REL: July 26, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180394

T.D.

v.

S.R., R.R., and A.M.

Appeal from Jefferson Juvenile Court
(JU-15-1658.02)

EDWARDS, Judge.

In December 2017, T.D. ("the father") filed in the Jefferson Juvenile Court ("the juvenile court") a form petition to modify a previous judgment of the juvenile court based on the alleged relapse into drug and alcohol abuse by

A.M. ("the mother"), who the father alleged was the child's custodial parent. The father also filed a form "complaint" in which he alleged that the child was dependent based on the mother's relapse into drug and alcohol abuse and that the child had been abandoned to his custody by the mother. In August 2018, the juvenile court entered a pendente lite order in which it indicated that it had granted the oral motion to intervene made by the child's maternal aunt, S.R. ("the maternal aunt"), and the child's maternal uncle, R.R. ("the maternal uncle"), over the father's objection and awarded S.R. custody of the child pending resolution of the litigation. After a trial held on October 23, 2018, the juvenile court entered a judgment on January 14, 2019, awarding custody of the child to the maternal aunt and the maternal uncle and awarding the father certain specified visitation rights. The father filed a timely notice of appeal on January 25, 2019.

The following legal principles guide our review of the father's appeal. 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 "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:
>
> "....
>
> "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.
>
> "....
>
> "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."

A finding of dependency must be supported by clear and convincing evidence. Ala. Code 1975, § 12-15-310(b). When a juvenile court has not made specific factual findings in support of its judgment, we must presume that the juvenile court made those findings necessary to support its judgment, provided that those findings are supported by the evidence. K.C. v. Jefferson Cty. Dep't of Human Res., 54 So. 3d 407, 413 (Ala. Civ. App. 2010). In addition, 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).

The father first argues that the juvenile court erred by granting, over his objection, the maternal aunt and the maternal uncle's oral motion to intervene. The father first contends that, under Rule 24(c), Ala. R. Civ. P., the motion to intervene was required to be in writing and served pursuant to Rule 5, Ala. R. Civ. P. Indeed, Rule 24(c) presupposes that the party wishing to intervene will serve a written motion seeking intervention. However, Rule 7(b)(1), Ala. R. Civ. P., permits oral motions when such motions are made during a trial or a hearing. The pendente lite order indicates that the matter had been called for a hearing before the juvenile court at which the maternal aunt and the maternal uncle orally moved to intervene; thus, we conclude that the oral motion to intervene was proper under Rule 7(b)(1).

The father argues that the juvenile court was not permitted to grant the maternal aunt and the maternal uncle's motion to intervene before the child was declared dependent. He cites Kennedy v. State Department of Human Resources, 535 So. 2d 168, 170 (Ala. Civ. App. 1988), in which this court

indicated that a petition to intervene filed by relatives in a dependency case should have been denied because, this court said, "we [have] held that a relative may petition the court for custody after parental rights are terminated." That statement in Kennedy was arguably dicta, because this court pretermitted other arguments made by the mother in that case based on the determination that the evidence supported the conclusion that the child involved was dependent; furthermore, we noted that the allowance of the intervention was, if error at all, merely harmless error. 535 So. 2d at 170. Moreover, Kennedy appears to be an aberrant holding, the continued viability of which is seriously doubtful in light of later precedents. See F.W. v. T.M., 140 So. 3d 950, 958 (Ala. Civ. App. 2013) (stating that "[t]his court has routinely recognized that relative caregivers and foster parents may seek and be granted intervention in a dependency action"); see also J.P. v. S.S., 989 So. 2d 591 (Ala. Civ. App. 2008) (affirming the award of custody to an aunt and an uncle who had intervened in a dependency action to seek permanent custody of the child). Thus, we find no reversible error in

the juvenile court's decision to allow the maternal aunt and the maternal uncle to intervene.

The father next argues that the juvenile court erred in stopping the trial in the middle of the father's presentation of evidence. The father contends that he was deprived of his right to present his own testimony and the testimony of his witnesses, both of which, he argues correctly, are hallmarks of due process. See Crews v. Houston Cty. Dep't of Pensions & Sec., 358 So. 2d 451, 455 (Ala. Civ. App. 1978) (explaining that due process requires, among other things, "an opportunity to present evidence and arguments"). However, we note that the father's counsel, upon being informed of "where the [juvenile] court [was] leaning" after a short break taken during the redirect examination of the father by his counsel, reported to the juvenile court that the father did not desire to continue the trial. Thus, as the child's guardian ad litem and the mother both contend, the father waived any error that the juvenile court may have committed by acquiescing to the discontinuation of the trial. See N.G. v. Blount Cty. Dep't of Human Res., 216 So. 3d 1227, 1236 (Ala. Civ. App. 2016) (concluding that the parents waived their right to an

evidentiary hearing in a dependency case by stipulating to dependency and that, therefore, they "cannot now complain that they were deprived of their right to testify and to cross-examine witnesses for the state").

The father next argues that the juvenile court erred in determining that the child should be placed in the custody of the maternal aunt and the maternal uncle. The father specifically contends that the juvenile court did not explicitly determine that the child was dependent and that the evidence presented at trial does not support an implicit determination that the child was dependent. See J.P. v. S.S., 989 So. 2d at 598 ("[T]his 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."); see also M.W.H. v. R.W., 100 So. 3d 603, 607 (Ala. Civ. App. 2012). He relies on the principle that,

> "[a]bsent clear and convincing evidence supporting a finding of dependency, a juvenile court cannot divest a parent of his or her parental rights, see, e.g., L.M. v. D.D.F., 840 So. 2d 171, 173 (Ala. Civ.

> App. 2002); moreover, the child must be dependent at the time the juvenile court enters its judgment -- not just in some periods preceding the initiation of the dependency proceeding. V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008)."

R.Y. v. C.G., 50 So. 3d 1090, 1092 (Ala. Civ. App. 2010).

The testimony at trial indicated that the father had had at least three convictions for domestic violence based on assaults against the mother, one of which had resulted from an assault on the mother in July 2015 when she was six months pregnant with the child and another of which was based on an assault on the mother in January 2018 in the presence of the child. The father had been placed on five years of probation as a result of his conviction for the 2015 assault, his probation was revoked in 2018 as a result of the 2018 assault, and he spent a combined 95 days incarcerated in both the county jail and a state penitentiary as a result of that revocation; the father remained on probation at the time of the trial. The father admitted his previous abuse of drugs and alcohol. The father further testified that he has been diagnosed with bipolar disorder and that he takes both an antipsychotic medication and a medication to treat his bipolar disorder. He also admitted that, if he does not take his

medications for a few days, he becomes unstable and could fly into a rage, during which he might not be fully capable of controlling his actions.

Although the father testified that the mother's condition had improved since she and the child had gone to live with the maternal aunt and the maternal uncle, his other testimony cast doubt on the mother's present ability to parent the child. He explained that he had been called upon to take custody of the child in May 2017 because of the mother's relapse into drug and alcohol abuse, that the mother had suffered a second relapse -- by taking heroin -- later that same summer, that the mother had moved in and out of his residence in the fall of 2017 and the early winter of 2018 as a way to escape a volatile relationship, and that the maternal aunt and the maternal uncle had kicked the mother out of their home in September 2018, shortly before the trial. The father indicated that the mother has a history of abusive relationships, including the one with him. Furthermore, the mother has not objected to the award of custody to the maternal aunt and the maternal uncle; in fact, she appears before this court as an appellee, arguing in support of the

juvenile court's judgment and conceding that the child is dependent as to her because she is not presently capable of parenting the child.

In its judgment, the juvenile court expressly found that the father had committed domestic violence against the mother on two occasions and had been incarcerated for having done so and that the mother suffers from substance-abuse issues for which she was seeking treatment. Based on the evidence presented, and despite the fact that that evidence was limited, we cannot conclude that the juvenile court lacked evidence from which it could conclude that the child was dependent, especially as to the father. The juvenile court remarked at trial that the father had made commendable strides in his efforts to rehabilitate himself, stating: "You have been doing an excellent job of fighting your demons. But that's the reason I don't think you need an added burden of a child with you while you fight through those demons." The juvenile court had ample evidence to support its conclusion that the father, although he had improved his circumstances, was not yet able to take on the responsibility for the child because of his past issues with domestic violence and his

mental-health issues, which could pose a risk to the child were the father to miss doses of his medications. See, e.g., J.P. v. T.H., 170 So. 3d 681, 683 (Ala. Civ. App. 2014) (indicating that the rebuttable presumption against placement of a child in the custody of a perpetrator of domestic violence set out in Ala. Code 1975, § 30-3-131, applies in a dependency action).

Insofar as the father briefly argues that the juvenile court's judgment is defective because it fails to contain the language required by Ala. Code 1975, § 30-3-166, regarding the notice of any proposed relocation of the child, we must reject his argument. We have explained that the failure to make such an argument before the juvenile court precludes our consideration of the issue on appeal. J.J. v. J.H.W., 27 So. 3d 519, 526 (Ala. Civ. App. 2008) (declining to reverse the juvenile court's judgment despite its failure to include the language required by § 30-3-166 and explaining that "the maternal grandparents did not assert in the juvenile court that the failure to include the required language was erroneous"). The father did not file a postjudgment motion objecting to the failure of the juvenile court to include the

required provisions in its judgment, so we are unable to reach that issue.

The father's final argument is that the juvenile court's judgment should be reversed because it was not entered until 83 days after the trial and, therefore, could not be based on the father's current circumstances. See P.H. v. Madison Cty. Dep't of Human Res., 937 So. 2d 525, 531 (Ala. Civ. App. 2006) (quoting D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003)) ("'This court has consistently held that the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence.'"). Relying on S.S. v. R.D., 258 So. 3d 340, 345 (Ala. Civ. App. 2018), and C.P.M. v. Shelby County Department of Human Resources, 185 So. 3d 461, 468 (Ala. Civ. App. 2015), the father contends that the juvenile court's dependency finding could not have been based on his current circumstances because of the 83-day delay in the entry of the judgment. Indeed, we reversed the dependency judgment entered in S.S. because we concluded that the juvenile court's

"determination regarding the child's dependency could not have been properly based on the evidence presented at trial," which had occurred 21 months earlier. 258 So. 3d at 345. The 21-month delay between the trial and the entry of the judgment in S.S. is significantly longer than the less-than-3-month delay in the present case. The delay in C.P.M., the case upon which S.S. relied, was 11 months, which is almost 3 times the delay in the present case. Although we certainly do not condone the practice of delaying the entry of judgments in juvenile cases for more than 30 days, the amount of time our legislature has seen fit to set as a benchmark for the entry of a judgment in termination-of-parental-rights cases, see Ala. Code 1975, § 12-15-320(a), we cannot conclude that the less-than-3-month delay in the present case is substantial enough to require reversal as a matter of law.

In C.P.M., the father presented evidence in conjunction with his postjudgment motion indicating that his circumstances had "'changed dramatically,'" which evidence would have supported a conclusion that the circumstances upon which the termination-of-parental-rights judgments were based were not, in fact, current. 185 So. 3d at 467. The father in the

present case did not file a postjudgment motion or present evidence indicating that his circumstances had changed. Accordingly, we decline to reverse the juvenile court's judgment in the present case based solely on the 83-day delay in the entry of that judgment.

Having considered and rejected the father's several arguments in favor of the reversal of the juvenile court's dependency judgment, we affirm that judgment.

AFFIRMED.

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