

Rel: September 2, 2022

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is published in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210022

J.S. and A.S.

v.

J.C. and C.C.

Appeal from Elmore Juvenile Court
(JU-19-271.04)

PER CURIAM.

J.S. and A.S. ("the foster parents") appeal from a judgment of the Elmore Juvenile Court denying their petition to adopt R.T.J. ("the child").

We affirm the judgment.

Background

The child was born on September 8, 2019, to M.R. ("the mother") and A.J. ("the father"). The mother and the father were not married, and, at the time of the child's birth, the mother lived with her mother, J.C. ("the grandmother"), and her stepfather, C.C. ("the grandfather") (collectively referred to as "the grandparents"). On October 15, 2019, the Elmore County Department of Human Resources ("the Elmore County DHR") filed a petition in the Elmore Juvenile Court seeking emergency custody of the child based on allegations of child abuse. A hospital had reported that the child had a fractured leg and a fractured skull. The skull injury was healing and was older than the leg injury. The next day, after a shelter-care hearing, the Elmore Juvenile Court entered an order finding that the child was dependent and awarding the Elmore County DHR custody. The Elmore County DHR placed the child with the foster parents.

On October 29, 2019, the grandparents filed a petition in the Elmore Juvenile Court seeking custody of the child on the ground that the child was dependent. A document filed that same day reflects that the mother consented to the grandparents' petition and states that the

mother believed that it was in the child's best interest to be placed with the grandparents.

Because the grandfather was an Elmore County sheriff's deputy, the Alabama Law Enforcement Agency ("ALEA") conducted the investigation into the child's injuries.¹ In a letter dated December 4, 2019, ALEA found that the grandparents had no involvement in or knowledge of the child's alleged abuse and that they were not under investigation.² Initially, the grandparents were awarded supervised visitation with the child. Over time, the grandparents' visitation rights were expanded until, ultimately, the grandparents and the foster parents had custody of the child on alternating weeks.

On October 30, 2020, the foster parents, represented by counsel, filed in the Elmore Juvenile Court a verified dependency complaint and petition seeking custody of the child. Four days later, on November 3,

¹For the same reason, social workers from the Chilton County Department of Human Resources, rather than the Elmore County DHR, investigated the abuse case, although it remained an Elmore County DHR case.

²In June 2020, an Elmore County grand jury indicted the mother for aggravated child abuse. At the time of the trial of this action, she had not yet been tried in the criminal matter.

2020, the foster parents filed in the Elmore County Probate Court a petition to adopt the child. The mother executed a consent-to-adoption document on November 30, 2020. The attorney for the foster parents notarized that consent document. On December 2, 2020, because of the pending dependency and custody actions in the Elmore Juvenile Court, the Elmore County Probate Court entered a temporary stay in the adoption action that was to remain in effect until the dependency and custody actions were concluded.

On December 23, 2020, despite already having filed an adoption petition in the Elmore County Probate Court, the foster parents filed a petition to adopt the child in the Jefferson County Probate Court.

The Elmore Juvenile Court scheduled a final dispositional hearing on each of the three pending dependency and custody petitions (the petitions filed by the Elmore County DHR, the grandparents, and the foster parents) for February 22, 2021. By that time, the foster parents' attorney was also representing the mother. It is unclear from the record when that attorney's representation of the mother began. On February 22, 2021, the Elmore Juvenile Court entered an order stating:

"At 6:36 a.m. on the day of trial, a Motion to Stay was filed by [the attorney], on behalf of his clients, [the mother] and [the

foster parents]. The basis of the motion was that an adoption had been filed in another County in this State, and that the Mother and the Father had filed consents to the adoption of the child by the Foster Parents."

The Elmore Juvenile Court rescheduled the final dispositional hearing for late June 2021. It also ordered that, beginning February 23, 2021, the grandparents were to have custody of the child for a week, then the foster parents were to have the child for a week; the Elmore Juvenile Court stated that the "week on/week off" visitation schedule was to remain in effect until the final dispositional hearing.

The foster parents filed a motion to dismiss the adoption petition pending in the Elmore County Probate Court. In an order entered March 24, 2021, that court dismissed that adoption action, noting that, in their motion, the foster parents had asserted that the dismissal of the action was in the child's best interest.

Meanwhile, the Jefferson County Probate Court set a hearing in the foster parents' adoption action then pending in that court for April 6, 2021. On March 25, 2021, the grandparents moved to continue that hearing and to transfer that adoption action to the Elmore Juvenile Court. In their motion, the grandparents stated that they had learned of the filing of the adoption petition in Jefferson County Probate Court on

March 19, 2021, and pointed out that the Elmore Juvenile Court had scheduled a final dispositional hearing in the proceedings pending in that court.

The Jefferson County Probate Court held a hearing in the adoption action, and on August 17, 2021, it entered an order finding that the foster parents, the grandparents, and the child were all Elmore County residents and had been since the child's birth. It also noted that the Elmore County DHR had custody of the child and that the Jefferson County Department of Human Resources has never been involved with the child. The Jefferson County Probate Court ordered that, on the authority of § 26-10A-21, Ala. Code 1975, the adoption petition should be transferred to the Elmore Juvenile Court and consolidated with the actions pending in that court.³

³Section 26-10A-21, Ala. Code 1975, provides:

"If, at any time during the pendency of the adoption proceeding, it is determined that any other custody action concerning the adoptee is pending in the courts of this state or any other state or country, any party to the adoption proceeding, or the court on its own motion, may move to stay such adoption proceeding until a determination has been made by an appropriate court with jurisdiction pursuant to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA).

After the Jefferson County Probate Court transferred the adoption petition to the Elmore Juvenile Court, the foster parents moved the Elmore Juvenile Court to have the adoption action heard before the dependency and custody actions. The Elmore Juvenile Court denied the motion, and all the pending actions proceeded to trial at the same time.

At trial, Special Agent Jared Roberson of the State Bureau of Investigation ("the SBI"), who conducted the investigation of whether the grandparents had been involved in the injury of the child, testified that the SBI had found no evidence indicating that the grandparents had harmed the child or had known that the child was being harmed. He also said that, at one point during the investigation, the mother had confessed to injuring the child.

Leah Graham, a social worker with the Chilton County Department of Human Resources (see note 1, *supra*) testified that she had observed

The adoption may be transferred and consolidated with a custody proceeding pending in any court in this state."

Although this Code section references the Uniform Child Custody Jurisdiction Act ("the UCCJA"), we note that, effective January 1, 2000, the legislature repealed the UCCJA and replaced it with Uniform Child Custody Jurisdiction and Enforcement Act, § 30-39-101 et seq., Ala. Code 1975. See Act No. 99-438, Ala. Acts 1999.

the child with both the grandparents and the foster parents and had detected no issues with the child at either the grandparents' home or the foster parents' home. Graham testified that, early in the proceedings, when the grandparents' visitation was supervised and limited, the child did not seem to want to spend time with the grandparents. However, she noted, that had been two years earlier, and, she said, since the grandparents' visitation had been expanded and they had had more contact with the child, the child seemed more relaxed with them.

Sonia Martin, a bonding expert who prepared a report regarding the attachment between the child and the foster parents and the child and the grandparents, observed the same behavior. In her initial evaluation, prepared July 6, 2020, Martin said that the child did not appear to have bonded with the grandparents, although, she observed, they obviously loved the child. However, in an addendum dated November 8, 2020, Martin said, "[r]emarkably, [the child] exhibits behavior that is a far departure from his previous responsiveness to the [grandparents]." In the addendum, she gave examples of the child's "substantial positive change" in his interactions with the grandparents. At the time she prepared the addendum, Martin recommended that the

grandparents' visitation be further increased. We note that, in their brief on appeal, the foster parents did not mention the addendum and relied only on Martin's initial evaluation in making their arguments to this court.

Graham testified that, at the time of the trial, the Elmore County DHR's permanency plan for the child was relative placement with transfer of custody to the grandparents. The concurrent plan was adoption by the foster parents. She added that the Elmore County DHR did not believe that it needed to continue to be involved in this matter.

The grandmother testified that she was concerned that the foster mother had trouble saying "no" to the mother and observed that the foster mother had allowed the mother to be with the child without Elmore County DHR's supervision, in violation of the Elmore County DHR's instructions. Additionally, the grandmother read from a court order that explicitly stated that there was to be no contact between the mother and the child unless the bonding expert requested it to enable her to conduct further observations between the child and the parties.

The foster mother said that, early on, she had expressed concerns about the grandparents having unsupervised visitation with the child

and that it was her job as a foster mother to voice those concerns. She also said that, at the initial individual-service-plan ("ISP") meetings with the parties and the Elmore County DHR, she told the group that, when the grandparents had started seeing the child, the child had not done well with them, and she added that to bring such matters to light "is my job as a mother." However, she said, she never objected to anything the Elmore County DHR had ordered her to do.

The foster mother acknowledged that she had "routinely" allowed the mother to be around the child, adding: "Once I had formed a relationship with [the mother] over almost two years, we have formed a bond, a friendship, a sisterhood. I have been raising her son, so yes, there is a large bond there." The foster mother said that she had reached out to the mother, who, she said, was struggling with mental-health issues. She said that the mother had met the foster mother's entire family.

The mother testified that, unlike the grandparents, the foster mother had allowed her to see the child "over and above the time that DHR was allowing" her to see the child. She said that the foster parents had promised her that, in the future, she would have additional access to the child. The foster mother said that the Elmore County DHR had never

instructed her not to allow the mother to have visitations outside the visitations that "went through" the Elmore County DHR. The foster mother testified that she felt "shut out" by the grandparents but not by the mother. The foster mother described the mother as "kind and welcoming." She stated unequivocally that she did not believe that the mother had injured the child and that, in her opinion, the mother poses no danger to the child's safety. The foster mother said that, if she was awarded custody of the child, her plan was to allow the mother to have unsupervised visits with the child.

The mother testified that the foster parents let her use one of their vehicles and had helped her find a place to live, which the foster mother admitted. Additionally, the mother said, the foster parents' attorney had approached her about representing her in the "custody case," telling her that "he felt it was a better idea for [the mother] to have representation in court." That attorney also undertook representation of the mother in the criminal child-abuse action against her. As mentioned, that attorney notarized the consent-to-adoption document the mother had signed.

The mother testified that she had recently reached out to the grandmother and that, after talking with her, she no longer wished to

give her consent for the foster parents to adopt the child. She explained that, when these proceedings began, the grandparents and she had not been permitted to talk but that she had learned that the grandparents did not intend for her to be cut off from the child from then on and that they did not intend to adopt the child. The mother said that she no longer believed that it was in the child's best interest to be adopted by the foster parents but, instead, believed that it was in the child's best interest to be placed in the grandparents' custody. She had executed a document asking that the consent-to-adoption document that she had signed earlier be withdrawn, and that document was admitted into evidence.

Numerous character witnesses testified on behalf of the grandparents, including Elmore County Sheriff Bill Franklin (the grandfather's former employer) and Marshal Earl Marsh of the Alabama Supreme Court, for whom the grandfather worked as a deputy marshal at the time of the trial. While questioning Sheriff Franklin and Marshal Marsh, the foster parents' attorney insinuated that the grandfather had left his job as a sheriff's deputy because of allegations contained in an ethics complaint that had been filed against him. Marshal Marsh said that he was unaware of the ethics complaint until the trial, and Sheriff

Franklin said that, although he was aware that a complaint had been filed, it was not the reason the grandfather had retired as a sheriff's deputy. He explained that the grandfather had worked as a sheriff's deputy for 25 years and, like a lot of people in that position, had retired after a successful career. Sheriff Franklin and the grandfather both testified that the grandfather's retirement was already planned before the ethics complaint was filed.

Additional questioning revealed that the mother had filed the ethics complaint against the grandfather on November 5, 2020, just two days after the foster parents filed the adoption petition in the Elmore County Probate Court, and that she had done so at the suggestion of the attorney representing her and the foster parents. She said that the attorney or someone in his office had drafted the complaint and that she was not sure if or did not understand the allegations that had been asserted against the grandfather. She said that, at the time she signed the ethics complaint, she had been unaware that an independent agency had investigated the child-abuse allegations.

The ethics complaint itself was not admitted into evidence, although Marshal Marsh agreed with the foster parents' attorney's

statement that the substance of the complaint was that the grandfather had used his office for personal gain to protect the grandmother from prosecution and to put the blame for the child's injuries on the mother. During his testimony, the grandfather denied the allegations in the ethics complaint, reiterated that ALEA and the SBI had investigated the abuse claims, and stated that he did not know Special Agent Roberson, who had conducted the investigation.

Toward the end of the evidentiary hearing, the foster parents attempted to submit into evidence an uncertified copy of the record from the adoption action they had commenced in the Jefferson County Probate Court, and the grandparents objected. The Elmore Juvenile Court observed that it did not have a certified copy of the record from the adoption action in the Jefferson County Probate Court that would enable it "to make a determination on the issues it would be interested in related to the adoption." The Elmore Juvenile Court then reproached the foster parents' attorney for his decision to file the adoption petition in the Jefferson County Probate Court when he already had filed an adoption petition in the Elmore County Probate Court, saying it "would be extremely interested" to hear why that adoption petition "was filed when

it was and, in particular, why was it filed in Jefferson County? And specifically to that, was it filed in Jefferson County in a fraudulent or a deceptive manner to usurp the jurisdiction of this court? Because that's what I think was done, as this has been done in other cases that [the attorney] was involved in with me," later adding: "Now, ..., I think there is no doubt that that is exactly what you did, and I think it's wrong."

The Elmore Juvenile Court specifically asked the foster parents' attorney whether he had advised the Jefferson County Probate Court that there were already proceedings involving the child pending in the Elmore Juvenile Court. After several evasive responses, the attorney finally conceded that he had not done so. The Elmore Juvenile Court said: "All right. There we go. Then here we go, your motion to hear the adoption is denied on grounds of being fraudulently filed in an attempt to usurp this court's jurisdiction." When the attorney said that he was not "trying to game the system," the Elmore Juvenile Court responded, "I don't believe you" and stated that the attorney had attempted the same tactic in a previous case before the court. The Elmore Juvenile Court asked the attorney why he had not filed the adoption petition at issue in this case in Elmore County, and the attorney responded that he had filed it "first

in Elmore County, and the court stated we dismissed it, and then we filed it in Jefferson County." The Elmore Juvenile Court asked why the Elmore County Probate Court had dismissed the first adoption petition, and the attorney responded, "because we asked him to."

On September 22, 2021, the Elmore Juvenile Court entered a judgment in the adoption action stating that it had been "consolidated with testimony" in the three previously filed dependency and custody actions. It also noted that, before the commencement of testimony on September 21, 2021, the mother had asked that the foster parents' attorney be removed as her attorney and that she be allowed to proceed pro se, which request it had denied. It then stated: "Upon testimony presented the Petition for Adoption is denied." The Elmore Juvenile Court did not include any findings of fact in the judgment. Although no judgments pertaining to the dependency and custody petitions are included in the record on appeal, we note that "[o]nce a final judgment has been entered in a case, it is immediately appealable, regardless of whether it is consolidated with another still pending case." Nettles v. Rumberger, Kirk & Caldwell, P.C., 276 So. 3d 663, 669 (Ala. 2018).

The foster parents filed a postjudgment motion in the adoption action, which the Elmore Juvenile Court denied. They then filed a timely notice of appeal to this court.

Analysis

The foster parents contend that the Elmore Juvenile Court abused its discretion in denying their adoption petition. They assert that they obtained the consent of the mother and the father and met the statutory requirements for adoption set forth in § 26-10A-25(b)(1), Ala. Code 1975. Thus, they argue, the burden shifted to the grandparents, as the contestants to the adoption, to prove that statutory grounds existed for denying the adoption petition. They contend that the evidence in support of the adoption contest was "so inadequate" that the Elmore Juvenile Court abused its discretion in denying the adoption petition. They also contend that an adoption by the foster parents is in the best interests of the child.

The Elmore Juvenile Court did not, in its final judgment, set forth its reason for denying the foster parents' petition to adopt the child, although the record discloses at least two possible bases on which the court may have relied. First, as recounted above, the Elmore Juvenile

Court explained during the trial that it believed the foster parents' attorney had "fraudulently filed" the adoption petition in the Jefferson Probate Court to avoid having the Elmore Juvenile Court consider it. Second, the Elmore Juvenile Court may have been convinced that the grandparents, through the evidence presented, had successfully contested the adoption and shown that the adoption was not in the child's best interest.

Although, as noted, the foster parents challenge the latter potential ground for the Elmore Juvenile Court's judgment, they do not contest the former potential ground. These circumstances trigger the application of Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006), in which our supreme court held that when a potential ground supporting a judgment is placed in issue in the trial court and the trial court might have relied on that ground as the basis for its judgment and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that ground in the appellant's principal brief constitutes a waiver with respect to that ground.

Our supreme court recently applied the principle from Fogarty in Facebook, Inc. v. K.G.S., 294 So. 3d 122, 141 (Ala. 2019). In that case, our

supreme court observed that, in its order denying a motion to dismiss, the trial court in that case had not indicated whether it believed that it had jurisdiction over one of the defendants in that action because that particular defendant had not timely raised its personal-jurisdiction defense or because that defendant had sufficient minimum contacts with Alabama -- the two reasons that the plaintiff had argued as grounds as to why the trial court had personal jurisdiction over that defendant. The supreme court explained:

"Under these circumstances, where the trial court did not specify a basis for its ruling, [the defendant] was required to present an argument in her principal brief on appeal, in compliance with Rule 28(a)(10), Ala. R. App. P., stating why neither ground was a valid basis for asserting personal jurisdiction over her. See Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006)."

Facebook, Inc., 294 So. 3d at 141.

Here, in their opening brief, the foster parents argued only that the juvenile court's judgment denying their adoption petition was unsupported by the evidence. They ignored any other possible basis for the judgment, including the Elmore Juvenile Court's explanation at trial that it had determined that the adoption petition constituted a fraudulent filing intended to usurp its authority. The foster parents'

failure to address that potential basis for the Elmore Juvenile Court's denial of the adoption petition is fatal to the foster parents' appeal. See Fogarty, supra.

Even assuming that the Elmore Juvenile Court denied the adoption petition on the merits of the grandparents' contest to the petition, however, the record contains sufficient evidence to support the judgment. When a court hears ore tenus evidence on a petition for adoption, its findings and conclusions based on that evidence are presumed to be correct. Ex parte J.W.B., 933 So. 2d 1081, 1087 (Ala. 2005). The ore tenus presumption of correctness arises because the trial court is in a position to observe the demeanor and behavior of the witnesses and is thus able to evaluate whether their testimony is credible and truthful. Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala.1996). An appellate court cannot reweigh the evidence or sit in judgment of disputed evidence presented ore tenus, id. at 1324-26, and the trial court's judgment based on ore tenus evidence will not be disturbed unless it is palpably wrong, manifestly unjust, or without supporting evidence. Samek v. Sanders, 788 So. 2d 872, 876 (Ala. 2000).

As mentioned, in its judgment the Elmore Juvenile Court did not make findings of fact or set forth the basis for its denial of the adoption petition; therefore, we will assume that it made the findings necessary to support its judgment if those findings are supported by the record. Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001). When a motion contesting an adoption is filed, the court hearing the action must determine, among other things not relevant here, whether the best interest of the prospective adoptee will be served by the adoption. § 26-10A-24(a)(1), Ala. Code 1975. After hearing evidence at a contested hearing, the court must dismiss the adoption action if it finds that the adoption is not in the best interest of the prospective adoptee. § 26-10A-24(d)(1).

The record in this case is replete with evidence demonstrating behavior on the part of the foster parents and their attorney from which the Elmore Juvenile Court could have determined that adoption by the foster parents would not be in the child's best interest. Evidence indicated that the foster parents had developed a relationship with the mother, lending her a vehicle, finding her a place to live, and allowing her to see the child more often than did the grandparents, who had adhered to the Elmore County DHR's instructions that the mother not have visitations

of which the Elmore County DHR was unaware. The evidence further indicated that the foster parents' attorney had approached the mother and convinced her that she needed his representation during the "custody" proceedings. He also represented her in the underlying criminal child-abuse prosecution. That attorney also notarized the document that the mother signed giving her consent to the child's adoption by the foster parents, after she had first expressed her belief that it was in the child's best interest for the grandparents to obtain custody. The mother's testimony indicated that the attorney had convinced her to file what the court could have found was a factually unsupported ethics complaint against the grandfather, which the foster parents attempted to use to portray the grandfather in a false light. The mother testified that, when the ethics complaint was filed, she did not know that an independent law-enforcement agency had investigated the child-abuse allegations and that the grandfather had nothing to do with the investigation. In short, the evidence tended to show that the foster parents and their attorney had used the mother and had swayed her opinion against the grandparents and in their favor at a time when both

the mother and the foster mother acknowledged that the mother was suffering from mental-health issues.

Furthermore, the foster mother had concluded that the mother -- despite having been indicted for abusing the child -- had not injured the child and that the mother should have a relationship with the child regardless of the conditions that the Elmore County DHR had established based on what it had learned through ISP meetings and the various investigations involving the child. To that end, the foster mother permitted the mother to have additional visits with the child other than those that the Elmore County DHR had sanctioned, and she testified that it was her intention to allow the mother to have unsupervised visitation with the child. Based on the totality of the evidence, the Elmore Juvenile Court could have determined that the foster mother lacked protective capacity regarding the child, that the foster parents and their attorney had employed questionable tactics in seeking the adoption, and, as a result, that it would not be in the child's best interest to be adopted by the foster parents. Thus, we conclude that the evidence supports the Elmore Juvenile Court's judgment dismissing the foster parents' adoption petition.

Conclusion

For the foregoing reasons, we conclude that the Elmore Juvenile court's judgment denying the foster parents' petition to adopt the child is due to be affirmed.

AFFIRMED.

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

Edwards and Hanson, JJ., recuse themselves.