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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2180888, 2180889, and 2180890

S.P.

v.

Madison County Department of Human Resources

Appeals from Madison Juvenile Court
(JU-16-1006.02, JU-16-1007.02, and JU-16-1008.02)

DONALDSON, Judge.

In these consolidated appeals, S.P. ("the mother") appeals from judgments of the Madison Juvenile Court ("the juvenile court") terminating her parental rights to three of

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her children, namely, N.P., M.P., and W.P. ("the children").

We reverse and remand.

Facts and Procedural History

N.P., a girl, was born in September 2002. M.P., a girl, and W.P., a boy, are twins and were born in May 2006. The mother has a fourth child who is an adult and is not at issue in these appeals. The children's father is deceased.

The record reveals that the Madison County Department of Human Resources ("DHR") first became involved with the children's family in November 2016 after the juvenile court, which had before it a pending truancy action involving N.P., asked DHR to investigate. DHR's investigation revealed that the mother was unable to control or discipline the children; that the family was living in unsanitary conditions; that the house in which the family was living had a foul odor; that one of the children, N.P., was truant; and that another one of the children, W.P., was not timely receiving medication that had been prescribed for him. DHR removed the children from the mother's home and commenced dependency actions with respect to the children.

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After holding a shelter-care hearing, the juvenile court, on November 18, 2016, entered shelter-care orders vesting DHR with custody of the children. DHR placed the children in foster care and began providing the family with services to assist them in reuniting. DHR provided the mother and the children with psychological evaluations and counseling. In addition, DHR provided the mother with grief counseling, parenting instruction, guidance regarding the cleaning and maintenance of the home, and supervised visitation.

Following an adjudicatory hearing, the juvenile court entered orders on December 28, 2016, finding that the children were dependent and maintaining DHR's custody of the children. Between December 2016 and September 2017, the juvenile court held periodic permanency hearings. Following each of those hearings, the juvenile court entered orders finding that the children remained dependent and maintaining DHR's custody of the children. By September 2017, however, the condition of the mother's home had improved to the point that the juvenile court entered an order returning the children to the custody of the mother. After the children were returned to the mother's custody, however, the home quickly became unsanitary

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and was again permeated by a foul odor. In addition, problems with W.P.'s receiving his medication in a timely fashion began to reoccur. Therefore, in the fall of 2017, DHR again removed the children from the mother's home. Subsequently, the condition of the home improved, and the children were returned to the mother's custody in August 2018; however, the conditions in the house deteriorated, which prompted DHR to remove the children again in January 2019.

Thereafter, on January 31, 2019, DHR filed petitions seeking to terminate the mother's parental rights to the children. The juvenile court appointed counsel to represent the mother and appointed a guardian ad litem to protect the interests of the children. The juvenile court also designated court-appointed special advocates for the children. On June 11 and 12, 2019, the juvenile court tried the three actions together. Before the juvenile court began receiving evidence on June 11, 2019, the following colloquy occurred:

"[DHR's attorney]: Your Honor, if I would proceed, I would just like to relay the Department's position. And I think we have an agreement with regards to [N.P.]. Due to [N.P.'s] age and her current living arrangement, the Department would ask to dismiss its Petition for Termination of Parental Rights as to [N.P.] and for the Court to adopt a

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plan of another permanent plan living arrangement for the children.

"THE COURT: Okay. And what is her current living arrangement?

". . . .

"[DHR's attorney]: She's at [a group foster home] and she's a resident at that facility. And we would like permission to, although she would maintain placement there, Your Honor, we would like permission to transfer her to an apartment, an independent living unit, to help her with her independent living moving forward.

"THE COURT: Does that mean she would transfer to a residence?

"[DHR's attorney]: It just -- No. She can stay at that facility.

"THE COURT: Okay.

"[DHR's attorney]: She would just transfer workers. And we would just work with her on independent living.

". . . .

"THE COURT: Okay. All right. All right. So before I grant the Department's request, let me hear from the young ladies. . . ." ¹

¹Although there is no ruling in the record on DHR's motion to dismiss the petition to terminate the mother's parental rights to N.P., the juvenile court's judgment terminating the mother's parental rights to N.P. implicitly denied the motion.

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N.P. and M.P. testified that they did not want to be adopted and that they would prefer to remain in their group foster home if they could not return to the mother's home. They both testified that they wanted to maintain a relationship with the mother and their other siblings. M.P., in particular, expressed a desire to spend more time with her twin, W.P., whose placement is at a group home in Montgomery. W.P. was not present at the trial.

DHR's witnesses testified that, despite DHR's having provided the mother with all available services to assist her in reuniting with the children, the mother was still unable to properly parent the children and that each time the children were returned to the mother the condition of the home had deteriorated to the unsanitary condition it had been in when the children were first removed in November 2016. DHR's witnesses also testified, however, that, in their opinions, terminating the mother's relationship with the children would be detrimental to the children because of the bond between the mother and the children. DHR's witnesses further testified that there were no suitable family members who were willing to take custody of the children.

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On June 28, 2019, the juvenile court entered judgments terminating the mother's parental rights to the children. The mother timely filed postjudgment motions challenging the judgments. The juvenile court denied the postjudgment motions within 14 days after they had been filed, and the mother timely filed notices of appeal.

The trial of the actions was electronically recorded, and the recording was transcribed by a licensed court reporter. The juvenile court then reviewed the record on appeal and certified that it was adequate for appellate review. Accordingly, this court has jurisdiction over these appeals pursuant to Rule 28(A)(1)(c)(i), Ala. R. Juv. P.

Standard of Review

"[W]e will reverse a juvenile court's judgment terminating parental rights only if the record shows that the judgment is not supported by clear and convincing evidence. F.I. v. State Dep't of Human Res., 975 So. 2d [969] at 972 [(Ala. Civ. App. 2007)]." J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007). Clear and convincing evidence is

""[e]vidence that, when weighed against evidence in opposition,

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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. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

"'§ 6-11-20[(b)](4), Ala. Code 1975.'

"L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002)."

J.C., 986 So. 2d at 1184 (emphasis omitted).

"On appeal from ore tenus proceedings, this court presumes the correctness of the juvenile court's factual findings. See J.C. v. State Dep't of Human Res., 986 So. 2d 1172 (Ala. Civ. App. 2007). This court is bound by those findings if the record contains substantial evidence from which the juvenile court reasonably could have been clearly convinced of the fact sought to be proved. See Ex parte McInish, 47 So. 3d 767 (Ala. 2008) (explaining standard of review of factual determinations required to be based on clear and convincing evidence)."

C.C. v. L.J., 176 So. 3d 208, 211 (Ala. Civ. App. 2015).

Analysis

When a nonparent seeks to terminate a parent's parental rights, a juvenile court's determination whether to terminate those rights is governed by a two-prong test: (1) whether

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clear and convincing evidence establishes that the child is dependent and (2) whether clear and convincing evidence establishes that no viable alternatives to the termination of parental rights exist. See K.N.F.G. v. Lee Cty. Dep't of Human Res., 983 So. 2d 1108, 1115 (Ala. Civ. App. 2007). "Concerning the first prong of the test[, i.e., dependency], the petitioner must prove by clear and convincing evidence that grounds for termination exist." J.S. v. Etowah Cty. Dep't of Human Res., 72 So. 3d 1212, 1219 (Ala. Civ. App. 2011) (citing § 12-15-319, Ala. Code 1975; and Bowman v. State Dep't of Human Res., 534 So. 2d 304, 305 (Ala. Civ. App. 1988)). Under subsection (a) of § 12-15-319, Ala. Code 1975, grounds for terminating parental rights exist if clear and convincing evidence establishes that the parents "are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future." That Code section directs the juvenile court, in determining whether such grounds exist, to consider certain factors, such as whether reasonable efforts by DHR to rehabilitate the

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parents have failed. See § 12-15-319(a)(7), Ala. Code 1975. The second prong of the test requires that the juvenile court find that there exists no viable alternative to termination of parental rights. See Ex parte J.R., 896 So. 2d 416, 423 (Ala. 2004).

The mother does not argue that the juvenile court's judgments are erroneous insofar as the juvenile court determined that grounds for termination of the mother's parental rights to the children exist. Such an argument would be futile because the record contains substantial evidence from which the juvenile court reasonably could have been clearly convinced that DHR had made reasonable efforts to rehabilitate the mother and that those efforts had failed. Instead, the mother argues that the juvenile court's judgments are erroneous insofar as the juvenile court determined that no viable alternative to termination of the mother's parental rights existed because, the mother says, maintaining the status quo is a viable alternative to terminating her parental rights. "[P]arental rights may not be terminated, even if sufficient statutory grounds exist, when some less drastic measure might be employed to preserve the parental

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relationship without harming the interests of the child[ren]."

B.A.M. v. Cullman Cty. Dep't of Human Res., 150 So. 3d 782, 785 (Ala. Civ. App. 2014).

"Parents and their children share a fundamental right to family integrity that does not dissolve simply because the parents have not been model parents. Santosky v. Kramer, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). That due-process right requires states to use the most narrowly tailored means of achieving the state's goal of protecting children from parental harm. Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). Thus, if some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court must explore whether that alternative can be successfully employed instead of terminating parental rights. Id.'

"T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011)."

Id.

At the time of the trial, N.P. was 16 years old and M.P. and W.P. were 13 years old. The undisputed evidence in the record from all witnesses, including the children who testified, established that the children's relationship with the mother is beneficial to them and that the children would

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not suffer harm if the mother were allowed to continue visiting them. The undisputed evidence indicated that terminating the mother's parental rights would be detrimental to the children. There was no evidence indicating that the children's continued residential placements were harmful. We also note that DHR had not identified anyone willing to adopt the children. After a careful review of the record, we find that it contains no evidence from which a determination could be made that the termination of the mother's parental rights would be in the best interests of the children. Although the general rule is that maintaining children in foster care indefinitely is not a viable alternative to terminating a parent's parental rights, see, e.g., C.P. v. Cullman Cty. Dep't of Human Res., 203 So. 3d 1261, 1270 (Ala. Civ. App. 2016), "[o]ur supreme court has held that a juvenile court should maintain foster care ... without terminating parental rights when a child shares a beneficial emotional bond with a parent and the custodial arrangement ameliorates any threat of harm presented by the parent." B.A.M., 150 So. 3d at 786. Accordingly, because the undisputed evidence established that the children "share[] a beneficial emotional bond with [the

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mother] and [that] the [existing] custodial arrangement ameliorates any threat of harm presented by the [mother]," id., we reverse the juvenile court's judgments and remand the causes for further proceedings consistent with this opinion.

2180888 -- REVERSED AND REMANDED.

2180889 -- REVERSED AND REMANDED.

2180890 -- REVERSED AND REMANDED.

Moore, Edwards, and Hanson, JJ., concur.

Thompson, P.J., concurs specially, with writing.

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THOMPSON, Presiding Judge, concurring specially.

I agree that the judgments of the Madison Juvenile Court ("the juvenile court") are due to be reversed. I write to elaborate on the quote relied upon in the main opinion stating that "'a juvenile court should maintain foster care ... without terminating parental rights when a child shares a beneficial bond with a parent and the custodial arrangement ameliorates any threat of harm presented by the parent.' B.A.M. [v. Cullman Cty. Dep't of Human Res.], 150 So. 3d [782,] 786 [(Ala. Civ. App. 2014)]." ___ So. 3d at ___. I believe that that quote does not encompass the entirety of what is required to maintain the status quo when considering whether to terminate a parent's parental rights.

It is well settled that, "to terminate an individual's parental rights, the trial court must find by clear and convincing evidence that the child is dependent and that an alternative less drastic than the termination of parental rights is not available. § 12-15-319, Ala. Code 1975; Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990)." Ex parte A.S., 73 So. 3d 1223, 1228 (Ala. 2011).

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"The party seeking to terminate parental rights ... has the burden of presenting clear and convincing evidence showing that the parent whose rights are at stake is not capable of discharging, or is unwilling to discharge, his or her parental responsibilities and that no viable alternatives to terminating his or her parental rights exist. Ex parte Ogle, 516 So. 2d 243, 247 (Ala. 1987); see also K.W. v. J.G., 856 So. 2d 859, 874 (Ala. Civ. App. 2003) (holding that the party seeking to terminate a parent's rights bears the burden of proving that the termination of those rights is the appropriate remedy)."

Ex parte A.S., 73 So. 3d at 1228 (emphasis added).

"The need to consider all viable alternatives is rooted, in part, in the recognition that the termination of parental rights is a drastic step that once taken cannot be withdrawn and that implicates due process. Thus, the Beasley two-pronged test is designed to protect the welfare of the child while also protecting the rights of parents. [Ex parte] Beasley, 564 So. 2d [950] at 952 [(Ala. 1990)]. The requirement that clear and convincing evidence support the determination to terminate parental rights is based on the need to protect the due-process rights of the parents. Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). The party seeking to terminate a person's parental rights thus has the burden of producing clear and convincing evidence that there are no viable alternatives to the termination of parental rights. Ex parte Ogle, 516 So. 2d [243] at 247 [(Ala. 1987)]; see also K.W. v. J.G., 856 So. 2d 859, 874 (Ala. Civ. App. 2003) (holding that the party seeking to terminate the parental rights of another bears the burden of proving that termination of those rights is the appropriate remedy)."

Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007).

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In T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011), this court explained that "if some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court must explore whether that alternative can be successfully employed instead of terminating parental rights."

Among those "less drastic alternatives" to termination is maintaining the status quo. This court has held that "maintaining the status quo is a viable option to terminating parental rights when the parent and the child enjoy a relationship with some beneficial aspects that should be preserved such that it would be in the child's best interests to continue that relationship." S.N.W. v. M.D.F.H., 127 So. 3d 1225, 1230 (Ala. Civ. App. 2013) (emphasis added).

In B.A.M. v. Cullman County Department of Human Resources, 150 So. 3d 782 (Ala. Civ. App. 2014), this court reversed the judgment of the juvenile court in that case, which terminated the parental rights of the mother. We explained:

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"The evidence presented to the juvenile court undisputably established that the mother had raised the child continuously since his birth until he was removed from her care at the age of seven. It is undisputed that the mother and the child share a strong bond and that the mother has maintained constant contact and communication with the child while he has been in the care of others. Multiple witnesses agreed that it would be in the child's best interest and necessary for his mental health that he and the mother continue to maintain their relationship and communication, even if he is not in her primary custody or care. Multiple witnesses further testified that the child suffers significant emotional distress when his visits with the mother end.

"In such cases, this court has held that terminating parental rights could do more harm than good. See, e.g., C.M. v. Tuscaloosa Cnty. Dep't of Human Res., 81 So. 3d 391 (Ala. Civ. App. 2011). Juvenile courts therefore must consider the benefit to the child of maintaining custody with some third party with parental visitation as opposed to terminating parental rights solely to remove obstacles to the adoption of the child. C.M., 81 So. 3d at 397 (citing D.M.P. v. State Dep't of Human Res., 871 So. 2d 77, 95 n. 17 (Ala. Civ. App. 2003) (plurality opinion))."

150 So. 3d at 785.

In this case, the evidence indicates that the Madison County Department of Human Resources ("DHR") sought the dismissal of its petition seeking to terminate the mother's parental rights to her second-oldest child, N.P., who was just a few months shy of being 17 years old at the time the

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judgment was entered. DHR stated that it had agreed to let N.P. live in an apartment at the group foster home where she was a resident, to help her with independent living. Such an arrangement is a less drastic and viable alternative to terminating the mother's parental rights. A review of the record indicates that the juvenile court's judgment terminating the mother's parental rights to N.P. is not supported by clear and convincing evidence and is therefore due to be reversed.

As to the mother's two younger children, who are twins, both testified that they did not want to be adopted and wanted to maintain their family relationship. Despite the mother's inability to parent the two younger children, the evidence indicates that the children have a close emotional bond with her and have said that they wanted to continue to visit the mother. Two DHR caseworkers and the court-appointed special advocate all testified that it would be in the children's best interests to maintain a relationship with the mother. The DHR worker who was handling the case at the time of the hearing testified that the mother was exercising unsupervised visitation and that there were no issues that led her to

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believe that the mother's contact with the children was detrimental to the children. In fact, that worker said that, based on her observations, the visits were beneficial to the children. In other words, it would not be in the younger children's best interest for the mother's parental rights to be terminated, and that doing so would not be an appropriate remedy under the facts of these cases. See Ex parte A.S., supra.

As with the case of N.P., I do not believe that the juvenile court's judgments terminating the mother's parental rights to the younger children are supported by clear and convincing evidence. Accordingly, I agree that the judgments terminating the mother's parental rights in these cases are due to be reversed.