

REL: October 2, 2020

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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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E.H.

v.

Calhoun County Department of Human Resources

Appeal from Calhoun Juvenile Court  
(JU-18-164.01)

EDWARDS, Judge.

In June 2018, the Calhoun Juvenile Court ("the juvenile court") entered a judgment declaring E.W. ("the child") dependent. The Calhoun County Department of Human Resources

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("DHR") placed the child in the home of her paternal grandparents, S.W. ("the paternal grandmother") and R.W. ("the paternal grandfather") (hereinafter referred to collectively as "the paternal grandparents"). DHR provided services to the child's mother, E.H. ("the mother").

On September 30, 2019, DHR filed a motion to transfer the legal and physical custody of the child to the paternal grandparents. In response, the mother filed, on November 20, 2019, a motion seeking the return of the child's custody to her. In that motion, the mother averred that she had made behavioral and lifestyle changes, that she had participated in the individualized-service-plan ("ISP") process, and that she had completed services through DHR. The mother stated that, as a result of her participation in services and the improvement in her conduct and/or condition, the child was no longer dependent and that the child's best interest would be served by returning custody to her.

After a trial held over one day in December 2019 and two days in January 2020, the juvenile court entered a judgment on February 10, 2020, awarding legal and physical custody of the child to the paternal grandparents and denying the mother's

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motion for a return of the child's custody.<sup>1</sup> The February 2020 judgment states that the child had previously been declared dependent but does not explicitly state that the child remained dependent based on the circumstances existing at the time of trial. After her postjudgment motion directed to the February 2020 judgment was denied, the mother filed a timely notice of appeal to this court.

The testimony at trial established that the child was removed from the custody of the mother and J.W. ("the father") based on the parents' drug use and possibly based on domestic violence between the mother and the father. The evidence indicating that domestic violence might have been an issue supporting the removal of the child is sparse and vague, however. The evaluations on the home of the paternal grandparents indicate that the child "is in need of a safe and stable home environment free from drug abuse and domestic

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<sup>1</sup>The child's guardian ad litem filed a Rule 60(a), Ala. R. Civ. P., motion the day following the entry of the February 2020 judgment because the juvenile court had inadvertently awarded custody of the mother's older child, N.T.P., to the paternal grandparents despite the fact that no party had requested such relief and despite the fact that the paternal grandparents were not related to that child. The juvenile court entered an order correcting the typographical error in its judgment.

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violence." Beverly Spears, the mother's caseworker beginning on November 1, 2019, testified that domestic violence was a concern for DHR.

Regarding her relationship with the father, the mother testified at trial that she and the father had ended their relationship and that he no longer lived with her. She explained that she had sought and received a protection-from-abuse ("PFA") order in her favor in September 2019 based on the father's firing a shot from a rifle into the ceiling in the room where the mother was because he was angry with the mother. However, the mother admitted that the father had assisted her in moving into a new mobile home in November 2019. She said that, on those occasions after November 2019 when the father had come by her new mobile home, she had called law-enforcement officers to report his potential violation of the PFA order.

The mother admitted that she was aware that DHR had concerns that the father was living with her when her older child was returned to her custody in March 2019. She said that his living with her had been "on and off. He would be there, and then he would leave. He wasn't living there. When

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you live somewhere, you pay bills and you contribute to the household." The mother admitted that she and the father had been living together in September 2019, when she sought the PFA order. She explained that, once her older child was removed from her custody a second time, the father "just came back" because he had a key to the residence and "pretty much" moved back in with her. The mother testified, however, that she and the father had not been intimate for "at least two years" or, at least, "over a year" before trial.<sup>2</sup>

The father testified that he and the mother had ended their relationship shortly before Christmas 2019 and that he had assisted her in locating the mobile home into which she had moved in November 2019. According to the father, he, too, had lived at that mobile home until the parties separated during the week of Christmas 2019, but, he said, as of the time of the trial, he was living out of his truck.

The paternal grandmother testified that she was aware that the mother and the father's relationship had included

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<sup>2</sup>The mother testified on two separate occasions at the trial. She testified first that she and the father had not been intimate since January 2018; she later testified that they had not been intimate for over a year before January 2020.

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violence between them. She also testified that the father had resided with the mother for a time despite the fact that he was not permitted to do so. However, it is unclear from the paternal grandmother's testimony whether DHR prohibited the father from living with the mother or whether the paternal grandmother was referring to the prohibition on the father's being in the proximity of the mother imposed in the PFA order.

Regarding her substance-abuse issues, the mother testified that she had participated in "drug court" for four months and that she had also completed nine months in "TASC."<sup>3</sup> However, the mother admitted that she had been released from drug court for failing to appear for a drug test because, she said, she had had a conflicting doctor's appointment. According to the mother, after her dismissal from drug court, she began a different 17-week outpatient program with "New Pathways," and, she said, she completed that program successfully on January 20, 2019; the record contains a completion certificate from New Pathways. She admitted that DHR had asked her to submit to another drug assessment by the

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<sup>3</sup>"TASC" is not defined in the record, but it appears to be a program through which the mother was tested for the use of illegal drugs.

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drug court in August 2019 but that she had not done so. Instead, she said, she had a second drug assessment at New Pathways in October 2019; however, she said that she had not provided that assessment to DHR.

Although the mother denied that she had a substance-abuse problem, she admitted under cross-examination that she had previously been addicted to opioids and that, at the time of the trial and for the previous two years, she had treated that addiction through the use of a prescribed medication, Suboxone. The mother testified that she had consumed alcohol in April 2019, but she described her use as having "only a glass of wine." She denied having used alcohol as recently as November or December 2019 or having been to a liquor store to purchase alcohol in December 2019. She admitted, however, that she had been informed by her physician that she was not to use alcohol while taking Suboxone.

Amanda Lovell, the office manager of, and a certified recovery support specialist at, New Pathways, testified that the mother had completed the outpatient drug-treatment program offered at New Pathways. In addition, she testified that the mother had continued in an after-care program she called

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"MAT," which required the mother to undergo continued peer counseling, counseling with a licensed professional counselor, and treatment by a physician; Lovell noted that the program also required monthly drug screening. When asked whether the mother's use of alcohol would concern her, Lovell answered in the affirmative. She commented that the mother should not use alcohol while taking Suboxone and that the use of alcohol could lead to a relapse of the mother's drug abuse.

The mother's mother, C.H. ("the maternal grandmother"), testified that the father no longer lived with the mother. In fact, she testified that she believed that the father was living in the barn located near the paternal grandparents' residence. She described the mother as a good mother and said that she had "matured" and "blossomed" during the previous two years.

The father testified that the mother was a good mother and should have custody of the child. The father admitted that he had a substance-abuse problem and that he had used methamphetamine in late December 2019 and had smoked marijuana around New Year's Day 2020. He said that, if the juvenile



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court would not return the child to the custody of the mother, the paternal grandparents should receive custody of the child.

The father also testified that he had given the mother money in December 2019 and that he had observed her walk into a liquor store directly after receiving the money. However, he admitted that he had not seen her purchase any alcohol. He said that the last time he had seen her drink alcohol was in November 2019. He further testified that, when the mother's older child was briefly returned to her custody, which occurred in March 2019, the father had become aware that that child, who was approximately 16 years old at the time, was consuming alcohol. According to the father, he confronted the mother about letting her teenaged child drink alcohol. When asked about the father's allegation, which had apparently been reported to DHR, the mother responded that any testimony indicating that she had been doing shots of alcohol with her older child would be untrue. The mother admitted, however, that she had tested positive for alcohol on the date that child was removed from her custody for a second time on April 19, 2019.

Spears testified that the mother had been referred by the ISP team to drug court a second time in August 2019 but that

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she had failed to follow through and submit to a drug-court assessment. According to Spears, the mother had not provided DHR with information on her completion of the New Pathways program. Spears testified that, after the second trial date, she had discovered that the father had been living or staying in the barn located adjacent to the paternal grandparents' home and that she had informed the father and the paternal grandmother that he could not live there; she said that the paternal grandmother had provided photographs indicating that the father had moved his items from the barn as Spears had instructed.

When recalled to testify in January 2020, the paternal grandmother admitted that she had discovered that the father had spent the night in the barn adjacent to her home a couple of nights in late December 2019 or early January 2020 but that he had not been living there full-time. She testified that she had never told the father that he could live in the barn. She explained that, when she first discovered that the father had spent the night in the barn, she told him that it could not happen again, but she said that, despite her expressing

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that opinion to him, the father had, in fact, slept in the barn on additional nights in January 2020.

On appeal, the mother argues solely that the juvenile court's judgment is not supported by clear and convincing evidence that the child remained dependent. Our caselaw provides that,

"[i]n order to make a custodial disposition of the child at the time [a] dispositional judgment [is] entered, the juvenile court [is] required to find that the child [is] dependent at the time of the disposition. T.B. v. T.H., 30 So. 3d 429, 431 (Ala. Civ. App. 2009). "[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in fact be dependent at the time of that disposition." V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting K.B. v. Cleburne Cty. Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result)). See also D.D.P. v. D.M.B., 173 So. 3d 1, 3 (Ala. Civ. App. 2015) (same). If the child is not dependent at the time of the dispositional judgment, the juvenile court lacks jurisdiction to make a custody determination. M.D. v. S.C., 150 So. 3d 210, 212 (Ala. Civ. App. 2014); L.R.J. v. C.F., 75 So. 3d 685, 687 (Ala. Civ. App. 2011); see also C.C. v. B.L., 142 So. 3d 1126, 1129 (Ala. Civ. App. 2013) ('In light of the juvenile court's finding that the child was not dependent, the juvenile court lacked jurisdiction to enter a judgment affecting the custody of the child, including visitation.')

H.C. v. S.L., 251 So. 3d 793, 794 (Ala. Civ. App. 2017); see also J.B. v. Cleburne Cty. Dep't of Human Res., 992 So. 2d 34,

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49-50 (Ala. Civ. App. 2008) (Moore, J., dissenting) (explaining that, in the context of a request for the return of custody by a parent in an ongoing dependency action, a juvenile court must consider whether the child remains dependent).

In the present case, the juvenile court found that there had been a material change in circumstances and that the child's best interest would be served by the child's permanent placement in the custody of the paternal grandparents. The juvenile court made no express finding of dependency and made no factual findings relating to the mother's conduct, condition, or circumstances at the time of the entry of the judgment. Although this court has explained 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,'" M.W.H. v. R.W., 100 So. 3d 603, 607 (Ala. Civ. App. 2012) (quoting J.P. v. S.S., 989 So. 2d 591, 598 (Ala. Civ. App. 2008)), we have not always been able to affirm a juvenile court's judgment when, to do so, we

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would necessarily have to conclude that the juvenile court had made an implicit finding of dependency.

In H.C., we observed that,

"in a situation in which the evidence clearly supports a dependency determination but in which the juvenile court has omitted an explicit dependency finding, this court has held that a dependency determination may be implicit in the judgment. ...

"In this case, the juvenile court found the child to be dependent at the time it entered the July 8, 2016, order. At the conclusion of the July 2016 hearing, it noted, among other things, that the mother had not resided long at her new apartment, that the mother had not yet completed her probationary period for a conviction for harassment, and that the mother had not yet completed crisis-management classes required as a condition of that probation. The juvenile court received additional evidence over the course of two days in December 2016. At the dispositional hearing, the mother presented evidence indicating that, among other things, she had completed the probationary period, she had completed the crisis-management classes, she remained living in the same apartment in which she had lived at the time of the July 2016 hearing, and she had a long-term lease for that apartment.

"In its December 22, 2016, judgment, the juvenile court did not make any determination regarding whether the child remained dependent at the time it entered that judgment. This court has reviewed the evidence in the record on appeal. It is not clear from our review whether the child remained dependent when the December 22, 2016, dispositional judgment was entered, and, therefore, this court cannot, as we did in J.P. v. S.S., [989 So. 2d 591 (Ala. Civ. App. 2008)], interpret the juvenile

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court's December 22, 2016, judgment as containing an implicit dependency determination. We conclude that the juvenile court must make a determination regarding whether the child remained dependent at the time the December 22, 2016, judgment was entered. We reverse the December 22, 2016, judgment and remand the cause for the juvenile court, as expeditiously as possible, to enter a new judgment determining whether the child was dependent at the time it entered the December 22, 2016, judgment."

H.C., 251 So. 3d at 794-95.

We cannot discern whether the juvenile court concluded that the child remained dependent based on the current circumstances of the mother because the evidence in the present case is similar to the evidence in H.C. in that that evidence, if believed, would support a conclusion that the mother has made certain steps toward reunification, including completing a drug-rehabilitation program and securing a residence at which, she testified, the father does not reside. Accordingly, because fact-finding is not a function of this court, we reverse the judgment of the juvenile court, and we remand the cause for the juvenile court to enter a judgment determining whether the child remained dependent at the time of the entry of the February 2020 judgment. See id. at 795.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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

Moore, J., concurs in the result, with writing.

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MOORE, Judge, concurring in the result.

In its final judgment, the Calhoun Juvenile Court ("the juvenile court") determined that it had previously adjudicated E.W. ("the child") to be dependent and "[t]hat there has been a material change in circumstances and that it is in the [child's] best interest that the prior order of custody be modified." From that language, it appears that the juvenile court applied a custody-modification standard in resolving the competing motions filed by E.H. ("the mother"), requesting the return of the child to her custody, and by the Calhoun County Department of Human Resources ("DHR"), requesting that custody of the child be vested in S.W. and R.W. ("the paternal grandparents"). It appears that the juvenile court did not apply the correct legal standard.

The record shows that, upon its initial determination of dependency, the juvenile court awarded legal custody of the child to DHR, which, in turn, placed the child in the care of the paternal grandparents, pending attempts to reunite the child with her parents through rehabilitation efforts. As I explained in my dissent in J.B. v. Cleburne County Department of Human Resources, 992 So. 2d 34, 47-57 (Ala. Civ. App.

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2008), when a dependent child has been placed into protective custody during a parent's or the parents' rehabilitation period, the ordinary custody-modification standards applicable in civil cases do not govern a later determination regarding whether the child should be returned to the custody of his or her parent or parents. Rather,

"when a parent petitions the juvenile court to regain custody of [a child determined to be dependent, but whose 'permanent' custody has not been adjudicated], the juvenile court is confronted with several separate, but interrelated, questions: (1) whether the child remains dependent, see J.P. v. S.S., 989 So. 2d 591 (Ala. Civ. App. 2008), (2) whether reasonable efforts at reunification, if required, have failed or succeeded, see Ala. Code 1975, [former] § 12-15-65(f) [the predecessor to § 12-15-310], and (3) whether it is in the best interests of the child to be returned to the custody of the parents. See Ala. Code 1975, [former] § 12-15-71(a) [now § 12-15-314(a)].

"....

"... The juvenile court could continue to completely deprive the parents of the custody of the child only if the appropriate quantum of evidence established all three conditions: that the child remained dependent, that reasonable efforts at reunification had not succeeded, and that it was not in the best interests of the child to return to the parents' custody."

992 So. 2d at 49-50.



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In her appeal, the mother does not argue that the juvenile court applied an incorrect legal standard when deciding the custody dispute below. The mother also does not assert that the juvenile court was required to find that the child remained dependent before proceeding to dispose of the custody of the child. However, a juvenile court lacks jurisdiction to dispose of the custody of a child in a dependency proceeding unless the child is dependent at the time of disposition. M.D. v. S.C., 150 So. 3d 210, 212 (Ala. Civ. App. 2014). If a juvenile court attempts to dispose of the custody of an allegedly dependent child without finding that the child is dependent at the time of disposition, this court may raise the juvenile court's absence of jurisdiction ex mero motu. See K.C.G. v. S.J.R., 46 So. 3d 499 (Ala. Civ. App. 2010). Thus, I agree with the main opinion that the failure of the juvenile court to find that the child remained dependent may be addressed by this court.

In the final judgment, the juvenile court did not make an express finding that the child remained dependent. Section 12-15-310(b), Ala. Code 1975, specifically requires a juvenile court to "record its findings on whether the child is

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dependent." Rule 25(A)(1), Ala. R. Juv. P., further provides that, when a juvenile court determines that a child is dependent, the juvenile court shall express that finding in writing. Although I have maintained that those unambiguous directives should be followed by the juvenile courts, see M.B. v. R.P., 3 So. 3d 237, 252-53 (Ala. Civ. App. 2008) (Moore, J., concurring in part and concurring in the result in part), a majority of this court has long maintained that a written finding of dependency is not required when that finding may be inferred from the judgment. See, e.g., E.H.Y. v. Covington Cty. Dep't of Human Res., 602 So. 2d 439 (Ala. Civ. App. 1992); and Phillips v. Alabama Dep't of Pensions & Sec., 394 So. 2d 51 (Ala. Civ. App. 1981). Following that line of cases, this court may review a judgment containing an implied finding of dependency to determine whether clear and convincing evidence supports such a finding. See, e.g., J.P. v. S.S., 989 So. 2d 591 (Ala. Civ. App. 2008).

Given the language used by the juvenile court in the final judgment, I agree that it is questionable whether the juvenile court impliedly found that the child remained dependent. I further agree that the judgment should be

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reversed. Upon remand, the juvenile court should determine whether the child remained dependent by applying the correct legal standards enunciated in J.B., supra, and by entering the express findings of fact necessary to sustain its judgment.