REL: November 20, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190344

R.E.H., Jr.

v.

C.T. and Y.S.-T.

Appeal from Jefferson Juvenile Court, Bessemer Division (JU-18-246.02)

HANSON, Judge.

R.E.H., Jr. ("the father"), is the father of L.T. ("the child"). The father is also an "adult sex offender" by virtue of his 2014 conviction for

the offense of sexual abuse in the first degree. See § 15-20A-4(1), § 15-20A-5(7), and § 13A-6-66, Ala. Code 1975. Because of the nature of the father's sex offense -- sexual contact by forcible compulsion of his then 16-year-old stepdaughter, see 13A-6-66(a)(1) -- to which he pleaded guilty, the father is prohibited by the provisions of the Alabama Sex Offender Registration and Community Notification Act ("the Act"), § 15-20A-1 et seq., Ala. Code 1975, from residing with the child. In this case, a dependency proceeding regarding the child, the Jefferson Juvenile Court, Bessemer Division ("the juvenile court") specifically concluded that, under the facts and circumstances of this case -- the child's mother, C. To. ("the mother") had stipulated that the child was dependent and the father was prohibited from residing with the child by § 15-20A-11(d), Ala. Code 1975 -- the child was, as a matter of law, dependent. The father has appealed from that judgment, contending that the juvenile court erred in finding the child dependent based on the fact that § 15-20A-11(d) prohibits the father from residing with the child; he also contends that § 15-20A-11(d) is unconstitutional. We affirm.

Facts and Procedural History

The child was born on July 13, 2012. The mother and the father were not married. On December 12, 2018, C.T. and Y.S.-T., the child's maternal grandparents ("the grandparents"), filed a dependency petition in the juvenile court asserting that the mother was unable to care for the child. Following a shelter-care hearing, a pendente lite custody order was entered by the juvenile court that placed the child with the grandparents and granted the father supervised visitation. The grandparents and the guardian ad litem appointed to represent the child subsequently moved to terminate the father's visitation on the grounds that paternity of the child had not been formally established and because the father was a convicted sex offender. Court-ordered genetic testing confirmed that the father was the child's biological father, and the father's parentage of the child was formally adjudicated by the juvenile court on September 27, 2019.

A dependency hearing before an appointed juvenile-court referee was conducted on January 13, 2020. Before that hearing, the grandparents had filed a motion in support of their dependency petition, asserting that, because he was conclusively prohibited by § 15-20A-11(d)(5) from residing

with the child , the father was unable to discharge his responsibilities to and for the child. At the outset of the dependency hearing, the father stipulated that he had been convicted of sexual abuse in the first degree pursuant to § 13A-6-66(a)(1), which provides that "[a] person commits the crime of sexual abuse in the first degree if he ... [s]ubjects another person to sexual contact by forcible compulsion." He further stipulated that the victim had been his stepdaughter; that the victim had been born on December 13, 1996; that he had been married to the victim's mother on April 4, 2013; that the year of the offense had been 2013; and that the victim had lived with the father until 2011 but had not lived with the father at the time of the offense.

After receiving the above stipulations, the juvenile-court referee presiding over the dependency hearing stated the following:

> "Okay. All right. Then I am going to find [the] child to be dependent as to [the father] under [§] 15-[20A]-11, [and] the [Act]....
>
> "So I'm not saying that this makes sense morally or legally or socially. But under the law as it currently stands, you're just not permitted to have any overnight visitation with a minor child whether it's your child or not your child. And ... that being the case, I can't say that you're able to adequately

> discharge your responsibility as a parent to a child that you aren't even allowed to have into your home to live with you. So, I'm going to find the child to be dependent."

The father made an on-the-record objection to the juvenile-court referee's determination that, based on the application of § 15-20A-11(d) in this case, the father was unable "to adequately discharge [this] responsibility as a parent" and, thus, that the child was dependent. He did not, however, seek to offer additional evidence, including evidence concerning whether he had the ability to parent the child notwithstanding the legal limitations imposed upon him because of his sex-offender status. As noted earlier, the mother stipulated to the child's dependency. Other than the stipulations of the parties, no further evidence or testimony was offered or received at the dependency hearing.

On January 13, 2020, the juvenile-court referee entered his findings and recommendations, concluding that the child was dependent and vesting custody with the grandparents. With regard to the father, the referee reasoned:

> "The parties stipulate that [the father] has been previously convicted of Sexual Abuse in the 1st Degree under Ala. Code[1975,] § 13A-6-66(a)(1) (sexual contact by forcible

> compulsion), that the victim in that case was born 12-13-1996 and was 16 [years old] at the time of the offense, and that [the father] was married to the victim's mother on 4-4-13, that [the father] lived with the victim until some time in 2011, but at the time of the offense in 2013, he did not reside with her.
>
> "Therefore, under at least one and perhaps all three of the provisions of [Ala. Code 1975,] §§ 15-20A-11(d)(2), (3) and (5), [the father] is not permitted to reside with or have overnight contact with a minor, even a biological child. Because of this prohibition, [the father] is unable to adequately exercise his paternal responsibility to care for a child, and [the child] is hereby found to be dependent solely on that basis per Ala. Code[1975, §§] 12-15-102(8)(a)(2) and (6) as to the father. Note that [the father] objects to the child being found dependent as to him solely on the basis of the limitation imposed on him by operation of Ala. Code[1975,] § 15-20A-11(d)."

The juvenile court ratified the findings and recommendations of the juvenile-court referee on January 13, 2020. This appeal timely followed.

Analysis

The father first challenges the juvenile court's dependency determination. This court has stated that, in a dependency case, "[a] petitioner must present clear and convincing evidence that a child is dependent pursuant to § 12-15-102(8)(a), Ala. Code 1975." J.W. v. T.D.,

58 So. 3d 782, 788 (Ala. Civ. App. 2010). Section 12-15-102(8)(a) defines a "dependent child," in pertinent part, as follows:

> "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."

Although a juvenile court's judgment in a dependency action in which evidence was presented ore tenus typically will not be reversed absent a showing that the juvenile court's ruling was plainly and palpably wrong, when the issue presented on appeal is a question of law, this court's review is de novo, and no presumption of correctness attaches to the juvenile court's judgment. See J.P. v. S.S., 989 So. 2d 591, 598 (Ala. Civ. App. 2008).

In this case, it was undisputed that the father had been convicted of first-degree sexual assault of a minor by forcible compulsion, a violation of § 13A-6-66(a)(1).[1] As such, he qualified as an "adult sex offender" and is prohibited by § 15-20A-11(d) from residing with a minor, even if the minor is his own child. Section 15-20A-11(d) provides, in pertinent part:

> "No adult sex offender shall reside or conduct an overnight visit with a minor. Notwithstanding the foregoing, an adult sex offender may reside with a minor if the adult sex offender is the parent, grandparent, stepparent, sibling, or stepsibling of the minor, unless one of the following conditions applies:
>
> "....
>
> "(2) The adult sex offender has been convicted of any sex offense in which any of the minor children, grandchildren, stepchildren, siblings, or stepsiblings of the adult sex offender was the victim.
>
> "(3) The adult sex offender has been convicted of any sex offense in which a minor was the victim

[1]As noted earlier, the father made an on-the-record stipulation regarding the pertinent circumstances surrounding his conviction for first-degree sexual abuse. See K.D. v. Jefferson Cnty. Dep't of Hum. Res., 88 So. 3d 893, 896 (Ala. Civ. App. 2012) (quoting Spradley v. State, 414 So. 2d 170, 172 (Ala. Crim. App. 1982)) (" 'A stipulation is a judicial admission, dispensing with proof, recognized and enforced by the courts as a substitute for legal proof.' ").

> and the minor resided or lived with the adult sex offender at the time of the offense.
>
> "....
>
> "(5) The adult sex offender has been convicted of any sex offense involving forcible compulsion in which the victim was a minor."

Furthermore, the Act contains the following definition of the term "reside":

> "To be habitually or systematically present at a place. Whether a person is residing at a place shall be determined by the totality of the circumstances, including the amount of time the person spends at the place and the nature of the person's conduct at the place. The term reside includes, but is not limited to, spending more than four hours a day at the place on three or more consecutive days; spending more than four hours a day at the place on 10 or more aggregate days during a calendar month; or spending any amount of time at the place coupled with statements or actions that indicate an intent to live at the place or to remain at the place for the periods specified in this sentence. A person does not have to conduct an overnight visit to reside at a place."

§ 15-20A-4(20).

In K.E.W. v. T.W.E., 990 So. 2d 375 (Ala. Civ. App. 2007), this court, applying former § 15-20-26(c), Ala. Code 1975, the predecessor of § 15-20A-11(d), concluded that our legislature had conclusively established, as

a matter of law, that it was not in a child's best interests to reside with a criminal sex offender. The court in K.E.W. explained:

> "Our legislature has conclusively established as a matter of law that it is in the best interests of the children of this state to avoid any living arrangement with a person convicted of a sex offense committed against children. Section 15-20-26(c)(4), Ala. Code 1975, provides:
>
> > " '(c) No adult criminal sex offender shall establish a residence or any other living accommodation where a minor resides. Notwithstanding the foregoing, an adult criminal sex offender may reside with a minor if the adult criminal sex offender is the parent, grandparent, or stepparent of the minor, unless one of the following conditions applies:
> >
> > > " '....
> > >
> > > " '(4) The adult criminal sex offender has ever been convicted of any criminal sex offense involving a child, regardless of whether the offender was related to or shared a residence with the child victim.'
>
> "The legislature has explicitly declared that the purpose behind the residency requirements of § 15-20-26 is 'to protect the public, especially children, from convicted criminal sex offenders' who, the legislature has found, pose a danger of recidivism. Ala. Code 1975, § 15-20-20.1[(the legislature's

> similar findings supporting the Act are now codified as § 15-20A-2, Ala. Code 1975)]. This court recently affirmed that § 15-20-26 is a civil remedial statute designed 'to protect communities and their most vulnerable citizens, children, from the proven danger of recidivism by criminal sex offenders.' Salter v. State, 971 So. 2d 31, 37 (Ala. Civ. App. 2007) (citing Lee v. State, 895 So. 2d 1038, 1042 (Ala. Crim. App. 2004)) (emphasis added).
>
> "Unlike other state legislatures, the Alabama Legislature has not granted trial courts the power to award custody to a parent who resides with or otherwise engages in a living accommodation with a convicted sex offender. See, e.g., Cal. Fam. Code § 3030(a)(2) (West 2007) (allowing trial court to award custody to parent who resides with convicted sex offender if trial court finds, in writing, that there is no significant risk of harm to the child). Rather, the legislature has created a rule without exception for the protection of the children of this state. It would violate Alabama's stated public policy to award custody of a minor to a parent who resides with or shares a living accommodation with a registered criminal sex offender convicted of crimes against children, regardless of the opinion of experts, lay persons, and the trial court that the registered sex offender does not pose a threat to the child."

990 So. 2d at 381. Accordingly, this court concluded that the trial court in K.E.W. had erred in not determining that, as a matter of law, it was not in the best interests of the child at issue in that case to remain in a living arrangement with a sex offender. 990 So. 2d at 382.

Similarly, under the facts and circumstances in this case, the public policy of Alabama prohibits the father from "residing" with the child, a term broadly defined in the Act to prohibit the father from spending significant time at the child's home (no more than 4 hours per day for 3 consecutive days or no more than 10 days in a month). See § 15-20A-4(20). This state-imposed separation of offenders and children necessarily renders the father unable to assume physical custody of the child and constrains his ability "to discharge his ... responsibilities to and for the child." § 12-15-102(8)a.6. See, e.g., S.U. v. Madison Cnty. Dep't of Hum. Res., 91 So. 3d 716, 720 (Ala. Civ. App. 2012) (noting, in a termination-of-parental-rights case, that nonparent state agency had obtained custody of parent's children because that parent's imprisonment rendered her unable to discharge her parental duties), and id. at 723 (Thomas, J., concurring in the result, joined by Pittman, J.) (opining that parent's own conduct had "caused her separation from the children"). Under such circumstances, and in light of Alabama's strong public policy intended to protect children from recidivist sex offenders, see § 15-20A-2, Ala. Code 1975, the father's conviction for a sex offense involving his minor

stepdaughter that prohibits him from legally residing with (and thus caring for) the child amounted to clear and convincing evidence supporting the juvenile court's determination that the child is dependent.

The father, however, argues that the juvenile court erred in reaching its dependency determination without "weigh[ing] any more evidence for or against [him] ... during the trial setting." The problem with this argument, however, is that no additional evidence was offered by the father at trial; thus, there was no additional evidence that the juvenile court could have considered. Even if this court was to assume that the juvenile court had informed the parties at or before trial that it intended to find the child dependent based solely on the operation of § 15-20A-11(d), to properly preserve this second issue for appeal, the father would have been required to state his intent to offer additional evidence, to obtain an on-the-record adverse ruling, and to make an offer of proof indicating what that additional evidence would have shown. See, e.g., Spencer v . Remillard, [Ms. 1180650, Sept. 4, 2020] ___ So. 3d ___, ___ (Ala. 2020) (quoting Pensacola Motor Sales, Inc. v. Daphne Auto, LLC, 155 So. 3d 930,

936-37 (Ala. 2013)) (" 'When there is no indication in the record that a trial court's ruling on a motion in limine was absolute or unconditional, the proponent of the contested evidence must attempt to admit the evidence at trial and obtain a specific adverse ruling in order to preserve the issue for appellate review.' "); Hennis v. Hennis, 977 So. 2d 520, 526 (Ala. Civ. App. 2007) (quoting Kilcrease v. John Deere Indus. Equip. Co., 663 So. 2d 900, 902 (Ala. 1995), quoting in turn Walton v. Walton, 409 So. 2d 858, 861 (Ala. Civ. App. 1982)) (" ' "Generally, in order to preserve review of the trial court's ruling sustaining an objection to proffered evidence, the party offering the evidence must make an offer of proof indicating what the evidence would have shown." ' "). Here, no additional evidence was tendered, much less excluded and demonstrated by an offer of proof such that this issue properly could be deemed preserved for appellate review. Accordingly, we need not reach the issue whether the operation of § 15-20A-11(d) would have compelled a dependency determination notwithstanding the existence of potentially favorable evidence concerning the father's general willingness or ability to act as a parent.

We also reject the father's argument that the juvenile court "impermissibly adjudicated dependency as to the father solely on the basis of the father's past conduct," i.e., his 2014 criminal conviction. To be sure, the father's past conduct led to his conviction, but it is the father's present legal inability to reside with the child, pursuant to § 15-20A-11(d), that flows from the conviction that precludes him from discharging his parental responsibilities. Accordingly, the juvenile court's judgment was supported by evidence that the child was dependent at the time of the judgment.

Finally, the father asserts that § 15-20A-11(d) is unconstitutional on its face and as applied against him in this dependency proceeding. The father's constitutional arguments, however, are improperly presented for the first time on appeal.

> "It is well settled that an issue cannot be raised for the first time on appeal.
>
> > " 'The rule is well settled that a constitutional issue must be raised at the trial level and that the trial court must be given an opportunity to rule on the issue, or some objection must be made to the

> failure of the court to issue a ruling, in order to properly preserve that issue for appellate review. [Our supreme court] succinctly stated this rule as follows:
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> > " ' "In order for an appellate court to review a constitutional issue, that issue must have been raised by the appellant and presented to and reviewed by the trial court. Additionally, in order to challenge the constitutionality of a statute, an appellate must identify and make specific arguments regarding what specific rights it claims have been violated."
>
> " 'Alabama Power Co. v. Turner, 575 So. 2d 551[, 553] (Ala. 1991) (citations omitted).'

"Cooley v. Knapp, 607 So. 2d 146, 148 (Ala. 1992)."

1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 344-45 (Ala. 2010). Additionally, the Alabama Attorney General was not provided an opportunity to defend the facial validity of § 15-20A-11(d) in the juvenile court. See Smith v. Renter's Realty, 296 So. 3d 844, 849 (Ala. Civ. App. 2019) (quoting Ex parte Northport Health Serv., Inc., 682 So. 2d 52, 55 (Ala. 1996), quoting in turn Ex parte St. Vincent's Hosp., 652 So. 2d

225, 228 (Ala. 1994)) (noting that "'" [a] constitutional issue can be reached by [an appellate] Court only when it has been raised ... at the trial level and the attorney general has been served pursuant to § 6-6-227[, Ala. Code 1975,] and Rule 44, Ala. R. App. P."'"). Accordingly, the father's constitutional arguments were not preserved for appellate review.

Conclusion

For the foregoing reasons, the judgment of the juvenile court is affirmed.[2]

AFFIRMED.

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

Edwards, J., concurs in the result, without writing.

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[2]Given our rejection of the arguments raised by the father on appeal, we need not consider whether the judgment could also potentially have been affirmed on grounds not argued by the parties, such as whether the child's dependency as to the mother would have authorized a custodial disposition to someone other than the father. See, e.g., T.B. v. Lee Cnty. Dep't of Hum. Res., 216 So. 3d 1246, 1250-51 (Ala. Civ. App. 2016).