling.

Both the mother and the paternal grandmother filed motions seeking permission to conduct discovery, which the juvenile court granted. The juvenile court set the trial on the paternal grandmother's dependency petition for June 18, 2018; however, as a result of the parties' commencing but not completing discovery, the juvenile court reset the trial for September 10, 2018.

At the end of June 2018, a dispute arose between the parties regarding visitation. The paternal grandmother filed an objection to the mother's having visitation in her home supervised by members of the mother's family. The mother responded with what she styled as an "Emergency Motion To Clarify DHR Authority to Establish Visitation," in which she contended that DHR had been granted the authority to arrange visitation in the pendente lite order and that the paternal grandmother, who had not attended any Individualized Service Plan ("ISP") meetings, despite having been invited to do so,

could not "veto" visitation established by DHR. The juvenile court set the mother's motion for a hearing to be held on July 12, 2018. The record does not contain a transcript of that hearing or an order resolving the parties' conflict. However, on August 14, 2018, the juvenile court set the case for another pendente lite hearing to be held on August 30, 2018. That hearing was transcribed, and the transcript is included in the record on appeal.

As noted above, the trial was scheduled for September 10, 2018. On August 31, 2018, the mother filed a motion to continue the trial. She based her request on allegations that discovery was not complete because the paternal grandmother had not signed her interrogatory responses, the paternal grandmother had not answered several specific discovery requests, and three nonparty subpoenas had not yet been answered. In addition, the mother contended that she had scheduled a hair-follicle drug test and that its results would not be available in time for the scheduled trial. The mother specifically requested a 90-day continuance of the trial.

The mother amended her motion to continue on September 6, 2018, to state that she had received information from a third

party indicating that the paternal grandmother's business, A&K Heavenly Homes, Inc., which operates group homes for the intellectually disabled, had had seven complaints filed against it. The mother listed the substance of those complaints in her amended motion; they included information that the paternal grandmother had engaged in inappropriate sexual activity with one of her employees in the presence of residents at one of the group homes, that the paternal grandmother employed persons on probation for federal drug trafficking, and that the business had misused a resident's food stamps. In addition, the mother alleged that she had been informed that the paternal grandmother had been involved in a violent altercation and had been charged with assault; the mother alleged that she had requested the records regarding that incident from the municipal court involved but had not been successful in obtaining those records. Finally, the mother contended that she had obtained information indicating that her abnormal drug screens could be the result of a liver condition and requested the continuance so that she could undergo testing to determine whether she suffered from that condition.

The paternal grandmother objected to the requested continuance, commenting that the trial had been set for several months and that the mother had procrastinated in seeking discovery from third parties. She admitted in her objection to the amended motion that she had been charged with misdemeanor assault 15 years ago, but, she said, the charge had been dismissed. The juvenile court denied the requested continuance on September 7, 2018, stating in its order that "[t]he motions for continuance are not timely filed on the eve of trial after it was determined on August 30, 2018, that the mother had not presented three consecutive negative drug screens since this case began."

On September 10, 2018, the date on which the trial was scheduled, the mother filed a motion to continue asserting that her attorney, Jimmy Sandlin, was in the hospital because of an emergency medical condition. The juvenile court granted a two-day continuance, resetting the trial for September 12, 2018. On September 11, 2018, the mother filed another motion for a continuance in which she asserted that Sandlin had "been placed on medical leave by his physician and is unable to adequately represent his client at this time." The mother

attached a letter from Dr. Darla Cowart, which, in its entirety, read as follows:

> "I provide primary care for James Sandlin. Due to recent health problems, I recommend that he take a 90 day leave of absence from work. I expect a full recovery following this time.
>
> "I appreciate the consideration. If I can be of any assistance, please do not hesitate to contact me."

Based on the physician's recommendation, the mother again requested a 90-day continuance.

The paternal grandmother filed an objection to the mother's fourth motion to continue. The paternal grandmother noted that the mother had requested a 90-day continuance in her initial motion to continue and her amended motion to continue and alleged that, when those motions were denied, Sandlin conveniently became ill and again asked for a 90-day continuance. In addition, the paternal grandmother questioned whether Sandlin had, in fact, been hospitalized, because the 90-day excuse had been provided by Sandlin's primary physician and not by a treating physician from the hospital at which he had allegedly been treated on September 10, 2018. Thus, the paternal grandmother argued that the continuance was due to be denied, especially if Sandlin could not provide proof of his

hospital admission; however, the paternal grandmother posited that, if the court was inclined to grant the continuance, the matter should be continued for no more than seven days, because, she alleged, Sandlin's law partner, Daniel Aldridge, had indicated to the court on September 10, 2018, that he was prepared to try the case in Sandlin's absence.

The juvenile court denied the mother's fourth motion to continue. The trial commenced on Wednesday, September 12, 2018, and Aldridge appeared with the mother to again argue that the matter should be continued. The juvenile court refused to continue the trial, and Aldridge tried the case on September 12, 2018. The testimony was not completed on September 12, 2018, and, because the child's guardian ad litem had a previous obligation that prevented her from appearing on Thursday, September 13, 2018, and Friday, September 14, 2018, the juvenile court continued the matter to Monday, September 17, 2018. A different attorney, Melissa Miller, represented the mother at the September 17, 2018, trial.

After the two-day trial, the juvenile court entered a judgment on November 12, 2018, determining the child to be dependent and awarding her custody to the paternal

grandmother. The juvenile court specifically stated that it had not found the mother's testimony credible, found that the mother had had a history of instability in housing, found that the mother had been evicted twice, found that the mother's relationship with Y.S. was marked with domestic violence, found that the mother had not presented three consecutive negative drug screens between the institution of drug testing and the August 30, 2018, pendente lite hearing, found that DHR remained involved with the half sibling, and found that the mother had not properly attended to the child's medical needs. The mother filed a postjudgment motion, which the juvenile court denied after a hearing. The mother timely appealed.

On appeal, the mother first argues that the juvenile court's judgment determining the child to be dependent is not supported by clear and convincing evidence of the child's dependency at the time of the trial. She also challenges the juvenile court's denial of her motions to continue based on outstanding discovery and on Sandlin's inability to represent the mother at trial. The mother's third issue on appeal relates to several evidentiary issues that she maintains support a reversal of the juvenile court's judgment. Finally,

the mother argues that the juvenile court improperly applied a local rule concerning the consideration of abnormal drug screens as positive and unfairly prevented the mother from rebutting that "presumption."

We are guided in our review of the mother's appeal by the following principles. A "dependent child" is defined in Ala. Code 1975, § 12-15-102(8), to include:

> "a. A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:
>
> > "1. Whose parent, legal guardian, legal custodian, or other custodian subjects the child or any other child in the household to abuse, as defined in subdivision (2) of [Ala. Code 1975, §] 12-15-301 or neglect as defined in subdivision (4) of [§] 12-15-301, or allows the child to be so subjected.
> >
> > "2. Who is without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child.
> >
> > "3. Whose parent, legal guardian, legal custodian, or other custodian neglects or refuses, when able to do so or when the service is offered without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child.
> >
> > "....

> "6. Whose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.
>
> "....
>
> "8. Who, for any other cause, is in need of the care and protection of the state."

"[T]he test [for determining whether a petitioner has established a child's dependency] is whether [the petitioner] has presented clear and convincing evidence demonstrating that the parental conduct or condition currently persists to such a degree as to continue to prevent the parent from properly caring for the child." M.G. v. Etowah Cty. Dep't of Human Res., 26 So. 3d 436, 442 (Ala. Civ. App. 2009) (plurality opinion). The juvenile court may consider the totality of the circumstances when making a finding in a dependency proceeding. G.C. v. G.D., 712 So. 2d 1091, 1094 (Ala. Civ. App. 1997). See also D.P. v. State Dep't of Human Res., 571 So. 2d 1140 (Ala. Civ. App. 1990). This court cannot reweigh the evidence presented to the juvenile court, and we cannot revisit its conclusions about the credibility of the witnesses before it. See Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004). Although the juvenile court's factual findings in a

dependency case when the evidence has been presented ore tenus are presumed correct, T.D.P. v. D.D.P., 950 So. 2d 311 (Ala. Civ. App. 2006), a finding of dependency must be supported by clear and convincing evidence. Ala. Code 1975, § 12-15-310(b). When reviewing a dependency judgment on appeal, "[t]his court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing." K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016). That is, this court "'must ... look through ["the prism of the substantive evidentiary burden," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986),] to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would "produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion."'" K.S.B., 219 So. 3d at 653 (quoting Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008), quoting in turn Ala. Code 1975, § 25-5-81(c)).

The testimony and documentary evidence presented at the trial reveals the following facts. The mother and the father were never married. The mother was 20 years old at the time of trial. At the time of the filing of the dependency petition and at the time of trial, the father was incarcerated and serving a life sentence for two counts of felony murder and three counts of robbery. The child, who was born on May 4, 2015, had lived with the mother since her birth. The mother had received a tuition scholarship to Berea College in Kentucky, and she had relocated there in August 2016. However, the mother testified that, despite the scholarship, the income from her work-study employment had not been enough to support her and the child and to afford day care, so, in January 2017, she withdrew from college and returned to Alabama. The mother requested the assistance of the paternal grandmother to meet the expenses of the move, and the paternal grandmother rented a moving truck to assist the mother.

The mother had moved from Kentucky to an apartment in Huntsville, which she leased from January 2017 to June 2017. She testified that she had broken the lease at that apartment by choosing to move out, resulting in an eviction notice being

served upon her. The eviction documentation pertaining to that residence in the record, however, reflects that the mother was served a notice of termination for failing to pay the April 2017 rent. The mother testified that she then moved to another apartment in Huntsville; the mother said that she decided to move from that apartment in January 2018. The eviction documentation relating to that apartment also indicates that the mother had failed to pay her rent.

According to the mother, she has held six jobs. She said that she had worked for Merry Maids, a cleaning service, and for Right at Home, a sitting service, at the same time. She testified that she had also worked for a time at a gas-station convenience store, at a Burger King fast-food restaurant, and at a McDonald's fast-food restaurant. At the time of trial, she was employed at a Hardee's fast-food restaurant, and she had just been promoted to a management position, in which she was earning $9.00 per hour. The mother testified that she typically worked the morning shift, which required her to be at work at 3:00 a.m.; however, she said that she was sometimes called on to work other shifts. The mother also testified

that Y.S. was employed at Huntsville Utilities, where he earned between $2,000 and $3,000 per month.

The mother testified about the child's eye condition. She testified that she had noticed that the child had what appeared to be a lazy eye and that she had made an appointment for the child to have her eye examined. However, the mother testified, she had had to work on the date of the first appointment, and, she said, she had asked the maternal grandmother to transport the child to the appointment. The mother said that the maternal grandmother's automobile had been repossessed on the date of the appointment, rendering her without transportation to take the child to the appointment. According to the mother, she made a second appointment for the child, to which she took the child; however, she said, the child's new Medicaid card had not yet arrived in the mail and the ophthalmologist could not use the previous card. Thus, the mother testified, she made a third appointment for the child, but, she said, the child was placed in the temporary custody of the paternal grandmother before the child could attend that appointment.

The paternal grandmother admitted the mother's drug-test history into evidence at the pendente lite hearing.[1] The mother tested positive for marijuana in April 2018, when the child was first placed with the paternal grandmother. Lisa Kersey, the DHR caseworker assigned to the child's case, testified at the pendente lite hearing that the mother was placed on "color code" drug testing beginning on June 12, 2018. According to Andra Carter, the senior lab technician at "Madison County Sentencing and Release," who testified at the trial, the mother's color had been called 11 times.[2] Carter testified that the mother had tested negative for any intoxicating substances on June 5, June 25, July 6, and August 8, 2018. However, he testified that the mother had had two "abnormal" drug screens on June 13, 2018, and July 23, 2018.

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[1]No party objected to the juvenile court's consideration of the testimony and documentary evidence admitted at the August 30, 2018, pendente lite hearing at the dependency trial.

[2]Based on Carter's testimony, it appears that he counted each of the mother's drug screens listed on the mother's report to determine that the mother's color had been called 11 times. However, Kersey's testimony indicated that the mother had not been on color-code testing before June 12, 2018; two drug screens on the mother's report predate the date of her placement on color-code testing, and one drug screen was taken on August 30, 2018, at the juvenile court's direction.

In addition, Carter testified that the mother had failed to appear for a drug test on August 21, 2018. Carter said that the mother had taken a drug screen on August 22, 2018, and that the results of that drug screen were negative. Carter further testified that the mother had taken a drug screen on September 4, 2018, the results of which were also negative.

Both Kersey and the mother testified regarding the mother's failure to appear for her drug screen on August 21, 2018. The mother testified that she had begun calling the number to check the color being called each day before she left for work in the morning, and, at first, she was unaware that she was placing her calls before the color was changed on the message each day. The mother testified that she discovered on August 22, 2018, that her color had been called the previous day and that she had contacted Kersey when she realized her mistake. Kersey testified that she had given the mother a slip permitting her to test that day and that the mother had taken a drug screen on August 22, 2018, the results of which were negative. Kersey also testified that DHR considered abnormal screens to be abnormal; she did not testify that DHR considered those tests to be positive tests.

The paternal grandmother testified that, when the mother returned to Huntsville in January 2017, she had had a black eye, which, the paternal grandmother said, the mother had attempted to obscure by makeup. According to the paternal grandmother, the mother had told her that she had needed to move back to Huntsville because of "an altercation between her and [Y.S.], and she had to be off campus." The mother denied that Y.S. had ever hit her.

Kersey testified at the pendente lite hearing that DHR had no concerns about the mother's home, which was properly kept and appropriate. She also testified that the child was not abused or neglected in the mother's care. However, although the mother had been granted unsupervised visits with the half sibling because Kersey had been informed of the mother's negative drug screens, the attorney for the paternal grandmother presented to Kersey at the pendente lite hearing the mother's abnormal drug screens, of which Kersey had been unaware. As noted above, Kersey was aware of the mother's failure to appear for the August 21, 2018, drug screen, and she testified that she had allowed the mother to make up that screen.

Kersey testified further at the trial on September 17, 2018. She again testified that the mother's home was appropriate for the child, and she also testified that both the mother and Y.S. had been cooperative and responsive to DHR's requests. Kersey admitted that the mother's marijuana use and her previous residential instability remained concerning; however, she noted that the mother had been living in her current residence since February 2018.

Kersey also testified that DHR had no safety concerns regarding the paternal grandmother's home. She described the interactions between the paternal grandmother, her husband, T.W.,[3] and the child as "good" and "loving." When questioned about her knowledge of T.W.'s criminal history and the fact that he had served several years in federal prison, Kersey indicated that she had been unaware of that information. She said, however, that she could not answer whether she would

[3]The paternal grandmother referred to T.W., who she had married in 2005, as her husband. However, she had divorced him in 2017. She later testified that they had "never really separated like that," but she also testified that they intended to remarry later in 2018. Thus, for purposes of this opinion, we consider T.W. to be the paternal grandmother's husband.

have concerns about the child's placement in the paternal grandmother's home based on T.W.'s criminal history.

Libby Brown testified that she had performed a home study on the paternal grandmother's home. She testified that, based on her home-study report, DHR had approved the paternal grandmother for placement. Brown explained that she had discovered that T.W. had criminal convictions: one in 1995, for cocaine distribution and assault, and one in 2000, for driving while under the influence of drugs or alcohol. When asked whether she had checked for federal convictions, Brown admitted that she does not routinely check federal records. The copy of the home-study report submitted as an exhibit contains the following statement: "[DHR] defers to the court system to check for any additional criminal records." (Emphasis added.)

The mother's attorney admitted into evidence the certified record of T.W.'s June 2011 federal convictions for two counts of distribution of a substance containing heroin and one count of possession with the intent to distribute a substance containing heroin, for which T.W. had been sentenced to 188 months in the federal penitentiary on each count, to

run concurrently; T.W.'s sentence also included 60 months of federally supervised probation upon his release from incarceration, which had occurred, according to the paternal grandmother's testimony, in June or July 2017.[4] Brown testified that she would need to assess the information but that she "would have concerns" about the paternal grandmother's home in light of T.W.'s 2011 convictions. She also noted that T.W. had been present during her home-study interview in April 2018 and that neither he nor the paternal grandmother had disclosed his 2011 convictions or recent imprisonment.

Dr. Stacy Ikard testified that she had counseled with the child on four occasions. She testified that the child seemed to be a cheerful child and that she had been affectionate toward the paternal grandmother and T.W. Dr. Ikard noted that the child had also been excited to "video chat" with the

[4]We note the inconsistency between the date of the federal convictions, the date of T.W.'s release from incarceration, and the testimony of the paternal grandmother that T.W. had been incarcerated for seven or seven and a half years. However, we note that the length of T.W.'s incarceration might have been impacted by possible incarceration in the county jail or other detention facility before his federal convictions.

father, who, as mentioned previously, was incarcerated. According to Dr. Ikard, she had no concerns about T.W.'s criminal history or recent incarceration.

However, Dr. Ikard expressed concern over the mother's "substance-abuse issues" and noted that the child needed stability, an environment free of conflict, and to have her medical needs met. Dr. Ikard admitted that she had not ever met with the mother, who she said that the child had "mentioned" during their sessions. Dr. Ikard also commented that she had "heard some anger toward" Y.S. from the child, but she added that it had sounded like the child's anger had resulted from a recent interaction between the two and that the child had felt that he was mean to her. She testified that she had not been troubled by the child's "anger" toward Y.S. and did not perceive him as a safety concern.

The paternal grandmother testified that she owns and operates A&K Heavenly Homes, which, she said, operated group homes for clients with intellectual disabilities. She also said that she has an unspecified interest in an entity named "Stack Maintenance and Construction." According to the paternal grandmother, her income is $15,000 per month.

As noted above, the paternal grandmother's husband, T.W., who lives with and works for the paternal grandmother, was released from federal incarceration in June or July 2017. The paternal grandmother indicated awareness of his convictions and incarceration at different points in her testimony. However, when Aldridge initially attempted to establish the paternal grandmother's knowledge of the drug convictions of both T.W. and her first husband, L.G., objections were raised to the lack of certified conviction records; as noted above, the certified federal conviction record for T.W.'s 2011 drug-distribution convictions was ultimately submitted as evidence. The paternal grandmother testified that she did not allow her children to be around people who sold drugs and said: "What people do on their own time, I have -- I don't have anything to do with that. I haven't been convicted of selling drugs. I've never sold drugs."

The paternal grandmother testified that her concerns about the mother and Y.S. included drug use and "living in the projects." She complained that Y.S. "doesn't treat the child fair," which she based on her observations that the child wanted "mommy" and not Y.S. at visitations, reports that the

child cried when Y.S. would pick her up from day care, and allegations that the half sibling received more attention than the child. The paternal grandmother also testified that she had concerns about the child's being in the care of the maternal grandmother, who had tested positive for marijuana. When asked if the mother's more recent negative drug screens, her stable residence and employment, and her testimony that she had reliable transportation would alleviate any concerns about the mother's ability to rear the child, the paternal grandmother answered in the negative; the paternal grandmother further indicated that the mother and Y.S. could take no measures that would convince her of their ability to parent the child.

The mother's first argument is that the record lacks the appropriate quantum of evidence to support the juvenile court's findings and ultimate conclusion that the child was dependent at the time of the trial. The paternal grandmother argues that the mother had previously stipulated to the child's dependency, and the record contains a transcript from a hearing held on June 18, 2018, at which the mother

stipulated in open court to the dependency of the child.[5] Thus, the paternal grandmother contends that the September 2018 trial was merely a dispositional hearing, see Ala. Code 1975, § 12-15-311(a), and that the standard applicable to the mother's appeal is the best-interest standard. See, e.g., J.P. v. S.S., 989 So. 2d 591, 600 (Ala. Civ. App. 2008) (explaining that the best-interest standard applies to a juvenile court's determination regarding a dependent child's custody). Although the best-interest standard does apply to the disposition of dependent children, the paternal grandmother is incorrect insofar as she argues that the juvenile court was not required to find that the child was dependent at the time of the disposition of her custody.

A juvenile court may hold its adjudicatory and dispositional hearings on different dates. See Ala. Code 1975, 12-15-311(a) ("If the juvenile court finds ... that a child is dependent, the juvenile court may proceed

[5]The case-action-summary sheet in the present case contains no entry indicating that an order memorializing that stipulation was entered; however, the paternal grandmother presented as an exhibit at trial an order entered in the action brought by DHR concerning the child recognizing the stipulation.

immediately, in the absence of objection showing good cause[,] or at a postponed hearing, to make proper disposition of the case."); Rule 25(a), Ala. R. Juv. P. (indicating that in dependency actions, among other proceedings, "the juvenile court may proceed immediately to a dispositional hearing after adjudication or may set a dispositional hearing for a later date"). However, when those hearings are held on separate dates, the child must still be dependent on the date of disposition. See H.C. v. S.L., 251 So. 3d 793, 794 (Ala. Civ. App. 2017). This is so because the juvenile court has jurisdiction to make a disposition of the child only when the child is dependent at the time of that disposition. H.C., 251 So. 2d at 794.

In H.C., we considered whether a July 2016 adjudication of dependency could support a December 2016 disposition of the custody of the child involved. Id. We determined in H.C. that,

> "[i]n order to make a custodial disposition of the child at the time the December 2016 dispositional judgment was entered, the juvenile court was required to find that the child was dependent at the time of the disposition. T.B. v. T.H., 30 So. 3d 429, 431 (Ala. Civ. App. 2009). '"[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in fact be

> dependent at the time of that disposition."' V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting K.B. v. Cleburne Cty. Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result)). See also D.D.P. v. D.M.B., 173 So. 3d 1, 3 (Ala. Civ. App. 2015) (same). If the child is not dependent at the time of the dispositional judgment, the juvenile court lacks jurisdiction to make a custody determination. M.D. v. S.C., 150 So. 3d 210, 212 (Ala. Civ. App. 2014); L.R.J. v. C.F., 75 So. 3d 685, 687 (Ala. Civ. App. 2011); see also C.C. v. B.L., 142 So. 3d 1126, 1129 (Ala. Civ. App. 2013) ('In light of the juvenile court's finding that the child was not dependent, the juvenile court lacked jurisdiction to enter a judgment affecting the custody of the child, including visitation.')."

H.C., 251 So. 3d at 794.

As was the case in H.C., the delay between the stipulation of dependency in June 2018 and the entry of the November 2018 judgment awarding custody to the paternal grandmother in the present case was five months. Thus, like in H.C., we adhere to the long-standing principle that a child must be dependent at the time of the juvenile court's disposition of that child's custody. We will therefore review both the juvenile court's factual findings challenged by the mother and its conclusion, based on those findings, that the child was dependent to determine whether the juvenile court

had before it evidence from which it could be clearly convinced of the child's continued dependency.

In her brief, the mother first challenges the juvenile court's alleged finding that "the mother had not produced three consecutive negative drug screens during the entirety of these proceedings." She contends, correctly, that the record reflects that, as of the September 17, 2018, trial date, the mother had, in fact, produced three consecutive negative drug screens. However, the juvenile court's judgment actually reads as follows: "As of the date of the mother's requested emergency hearing on August 30, 2018, the mother had not presented three, consecutive negative drug screens during the entirety of these proceedings." This finding was supported by evidence that the juvenile court could have found to be clear and convincing.

However, the evidence undisputedly demonstrated that the mother had, in fact, produced three consecutive negative drug screens at the time of the completion of the September 2018 trial. DHR had placed the half sibling in the custody of the mother and Y.S., albeit under DHR's supervision and monitoring. The evidence suggested that the mother and Y.S.

had cooperated with DHR and that they had complied with their ISP steps sufficiently to support reunification of the family. Although the mother had produced two abnormal drug screens, she had not done so since July 2018, and her missed drug screen in August was very clearly excused by Kersey, who had accepted the mother's explanation and permitted her to take a drug screen on the following day when the mother realized her mistake. Furthermore, no evidence in the record indicated that the mother's drug use had actually impacted her ability to rear the child, who Kersey had testified had not been abused or neglected in the mother's custody. Despite the evidence regarding the mother's failure to produce three consecutive negative drug screens before the August 30, 2018, pendente lite hearing, the evidence contained in the record does not clearly and convincingly support a conclusion that the child is dependent in the mother's custody based on concerns about her purported use of marijuana.

The mother next specifically contends that the evidence before the juvenile court did not clearly and convincingly establish that the mother had suffered from periods of housing instability, as the juvenile court found. The mother argues

that she presented evidence indicating that her changes in residence were for purposes of moving to a larger residence or to a safer neighborhood. What the mother fails to recognize is that the juvenile court expressly found the mother not to be credible. The juvenile court was not required to believe the mother's stated reasons for her two evictions, the records of which were admitted into evidence and revealed that they were based on nonpayment of rent. Insofar as the mother challenges the juvenile court's finding as being unsupported based on the fact that the mother had been living in the same residence for approximately seven months at the time of trial, we note that the juvenile court did not find that the mother's housing was not currently stable but, instead, found that the mother had a history of housing instability, which finding was supported by evidence the juvenile court could have found to be clear and convincing.

Although the juvenile court's factual finding that the mother had suffered from instability in housing in the past is supported by the evidence, the record lacks any evidence indicating that the mother's evictions had resulted in homelessness or had put the child in danger. The mother

testified that she had moved from each apartment from which she had been evicted into another apartment. Even if the juvenile court rejected the mother's testimony on that point, the juvenile court was presented no contrary evidence from which it could have concluded that the child had not been provided adequate shelter during the periods of transition from one apartment to the next. See Burlington Coat Factory of Alabama, LLC v. Butler, 156 So. 3d 963, 971 (Ala. Civ. App. 2014) (noting that the trier of fact "cannot infer a fact from the lack of evidence"). Kersey testified that DHR had specifically determined that the child had not suffered neglect or abuse at the hands of the mother and Y.S. and that their current home was appropriate. Insofar as the juvenile court also found that the mother had moved to Kentucky with "no plan," we note that the testimony was that the mother had moved to Kentucky to attend college. The record lacks evidence indicating that the mother's later inability to meet her financial obligations while a college student in Kentucky, although unfortunate and perhaps due to some lack of planning by an 18 year old, subjected the child to any neglect or abuse. Thus, even indulging the ore tenus presumption in

favor of the juvenile court's findings that the mother had a history of instability in housing and had been evicted twice, we conclude that the evidence before the juvenile court is insufficient to have clearly convinced that court that the mother's history of unstable housing and her two evictions had resulted in the dependency of the child.

The mother also challenges the juvenile court's finding that "the mother did not properly attend to the child's medical needs concerning eyesight." Indeed, a parent's failure to provide for the medical needs of his or her child, when the parent is able to do so, may support a finding of dependency. See § 12-15-102(8)a.3. (defining a "dependent child" as one "[w]hose parent ... neglects or refuses, when able to do so or when the service is offered without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child"). The paternal grandmother's verified motion for an emergency pickup order alleged, among other things, that the maternal grandmother had been unable to take the child to a previously scheduled eye appointment. Although the paternal grandmother alleged in her motion that the child had suffered an eye injury that was

going untreated, she testified at trial that the child had been diagnosed with a weakened eye muscle or "lazy eye" and that she had been prescribed corrective lenses to address the issue.

The mother testified that the child had had three scheduled eye appointments in spring 2018: the first, which was apparently scheduled for a date in March 2018, was rescheduled because of the transportation issues encountered by the maternal grandmother; the second, which was on April 3, 2018, had to be rescheduled because of an issue with the child's Medicaid card; and a third, scheduled for April 9, 2018, was missed because the child had been placed in the custody of the paternal grandmother. The record also contains an exhibit from the child's ophthalmologist, which reiterates the mother's testimony concerning the April 3, 2018, eye appointment and the issue with the Medicaid card. Thus, despite the fact that the juvenile court found the mother not to be credible, the other evidence in the record regarding the child's eye condition indicates that the mother had, in fact, made attempts to address the child's eye condition before the paternal grandmother was awarded custody of the child. We

conclude therefore that the record lacks evidence from which the juvenile court could have been clearly convinced that the mother had not properly attended to the child's medical needs.

According to the mother, the juvenile court's finding that Y.S. had committed domestic violence against the mother is also not supported by sufficient evidence. The substance of the paternal grandmother's testimony was that the mother had admitted to her that she had had to leave college because of an altercation between her and Y.S. and that the mother had had a black eye upon her return from college. Those statements, which were believed by the juvenile court, serve as a basis for the inference that the mother had suffered a black eye in an altercation with Y.S. that had required her to withdraw from college and return to Alabama. Although the mother denied having had a black eye or having suffered any domestic violence at the hands of Y.S., the juvenile court stated in its judgment that it had not found the mother to be credible. In addition, as further support for its conclusion that domestic violence was present in the child's home, the juvenile court commented on Y.S.'s conduct on the first day of the trial. In its judgment, the juvenile court indicated that

it had observed what it characterized as Y.S.'s "quick temper" and "hostility" when he was asked to wait in the hall while the trial was being conducted.[6] We cannot reweigh the evidence presented to the juvenile court, and we certainly cannot revisit its conclusions about the credibility of the witnesses before it. See Ex parte R.E.C., 899 So. 2d at 279. Thus, the juvenile court's finding that Y.S. had committed domestic violence against the mother is adequately supported by evidence that the juvenile court could have found to be clear and convincing.

The mother further contends that, in order for domestic violence to serve as a basis for a finding of dependency, "the paternal grandmother was required to prove that [the child] or any other child in [the mother's] home was subjected to abuse." Indeed, Ala. Code 1975, § 12-15-102(8)a.1., indicates that a child is dependent if that child or another child in

[6]Based on its observation of Y.S., the juvenile court concluded in its judgment that Y.S. "has an anger-management problem at the very least." We assume that the juvenile court was merely observing that Y.S. did not keep a check on his temper on that one occasion and not that the juvenile court was diagnosing Y.S. with an anger-management condition, a diagnosis that it is not empowered to make in the absence of expert testimony.

the household is exposed to "abuse," which is defined in Ala. Code 1975, § 12-15-301(2), to include "[h]arm or the risk of harm to the emotional, physical health, or welfare of a child." The definition in § 12-15-301(2) further provides that "[h]arm or the risk of harm to the emotional, physical health, or welfare of a child can occur through nonaccidental physical or mental injury ...." We cannot agree with the mother to the extent that she might be arguing that the paternal grandmother was required to prove that the child or the half sibling suffered physical abuse in the mother's home as a result of the alleged domestic violence. A child's exposure to domestic violence in his or her home could, in fact, be considered "abuse," as defined in § 12-15-301(2), if the child was impacted by that domestic violence and suffered a mental or emotional injury as a result or was exposed to domestic violence and is at risk of mental or emotional harm as a result.

That being said, we agree with the mother that no evidence was presented to the juvenile court regarding whether the child or the half sibling were present during any incident of domestic violence, had witnessed any domestic violence, or

whether domestic violence had impacted, or was likely to impact, the child or the half sibling in any way. Although the juvenile court was free to disbelieve the mother's denial that she had suffered a black eye at the hands of Y.S., the only evidence pertaining to domestic violence in the mother's home was that of the paternal grandmother, who testified that she had observed that one black eye in January 2017. No evidence suggested that the mother had suffered continued domestic violence. According to Kersey, DHR had deemed the mother's home suitable and DHR had returned the half sibling to the home of the mother and Y.S. We reiterate that Kersey testified that DHR had determined that the child had not been abused or neglected by the mother or Y.S. and that she had described the mother and Y.S. as "cooperative." Furthermore, the evidence indicating that the child had "some anger toward" Y.S. was, according to Dr. Ikard, linked to a particular recent interaction between the child and Y.S. and was not, in her opinion, significant enough to raise concerns for the child's safety. The juvenile court could not properly infer from testimony that the mother suffered one black eye in 2017 and evidence indicating that the child might have been angry

at Y.S. for some reason at one visit with her counselor that "there [was] domestic violence in the home of the child" at the time of the trial in September 2018 or that domestic violence had had, or likely would have, an impact on the child. Without such evidence, the juvenile court could not have been clearly convinced that the child was dependent in the custody of the mother based on an incident of domestic violence.

We have reviewed the record to determine whether the juvenile court could have been clearly convinced by the evidence presented to it that the child was dependent in the custody of the mother. Even indulging the presumption in favor of the juvenile court's factual findings, we conclude that the record lacks sufficient evidence from which the juvenile court could have been clearly convinced that the child was dependent in the care of the mother as of the time of the September 2018 trial. The record lacks evidence establishing that any of the conditions of the mother "currently persist[ed] to such a degree as to continue to prevent the [mother] from properly caring for the child." M.G., 26 So. 3d at 442. The judgment of the juvenile court is

reversed, and the cause is remanded for the entry of a judgment dismissing the paternal grandmother's dependency petition. See Ala. Code 1975, § 12-15-310(b) (requiring a juvenile court to dismiss a dependency petition if the allegations in that petition are not proven by clear and convincing evidence); L.R.S. v. M.J., 229 So. 3d 772, 776 (Ala. Civ. App. 2016) ("[A] juvenile court has jurisdiction only to dismiss a dependency petition if the child at issue is not adjudicated to be dependent."). In light of our resolution of the mother's first issue, we pretermit consideration of the other issues raised in her brief on appeal. See L.M.W. v. D.J., 116 So. 3d 220, 223 (Ala. Civ. App. 2012) (pretermitting consideration of additional arguments on appeal when one argument is dispositive of the appeal).

REVERSED AND REMANDED WITH INSTRUCTIONS.

All the judges concur.