REL: October 18, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180683

D.W.

v.

Jefferson County Department of Human Resources

Appeal from Jefferson Juvenile Court
(JU-17-492.02)

MOORE, Judge.

D.W. ("the father") appeals from a judgment entered by the Jefferson Juvenile Court ("the juvenile court") terminating his parental rights to A.M.S. ("the child"). We reverse the juvenile court's judgment.

Procedural History

On June 22, 2017, the Jefferson County Department of Human Resources ("DHR") filed a petition to terminate the parental rights of the unknown parents of the child. On November 6, 2017, the father filed a motion to strike the petition, alleging in part: "DHR knows who the father is, has known who the father is, has worked with the father, has attended Individualized Service Plan ('ISP') meetings with the father, and has arranged visitation between the father and [the] child both prior to and during the filing of the Petition." That same day, the father filed a motion to dismiss the petition.

On March 1, 2018, the juvenile court entered an order that stated, in part: "Father's motions to strike and dismiss are granted ... in that DHR shall amend [its] Termination of Parental Rights Petition." On March 22, 2018, DHR filed an amendment to the petition to terminate the parental rights regarding the father in which it alleged, in part: "On or about July 21, 2017, [the father] submitted to motherless DNA testing and was determined to be the biological father of the

minor child." The juvenile court thereafter adjudicated the father to be the father of the child.

The trial in this matter was held on March 20, 2019; it was consolidated with the trial of case number JU-15-1939.02, which was a petition to terminate the parental rights of the father and A.C. to S.W., whose date of birth is March 20, 2015. Following the consolidated trial, the juvenile court entered a judgment terminating the parental rights of the father and the unknown mother of the child. The father filed a postjudgment motion on April 27, 2019; that motion was denied on May 9, 2019. The juvenile court also entered a separate judgment terminating the parental rights of the father and A.C. to S.W. Although the father did not appeal the judgment terminating his parental rights to S.W., some information pertaining to S.W. is included in the recitation of the facts below for background purposes.

Standard of Review

A judgment terminating parental rights must be supported by clear and convincing evidence, which 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."'" C.O. v. Jefferson Cty. Dep't of Human Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

> "'[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to clearly and convincingly ... establish the fact sought to be proved.'
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> "KGS Steel[, Inc. v. McInish,] 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].
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> "... [F]or trial courts ruling on motions for a summary judgment in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden'; thus, the appellate court must also look through a prism 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.'"

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). This 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. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus evidence, this court presumes their correctness. Id. We review the legal conclusions to be drawn from the evidence without a presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

Facts

Carmen Seawright, a supervisor in the foster-care department of DHR, testified that DHR became involved with S.W. when she tested positive for amphetamines and cocaine at her birth in 2015. The father and A.C. subsequently stipulated that S.W. was dependent, and DHR began working with the family. Seawright testified that S.W. has a brain injury that was caused from a lack of oxygen to the brain at her birth. According to Seawright, when S.W. was born, her prognosis for survival was very poor. She testified that S.W. has been in hospital or nursing care full time since her birth and that S.W. cannot see, hear, or walk.

Kelly Crenshaw, an investigator for DHR, testified that she investigated the father and A.C. because there had been allegations that they had used drugs. She testified that the father had admitted to having smoked marijuana and to taking a Lortab PILL for which he did not have a prescription. There was also evidence indicating that the father had been banned from visiting S.W. at two hospitals. An employee from one of those hospitals testified that the father had threatened the hospital staff.

DHR began providing services for the father and A.C. at the time S.W. was born. However, according to Seawright, she had lost contact with A.C. in March 2017, before the child was born, and, she said, she had been unable to contact A.C. since that time.

The child was born on March 28, 2017. According to Seawright, shortly after the child was born, she was dropped off at the "UAB Women and Infant Children's Center." Seawright testified that DHR had suspected that A.C. was the mother of the child but that maternity of the child was never conclusively established. Seawright testified that DHR had filed a petition seeking to have the child declared dependent,

that that petition had been granted, and that the child had been placed in foster care. The child remained in the same foster home at the time of the termination-of-parental-rights trial. According to Seawright, DHR had been relieved of making reasonable efforts to reunite the family because the parents of the child had not been conclusively established at that time. Seawright testified that the father had suspected that he was the father of the child, and, she said, his paternity had subsequently been established.

Seawright testified that DHR was not aware of the father's having a substance-abuse problem. She testified that he had denied having an issue with drugs. She testified that he had submitted to a substance-abuse assessment and that no treatment was recommended. Seawright testified that the father was placed on color-code drug testing; however, she said, he routinely refused to test. She testified that the father had submitted to a drug test once before a hearing and that the results of that test had been negative. Alicia Shields, the most recent social-service caseworker assigned to the father and the child, testified that the father had also told her that he did not have an issue with drugs. According

to Shields, at the time of the trial, the father had submitted to only three drug tests since August 2017. She testified that the results of the drug tests he did take were negative, with the exception of one, for which he had produced a prescription.

Shields testified that the father had completed a parenting program. She also testified that the father had completed a domestic-violence and anger-management program. She testified that further counseling had been recommended and that the father had also completed that counseling.

Seawright testified that the father had maintained stable housing but that he had not maintained stable employment. According to Seawright, the father receives Social Security disability benefits. She testified that the father had not provided any child support for the child.

Shields testified that the father's visitation with the child had been on and off. Roderick Henderson, a supervisor for Covenant Services who supervised the father's visitations with the child, testified that Covenant Services had provided transportation for the father to visit the child twice per month beginning in January 2018. He testified that the father

had attended only 12 visits since January 2018, specifically, on January 22, 2018; February 1, 2018; May 17, 2018; June 7, 2018; August 16, 2018; September 6, 2018; September 20, 2018; October 4, 2018; October 18, 2018; November 20, 2018; December 20, 2018; and January 3, 2019. Henderson testified that the reason the father's scheduled visitations had been missed was because Covenant Services' employees had been unable to get in touch with the father. Henderson admitted, however, that Covenant Services had recently moved and that there was a possibility that the father had visited on occasions other than the dates that the records showed. According to Henderson, during visits, the father had had appropriate interaction with the child, had been affectionate with the child, had played on the floor with the child, had comforted her when she was upset, and had changed the child's diapers. Henderson also testified that the father had brought clothes, toys, and food for the child to visitations. He testified that the child had had some stomach problems and that, during one visitation, she had become sick after eating some "Cheetos" that the father had provided for her.

Discussion

On appeal, the father argues that, considering his current circumstances, the juvenile court erred in terminating his parental rights.

Section 12-15-319, Ala. Code 1975, provides, in pertinent 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:
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> "....
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> "(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for needs of the child.
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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.
>
> "(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."

The father argues that DHR failed to present evidence indicating that he had a current drug problem. In A.A. v. Jefferson County Department of Human Resources, [Ms. 2170595, Aug. 24, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018), this court quoted D.O. v. Calhoun County Department of Human Resources, 859 So. 2d 439, 444 (Ala. Civ. App. 2003), in which this court stated: "[T]he 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." In A.A., the evidence indicated as follows:

> "[T]he mother completed outpatient drug treatment in March 2016. Because she felt she needed additional

> help, the mother enrolled in the drug-rehabilitation program at the Lovelady Center in July 2017, the same month the last positive drug-screen result appears on the mother's color-code drug-test results. After the mother was dismissed from the Lovelady Center, she shortly thereafter enrolled in the Expect a Miracle program. Although the evidence indicates that the mother had missed drug screens through the color-code program, she testified that she had been tested for drugs at both the Lovelady Center and through the Expect a Miracle program. There was no evidence presented indicating that the mother had tested positive for drugs while enrolled in those programs, and there was no evidence indicating that the mother's discharge from the Lovelady Center was related to drug use. Furthermore, the mother testified that she was required to test for drugs as a condition of her probation and that she had not tested positive. There being no affirmative evidence indicating that the mother was using drugs at the time of the trial, we cannot conclude that, at the time of the trial, the mother had failed to adjust her circumstances from the drug use that had caused the child to be removed from her care."

___ So. 3d at ___.

In the present case, although there was evidence indicating that, in 2015, the father had admitted to smoking marijuana and taking a Lortab pill for which he did not have a prescription, there was no evidence indicating that he had abused drugs in the four years leading up to the trial. The father denied having a drug problem, and he submitted to a substance-abuse assessment that indicated that no treatment

was necessary. Although the father failed to submit to regular drug tests, the failure to test does not constitute affirmative proof that he is using drugs. In fact, DHR workers testified that the drug tests that the father had submitted to produced negative results. Like in A.A., we conclude that, without affirmative evidence that the father was abusing drugs, we cannot conclude that there was sufficient evidence to clearly convince a reasonable fact-finder that the father had a current drug problem such that termination of the father's parental rights was warranted.

The father apparently did have some anger-management issues, as evinced by his being banned from two hospitals at which S.W. was being treated. However, the evidence indicated that the father had completed services aimed at improving his anger-management issues, and there was not sufficient evidence to clearly convince a reasonable fact-finder that those issues persisted at the time of the trial despite his completion of those services.

Finally, although there was evidence indicating that the father's visitations with the child had been inconsistent, the evidence indicated that the father's interactions with the

child had been appropriate and that he had played with and cared for her during the visits. We cannot conclude that the missed visitations alone constitute evidence sufficient to clearly convince a reasonable fact-finder that termination of the father's parental rights was warranted. See, e.g., K.W. v. J.G., 856 So. 3d 859, 872 (Ala. Civ. App. 2003) (reversing termination-of-parental-rights judgment despite the parent's having missed some visitations with the child).

> "The termination of parental rights is an extreme matter and is not to be considered lightly. Ex parte Beasley, 564 So. 2d 950 (Ala. 1990). 'Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances.' Beasley, 564 So. 2d at 952."

S.M.W. v. J.M.C., 679 So. 2d 256, 258 (Ala. Civ. App. 1996). We cannot conclude that this case presents "'the most egregious of circumstances'" such that a reasonable fact-finder would be clearly convinced that termination of the father's parental rights is warranted. Id.

Conclusion

Based on the foregoing, we conclude that the juvenile court could not have been clearly convinced "that the [father] ... [is] unable or unwilling to discharge [his]

responsibilities to and for the child, or that the conduct or condition of the [father] renders [him] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future." § 12-15-319(a). Therefore, we reverse the judgment terminating the parental rights of the father, and we remand the case to the juvenile court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Donaldson, Edwards, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, with writing.

THOMPSON, Presiding Judge, concurring in the result.

I concur in the result because I conclude that at the March 20, 2019, hearing, the Jefferson County Department of Human Resources ("DHR") did not meet its evidentiary burden of presenting clear and convincing evidence in support of the petition. See § 12-15-319(a), Ala. Code 1975. This court may not affirm the judgment terminating parental rights because of an inference that D.W. ("the father") might be hiding a substance-abuse problem. Although Carmen Seawright, a supervisor in the foster-care department of DHR, testified that DHR was unaware of any drug abuse by the father, DHR had reason to suspect drug use on the part of the father and to request that the father submit to drug screens. Although he agreed to submit to drug screens and to undergo a substance-abuse assessment, the father repeatedly refused specific requests to do either. At least one, and possibly two, of the drug screens to which he did submit were performed at the same time as a court hearing, i.e., when a parent might reasonably know he or she would be expected to submit to screening.

DHR did not call the father as a witness at the March 20, 2019, termination hearing. As a result, both DHR and the

juvenile court were unable to question the father regarding his repeated refusals to submit to substance-abuse assessments or to inquire regarding the accuracy of the history the father provided to a substance-abuse assessor when he finally submitted to an assessment. The failure to call the father as a witness also resulted in an inability to gain from the father explanations regarding his failure to comply with previous court orders in a case relating to S.W., his other child, requiring that he submit to drug screens or why he agreed to do those screens as a part of two Individualized Service Plans but then did not do so. Thus, the juvenile court was deprived of the opportunity to observe the father as he testified and to assess his demeanor. I am also concerned that, although it appears that at one point the father was filling the medications prescribed by his psychiatrist, with one exception those substances were not present in the father's system the few times he did submit to drug screens.

The father was represented by a competent attorney at trial who successfully objected to a great deal of evidence. My impression from reading the DHR social workers' responses to some questions was that those witnesses expected an

opportunity to more fully explain on redirect. They were rarely given that opportunity. DHR social workers have worked extensively with the father in this case. Those workers made referrals for the father so that he could obtain a home, provided in-home services for him, and have provided bus passes or transportation for every service offered. The father's efforts to take advantage of those services has been desultory at best; in addition, he has repeatedly refused services and drugs screens, and his attendance at visitation has been sporadic. However, at the March 20, 2019, termination hearing, DHR focused on the father's purported drug use, and I must agree that its evidence on that issue did not meet the required evidentiary burden.

The main opinion states that a parent's "failure to test does not constitute affirmative proof that he is using drugs." ___ So. 3d ___ at ___. I would also note that a parent's mere denial of drug use and an accompanying failure to submit to drug screens is not affirmative proof that he or she is not using drugs. However, given the lack of evidence at the March 20, 2019, hearing, I agree that, in this case, DHR did not meet its burden in support of its petition to terminate the

father's parental rights at the March 20, 2019, hearing. The main opinion does not foreclose a future action seeking to terminate the father's parental rights if the facts warrant such an action, and, if DHR's presentation of evidence is sufficient in such an action, termination of the father's parental rights might be an appropriate remedy.