

**REL: October 8, 2021**

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# **ALABAMA COURT OF CIVIL APPEALS**

**OCTOBER TERM, 2021-2022**

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**2200467, 2200468, and 2200469**

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**H.P.**

**v.**

**Jefferson County Department of Human Resources**

**Appeals from Jefferson Juvenile Court  
(JU-18-1716.02, JU-18-1717.02, and JU-18-1718.02)**

MOORE, Judge.

In appeal number 2200467, H.P. ("the mother") appeals from a judgment entered by the Jefferson Juvenile Court ("the juvenile court"),

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in case number JU-18-1716.02, terminating her parental rights to G.A., whose date of birth is January 20, 2015; in appeal number 2200468, the mother appeals from a separate, but almost identical, judgment entered by the juvenile court, in case number JU-18-1717.02, terminating her parental rights to M.P., whose date of birth is July 8, 2017; and, in appeal number 2200469, the mother appeals from a separate, but almost identical judgment entered by the juvenile court, in case number JU-18-1718.02, terminating her parental rights to D.P., whose date of birth is October 26, 2018. We reverse the juvenile court's judgments.

### Procedural History

On June 8, 2020, the Jefferson County Department of Human Resources ("DHR") filed separate petitions seeking to terminate the parental rights of the mother to G.A., M.P., and D.P. ("the children"). After a trial that was commenced on February 4, 2021, and was concluded on February 19, 2021, the juvenile court entered separate, but almost identical, judgments on March 1, 2021, terminating the parental rights of the mother to the children. Those judgments stated, in pertinent part:

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"The mother ... testified that she is currently residing at Aletheia House, an inpatient substance abuse treatment facility and has been inpatient since November 25, 2020. Before this she lived many other places including with her sister in a housing project, a van in a parking lot and with the [children's] maternal grandmother. The maternal grandmother has a long history with substance abuse and when the mother and maternal grandmother are together it is very disruptive and is a trigger for the mother to use. [The mother] has never had her own housing. She has worked multiple jobs but not working at any one job more than four months.

"[The] Mother currently has ... criminal court cases pending involving marijuana and a pipe that was found on or near her.

"The [children have] been in foster care since October 2018. [The] Mother was ordered to participate in Wellness Court (Drug Court) but was unsuccessful; [to] participate in mental health treatment but has not; [to] obtain stable housing and employment but has not; [to undergo] random drug screening but has not until recently; and to participate in a parenting skills course in which she has received a certificate of completion. [The] Mother states that she has provided the name of relatives to [DHR] willing to take custody of her child[ren]. [The] Mother states that she participated in the CAP [comprehensive addiction and pregnancy] program, which is a program to assist pregnant women with substance use problems but was positive at th[e] birth of [J.P., the mother's fourth] child and custody of that child was removed and is in the custody of family friends.

"[The] Mother states that her last drug use was in November 2020. She is currently on the medicated assisted treatment and she states that her mind is clear today.

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"Mamika Brown was the next witness who is the [DHR] social worker. She states that there is no legal father for [any of the children]. [The] mother has provided no financial support or any items for the child[ren]'s day to day needs. [The] Mother has had many opportunities to complete services but unfortunately has not complied. [The] mother is currently in inpatient treatment and is doing well but has only been in the program approximately three months. Adoption by current foster parents is the case plan.

"[Brown] did investigate the mother's sister ... as a possible relative resource but she had no employment and the home was not appropriate. [DHR] knows of no other services that can be offered to the mother.

"During the second day of trial, the Court learned that the [children were] placed with a foster family, who is also a friend of the family. At the close of case, the Court requested the [DHR] social worker, Ms. Brown, to talk to the foster family to determine if they desired to obtain full legal custody or if their intention was to adopt the child[ren]. Ms. Brown did talk to them, ... their desire was to continue to provide foster parenting and eventually adopt if termination of parental rights were to occur.

"Katie Day was the next witness who is the mother's therapist at Aletheia's House. She reports that [the] mother has been in the program since the end of November 2020. Her treatment plan is working on her co-dependency, stress management, confidence in herself, parenting skills and mental health. [The mother] is compliant with meeting her treatment plan and goals. [Day] states that [the mother] came to Aletheia House because of her legal issues regarding substance abuse and [DHR] involvement with her child[ren].

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The program is on average a ninety day program but it is likely that [the mother] will be there four to five months.

"Kenya Franklin testified that she is a case worker for the CAP Program. [The] mother had participated in the program while she was pregnant with [J.P.,] her fourth child. ... [U]nfortunately, [the] mother was not compliant and her fourth child was removed due to continued substance use, but she has continued to work with the mother. She states that [the] mother has done well at Aletheia House in that she is clean, she has matured, shows better self control and is making better decisions.

"Having considered the ore tenus testimony and evidence offered on the hearing date, the Court finds that the Petition[s] to Terminate Parental Rights [are] due to be GRANTED.

"This Court specifically finds that there is clear and convincing evidence, competent, relevant, and material in nature that the mother, ... and/or any unknown fathers, are not willing or able to discharge their responsibilities to and for the minor child[ren]; that the conduct or condition of the mother and any unknown fathers renders them unable to properly care for the minor child[ren] and that said conduct or condition is unlikely to change in the foreseeable future.

"The Court further finds that there are no viable alternatives to Termination of Parental Rights and no potential relative resources available for the permanent placement of [the children]. This Court finds [a]doptive resources have been identified for the minor child[ren]. In making the foregoing finding, the Court has considered the factors set forth in [§] 12-15-319(a)[, Ala. Code 1975]."

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The mother filed a postjudgment motion in each of the cases on March 12, 2021; those motions were denied on March 16, 2021. On March 29, 2021, the mother filed her notices of appeal. This court consolidated the appeals.

### Facts

The mother herself had been adopted out of foster care as a result of her biological mother's drug abuse. When the mother was 16 years old, she left her adoptive home and reunited with her biological mother; her biological mother introduced the mother to drugs at that time. The mother gave birth to her first child at the age of 16. The mother testified that DHR initially became involved with her family in October 2018 when she and D.P. tested positive for amphetamines at his birth. Although it had been recommended in November 2018 that she attend intensive outpatient drug-rehabilitation classes, the mother admitted that she had failed to complete those classes. The mother testified that she had been arrested in 2019 for possession of a forged instrument and had been ordered to complete 14 months' probation. She testified that she had participated in Family Wellness Court in 2019 but that she had been

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dismissed from that program in October 2019 for testing positive for marijuana and amphetamines; she was ordered to complete inpatient drug-rehabilitation treatment at that time but did not do so.

Kenya Franklin, who is a case manager for the comprehensive addiction and pregnancy ("CAP") program at the University of Alabama at Birmingham, testified that the mother had been referred to the CAP program in March 2020 and that it had been recommended at that time that the mother complete inpatient drug-rehabilitation treatment. Franklin testified that the mother had decided to attend outpatient treatment instead and had not been compliant.

The mother testified that she had been arrested in the fall of 2020 for possession of marijuana and a pipe. Franklin testified that the mother had completed a drug assessment in October 2020 and that it was again recommended that the mother attend inpatient drug-rehabilitation treatment. In November 2020, the mother was admitted to an inpatient treatment program at Aletheia House.

The mother testified that, through her inpatient treatment at Aletheia House, she had been prescribed medications for her mental

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health and had stopped using illegal drugs. She admitted that she was unable to care for the children at the time of the trial and testified that she wanted them to stay temporarily with the foster parents, whom she considered to be her godparents and with whom she and the children had had a relationship even before they became the children's foster parents.<sup>1</sup> Aletheia House employees transport the mother to visits with the children. The mother expressed a desire to care for the children once she has completed her treatment and has utilized the resources at the Aletheia House to obtain housing and employment.

Franklin testified that she had noticed a change in the mother in November 2020. According to Franklin, the mother seemed to be taking responsibility for her actions and making better choices; she testified that the mother has matured and has self-control. Franklin testified that, at the time of trial, the mother was "on a right track ... and [that,] if she continues to make appropriate choices, good choices, and utilizes the

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<sup>1</sup>The mother testified that the foster parents had been "hurt" by her because of her drug use but that she wanted to make amends to them. She testified that she is grateful to them for caring for the children.



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resources and support that she has with CAP and Family Wellness and Aletheia House," she can be successful. She testified that she had no reason to think that the mother would not continue doing those things. Katie Day, the mother's therapist at Aletheia House, testified that the mother had been compliant with the program and had tested negative on all drug screens other than on tests when she first entered the program. Day testified that the mother had made much progress in the two months she had been in the program and that she considered the mother to be at a low risk for relapse.

#### Standard of Review

A judgment terminating parental rights must be supported by clear and convincing evidence, which is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." "C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

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" '[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to clearly and convincingly ... establish the fact sought to be proved.'

"KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].

"... [F]or trial courts ... in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden[.]' [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)]; thus, the appellate court must also look through a prism to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would 'produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion.' "

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus evidence, this court presumes their correctness. Id. We review the legal conclusions

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to be drawn from the evidence without a presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

### Discussion

On appeal, the mother argues that, considering her current circumstances, there was not clear and convincing evidence demonstrating that she is unable to care for the children and is unlikely to be able to do so in the foreseeable future. She also argues that maintaining the status quo is a viable alternative to terminating her parental rights.

"When determining whether to terminate an individual's parental rights, 'the primary focus of a court ... is to protect the welfare of children and at the same time to protect the rights of their parents.' Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990). Therefore, 'a court should terminate parental rights only in the most egregious of circumstances.' Id. Ex parte Beasley set out a two-pronged test that a court must apply in terminating an individual's parental rights. First, unless the person petitioning for the termination of parental rights is a parent of the child, the court must make a 'finding of dependency.' 564 So. 2d at 954. In order to make a finding of dependency, the court must consider, among others, the factors found in § 12-15-319(a)..., Ala. Code 1975. After making a finding of dependency, the court must ensure that 'all viable alternatives to a termination of parental rights have been considered.' 564 So. 2d at 954."

Ex parte A.S., 73 So. 3d 1223, 1228 (Ala. 2011).

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Section 12-15-319(a), Ala. Code 1975, provides, in part:

"(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, 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 that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parents. In a hearing on a petition for termination of parental rights, the court shall consider the best interests of the child. In determining whether or not the parents are unable or unwilling to discharge their responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

"....

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for the needs of the child.

"....

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parents have failed.

"....

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child

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in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review.

"(13) The existence of any significant emotional ties that have developed between the child and his or her current foster parent or parents, with additional consideration given to the following factors:

"a. The length of time that the child has lived in a stable and satisfactory environment.

"b. Whether severing the ties between the child and his or her current foster parent or parents is contrary to the best interest of the child.

"c. Whether the juvenile court has found at least one other ground for termination of parental rights."

In A.A. v. Jefferson County Department of Human Resources, 278 So. 3d 1247 (Ala. Civ. App. 2018), this court reversed a judgment terminating a mother's parental rights because, we concluded, the mother in that case, A.A., had been consistently seeking drug treatment in the months leading up to the trial and there was no evidence indicating that

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the mother had a current drug problem. 278 So. 3d at 1252. This court explained:

"Although a court may consider a parent's history, 'the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence.' D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003).

"In M.G. v. Etowah County Department of Human Resources, 26 So. 3d 436, 443 (Ala. Civ. App. 2009), this court, in reversing a judgment terminating a mother's parental rights, reasoned that 'DHR produced no evidence indicating that relapse was so likely or imminent that the mother should have been considered as having a current drug problem that interfered with her ability to properly care for the children.' Similarly, in the present case, although the mother had a history of using drugs and had continued using drugs despite her outpatient drug treatment at Aletheia House, she had subsequently pursued additional drug treatment in which she resided at the respective treatment facilities for the seven months leading up to the trial. Considering the mother's consistency in pursuing treatment in the months leading up to the trial and the lack of affirmative evidence indicating that the mother was using drugs at the time of the trial, the juvenile court could not have been clearly convinced 'that relapse was so likely or imminent that the mother should have been considered as having a current drug problem that interfered with her ability to properly care for the child[].' M.G., 26 So. 3d at 443."

278 So. 3d at 1252-53.

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In the present cases, like in A.A., DHR became involved with the mother at the time of D.P.'s birth because of the mother's drug use. Therefore, like in A.A., in these cases "we must determine from the evidence in the record whether the juvenile court could have been clearly convinced that the mother had failed to cease her drug use at the time of the trial." 278 So. 3d at 1252. Although in these cases the evidence is clear that the mother had failed to complete outpatient drug-rehabilitation treatment multiple times and had rejected multiple recommendations to enter inpatient drug-rehabilitation treatment, Franklin testified that she had seen a change in the mother beginning in November 2020 when the mother began inpatient treatment at Aletheia House. By the time of trial, the mother had entered an inpatient drug-rehabilitation program, had complied with the requirements of that program, had tested negative for illegal drugs, and had obtained treatment for her mental-health issues. The mother's therapist considered her a low risk for relapse. Based on the foregoing, we cannot conclude that there was clear and convincing evidence indicating that the mother would be unable to parent the children in the foreseeable future.

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Moreover, we note that the children are currently placed with foster parents who had had a relationship with the mother and the children before DHR became involved with the family. The mother testified that she is content with the children being placed with the foster parents but that she would like to be reunited with the children once she completes her inpatient program and obtains housing and employment. In Ex parte A.S., our supreme court held that, in that case, because the mother was "satisfied with the grandmother's care of the child," 73 So. 3d at 1229, and because the mother was making progress in rehabilitation despite being incarcerated, maintaining custody with the maternal grandmother was a viable alternative to termination of the mother's parental rights. Id. at 1229-30. Similarly, in the present cases, we cannot conclude that there was clear and convincing evidence indicating that maintaining the status quo while the mother continued her rehabilitation was not a viable alternative to termination of her parental rights.



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Conclusion

Based on the foregoing, we reverse the juvenile court's judgments terminating the mother's parental rights and remand the cases for the entry of judgments consistent with this opinion.

2200467 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2200468 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2200469 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Hanson and Fridy, JJ., concur.

Thompson, P.J., dissents, with writing, which Edwards, J., joins.

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THOMPSON, Presiding Judge, dissenting.

H.P. ("the mother") has an extensive history of drug use. The Jefferson County Department of Human Resources ("DHR") became involved with the mother and the three children at issue in these cases when the mother and her third child, D.P., tested positive for amphetamines at the time of that child's birth in late October 2018. DHR placed the mother's three children in foster care at that time and began providing the mother reunification services. The mother failed or refused to participate in two different recommended substance-abuse programs and was dismissed from Family Wellness Court after testing positive for marijuana and amphetamines. The mother admitted to not submitting to drug screens between November 2019 and December 2020. She also stated that she has difficulty finishing what she starts.

DHR filed its termination petitions on June 8, 2020. At the time of the birth of J.P., the mother's fourth child, in late September 2020, the mother and J.P. tested positive for marijuana and amphetamines. The mother was arrested for possession of marijuana and possession of drug paraphernalia in November 2020. At the end of November 2020, the

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mother enrolled in a substance-abuse program, and she was still in that program approximately two months later, at the time of the first day of the trial on February 4, 2021.

" ' "The trial court's decision in proceedings to terminate parental rights is presumed to be correct when the decision is based upon ore tenus evidence, and such a decision based upon such evidence will be set aside only if the record shows it to be plainly and palpably wrong." Ex parte State Dep't of Human Res., 624 So. 2d 589, 593 (Ala. 1993). That "presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility." Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001).'

"A.K. v. Henry Cty. Dep't of Human Res., 84 So. 3d 68, 69 (Ala. Civ. App. 2011). See also J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1185 (Ala. Civ. App. 2007) ('Because appellate courts do not weigh evidence, particularly when "the assessment of the credibility of witnesses is involved," ... we defer to the trial court's factual findings.' (quoting Knight v. Beverly Health Care Bay Manor Health Care Ctr., 820 So. 2d 92, 102 (Ala. 2001)))."

K.J. v. Pike Cnty. Dep't of Hum. Res., 275 So. 3d 1135, 1145 (Ala. Civ. App. 2018).

The main opinion focuses on the mother's recent progress in the substance-abuse program that she had been participating in for only two

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months when the trial on the termination-of-parental-rights petitions began. However, the mother began those efforts more than five months after DHR had filed its termination-of-parental-rights petitions and after the young children had been in foster care for more than two years. The juvenile court was in the best position to determine the mother's credibility and to assess her demeanor. Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001); D.M. v. Walker Cnty. Dep't of Hum. Res., 919 So. 2d 1197, 1214 (Ala. Civ. App. 2005). Accordingly, given the evidence in the record, the juvenile court could have determined that the mother's then current participation in substance-abuse treatment was not an adjustment of her circumstances but, rather, was undertaken as an attempt to prevent the termination of her parental rights. See A.M.F. v. Tuscaloosa Cnty. Dep't of Human Res., 75 So. 3d 1206, 1213 (Ala. Civ. App. 2011) ("[T]he juvenile court could have determined that, to the extent the mother may have allegedly improved her condition, those efforts were merely last-minute efforts undertaken in anticipation of the impending termination-of-parental-rights trial."); and K.J. v. Pike Cnty. Dep't of Hum. Res., 275 So. 3d at 1145 (same); H.T. v. Cleburne Cnty. Dep't of

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Hum. Res., 163 So. 3d 1054, 1070 (Ala. Civ. App. 2014); S.S. v. Calhoun Cnty. Dep't of Hum. Res., 212 So. 3d 940, 949 (Ala. Civ. App. 2016)

In its March 1, 2021, judgments, the juvenile court found that the mother was unwilling or unable to discharge her responsibilities to the children and that her conduct or condition was unlikely to change in the foreseeable future. See § 12-15-319, Ala. Code 1975. My review of the evidence in the record, considering the presumption of correctness this court is to afford the juvenile court's findings of fact, leads me to conclude that the judgments should be affirmed.

Edwards, J., concurs.