

Rel: June 18, 2021

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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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**Eric Funderburk, in his capacity as the guardian ad litem  
for H.L., a minor child.**

v.

**Russell County Department of Human Resources**

**Appeal from Russell Juvenile Court  
(JU-18-111.02)**

THOMPSON, Presiding Judge.

In 2018, in case number JU-18-111.01 ("the .01 action"), the Russell Juvenile Court ("the juvenile court") found H.L. ("the child") to be

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dependent and awarded custody of the child to the Russell County Department of Human Resources ("DHR").

On August 3, 2020, Jodi C. Dykes, in her capacity as the guardian ad litem for the child in the .01 action, filed a petition in the juvenile court seeking an adjudication that the child was dependent and seeking a custodial disposition of the child. The action commenced by Dykes's petition was designated by the juvenile-court clerk as case number JU-18-111.02 ("the .02 action"). In her petition, Dykes alleged that the child had been found to be dependent in the .01 action, that custody of the child had been awarded to DHR, and that DHR had placed the child in a home in which the child was at risk of sexual abuse and had refused to take appropriate action to protect the child. In the .02 action, Dykes requested that custody of the child be transferred to another county's department of human resources. Dykes also requested an emergency hearing on her petition. The juvenile court scheduled an August 18, 2020, hearing on the request for emergency relief in the .02 action.

On August 17, 2020, DHR filed a motion to dismiss the .02 action based on its allegation that the juvenile court lacked subject-matter

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jurisdiction over the action. After conducting the scheduled hearing, the juvenile court entered a judgment on August 18, 2020, dismissing the .02 action for lack of subject-matter jurisdiction. In that judgment, the juvenile court also declined to modify the custodial disposition of the child, but it scheduled the .01 action for a review hearing during which, it stated, it would allow Dykes to seek to modify the placement of the child.

Dykes filed a postjudgment motion on August 28, 2020, and the juvenile court entered an order denying that motion on September 7, 2020. Dykes had filed a notice of appeal to this court on September 1, 2020, while her postjudgment motion was still pending in the juvenile court. That notice of appeal, however, is deemed to have been held in abeyance until the disposition of the postjudgment motion. See Rule 4(a)(5), Ala. R. App. P. ("A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59, Alabama Rules of Civil Procedure, shall be held in abeyance until all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59 are ruled upon; such a notice of appeal shall become effective upon the date of disposition of the last of all such

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motions."); and Rule 1(B), Ala. R. Juv. P. (discussing the shortened time limitations on postjudgment motions filed in juvenile actions).

On October 1, 2020, after the notice of appeal had been filed, Dykes's contract as an attorney with Russell County ended, and the juvenile court appointed Susan Huffstutler as the child's new guardian ad litem. Huffstutler represented the child during the review hearing in the .01 action that was conducted on November 5, 2020, as a result of Dykes's allegations. Later, Huffstutler withdrew and the juvenile court appointed Eric Funderburk as the child's guardian ad litem. Funderburk is now prosecuting this appeal, and, pursuant to Rule 43(b), Ala. R. App. P., we have changed the style of this appeal to reflect that he has been substituted in place of Dykes. Funderburk is hereinafter referred to as "the guardian ad litem."

On December 12, 2020, the juvenile court entered a review order in the .02 action in which it made the following conclusions, among others:

"1. [The child] was adjudicated dependent by the stipulation of the parties on August 12, 2018, and custody was transferred to [DHR]. [The child] has remained in [DHR's] custody since that date. JU-2018-111.01.

"2. While the child was dependent and in [DHR's] custody, on or about August 3, 2020, the minor child's previous guardian ad litem, the Hon. Jodi Dykes, filed a second dependency petition alleging that [the child] had been sexually abused while in [DHR's] custody and that [DHR] did nothing to investigate or protect [the child], leaving her unprotected in the care of her sexual abuser. (See JU-2018-111.02). That petition sought to have an already dependent child found to be dependent once again and proposed to have the child removed from [DHR].

"3. On August 17, 2020, DHR filed a Rule 12(b)(1)[, Ala. R. Civ. P.,] motion to dismiss alleging that this Court did not have jurisdiction to grant the relief sought. After a hearing on the matter, this Court granted the motion and dismissed the petition for lack of subject matter jurisdiction.

"4. Even though the Court dismissed [Dykes's] dependency petition, the allegations contained in that petition were very serious. This Court has continuing jurisdiction in the ongoing dependency case (JU-18-111.01) to monitor and review [the child's] placement, [to review] whether [DHR] is making reasonable efforts, and to determine whether [the child] is safe, whether her needs are being met, and whether her best interests are being served.

"5. Accordingly, in the same order dismissing the petition, the Court also scheduled a dispositional review hearing to allow [Dykes] to present 'evidence that the child's current placement and custody should be modified.' The purpose of the hearing was so the Court could review the factual allegations made by [Dykes] in her dependency petition [in the .02 action] and determine what action may need to be taken in the pending .01 dependency case. In short, even though the Court dismissed the [.02] dependency petition, it

conducted a hearing [in the .01 action] to determine whether the allegations in [Dykes's] dependency petition [in the .02 action] had any meritorious basis. This Court concluded that they did not.

"6. Effective October 1, 2020, the Court was informed that the Hon. Jodi Dykes would no longer serve as contract attorney for the 26th Judicial Circuit. Accordingly, Ms. Dykes was removed as [the child's] guardian ad litem and the Hon. Susan Huffstutler was appointed as successor guardian ad litem.

"7. During the November 5, 2020, hearing, there was no evidence presented which supported the very serious allegations contained in [the .02 dependency] petition as 'alleged' by Ms. Dykes. In fact, Mrs. Huffstutler reported to the Court that, after a thorough investigation and review of the record, she could not find any evidence to support the allegations in [Dykes's] dependency petition, and she could specifically find no evidence that [the child] was sexually abused or that [DHR] was derelict in its duty as [the child's] custodian. No other party had any evidence to support [Dykes's] petition.

"8. This Court is aware that [the child] has had concerning behaviors and has 'acted out' sexually in several instances. The Court is also aware that in July 2019, [the child] (then five) and an eight-year-old boy were observed by a foster parent playing a game in which the boy was licking [the child's] leg and arm. This was the extent of the report that DHR received. Although this event did and should have caused concern, two young children playing in this manner does not amount to sexual abuse. Even so, as the play was certainly inappropriate, DHR took appropriate actions as it relates to both [the child] and the young boy so that the play would not

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be repeated. The Court notes that no one contended that there was ever another incident between [the child] and the boy. The version of the facts propounded by [Dykes was] untrue.

"9. No evidence was admitted or even proffered that would suggest to this Court that [the child's] current custodial placement is inappropriate, unsafe, or should be disturbed."

In its December 12, 2020, order, the juvenile court specified that that order "shall be made a part of the clerk's record in [the .01 action]."

On appeal of the August 18, 2020, judgment dismissing the .02 action, the guardian ad litem's argument intertwines a brief argument that the dismissal of the .02 action was erroneous with questioning this court regarding the correct "mechanism" to obtain the remedy Dykes had sought on behalf of the child.<sup>1</sup> In its brief submitted to this court, DHR argues, among other things, that the issues raised by the guardian ad litem are moot because of the pendency of the .01 action and because of

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<sup>1</sup>In his analysis in his appellate brief, the guardian ad litem contends that the dependency of a child ends when DHR stops providing reunification services, and, he contends, it was not clear whether DHR was providing those services at the time Dykes filed her petition in the .02 action. The guardian ad litem also insists that Dykes had the authority to file a separate action alleging the dependency of the child. As is explained below, we do not address the merits of those arguments or comment on the accuracy of the guardian ad litem's interpretation of applicable law.

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the December 12, 2020, order in which the juvenile court determined that there was no merit to Dykes's allegations raised in the .02 action.<sup>2</sup> We conclude that the argument that the juvenile court's December 12, 2020, order rendered this appeal moot is dispositive.

" ' " 'A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.' " Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) (quoting American Fed'n of State, County & Mun. Employees v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). "The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004) (citing VE Corp. v. Ernst & Young, 860 S.W.2d 83, 84 (Tex. 1993)). "A case becomes moot if at any stage there ceases to be an actual controversy between the parties." Id. (emphasis added) (citing National Collegiate Athletic Ass'n v. Jones, 1 S.W.3d 83, 86 (Tex. 1999)).

" '... "A moot case lacks justiciability." Crawford, 153 S.W.3d at 501. Thus, "[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent

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<sup>2</sup>The guardian ad litem filed a reply brief in this court, but he did not address DHR's arguments that the appeal was moot. For that reason, on May 6, 2021, this court issued an order requesting that the guardian ad litem submit a letter brief on the mootness issue. In that letter brief, the guardian ad litem has contended, generally, that the appeal is not moot.



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acts or events." Case, 939 So. 2d at 884 (citing Employees of Montgomery County Sheriff's Dep't v. Marshall, 893 So. 2d 326, 330 (Ala. 2004)).' "

K.L.R. v. K.G.S., 201 So. 3d 1200, 1203 (Ala. Civ. App. 2016) (quoting Chapman v. Gooden, 974 So. 2d 972, 983-84 (Ala. 2007)).

In its December 12, 2020, order, the juvenile court noted that the child remained dependent and that, given the seriousness of the allegations raised by Dykes in her petition in the .02 action, it had reviewed the matter to ensure the safety of the child. The juvenile court concluded that those allegations were untrue or were a mischaracterization of the facts.

" " "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' "

" ' King v. Campbell, 988 So. 2d 969, 976 (Ala. 2007) (quoting Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)).' "

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Crosby v. Seminole Landing Prop. Owners Ass'n, 265 So. 3d 266, 270 (Ala. Civ. App. 2018) (quoting Davis v. Davis, 221 So. 3d 474, 480-81 (Ala. Civ. App. 2016)).

In this case, the juvenile court dismissed Dykes's petition in the .02 action, but it considered the allegations she raised in that action as a part of the original, and still pending, .01 action. In its December 12, 2020, order, out of an abundance of caution and in an effort to ensure the protection and best interests of the minor child, the juvenile court ruled on the issues raised by Dykes in the .02 action. See W.T.M. v. S.P., 889 So. 2d 572, 580 (Ala. Civ. App. 2003) ("[W]e have long stated in both child-custody and dependency cases that the primary concern is the best interests and welfare of the child."). The guardian ad litem has failed to argue before this court how reversing the judgment dismissing the .02 action and remanding the cause would impact the proceedings below, i.e., he has failed to demonstrate how remanding the .02 action to the juvenile court for it to consider the same evidence or proffer that was made during the November 5, 2020, hearing would impact or affect the child's

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dependency and disposition.<sup>3</sup> In other words, a ruling in this appeal would not impact the rights of the parties, because those rights have already been determined by the juvenile court in the December 12, 2020, order. K.L.R. v. K.G.S., supra. "An appeal is due to be dismissed as moot if an event occurring after the trial court has entered its order or judgment makes determination of the appeal unnecessary or makes the granting of effectual relief impossible." Directory Assistants, Inc. v. Cooke, Cameron, Travis & Co., 49 So. 3d 1175, 1181 (Ala. Civ. App. 2010). We conclude that the matter before this court is currently moot, and, therefore, we dismiss the appeal.

APPEAL DISMISSED.

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

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<sup>3</sup>No appeal was taken with regard to the December 12, 2020, order, and, therefore, no party has raised the issue whether the juvenile court should have conducted an evidentiary hearing before entering that order or whether the juvenile court's ruling in that order was correct. Any such arguments are now waived.