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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2201009

M.C. and V.C.

v.

Lee County Department of Human Resources et al.

2201046

M.B.

v.

Lee County Department of Human Resources et al.

Appeals from Lee Juvenile Court
(JU-19-3.01)

THOMPSON, Presiding Judge.

On January 7, 2019, the Lee County Department of Human Resources ("DHR") filed in the Lee Juvenile Court ("the juvenile court") a petition seeking to have a child, K.M. ("the child"), who was then four months old, declared dependent and seeking an award of custody. In its petition, DHR alleged that H.R., the mother of the child ("the mother") was abusing illegal substances and that, as a result, she was unable to properly care for the child. At the time the dependency petition was filed, no father of the child had been identified. The juvenile court conducted a 72-hour shelter-care hearing pursuant to § 12-15-308, Ala. Code 1975, and entered an order noting that there were concerns about the mother's ability to care for the child but denying DHR's request to place the child in the pendente lite custody of DHR. Later, the mother named M.B. as the child's father, and, pending the results of paternity testing, DHR sought to amend its dependency petition to identify M.B. as the child's father.

On February 7, 2019, the juvenile court entered an order in which it, among other things, found the child to be dependent but left the child in the custody of the mother. DHR subsequently filed several motions

seeking the entry of a "pick up" order regarding the child. On July 22, 2019, the juvenile court conducted an evidentiary hearing on one of DHR's motions. After that hearing, and also on July 22, 2019, the juvenile court entered an order granting DHR's motion and awarding DHR custody of the child; it cited the mother's unstable living arrangement as a basis for the relief granted in that July 22, 2019, order. We note that, during the July 22, 2019, hearing, the mother testified that she was married to J.R. She stated that she had been separated from J.R. for five years and that, at the time of the July 22, 2019, hearing, she was unaware of J.R.'s whereabouts.¹ At the July 22, 2019, hearing, the mother stated that M.B. was the child's biological father.

In February 2020, M.B.'s paternity was established in a separate juvenile-court action ("the paternity action") in which DHR also sought an award of child support for the benefit of the child. The record contains no indication that DHR sought to serve J.R. with notice of the paternity action or that, in the paternity action, DHR identified J.R. as a possible

¹As is indicated later in this opinion, the juvenile court appears to have forgotten the mother's testimony concerning her husband.

legal father of the child. The paternity judgment is marked as having been entered by "default."

During a June 3, 2020, review hearing in this matter, an attorney for DHR represented to the juvenile court that M.B. had been adjudicated the child's father and that DHR was considering M.B.'s sister, M.C., as a possible relative placement for the child. We note that, as is explained later in this opinion, the juvenile court, in its final judgment entered in this matter, questioned the validity of the February 2020 paternity judgment. In this opinion, this court neither addresses or comments on the validity of the February 2020 paternity judgment. For ease of reference, we hereinafter refer to M.B. as "the father," to M.C. as "the aunt," and to M.C.'s husband, V.C., as "the uncle."

On December 31, 2020, DHR filed a motion asking the juvenile court to conduct a hearing on the issue of a "custody change" that would involve placing the child in the aunt's home.² On February 17, 2021, the

²In that December 31, 2020, motion, and in several other parts of the record on appeal, DHR referred to placing the child with "the aunt." In other parts of the record, DHR made references to placing the child with both the aunt and the uncle.

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child's foster parents, J.C. and L.C. ("the foster parents"), moved to intervene in the action and asserted a claim for custody of the child.

The juvenile court entered an order on February 17, 2021, in which it noted that a hearing had been conducted on that day and that, during that hearing, it had considered the foster parents' motion to intervene as well as a statement by counsel for DHR that the aunt had been approved as a relative resource for the child. In addition, during that hearing the aunt made an oral motion to intervene in order, she said, to be considered for the disposition of the child, to be represented in the matter, and to oppose the foster parents' motion to intervene. In its February 17, 2021, order, the juvenile court granted the foster parents' motion to intervene, allowing them to assert a claim for custody of the child. In addition, in that order, the juvenile court stated that "[the aunt] (and her husband) is/are allowed to intervene and the Court will consider their contentions at the upcoming custody hearing."

On March 3, 2021, the aunt filed a written motion to intervene "for consideration of custody placement of the minor child." We note that the uncle did not join in that motion. In that motion, the aunt requested "to

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be considered as [a] long-term placement for the minor child, [K.M.], and that care, custody, and control of [the child] be placed with [the aunt]."

In March 2021, the father, who was incarcerated at that time, mailed a letter to the juvenile court in which he stated that he wanted to be involved in the child's life and wanted the child to be placed with the aunt. On March 25, 2021, the juvenile court entered an order noting that it was sending paperwork to the father so that the father could file an affidavit of substantial hardship in order to request an appointed attorney.

The juvenile court conducted a dispositional hearing and received evidence over the course of three days on March 24, 2021, March 26, 2021, and March 29, 2021. The father was not present or represented by counsel at that hearing. On April 13, 2021, the juvenile court entered the following order:

"This matter was recently heard over the course of several days. DHR, the mother, the foster parents, and [the aunt and uncle] were all present and represented. The child's guardian ad litem was present as well. The hearing came about as a result of a request by DHR to place custody of this child with his aunt. The child has been in foster care with [the foster parents] since he was 11 months old. The child is now 32 months old, so his home has now been with the [foster parents] for 2/3 of his life. That fact is not anyone's fault other than the parents and the administrative system that has been

erected and must be navigated in cases like these. The [aunt and uncle] are relatives through the father. However, because this child was born out of wedlock, [during] the early stages of this case his paternity had not yet been proven. It took some time to determine that [M.B.] was the father of this child. The situation was made further complex by fact that the [aunt and uncle] live in Augusta, [Georgia]. Under our current system, for most out-of-state relatives to be considered as placement options for a child they must be reviewed by [the Interstate Compact on the Placement of Children, or] 'ICPC' process that includes administrative and social work on the part of both the State of Alabama and the State of Georgia.^{3]} Unfortunately, this is almost never a quick process and children at issue are left in limbo while this bureaucratic process is completed. Such was the case in regards to the [aunt and uncle], and the net result of all of this is that [the child] has grown more and more attached to his foster parents while this process was playing out.

"During that time, DHR and the [foster parents] were cooperating and providing visitation time between [the child] and the [aunt and uncle]. [The child] did not have a relationship with the [aunt and uncle] before all of this, but through his visitation he has developed somewhat of a relationship with them while he has been in foster care. While waiting on the ICPC home evaluation to be completed, DHR indicated that if the evaluation indicated that [the aunt and uncle] would be a safe placement option, then a bonding assessment would likely be done to aid in determining what would be the best direction to go from there. However, after the ICPC report came back as positive, DHR workers decided not to do a bonding assessment, determining that it would be 'unfair' to [the aunt and uncle] because they had not had

³The Interstate Compact on the Placement of Children, codified in Alabama at § 44-2-20 et seq., Ala. Code 1975, sets forth a process by which "states ... cooperate with each other in the interstate placement of children." § 44-2-20, Art. 1.

enough time to build a bond yet. This type of analysis is problematic because it assumes that what we are primarily trying to achieve is fairness between the nonparent adults, when what is most important is the best interests of this child. The court certainly understands that it is policy and the law that all things being equal, relative placements are preferred over nonrelative placements. However, relatedness is not the only factor. When it is in the child's best interest to be placed with, or, in this case to remain with nonrelatives, the best interests of the child prevail over bloodlines. F.W. v T.M., 140 So. 3d 950 (Ala. Civ. App. 2013). Furthermore, pre-determining the outcome without fully considering all the relevant facts, and fully assessing the circumstances, is neither fair to the child nor the adults. After long and careful consideration, this court finds that although the [aunt and uncle] appear to be great people, all things considered, and at this juncture in [the child's] life and the court processes related to him, it is not in his best interests to be placed in the custody of the [aunt and uncle] at this time. It is in his best interests to remain with the [foster parents] at this particular juncture, where his future is uncertain enough as it is.

"Therefore, this court does not grant the request to place [the child] in [the aunt and uncle's] custody at this time. Having said that, this court is not saying that there might not be other circumstances and times where making them [the child's] custodians might be in [the child's] best interest. The court also finds visitation with them remains important and providing more opportunity for connection with them. Therefore, the court requests that all parties seek to work out visitation periods between [the child] and the [aunt and uncle]. If, however the parties cannot agree on such visitation times, places and circumstances, the [aunt and uncle] shall have visitation as set out in Exhibit A. All interactions between [the child] and his parents shall continue to be limited as set out in previous orders, and, except as modified above, all prior orders remain in full force and effect."

(Emphasis added.)

The April 13, 2021, order was a pendente lite order. The order states several times that custody was not being decided "at this time," and the order itself does not mention an award of custody of the child. Rather, it simply states that moving the child to the home of the aunt and uncle at that time would not be in the child's best interests. We also note that the statements of the juvenile court in a later judgment and comments by the attorneys and the juvenile court in a subsequent hearing support the conclusion that the juvenile court and the parties understood that the April 13, 2021, order was a pendente lite order.

Regardless, DHR and the aunt filed a joint purported postjudgment motion in the juvenile court on April 22, 2021, and the mother filed a separate purported postjudgment motion on April 23, 2021. See Stockton v. CKPD Dev. Co., 936 So. 2d 1065, 1069 n.1 (Ala. Civ. App. 2005) ("A true postjudgment motion filed pursuant to Rule 59, Ala. R. Civ. P., may only be made in reference to a final order or judgment."). The juvenile court entered orders on April 29, 2021, in which it denied those purported postjudgment motions.

On July 7, 2021, DHR and the aunt filed a motion titled "Joint Motion to Transfer Custody." The request for relief set forth in that motion is a request by DHR for "placement" of the child with the aunt. The foster parents opposed that motion. The juvenile court scheduled a hearing on the motion and a final dispositional hearing for August 30, 2021.

The father was represented by counsel at the time of the August 30, 2021, hearing and took part in that hearing. At the August 30, 2021, hearing, the aunt and uncle argued that they wanted to be a "long-term family placement" for the child, which, they hoped, would prevent any termination of the parents' parental rights to the child. The attorney for the aunt and uncle stated: "I mean, that's it. We want to leave here today as the long-term placement." In its arguments before the juvenile court, DHR requested that custody of the child be transferred to the aunt and uncle.

On September 2, 2021, the juvenile court entered a judgment, providing, in relevant part:

"The Court heard updated evidence, ore tenus, centering mostly around new facts arising or discovered since April of 2021. The general testimony was that things remained stable in the [foster parents'] home. The visits with the [aunt and

uncle] have gone well. [The father] is now out of jail and awaiting trial on drug-related charges, which he denies. [The mother] is currently in Drug Court for a possession-of-a-controlled-substance charge in Shelby County. She has failed at least one drug screen for alcohol in drug court and had a few other screens that reported as diluted, but she can graduate as early as April of 2022 if all goes well. She is working and has an apartment, but no automobile or driver's license. She was cohabiting with [G.Y.], who is a known felon currently charged with attempted murder and the father to her youngest child, up until two months ago when DHR advised her against it. [G.Y.] has abused [the mother] in the past but she says there has been no domestic violence recently. [The mother] states that [G.Y.] understands and 'respects what [she has] going on' and is willing to step aside.

"Perhaps the most surprising information to the Court was the revelation that [the mother] was married at the time of [the child's] birth to [J.R.] and is still married to him, although she does not know his whereabouts and believes him to be in Mexico, which creates some legal hurdles and doubt as to whether [the child] is or will be [the aunt's] nephew. It will undoubtedly take some time and legal action to untangle those issues.

"But [the child] has spent enough time in limbo. He needs permanency. He has spent over two of his three years [of life] in foster care, and he sees his home and nuclear family as being with the [foster parents]. The Court is aware of, and uncomfortable with, the idea of granting custody to foster parents in the abstract, but this Court is not tasked with declaring broad policy or making decisions in the abstract. The Court is not tasked with enforcing any contractual obligations or remedies between the [foster parents] and [DHR], either. It is tasked with doing what is in the best interests of this child in this situation while protecting the parents' rights.

"In this case, more than two-and-a-half years after the child was first found dependent, the court finds by clear and convincing evidence that the child is still dependent and in need of the care and supervision of others beyond his parents. There is uncertainty about who [the child's] father legally is and will be, and even more uncertainty about when, if ever, either of the men would become stable enough to be a fit custodian for this child. The mother has been up and down in pursuit of stability and sobriety, and it would be at least seven more months before her legal status would be known, even if she otherwise regains stability. The [aunt and uncle], though apparently good solid people, are only considerations in this case if [M.B.] is the legal father of this child, and, currently, there are conflicting issues in regards to paternity including what is likely a void court order entered by default in a [paternity action] in which neither the presumed father nor mother were parties, and a presumption of another man's paternity due to his marriage to [the mother]. There is little indication that [J.R.] has persisted in the role as father of [the child] or ever even took it up, but, as of yet, he has not been given an opportunity to defend his paternity. Furthermore, even if paternity were not a clouded issue, the Court could not find that the [aunt and uncle's] blood connection to [the child] outweighs [the child's] bond to the [foster parents] as a result of his extended time in their family.

"The Court finds by clear and convincing evidence that allowing [the child] to remain in the [foster parents'] home and making them his custodians is in [the child's] best interests and is a viable alternative to a plan of terminating parental rights. The child's mother and the [foster parents] have developed a working relationship. The [foster parents] have graciously included her in [the child's] journey often, and they state a willingness to continue doing so. While the mother is not stable enough to be [the child's] custodian, with the [foster parents] there is the possibility of continued visitation with the child and a growing relationship with him as his mother, if not his custodial mother. And while [the

aunt] has been very gracious in bringing [the child] to [visit the mother, the child] is much closer to her at the [foster parents' home] than at the [aunt and uncle's] home near Augusta, Georgia. Therefore, [the child] is more accessible at the [foster parents' home].

"This decision probably should have been made over a year ago, but we all kept chasing the proverbial pot of gold at the end of the rainbow, only to find ourselves a year later not any closer to it. At this point, this Court is electing to take hold of the treasure that is at hand in the form of a stable loving home where [the child] is bonded and can be stable and secure, instead of continuing to chase after what may prove to be the wind."

(Emphasis added.)

In its September 2, 2021, judgment, the juvenile court awarded custody of the child to the foster parents. However, the juvenile court encouraged the foster parents to continue to allow visitation between the aunt and uncle and the child. The juvenile court awarded the mother visitation, subject to some restrictions, stated that the September 2, 2021, judgment was the final judgment in the matter, and relieved DHR from future supervision of the child.

On September 15, 2021, the father filed a postjudgment motion and a notice of appeal. The aunt also filed a postjudgment motion on September 15, 2021. On September 16, 2021, the aunt and uncle filed a notice of appeal. The two notices of appeal were held in abeyance pending

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the disposition of the postjudgment motions filed by the father and by the aunt. Rule 4(a)(5), Ala. R. App. P. Those postjudgment motions were denied by operation of law on September 29, 2021, and the notices of appeal became effective on that same date. Harvison v. Lynn, 303 So. 3d 1195, 1205 (Ala. Civ. App. 2020). This court assigned appeal number 2201009 to the aunt and uncle's appeal and appeal number 2201046 to the father's appeal. The two appeals were consolidated, ex mero motu, by this court.

On appeal, the aunt and uncle have argued that the juvenile court erred in rejecting placing the child in their custody and that it erred in allowing the foster parents to intervene in the custody action. As an initial matter, we note that in their appellate brief, the aunt and uncle have not addressed their authority or standing to appeal in this matter. It is clear that the aunt, through her intervention in the action below, is a party to the action and, therefore, may be a party to an appeal. See D.M. v. Walker Cnty. Dep't of Hum. Res., 919 So. 2d 1197, 1205 (Ala. Civ. App. 2005) (plurality) ("Unless a person is a party to a judgment, he can not appeal from that judgment.") (quoting Daughtry v. Mobile Cnty. Sheriff's Dep't, 536 So. 2d 953, 954 (Ala. 1988), quoting in turn

Boschert Merrifield Consultants, Inc. v. Masonite Corp., 897 So. 2d 1048, 1051-52 (Ala. 2004)). This court has elected to treat the aunt and uncle's motions and statements below as constituting a claim seeking an award of custody of the child. Accordingly, the September 2, 2021, judgment implicitly denied their claim seeking an award of custody of the child.

The aunt and uncle argue on appeal that the juvenile court erred in "negating the father's legal and biological relationship to the child" and, they say, thereby erroneously failing to award custody to the aunt pursuant to the preference afforded to biological relatives set forth in § 12-15-314(a)(3)c., Ala. Code 1975.

Initially, we note that we do not agree with their characterization of the September 2, 2021, judgment as "negating the father's legal and biological relationship to the child." In its September 2, 2021, judgment, as quoted above, the juvenile court questioned the validity of the paternity judgment, but it did not set aside that judgment. Therefore, it did not "negate" or otherwise alter the father's legal relationship with the child.

In addition to that argument, the aunt and uncle contend that the father is the child's presumed and adjudicated father and, therefore, that

the aunt should be awarded preference for the placement of the child over a nonrelative pursuant to § 12-15-314(a)(3)c. Section 12-15-314(a) provides, in pertinent part:

"(a) If a child is found to be dependent, the juvenile court may make any of the following orders of disposition to protect the welfare of the child:

"(1) Permit the child to remain with the parent, legal guardian, or other legal custodian of the child, subject to conditions and limitations as the juvenile court may prescribe.

"(2) Place the child under protective supervision under the Department of Human Resources.

"(3) Transfer legal custody to any of the following:

"a. The Department of Human Resources.

"....

"c. A relative or other individual who, after study by the Department of Human Resources, is found by the juvenile court to be qualified to receive and care for the child. Unless the juvenile court finds it not in the best interests of the child, a willing, fit, and able relative shall have priority for placement or custody over a non-relative.

"(4) Make any other order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child."

(Emphasis added.)

The aunt and uncle argue that they should have been awarded custody of the child over the nonrelative foster parents simply by virtue of the aunt's being biologically related to the child. However, although § 12-15-314(a)(3)c. creates a presumption in favor of an award of custody to a relative, it specifically states that that presumption may be overcome if the juvenile court finds that such an award is not in the child's best interests. In this case, the juvenile court specifically determined that an award of custody to the foster parents was in the child's best interests.

Moreover, we note that the record indicates that, when DHR became involved with the mother, she was living in Auburn but that, at the time of the August 30, 2021, hearing, the mother lived in Montevallo at an address 117 miles from the foster parents' home. The aunt and uncle live in Grovetown, Georgia, which is approximately 300 miles from the mother's home. Thus, the foster parents live significantly closer to the mother than do the aunt and uncle, and the child could visit the

mother more easily if he remained in the home of the foster parents.⁴

"Despite the statutory preference for a willing, fit, and able relative, the law does not require the juvenile court to award custody to a relative caregiver 'without regard to the best interest of the child and without an eye toward achieving permanency for the child.'" F.W. v. T.M., 140 So. 3d 950, 959 (Ala. Civ. App. 2013) (quoting B.H. v. Marion Cnty. Dep't Human Res., 998 So. 2d 475, 480 (Ala. Civ. App. 2008)). Accordingly, we cannot say that the aunt and uncle have demonstrated that the juvenile court erred in determining that, even considering the availability of a relative placement, awarding custody of the child to his foster parents was in the child's best interests under the specific facts of this case.

In its September 2, 2021, judgment, the juvenile court declined to award the aunt and uncle visitation because of the "cloud" it found to exist on the issue of the child's paternity. On appeal, the aunt and uncle have not argued that the juvenile court erred in refusing to award them visitation with the child. Arguments not asserted on appeal are deemed

⁴The record indicates that the father has had little contact with the child. The father did not request an award of visitation with the child. If the father were to assert such a claim, however, the record indicates that the father also lives closer to the foster parents than he does to the aunt and uncle.

to have been waived, and, therefore, we do not address that issue. Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005) ("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

We next turn to the aunt and uncle's argument concerning the propriety of allowing the foster parents to intervene in the action below.

"In Alabama intervention is permitted as of right in certain circumstances and with the permission of the court in others. Rule 24, [Ala. R. Civ. P.]. The granting of a motion to intervene is within the discretion of the trial court and we will not disturb its decision on appeal absent a showing of abuse of discretion."

Walker Cnty. Dep't of Pensions & Sec. v. Mason, 373 So. 2d 863, 864 (Ala. Civ. App. 1979). To the extent that the aunt and uncle contend that the foster parents' motion to intervene was untimely, this court has explained:

"[B]ecause [Rule 24, Ala. R. Civ. P.] itself is silent concerning what constitutes a "timely application [to intervene]," it has long been held that the determination of timeliness is a matter peculiarly within the sound discretion of the trial court. In exercising its discretion in this regard, the trial court must take into consideration that in a situation where intervention is sought as a matter of right, the interest of the would-be intervenor may be seriously prejudiced if he is not allowed to participate in the action.'"

Long v. City of Hoover, 844 So. 2d 1273, 1282 (Ala. Civ. App. 2002) (quoting Root v. City of Mobile, 592 So. 2d 1051, 1053 (Ala. 1992)).

The evidence or arguments that the juvenile court considered in granting the foster parents' motion to intervene is not set forth in the record on appeal. It is clear from testimony in the transcript on other matters, however, that the foster parents were concerned about instructions from DHR granting the aunt and uncle weekend visitation; the foster mother stated that the foster parents filed the motion to intervene because they did not believe that the child, who was then almost two years old, was sufficiently familiar with the aunt and uncle such that extended visitation with them would be in the child's best interests. It is also clear that, at the time the foster parents intervened, the child, who was not yet one and a half years old, had been in their home for one year. Although the foster parents intervened only after the action had been pending for a year, we cannot say that, given their interest in advocating for the child's best interests, the juvenile court erred in allowing the foster parents to intervene.

We next turn to the father's arguments set forth in appeal number 2201046. In his appellate brief, the father asserts that the juvenile court

erred in allowing the foster parents to intervene below. However, the father did not object to the intervention or otherwise raise that argument before the juvenile court, and, therefore, he has not preserved this argument for this court's review.

"As our supreme court has stated:

""""[That an appellate court cannot reverse a trial court's judgment on an argument that was not first presented to the trial court] is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; ... fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; ... the rule promotes efficient trial proceedings; ... reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and ... there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right...""""

"Birmingham Hockey Club, Inc. v. National Council On Comp. Ins., Inc., 827 So. 2d 73, 80 (Ala. 2002) (quoting Ex parte Elba Gen. Hosp., 828 So. 2d 308, 314 (Ala. 2001), quoting in turn Cantu v. State, 660 So. 2d 1026, 1031-32 (Ala. 1995) (Maddox, J., concurring in part and dissenting in part), quoting in turn State v. Applegate, 39 Or. App. 17, 21, 591 P.2d 371, 373 (1979))."

A.M.F. v. Tuscaloosa Cnty. Dep't of Hum. Res., 75 So. 3d 1206, 1210 n.3 (Ala. Civ. App. 2011).

The father also argues on appeal that the juvenile court erred in awarding custody of the child to the foster parents.

"In Ex parte Alabama Department of Human Resources, 682 So. 2d 459 (Ala. 1996), the Alabama Supreme Court stated the applicable principles of appellate review in the context of a challenge to a juvenile court's custodial disposition of a dependent child:

"Appellate review is limited in cases where the evidence is presented to the trial court ore tenus. In a child custody case, an appellate court presumes the trial court's findings to be correct and will not reverse without proof of a clear abuse of discretion or plain error. Reuter v. Neese, 586 So. 2d 232 (Ala. Civ. App. 1991); J.S. v. D.S., 586 So. 2d 944 (Ala. Civ. App. 1991). This presumption is especially applicable where the evidence is conflicting. Ex parte P.G.B., 600 So. 2d 259, 261 (Ala. 1992). An appellate court will not reverse the trial court's judgment based on the trial court's findings of fact unless the findings are so poorly supported by the evidence as to be plainly and palpably wrong. See Ex parte Walters, 580 So. 2d 1352 (Ala. 1991)."

"682 So. 2d at 460."

F.W. v. T.M., 140 So. 3d 950, 956-57 (Ala. Civ. App. 2013) (quoting J.J. v. J.H.W., 27 So. 3d 519, 522 (Ala. Civ. App. 2008)).

The father contends that the juvenile court erred in failing to give the aunt and uncle a "custodial preference" over the foster parents in the placement of the child. The father maintains that, in its September 2, 2021, judgment, the juvenile court "made factual findings that were insufficient as a matter of law" to support its award of custody to the foster parents. The father contends that, to award custody of the child to the foster parents, the juvenile court was required to make a finding that the aunt and uncle were not fit or able to receive the child into their home, and that, because the juvenile court did not find them to be unfit, it erred in not placing the child with them.

The father cites Ex parte W.T.M., 851 So. 2d 55 (Ala. Civ. App. 2002), a plurality opinion of this court in which a child had been in foster care for approximately three years. In that case, the child's father had suffered a debilitating stroke that prevented him from taking care of the child, but an aunt and uncle offered to be a relative placement for the child as an alternative to the termination of the father's parental rights and filed a petition for custody of the child; the child's foster mother also intervened and sought an award of custody of the child. After the reversal of one judgment, the juvenile court in that case, on remand, entered a

judgment finding that it was in the child's best interests to be placed in the custody of the foster mother because the then three-year-old child had lived in her home since his birth. A plurality of this court reversed the judgment, stating that the juvenile court's finding that the child should remain in the foster mother's home because of how long the child had already been in that home was "insufficient, as a matter of law, to overcome the statutory policies and preferences expressed in [former] § 12-15-1.1 [repealed and replaced by § 12-15-101] and [former] § 12-15-62(c) [repealed and replaced by § 12-15-315(a)], Ala. Code 1975." 851 So. 2d at 58.⁵

In B.H. v. Marion County Department of Human Resources, 998 So. 2d 475 (Ala. Civ. App. 2008), the juvenile court in that case granted a petition filed by the Marion County Department of Human Resources seeking to terminate the parental rights of the mother in that case and denied a petition for custody filed by the great-aunt of the child at issue.

⁵The former Juvenile Justice Act, which was in effect when Ex parte W.T.M. was decided, was repealed and replaced by the current Juvenile Justice Act in 2008. Former §§ 12-15-1.1 and 12-15-62(c) were part of the former Juvenile Justice Act; §§ 12-15-101 and 12-15-315(a) are the corresponding sections in the current Juvenile Justice Act and are substantially identical to their predecessors.

In that case, the great-aunt took a significant amount of narcotic pain medication to treat her various medical conditions, but other witnesses testified that she was capable of caring for the child. Also, the permanency plan regarding custody of the child in that case had never been to "return [custody] to [the] parent" because the mother had lost custody of her older children and the juvenile court had determined that making reasonable efforts toward reunification was not necessary. In that case, the great-aunt cited Ex parte W.T.M., supra, in support of her argument that she should have been awarded custody of the child. This court, however, affirmed the judgment in B.H., noting that the great-aunt's health issues might impact her ability to provide care for the child for the remainder of his minority. Also in that case, this court noted that Ex parte W.T.M., supra, had been a plurality opinion and stated that, although the opinion in Ex parte W.T.M. had expressed the preference for placing a child with a relative over a nonrelative,

"[a] related caregiver may, in some circumstances, be a suitable permanent alternative for a child; however, the relative preference does not require an automatic award of custody to a 'fit and willing' relative or supplant the juvenile court's responsibility to determine whether that related caregiver is, in fact, the most appropriate placement to ensure permanency and stability in the child's life."

B.H., 998 So. 2d at 481.

The father in this case, relying on Ex parte W.T.M., supra, contends that the juvenile court erred in basing its decision to award custody to the foster parents solely on the fact that the child had lived with them for almost three years. He also contends that the facts of B.H., supra, are distinguishable from this case because, he says, "the juvenile court made no finding that the aunt was not 'fit' or 'able' to have custody of" the child. The father acknowledges the juvenile court's discretion in making a custodial determination for a dependent child but insists that, in this case, the juvenile court's judgment was not supported by the evidence.

In making his arguments on appeal, the father has misconstrued § 12-15-314(a)(3)c., the holding in B.H., supra, and the factual findings in the juvenile court's September 2, 2021, judgment. Section 12-15-314(a)(3)c. provides that a "willing, fit, and able relative" has placement priority over a nonrelative unless a court finds that the placement with the relative is not in the child's best interests. "[A] 'fit and willing' relative is one who can care for the child's physical, emotional, mental, and other needs during the child's minority." B.H., 998 So. 2d at 481. The juvenile court's factual findings indicate that it did find the aunt to be a fit and

willing relative resource for the child. The juvenile court noted, in both its April 13, 2021, order and its September 2, 2021, final judgment, that the aunt and uncle were "great people" and "good, solid people."

The fact that a relative resource such as the aunt is fit and able to care for a child does not, by itself, require that the child be placed with that relative or that the relative be given custody of the child over a nonrelative. As is explained earlier in this opinion, "[d]espite the statutory preference for a willing, fit, and able relative, the law does not require the juvenile court to award custody to a relative caregiver 'without regard to the best interest of the child and without an eye toward achieving permanency for the child.'" F.W., 140 So. 3d at 959 (quoting B.H., 998 So. 2d at 480). In this case, the juvenile court found that it would not serve the child's best interests to be removed from the foster parents' home, the only home the almost three-year-old child had known. In addition, the juvenile court found that the foster parents lived much closer to the mother and that awarding them custody of the child would make visitation between the mother and the child easier.

The juvenile court was asked to determine whether to place the child with the aunt and uncle or to award custody to the foster parents.

Both the aunt and uncle and the foster parents are fit and able to properly care for the child, and it is clear that the aunt and the uncle and the foster parents love the child.⁶ Although the aunt is related to the child and, therefore, there is a preference under § 12-15-314(a)(3)c. in favor of placing the child with her, that preference is not a mandate. The juvenile court determined that the child's best interests would be served by awarding custody to the foster parents, and it cited as a basis for that determination the length of time the young child had been in the foster parents' home and the proximity of the foster parents to the mother,

⁶Neither the father nor the aunt and uncle in their argument that this court refused to consider have asserted an argument that, under the facts of this case, custody should not have been awarded to the foster parents. Other than asserting that the aunt and uncle should be awarded custody by virtue of their being related to the child, the father (and the aunt and uncle) failed to discuss the particular facts as they relate to an award of custody of the child. They have not argued that the facts of this case (outside of the aunt's blood relation to the child) of this case demonstrate that the aunt and uncle should have been awarded custody over the foster parents. Accordingly, any such argument has been waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."); Black v. Allen, 587 So. 2d 349, 349 (Ala. Civ. App. 1991) ("When an appellant fails to argue an issue in its brief, that issue is waived and cannot be considered on appeal.") (quoting Roberson v. Riley, 464 So. 2d 90, 91 (Ala. Civ. App. 1984), rev'd on other grounds, 464 So. 2d 92 (1985)).

which would facilitate visitation and preserve the relationship between the mother and the child.

"Whether a relative is suitable to assume custody of a child and whether such placement serves the best interests of the child are both questions of fact to be determined by the juvenile court.' R.L.M.S. v. Etowah Cnty. Dep't of Human Res., 37 So. 3d 805, 812 (Ala. Civ. App. 2009) (citing T.B. v. Cullman Cnty. Dep't of Human Res., 6 So. 3d 1195, 1204-05 (Ala. Civ. App. 2008))."

F.W., 140 So. 3d at 958. Given the findings in the juvenile court's judgment, we cannot say that the father has demonstrated that the juvenile court erred in its September 2, 2021, judgment.

We note that, on appeal, the father has argued that the juvenile court erred in finding that there was a "cloud" on the judgment that adjudicated his paternity. However, we do not reach that issue. The juvenile court did not purport to set aside the paternity judgment. Further, in its September 2, 2021, judgment, the juvenile court noted that there was no indication that J.R., the mother's husband, had any intention of persisting in the presumption in favor of his paternity, and it specifically stated that the question about the validity of the paternity judgment did not impact its custody determination. The juvenile court explained that, "even if paternity were not a clouded issue, the Court

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could not find that the [aunt and uncle's] blood connection to [the child] outweighs [the child's] bond to the [foster parents] as a result of his extended time in their family." Thus, the juvenile court's comments about the paternity judgment, whether or not correct, did not impact its custody determination. Accordingly, the father has not demonstrated a basis for reversal.

2201009 -- AFFIRMED.

2201046 -- AFFIRMED.

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