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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200369

T.E.

v.

Calhoun County Department of Human Resources

2200370

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v.

Calhoun County Department of Human Resources

Appeals from Calhoun Juvenile Court
(JU-18-203.02 and JU-18-204.02)

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HANSON, Judge.

These appeals from judgments of the Calhoun Juvenile Court arise from ongoing dependency cases initiated in August 2019 by the Calhoun County Department of Human Resources ("DHR") as to two children, S.E. and N.E. ("the children"), born in November 2015 to C.M. ("the mother") and T.E. ("the father"). According to the dependency petitions, DHR conducted a welfare check on August 24, 2019, and ascertained that the mother, who had reportedly been drinking alcohol and smoking marijuana while the father was working in Ohio, had punched S.E. in the face, which caused lacerations and contusions necessitating treatment at a hospital emergency room. A shelter-care order entered by the juvenile court on August 26, 2019, placed the children in the custody of DHR pending subsequent orders; in December 2019, the juvenile court, after considering the parties' stipulations of facts, adjudicated the children to be dependent and placed them in the custody of DHR pending subsequent review hearings.

In February 2020, the children's guardian ad litem filed motions seeking to relieve DHR of any duty to exercise reasonable efforts to

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reunify the children and the parents, averring that the mother had been charged with aggravated child abuse, that the father had secured her release from detention pending a hearing on that charge, that the mother was not actively seeking rehabilitation for her substance-abuse conditions, and that the mother and the father continued to reside together. After the father and the mother filed objections to those motions, the juvenile court, following a hearing, entered orders denying those motions. Those orders were followed by permanency orders entered in June 2020 in which, based upon "an administrative paper review" of the circumstances of the children's cases conducted as a result of the COVID-19 pandemic, the juvenile court expressly determined that placement of the children in the home of the mother and the father "continue[d] to be contrary to the best interests and welfare of" the children but further noted that the most appropriate plan for the children would be "return to parent" and that a further review hearing would take place on December 16, 2020.

In late October 2020, the father filed requests in the juvenile court seeking the transfer of the children's custody from DHR to him, averring that he had "complied with all requests of [DHR], including completely

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changing his work schedule," and that he was "ready, willing and capable of taking custody of" the children. The juvenile court, after initially directing the parties to report to a December 9, 2020, docket call concerning the father's filings, issued orders on December 1, 2020, setting a trial for February 4, 2021. However, on December 17, 2020, the juvenile court entered orders indicating that it had held a virtual hearing via teleconference and had again concluded that the return of the children to the parents' home would not be in their best interests; however, rather than setting the cases for a review six months later, the juvenile court specified that a "review" would take place on February 4, 2021, i.e., the previously scheduled trial date.

On February 4, 2021, the juvenile court held a trial in the two cases. At trial, the father, the mother, and a representative of DHR testified. The juvenile court subsequently entered judgments summarily denying the father's custody requests and setting the cases for further review in June 2021. The father, following the denial of his motions to alter, amend, or vacate the judgments, appealed; upon a review of the record, which contains a transcript of the trial prepared by a licensed court reporter who

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was present, we conclude that we have jurisdiction pursuant to Rule 28(A)(1)(c)(ii), Ala. R. Juv. P., because an adequate record for appellate review is available.

The father, in his opening brief, sets forth two issues for review. First, he says, the evidence was insufficient to permit the conclusion that the children remained dependent at the time the juvenile court disposed of the father's custody requests. Second, the father asserts that, even if such evidence existed, the juvenile court's custodial disposition was erroneous. In response to DHR's brief urging affirmance of the judgments, in which DHR argued that, among other things, the juvenile court properly made implicit determinations of dependency in denying the father's custody requests, the father suggests in his reply brief that the issue of continued dependency is of jurisdictional magnitude, citing this court's recent decision in E.H. v. Calhoun County Department of Human Resources, [Ms. 2190441, Oct. 2, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020).

The procedural background set forth in E.H. is substantially similar to that of these cases. In E.H., a child, E.W., was found to be dependent

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and was placed by DHR in the care of her paternal grandparents in June 2018. In November 2019, responding to a motion filed by DHR seeking the transfer of E.W.'s custody to the paternal grandparents, E.W.'s mother, E.H., filed a motion that requested that E.W. be returned to her home, stating that she "had made behavioral and lifestyle changes, that she had participated in the individualized-service-plan ... process, and that she had completed services" provided by DHR such that E.W. could not properly be deemed dependent any longer. ___ So. 3d at ___. After a trial, the juvenile court in that case entered a judgment in February 2020 granting the relief requested by DHR and denying E.H.'s custody request, albeit without making any express determination regarding whether E.W. remained dependent. The evidence adduced at trial tended to show that E.W.'s father had a history of violent conduct, but had moved from E.H.'s residence, and that E.H. had completed one outpatient drug-treatment program but had subsequently been referred for a second drug-abuse assessment.

In E.H., the absence of any express dependency determination in the February 2020 judgment disposing of E.W.'s custody, coupled with the

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tendency of the evidence to disprove the existence of E.W.'s continued dependency, proved crucial, and this court reversed that judgment and remanded the cause for further proceedings:

" '[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, 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).

"... The juvenile court made no express finding of dependency and made no factual findings relating to [E.H.]'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 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 [i.e., H.C.], 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 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.'

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

"We cannot discern whether the juvenile court concluded that [E.W.] remained dependent based on the current circumstances of [E.H.] 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 [E.H.] has made certain steps toward reunification, including completing a drug-rehabilitation program and securing a residence at which, she testified, [E.W.'s] 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 [E.W.] remained dependent at the time of the entry of the February 2020 judgment."

E.H., ___ So. 3d at ___-___ (first emphasis in original; other emphasis added). E.H. and H.C. v. S.L., 251 So. 3d 793 (Ala. Civ. App. 2017), thus stand for the proposition that, although a finding of the continued dependency of a child may indeed be implicit in a judgment redispensing of that child's custody, the evidence of record supporting dependency must so " 'clearly support[] a dependency determination' " that no fact-finding is necessary. E.H., ___ So. 3d at ___.

In this case, the evidence is not unequivocally supportive of the proposition that the children remained dependent as of the February 4, 2021, trial. The record reflects that, in August 2019, the children were

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removed from the father's home, which the mother had previously shared with the father, because of a report that the mother had physically abused S.E. and was abusing, among other things, alcohol; at that time, the father, who was then a long-haul truck driver, was located in another state, and there is no indication that the father has himself ever abused the children or abused alcohol. Moreover, since the children were placed in the custody of DHR, the father has changed workplaces and no longer routinely travels overnight; he testified that the children had routinely attended a day-care facility close to his current workplace and that they could be cared for there on his working days. Further, the mother confirmed that her relationship with the father has ended, that she had moved out of the father's home in May 2020 to enter rehabilitation for her alcoholism (which, she said, she had taken elaborate efforts to conceal from the father), and that she had no desire to reclaim any personal effects of hers that may remain at the father's home because they remind her of her alcoholism. The father testified that no personnel from DHR had voiced any concerns about his ability to parent the children, about his relationship with the children, or about the conditions of his home, and he

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testified that the mother would not be allowed to return to the home or to have any contact with the children in contravention of any court orders if the children were returned to him; in response to questioning from counsel for DHR concerning whether the children would be safe from the effects of the mother's alcohol abuse if they were returned to his care, the father flatly stated that "that environment won't happen with me."

DHR's social worker testified at trial that, as to the father, DHR's concerns had been that, in the past, he had "always been on the road working, truck driving[,] gone days at a time, weeks at a time, and it's always been [the mother] taking primary care of the [children]." In contrast, the social worker testified that the father had been "in the picture" after the removal of the children from his home in August 2019 and intimated that the sole present concern of DHR was that the mother would be permitted to resume contact with the children after her completion of rehabilitation; on cross-examination by the father's counsel, the social worker admitted that, "if there was a court order that said the [mother] could not be around the children, and they were just with the [father], and [he] complied with that order," DHR would not have safety

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concerns about the children, and the social worker further opined, based upon his personal knowledge of the father, that the father would not violate such a no-contact order.

After having reviewed the record in these cases, and being mindful of the jurisdictional necessity¹ of a juvenile court's determination of continued dependency as a mandatory condition of disposing of a child's custody pursuant to § 12-15-314(a), Ala. Code 1975, this court "cannot discern whether the juvenile court concluded that the [children] remained dependent based on the current circumstances of the [parent seeking custody]," E.H., ___ So. 3d at ___, and we conclude that the judgments under review are due to be reversed on the authority of E.H. Here, as was true in E.H. (and in H.C., supra), there is evidence "that ..., if believed,

¹Citing K.M. v. S.R., [Ms. 2190472, Nov. 5, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020), DHR asserts that the father failed to adequately raise, in his postjudgment motions attacking the February 4, 2021, judgments, the absence of sufficient evidence to support any determination of the continued dependency as to the children. However, K.M. involved an initial determination of dependency that was expressly made by the pertinent juvenile court. Because, as explained above, we cannot properly infer a dependency determination from the silence of the juvenile court in these cases, we conclude that K.M. is distinguishable.

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would support a conclusion that the [father] has [taken] certain steps toward reunification," E.H., ___ So. 3d at ___, such as securing employment that does not require his overnight absence from the home, ending his relationship with the mother to the point of expelling her from his home, and professing his intent to adhere to judicial measures designed to protect the children from harm potentially arising from any future contact with the mother. Compare E.H., ___ So. 3d at ___ (noting evidence indicating that E.H. had "complet[ed] a drug-rehabilitation program and secur[ed] a residence at which, she testified, [E.W.'s] father [did] not reside"). The causes are remanded "for the juvenile court, as expeditiously as possible, to enter ... new judgment[s] determining whether the child[ren were] dependent at the time it entered the [February 4, 2021,] judgment[s]." H.C., 251 So. 3d at 795.

2200369 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

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Thompson, P.J., and Moore, Edwards, and Fridy, JJ., concur.