REL: August 9, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180459

J.Y.

v.

Geneva County Department of Human Resources

Appeal from Geneva Juvenile Court
(JU-17-157.02)

EDWARDS, Judge.

In November 2018, the Geneva County Department of Human Resources ("DHR") filed a petition in the Geneva Juvenile Court seeking to terminate the parental rights of J.Y. ("the father") and A.A. ("the mother") to R.S. ("the child"). In its petition, DHR alleged that the father and the mother had

failed to provide for the material needs of the child, had failed to maintain regular visits with the child, had failed to maintain consistent communication with the child, and had failed to adjust their circumstances to meet the needs of the child. The father was served with the petition and filed an answer; the mother was served by publication and was appointed an attorney. The juvenile court held a trial on DHR's petition on January 31, 2018, at which neither the father nor the mother appeared; both parents were represented by counsel. On February 22, 2018, the juvenile court entered a judgment terminating both the father's and the mother's parental rights to the child. Both the father and the mother timely appealed; the father's appeal was assigned appeal number 2180459, and the mother's appeal was assigned appeal number 2180460. Although we originally consolidated the appeals ex mero motu, we have elected to unconsolidate the appeals for separate disposition.

The termination of parental rights is governed by Ala. Code 1975, § 12-15-319. That statute reads, in part:

> "(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her]

responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parent[]. In determining whether or not the parent[] [is] unable or unwilling to discharge [his or her] responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

> "(1) That the parent[] ha[s] abandoned the child, provided that in these cases, proof shall not be required of reasonable efforts to prevent removal or reunite the child with the parent[].
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> "....
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> "(4) Conviction of and imprisonment for a felony.
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> "....
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> "(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parent[] have failed.
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> "....
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> "(9) Failure by the parent[] to provide for the material needs of the child or to pay a reasonable portion of support of the child, where the parent is able to do so.
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> "(10) Failure by the parent[] to maintain regular visits with the child in

> accordance with a plan devised by the Department of Human Resources, or any public or licensed private child care agency, and agreed to by the parent.
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> "(11) Failure by the parent[] to maintain consistent contact or communication with the child.
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> "(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review.
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> "(b) A rebuttable presumption that the parent[] [is] unable or unwilling to act as parent[] exists in any case where the parent[] ha[s] abandoned a child and this abandonment continues for a period of four months next preceding the filing of the petition. Nothing in this subsection is intended to prevent the filing of a petition in an abandonment case prior to the end of the four-month period."

The test a juvenile court must apply in an termination-of-parental-rights action is well settled.

> "A juvenile court is required to apply a two-pronged test in determining whether to terminate parental rights: (1) clear and convincing evidence must support a finding that the child is dependent; and (2) the court must properly consider and reject all viable alternatives to a termination of parental rights. Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990)."

B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004). A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. P.S. v. Jefferson Cty. Dep't of Human Res., 143 So. 3d 792, 795 (Ala. Civ. App. 2013). "Clear and convincing evidence" is "'[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.'" L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting Ala. Code 1975, § 6-11-20(b)(4)). Although a juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct, K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d 602, 605 (Ala. Civ. App. 2010), "[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 evidence presented at trial was composed solely of the testimony of Shannon Dotson, the DHR caseworker assigned to the child's case. She testified that the child had been removed from the custody of the father and the mother in August 2017 upon the arrest of both parents for possession of a controlled substance and possession of drug paraphernalia. Dotson said that the father had had some contact with DHR after the child was removed; however, she testified that his last contact with DHR had been in December 2017 at a court hearing. According to Dotson, the father had been arrested in March 2018 for "his most recent crime," which Dotson did not otherwise describe, and "sentenced" in September 2018; she

commented that she was "not sure of the exact date that he may have been moved from one facility to another," indicating, perhaps, that the father had been incarcerated since his March 2018 arrest. She also said that the father was currently incarcerated in Florida and that his expected release date, based on a computer printout that was not entered into evidence, was September 2019. Dotson testified, somewhat inconsistently with her earlier testimony, that the father had not had direct contact with DHR after the child's removal from his custody; instead, she noted, the father had visited with the child for some uncertain length of time on two weekends during which the child had had home visits with the father's mother, Mrs. A. ("the paternal grandmother"), and his stepfather, Mr. A. ("the paternal stepgrandfather"), when they were being considered as a placement resource.

Regarding DHR's attempt to locate viable alternatives to termination of the father's parental rights, Dotson testified that DHR had considered several relatives as potential placement resources. In addition to the paternal grandmother and the paternal stepgrandfather, Dotson said, DHR had considered the child's maternal aunts, B.Cl. and R.A., and a

maternal cousin, E.R. According to Dotson, the paternal grandmother and the paternal stepgrandfather had a "severe" history of domestic violence, which had resulted in their separation after the arrest of the paternal stepgrandfather following an altercation between the two during the pendency of DHR's petition. Dotson said that, as a result of the separation, the paternal grandmother was unemployed and homeless, relying on friends for a place to stay. She also noted that the paternal grandmother and the paternal stepgrandfather had a substance-abuse history. Thus, Dotson indicated that the paternal grandmother and the paternal stepgrandfather had been rejected as potential placement alternatives for the child. Dotson said that B.Cl. had been rejected as a potential placement by DHR because of her significant substance-abuse history and a lack of financial resources and that R.A. had been rejected as a potential placement because her own children were in foster care. Dotson testified that E.R., who resides in Florida, had indicated that she was recovering from cancer and that she did not feel that she could assume financial responsibility for the child.

Dotson was questioned about the availability of the father's girlfriend, B.Ch., as a potential custodian for the child. She indicated that the child, who was not yet two when she was removed from the custody of the father and the mother, had lived with the father and B.Ch. for an unknown period after her birth. According to Dotson, B.Ch. had told Dotson that she feared the father and that she had initially lied to him about their child by telling him that she had miscarried the pregnancy. Dotson said that B.Ch. had indicated a willingness to take custody of the child but had also indicated that she felt that she would need to relocate and change her name to protect herself, her and the father's child, and the child. The basis for B.Ch.'s fear of the father is not evident from the sparse record.[1] Dotson further testified that DHR had not considered B.Ch. to be a potential resource because she was not a relative. See Ala. Code 1975,

[1]The father filed a motion entitled "Objection to Termination of Parental Rights and Motion to Intervene as Custodian Of Minor Child," in which B.Ch. was identified as the mother of the father's other child and requested that she be awarded custody of the child. To the extent that the motion was a motion seeking to allow B.Ch. to intervene, nothing in the record indicates that the juvenile court permitted B.CH. to intervene.

§ 12-15-301(13) (defining "relative" as "[a]n individual who is legally related to the child by blood, marriage, or adoption within the fourth degree of kinship, including only a brother, sister, uncle, aunt, first cousin, grandparent, great grandparent, great-aunt, great-uncle, great great grandparent, niece, nephew, grandniece, grandnephew, or a stepparent").

On appeal, the father argues that the evidence presented at trial does not support termination of his parental rights because DHR failed to prove that he had been convicted of and incarcerated for a felony. See Ala. Code 1975, § 12-15-319(a)(4). Furthermore, he contends that, because he expected to be released within the near future, his condition, i.e., his incarceration, was not a condition that was unlikely to change in the foreseeable future. Finally, the father appears to argue that a viable alternative to the termination of his parental rights existed in the form of placement of the child with his girlfriend, B.Ch., who is the mother of his other child and with whom he and the child had resided for a time.

We agree with the father that DHR failed to prove that his conviction and imprisonment in the State of Florida is

related to a felony offense. As we explained in D.P. v. Madison County Department of Human Resources, 23 So. 3d 1156, 1159 (Ala. Civ. App. 2009), a juvenile court is not permitted to assume that a parent is incarcerated for a felony based on evidence that a parent has been incarcerated for a lengthy period.[2]

> "After careful review, we find that there is nothing in the record to confirm that the father has been convicted of and imprisoned for a felony. We are not convinced that the father is incarcerated for a felony conviction simply based on the fact that he has been incarcerated for more than one year and one day.[5] There is no evidence indicating that the father has been convicted of and imprisoned for a felony, nor is there sufficient evidence to show that the father has engaged in any behavior found in [Ala. Code 1975, former] § 26-18-7(a)(1)-(8)[, the predecessor to § 12-15-319,] that would support a finding of his inability or unwillingness to discharge his responsibility as a parent to the

[2]Although this court has held that, when the record reflects that a parent is incarcerated in an Alabama penitentiary, the juvenile court has evidence from which it may determine that the parent has been convicted of and imprisoned for a felony offense because Alabama law provides that a person may not be incarcerated in a state penitentiary based on misdemeanor convictions, see Ala. Code 1975, § 15-18-1(b); K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d 602, 608 (Ala. Civ. App. 2010); and J.F.S. v. Mobile Cty. Dep't of Human Res., 38 So. 3d 75, 78 (Ala. Civ. App. 2009), this court may not take judicial notice of Florida law, see S.A.M. v. M.H.W., 261 So. 3d 356, 365 (Ala. Civ. App. 2017), and we cannot therefore know for what class of offense the father was incarcerated in Florida.

> children. It is clear from the testimony of the only witness called by DHR that DHR was relying on the father's incarceration to serve as the ground for terminating his parental rights. We cannot assume that the father has been convicted of a felony based on nothing more than Holloway's testimony that the father has been incarcerated for approximately 16 months.
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> "_____
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> "[5]This argument ignores the possibility that the father is incarcerated and serving time for more than one misdemeanor conviction."

D.P., 23 So. 3d at 1159-60 (footnote 6 omitted).

However, DHR never argued to the juvenile court that the father's incarceration alone could serve as the sole ground for the termination of his parental rights. Instead, DHR alleged in its petition, and the juvenile could found, that the father had abandoned the child. On appeal, DHR contends that, "[a]lthough involuntary imprisonment alone does not equate to abandonment, a juvenile court can consider the voluntary conduct of the parent toward the child before and after incarceration as evidencing abandonment of the child." C.F. v. State Dep't of Human Res., 218 So. 3d 1246, 1250 (Ala. Civ. App. 2016). Thus, according to DHR, the father's conduct

before his incarceration[3] supports the juvenile court's finding that he abandoned the child.

In C.F., this court considered whether C.F., an incarcerated mother, could have been considered to have abandoned her child based on her conduct before her incarceration. 218 So. 3d at 1250. C.F. had been involved with the State Department of Human Resources ("the department") since her child was removed from her care in August 2013. Id. at 1249. She had tested positive for cocaine, and the department had required the mother to attend a drug-court program, to participate in random drug screening, to attend parenting classes, to undergo mental-health treatment, to engage in stable employment, and to locate stable housing. Id. However, over the next few months, C.F. was unable to make any progress on the goals the department had set for her, having been expelled from the drug-court program within three months and having failed to participate in the other requirements of her reunification plan. Id. at 1249-50.

[3]Because the father was still incarcerated at the time of trial, DHR has no evidence of the father's conduct after his incarceration.

The department lost contact with C.F. in November 2013, only to learn that she had been incarcerated for at least two months. Id. at 1250. After reinstituting contact with the department in January 2014, C.F. indicated to the department that she was seeking drug treatment; however, she did not execute a release for the department to obtain any records evidencing her participation in treatment. Id. Thus, as of April 2014, C.F. had failed to make any verifiable progress toward reunification. Id. Although C.F. presented the department with a clean drug screen in November 2014, she consistently refused to undergo random drug screens. Id. She also failed to consistently visit the child, causing the child to become upset when she failed to show up at a scheduled visitation. Id. We concluded that the evidence presented had established that C.F. had not attempted to "claim[] her residual right to visitation with the child, see Ala. Code 1975, § 12-15-102(23) (indicating that a parent has a residual right to visit with a child after a juvenile court transfers custody of the child because of the dependency of the child), even telephonically," indicating that she did not make any

attempts to communicate with the child outside her infrequent visitations before November 2014. Id. at 1250.

C.F. was incarcerated again in December 2014. Id. When the department filed its petition to terminate C.F.'s parental rights in September 2015, she had not visited with the child or been in contact with the department after November 2014. Id. At the time of the January 2016 trial on the department's petition, C.F. was incarcerated in a federal penitentiary on a drug-related conviction. Id.

Based on the above-discussed evidence, this court concluded that the juvenile court had ample evidence from which to determine that C.F. had "'[withheld] from the child, without good cause or excuse ... her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection'" or that the mother had "'fail[ed] to claim the rights of a parent, or fail[ed] to perform the duties of a parent.'" C.F., 218 So. 3d at 1250 (quoting Ala. Code 1975, § 12-15-301(1)). We therefore determined that the evidence supported the conclusions that C.F. had failed to consistently visit the child, had abandoned her to the care of the department, and would not be able to resume her parental

duties in the foreseeable future. Id. Thus, we affirmed the juvenile court's judgment terminating C.F.'s parental rights. Id. at 1251.

We are not convinced, however, that C.F. compels an affirmance in the present case. The evidence in the present case, as noted above, is extremely sparse, consisting of only the testimony of Dotson, which spans a mere 17 pages. Because DHR contends that the evidence supports the juvenile court's finding that the father abandoned the child, we will consider DHR's arguments concerning the evidence that it contends supports that abandonment finding.

To establish conduct evidencing abandonment, DHR first relies on what it characterizes as the father's "substance abuse," which, DHR says, "led to his arrest [and] contributed to the removal of [the child] from the home in August 2017." Although the fact of a parent's substance abuse before incarceration may bear on the parent's ability to parent his or her child and may be relevant to determining whether that parent abandoned his or her child, the record is devoid of evidence indicating that the father suffered from "substance abuse." Dotson testified that the child's removal from the

parents' home resulted from the arrest of the father and the mother for possession of a controlled substance and possession of drug paraphernalia, but she did not testify that the father had ever tested positive for a controlled substance. In fact, the record contains no evidence indicating that DHR had required the father to undergo any drug screening or a substance-abuse assessment or that DHR had offered the father drug treatment. Thus, we cannot conclude that the juvenile court could have used the father's preincarceration "substance abuse" as a basis for finding that the father's conduct amounted to abandonment.

DHR further argues that the father's "willful failures to visit his child" and his failure to "maintain contact or communication with [the child]" despite his "residual right to visit with the child," see Ala. Code 1975, § 12-15-102(23), and C.F., 218 So. 3d at 1250 (noting that "the mother never claimed her residual right to visitation with the child" in the discussion of the mother's abandonment of the child), should also be considered as evidence of the father's preincarceration conduct supporting the juvenile court's abandonment finding. However, the only evidence presented by

DHR relating to the father's visitation with the child or his contact with the child is Dotson's testimony that he had visited the child twice when the child was visiting the paternal grandmother and the paternal stepgrandfather on two separate weekends, the dates of which are not apparent from the record. In contrast to the evidence presented in C.F., DHR presented no evidence in the present case that the father was offered any form of visitation with the child. In addition, Dotson was not asked about whether the father had contacted or had communicated with the child, so the record is devoid of evidence indicating that he had failed to do so. Thus, DHR failed to present evidence from which the juvenile court could have determined that the father's preincarceration conduct relating to visitation or contact with the child is sufficient to support a finding of abandonment.

To the extent DHR contends that the father's failure to provide financial support for the child before his incarceration supports a finding of abandonment, we must again reject DHR's argument. We note that the juvenile court did not make a specific finding that the father had failed to provide support for the child; however, the definition of

"abandonment" includes the withholding from a child of "maintenance," which we will presume for purposes of this discussion is equivalent to a failure to provide support for a child. Ala. Code 1975, § 12-15-301(1). The record contains so little evidence about the father that the juvenile court could not possibly have been clearly convinced that the father "[failed] ... to provide for the material needs of the child or to pay a reasonable portion of support of the child, where the parent is able to do so." § 12-15-319(a)(9). The record does not indicate whether the father was employed at the time the child was removed from his custody or thereafter or whether the father had any source of income at all. Put simply, the record does not contain sufficient evidence to support the juvenile court's finding that the father abandoned the child based upon his failure to provide support despite being able to do so.

We further note that the sparse record fails to indicate that DHR invited the father to participate in an Individualized Service Plan ("ISP") meeting before his

incarceration[4] or that he was offered any services at any time before his incarceration in March 2018, which, based on the minimal testimony on the matter and Dotson's reference to a transfer between facilities, we presume continued through the date of the trial. Unlike C.F., who was given an opportunity to visit with her child and to attempt rehabilitation and reunification through services offered by the department, C.F., 218 So. 3d at 1249-50, the father in this case, for all that appears in the record, was never offered the first service, including the opportunity to visit the child. DHR's failure to adduce evidence regarding its attempts "to identify the circumstances that led to removal of the child, to develop a plan to ameliorate those circumstances, and to use reasonable efforts to achieve that plan," H.B. v. Mobile Cty. Dep't of Human Res., 236 So. 3d 875, 882 (Ala. Civ. App. 2017) (explaining DHR's duty under § 12-15-312), has contributed to the failure of the record to contain evidence sufficient for

[4]The only reference to an invitation for the father to attend an ISP meeting was Dotson's testimony that the father had received an invitation to attend an ISP meeting held in December 2018, approximately one month before the termination-of-parental-rights trial, when he was incarcerated and could not physically attend.

the juvenile court to have been clearly convinced that grounds for the termination of the father's parental rights existed.

Based on the evidence in the record on appeal, we cannot affirm the judgment of the juvenile court insofar as it found that the father abandoned the child and insofar as it terminated the parental rights of the father. Because we have concluded that the record does not contain evidence from which the juvenile court could have been clearly convinced that the father abandoned the child, we pretermit the father's other arguments relating to viable alternatives and the foreseeabilty of changes in his condition.[5]

REVERSED AND REMANDED.

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

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[5]We note that DHR is not barred from seeking to terminate the father's parental rights based on the father's condition or conduct existing at the time of the entry of the January 2019 termination judgment, provided, however, that it also relies on circumstances that continued or developed after the entry of that judgment. See L.M. v. Shelby Cty. Dep't of Human Res., 86 So. 3d 377, 381-84 (Ala. Civ. App. 2011) (explaining that consideration of evidence existing at the time an initial petition for a termination of parental rights is denied is not barred by the doctrine of res judicata so long as the subsequent termination-of-parental-rights action is also based on new evidence of changes, or a lack thereof, in circumstances).