REL: March 26, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190927

J.L.

v.

Alabama Department of Human Resources

Appeal from Tuscaloosa Juvenile Court
(JU-12-340.05)

PER CURIAM.

On September 4, 2020, J.L. ("the mother"), appearing through her appointed counsel, timely appealed from a judgment of the Tuscaloosa

Juvenile Court entered on September 1, 2020, in response to a petition filed in November 2019 by a representative of the Alabama Department of Human Resources ("DHR") that sought termination of parental rights. That judgment, in pertinent part, terminated the parental rights both of the mother and of R.D.P. (the father) as to a minor child, i.e., M.M.-F.P. ("the child").

During the pendency of this appeal, the mother's appointed counsel filed a "no-merit" brief and a motion to withdraw under the procedure set forth in Anders v. California, 386 U.S. 738 (1967), and subsequently deemed to be applicable in appropriate civil cases by this court in J.K. v. Lee County Department of Human Resources, 668 So. 2d 813 (Ala. Civ. App. 1995). In response to the filing of that no-merit brief and motion to withdraw, this court, on December 11, 2020, ordered that the no-merit brief and motion to withdraw, along with a copy of the appellate record,[1]

[1]We have appellate jurisdiction under Rule 28(A)(1)(c)(i), Ala. R. Juv. P., because the ore tenus proceeding held in the juvenile court on DHR's petition was transcribed by a court reporter from an audio recording and the ensuing record was certified as adequate for appellate review by the juvenile-court judge.

be served upon the mother and that the mother would "have until January 8, 2021, to serve [appointed] counsel and this [c]ourt with a list of each and every point or issue that [she] want[ed] considered in this appeal." Appointed counsel has since provided a written notice to this court of his having twice "sent a copy of the record and brief to the [mother] via ... United States Mail to her last known address [in] Bessemer,"[2] including once via certified mail, and stating that those mailings had not been returned undelivered. According to appointed counsel, he has not had any contact with the mother since the day he filed the notice of appeal, and he does not have any additional information concerning how to contact the mother. Further, the mother has not filed any response to this court's December 11, 2020, order in the office of the clerk of this court.

The Mother's Appeal

In the absence of any filing from the mother in response to this court's December 11, 2020, order, this court, pursuant to Anders and J.K., now proceeds to consider whether the mother's appeal as currently

[2]Pursuant to Rule 25(c)(3), Ala. R. App. P., "[s]ervice by mail ... is complete on mailing."

postured is "wholly frivolous" (J.K., 668 So. 2d at 815 (citing Anders, 386 U.S. at 744)). Under Alabama law, parental rights may be terminated if, upon consideration of a number of statutory factors, it is demonstrated by "clear and convincing evidence" that "the parents of a child 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 ... the conduct or condition is unlikely to change in the foreseeable future." Ala. Code 1975, § 12-15-319(a). Appointed counsel for the mother asserts, in the Anders brief, that the mother "could argue" that the petition for termination of parental rights should not have been granted as to her based on a lack of clear and convincing evidence in support thereof.

The juvenile court's judgment in this case contains a number of explicit determinations that are expressly "based upon clear and convincing evidence presented at" trial. In pertinent part, the juvenile court determined that "[t]he conduct and condition of ... each parent is such as to render [each parent] unable to properly care for the child," that the conduct or condition "is unlikely to change in the foreseeable future,"

that "[t]he parents abandoned the child" (see Ala. Code 1975, § 12-15-319(a)(1)), that "DHR made reasonable efforts and stood ready to make further reasonable efforts to reunify the family but those efforts ha[d] been unsuccessful" (see Ala. Code 1975, § 12-15-319(a)(7)), that the mother and the father had "exhibited a lack of effort to adjust their circumstances" (see Ala. Code 1975, § 12-15-319(a)(12)), that "[t]here is no suitable relative of [either parent] who is both fit and willing to serve as a relative placement resource for the child," that "[a]ll viable alternatives to termination of parental rights ha[d] been considered," that "no such alternative exists," that "[t]he child is adoptable and in need of and is entitled to the care and protection of the State of Alabama," and that "the child's morals, health and general welfare w[ould] be best served by granting permanent care, custody and control to" DHR.

In addition, as appointed counsel for the mother notes in his Anders brief, the mother "offered no other resource for custody," "never attempted to visit with [the] child," and "did not show up for the ... trial even though she was properly served." The record supports counsel's statement regarding service of process, indicating that the mother was served on

July 2, 2020.[3] That said, this court has observed that a parent's personal presence at a trial of a termination-of-parental-rights case is not mandated so long as that parent, as the mother was here, is represented by counsel and has the means, through counsel, to present evidence favorable to the parent's case. See J.C. v. AGAPE of Cent. Alabama, 590 So. 2d 302, 305 (Ala. Civ. App. 1991).

At trial, a DHR social worker testified that the child had been in foster care since June 2019 in response to an indicated report of inadequate supervision and neglect because the mother and the child had been "basically homeless" and had been "sleeping outside in [a] car" and the child had missed 25 days of school. According to the social worker, the child had also been in foster care from 2012 until early 2016 based on indicated findings of neglect and inadequate supervision and a report of physical abuse as to a half sibling of the child. After the child reentered foster care, the sole contact that the mother had with DHR personnel

[3]Pursuant to Ala. Code 1975, § 12-15-320(a), trials in cases in which termination of parental rights is sought must be completed within 90 days of perfection of service of process.

occurred when the social worker visited the mother during her incarceration at the Tuscaloosa County jail approximately two weeks later; the mother did not provide any contact information for herself or family members, but informed the social worker of an intent to provide that information as soon as she was released. Apart from a voicemail message left with DHR on December 31, 2019, the mother made no further contact with DHR, and the mother made no contact whatsoever with the child after the child's placement in foster care. Further, DHR received no response to a certified letter it had sent to an address for the mother that had been supplied by a local law-enforcement agency. Although a maternal aunt of the child contacted DHR and indicated that the child's maternal grandfather wanted to seek custody of the child, the maternal grandfather made no direct contact with DHR despite having been sent a letter from DHR by certified mail.

Withdrawal of Appointed Counsel for Appealing Parents

In light of the absence in the record of any potentially meritorious issue discussed in the preceding section of this opinion, leave to withdraw would arguably be due to be summarily granted, and dismissal of the

appeal on the authority of Anders and J.K. would arguably be warranted without further comment. However, in connection with this court's consideration of the no-merit brief and motion to withdraw filed by appointed counsel for the mother in this appeal, we have had occasion to revisit the breadth of this court's 26-year-old decision in J.K. In that case, this court, noting that there was "a split in the few jurisdictions that ha[d] addressed the question whether to make Anders applicable in civil cases," 668 So. 2d at 815, elected to follow a line of Illinois appellate opinions[4] over a contrary holding from Washington[5] and "imported" the procedure set forth in Anders to appeals in civil cases taken by clients represented by appointed (as opposed to retained) counsel. Since that time, however, (1) the United States Supreme Court has indicated that the Anders procedure is not compelled by the United States Constitution, see Smith v. Robbins, 528 U.S. 259, 273-76 (2000); (2) multiple appellate courts in other states considering the question since J.K. was decided have

[4]In re Keller, 138 Ill. App. 3d 746, 486 N.E.2d 291, 93 Ill. Dec. 190 (1985), and In re McQueen, 145 Ill. App. 3d 148, 495 N.E.2d 128, 99 Ill. Dec. 63 (1986).

[5]In re Welfare of Hall, 99 Wash. 2d 842, 664 P.2d 1245 (1983).

advanced more persuasive rationales than did In re Welfare of Hall, 99 Wash. 2d 842, 664 P.2d 1245 (1983), for electing not to apply the Anders procedure in a setting in which counsel has been appointed to represent parents appealing from child-protection judgments, such as judgments terminating parental rights;[6] and (3) since J.K. was decided, this court has encountered a number of situations[7] in which appointed counsel electing

[6]See Denise H. v. Arizona Dep't of Econ. Sec., 193 Ariz. 257, 972 P.2d 241 (Ct. App. 1998); In re Sade C., 13 Cal. 4th 952, 920 P.2d 716, 55 Cal. Rptr. 2d 771 (1996); A.L.L. v. People, 226 P.3d 1054, 1055 (Colo. 2010); N.S.H. v. Florida Dep't of Child. & Fam. Servs., 843 So. 2d 898 (Fla. 2003); and In re S.C., 195 Vt. 415, 88 A.3d 1220 (2014).

[7]See C.M. v. Tuscaloosa Cnty. Dep't of Hum. Res., 81 So. 3d 391, 394-98 (Ala. Civ. App. 2011) (stating that appointed counsel for appellant had been directed to file supplemental brief addressing effect of "beneficial emotional bond" existing between appellant and children upon whether termination would be in children's best interests, which issue was held to warrant reversal); M.G. v. Madison Cnty. Dep't of Hum. Res., 248 So. 3d 13, 15 (Ala. Civ. App. 2017) (stating that appointed counsel for appellant had been directed to file a supplemental brief addressing sufficiency of the evidence to support dependency determination, which issue was held to warrant reversal); M.L.M. v. Madison Cnty. Dep't of Hum. Res., 298 So. 3d 509, 512-14 (Ala. Civ. App. 2020) (noting that review of initial appointed counsel's no-merit brief on behalf of one parent revealed "certain potentially viable arguments on appeal, none of which ... had [been] identified or briefed"; only later did parent's replacement appointed counsel raise and argue dispositive issue that parent had been denied statutory right to trial counsel); see also K.J. v. Pike Cnty. Dep't of Hum. Res., 275 So. 3d 1135, 1143-47 (Ala. Civ. App. 2018) (noting that, although

to seek withdrawal from representation and to file no-merit briefs in appeals from judgments terminating parental rights have failed to raise in such briefs potentially or actually meritorious issues.

It is the view of this court that, as a matter of prospective application, the Anders procedure as adopted in J.K. should no longer be permitted in appeals taken after the date of this decision from dependency and termination-of-parental-rights judgments:

> "An action involving a claim seeking to terminate parental rights affects both the fundamental rights of a parent and the well-being of the child at issue. The nature of a termination action involves allegations that a parent's inability to parent his or her child, that parent's failure to timely adjust his or her circumstances, and the lack of viable alternatives to termination, warrant the termination of the parent's fundamental right to parent his or her child. It is the duty of counsel to proceed as best he or she can to advocate on behalf of his or her client, even given a generally less-than-ideal fact situation."

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judgments from which appeals were taken were ultimately affirmed, appointed counsel's no-merit brief "did not discuss any facts pertaining [to] the cases for which [counsel had been] appointed" and "contained no references to any facts or issues," necessitating appointment of new counsel for appellant before appeals could be decided).

K.J. v. Pike Cnty. Dep't of Hum. Res., 275 So. 3d 1135, 1143 (Ala. Civ. App. 2018) (emphasis added).[8] As the Colorado Supreme Court observed, affording a right to representation by counsel to a parent involved in termination-of-parental-rights proceedings, which Alabama does by statute (see Ala. Code 1975, § 12-15-305(b)), indicates a policy determination that "the parent must be able to seek meaningful review of the order, whatever the specific circumstances of his case," such that "pursuit of such an appeal -- with the guaranteed aid of court-appointed counsel -- serves an important function and cannot be said to be 'wholly frivolous' for lack of merit alone." A.L.L. v. People, 226 P.3d 1054, 1063 (Colo. 2010). Stated another way, "the prosecution [by appointed counsel] of an appeal serves the same important goals -- shared by the State and the parent alike -- of protecting the parent-child relationship and ensuring

[8]Although much of the caselaw cited and applied in this opinion arises from the context of appeals from judgments terminating parental rights, it is well settled that, as a matter of Alabama law, "[t]he right of the parents of the child in a dependency case to be represented by counsel at every stage of the proceeding" is a similarly "fundamental one protected by statute and court decision." Smoke v. State Dep't of Pensions & Sec., 378 So. 2d 1149, 1150 (Ala. Civ. App. 1979).

a fair and accurate decision that termination of parental rights is in the child's best interests." In re S.C., 195 Vt. 415, 419, 88 A.3d 1220, 1223 (2014).

However, the experience of this court (see note 7, supra) indicates that allowing appointed appellate counsel in dependency and termination-of-parental-rights cases to move for withdrawal of representation by following the Anders procedure has hindered, rather than furthered, this court's charge to expedite the decision of such appeals. See Ala. Code 1975, § 12-15-601 (providing that "[a]ll appeals from juvenile court proceedings ... shall take precedence over all other business of the court to which the appeal is taken" (emphasis added)).[9] As A.L.L. notes, "[t]he procedure outlined in Anders does little for judicial economy" because, under Anders, "an appellate court must both thoroughly review the record in order to ensure counsel has not missed any appealable issues and

[9]As the California Supreme Court has noted concerning that state's analogous appellate-preference statute, "attorneys are enabled, and indeed encouraged, to effectively represent their clients by [such] procedural protections." In re Sade C., 13 Cal. 4th 952, 990, 920 P.2d 716, 739, 55 Cal. Rptr. 2d 771, 794 (1996).

consider -- at least to some extent -- the merits of any issues the court identifies in the record or that the attorney has identified in her briefs"; it is perhaps an understatement to say that "[s]uch a searching review that requires appellate courts to play the roles of both advocate and tribunal cannot be considered the swifter path to resolution of the issues" in appeals in dependency and termination-of-parental-rights cases compared to direct consideration of the merits of the appeals themselves. A.L.L., 226 P.3d at 1063; accord N.S.H. v. Florida Dep't of Child. & Fam. Servs., 843 So. 2d 898, 902-03 (Fla. 2003) ("[r]equiring appellate courts to review extensive fact-based records in termination of parental rights cases" for presence of colorable meritorious issues adds "to both the burden placed on the appellate courts and the delay in bringing the termination of parental rights proceeding to conclusion without a concomitant showing of need to protect the constitutional rights of parents").

Thus, upon reflection, we are compelled to express our agreement with the Colorado Supreme Court's view that, at least in the context of appeals by parents in child-protection cases, such as in dependency and

termination-of-parental-rights cases,[10] the Anders procedure is "inappropriate and unnecessary"; rather, "[a]ppellate review of a parent's best arguments -- however weak -- made with the assistance of counsel best protects the parent's rights, supports the child's interests in permanency and finality, and avoids the injection of unnecessary confusion and delay into the reviewing process." A.L.L., 226 P.3d at 1064. We further agree with the Vermont Supreme Court that, under Rule 1.16(c) of the Model Rules of Professional Conduct as adopted in various states (including Alabama) -- which rule permits an attorney's continued representation of a client "[w]hen ordered to do so by a tribunal" -- an appointed attorney acting in good faith on behalf of an appealing parent in a child-protection proceeding may resist a hypothetical or actual charge of unethical conduct on the basis that "even an arguably frivolous claim

[10]But see N.S.H. v. Florida Dep't of Child. & Fam. Servs., 843 So. 2d at 902 (indicating that the Anders procedure should be applied in the context of appeals from judgments entered in mental-health civil-commitment proceedings); see generally Joseph Frueh, Note, The Anders Brief in Appeals from Civil Commitment, 118 Yale L.J. 272, 317 (2008) (advocating for "importing the Anders procedure into the civil-commitment context").

will not be deemed to violate Rule 3.1 where ... a court categorically refuses to grant motions to withdraw in deference to overriding state interests." In re S.C., 195 Vt. at 420-21, 88 A.3d at 1224. Indeed, as an Arizona appellate court has intimated, there is rarely a significant additional expenditure of effort in counsel's filing a "substantive" brief as opposed to an Anders no-merit brief:

> "A proceeding to terminate a parent's rights is one filled with facts and opinions, all relating to whether one of the statutory grounds for termination can be proved and whether termination will be in the child's best interests. No matter how egregious the facts may appear to be in such a case, they are rarely wholly one-sided or entirely clear-cut. In addition, experts' opinions are frequently based on a limited knowledge of the applicable facts and vary from timely to stale. ... [I]t seems to us counsel could have filed a substantive brief in this case by developing two of the four arguable issues she listed."

Denise H. v. Arizona Dep't of Econ. Sec., 193 Ariz. 257, 260, 972 P.2d 241, 244 (Ct. App. 1998).

Conclusion

The foregoing opinion will serve as prospective notice to the bench and bar of this state that this court, in appeals taken after the date of this decision, will no longer permit counsel appointed to represent a parent

appealing from a dependency judgment or a judgment terminating parental rights[11] to seek withdrawal by filing a motion to withdraw and a no-merit brief pursuant to the Anders procedure as set forth in J.K. However, we recognize that, as a practical matter, counsel for the mother in this case could not reasonably have anticipated that this court would recede from the holding in J.K. in the manner discussed herein. It is ordered, therefore, that, consistent with the manner in which Anders and J.K. were applied by this court[12] until today to appeals by parents in

[11]It is not the intent of this court to preclude attorneys appointed to represent parents in dependency or termination-of-parental-rights cases at the trial level from seeking leave from the appropriate trial court (whether a juvenile court or a circuit court exercising de novo appellate jurisdiction) to withdraw from representation upon the appearance of newly appointed appellate counsel, nor to disturb the discretion of such trial courts to appoint new counsel for purposes of appeal if trial counsel does not routinely represent clients on appeal.

[12]We note that this court "does not have the authority to overrule decisions of" either our supreme court or another intermediate appellate court, see Money v. State, 717 So. 2d 38, 48 n.5 (Ala. Crim. App. 1997), and this decision should thus not be read as applicable to any class of criminal cases outside this court's appellate jurisdiction, such as delinquency adjudications. Compare Ex parte Sturdivant, 460 So. 2d 1210, 1212 (Ala. 1984) ("Applying Anders to Alabama practice, once counsel [in an appeal from a criminal conviction] has complied with the requirements of [Anders], the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to

dependency and termination-of-parental-rights cases, the motion to withdraw filed by appointed counsel for the mother in this case is granted and the mother's appeal is dismissed.

MOTION TO WITHDRAW GRANTED; APPEAL DISMISSED.

All the judges concur.

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argue the appeal for the indigent.").