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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210148 and 2210149

E.A.D.

v.

Randolph County Department of Human Resources

2210165 and 2210166

S.D.

v.

Randolph County Department of Human Resources

Appeals from Randolph Juvenile Court
(JU-20-15.03 and JU-20-162.03)

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MOORE, Judge.

In appeal number 2210148, E.A.D. ("the father") appeals from a judgment entered by the Randolph Juvenile Court ("the juvenile court"), in case number JU-20-15.03, terminating his parental rights to M.D., whose date of birth is April 13, 2021; in appeal number 2210165, S.D. ("the mother") appeals from that same judgment to the extent that it terminated her parental rights to M.D. In appeal number 2210149, the father appeals from a judgment entered by the juvenile court, in case number JU-20-162.03, terminating his parental rights to C.D., whose date of birth is December 7, 2014; in appeal number 2210166, the mother appeals from that same judgment to the extent that it terminated her parental rights to C.D. The father's and the mother's appeals were consolidated by this court, ex mero motu.¹ We reverse the juvenile court's judgments.

¹These appeals were also consolidated with two other appeals: (1) appeal number 2210147, in which the father appealed from a judgment entered by the juvenile court, in case number JU-20-14.03, terminating his parental rights to M.D. and C.D.'s sibling, H.D., and (2) appeal number 2210164, in which the mother appealed from that same judgment to the extent that it terminated her parental rights to H.D.

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Procedural History

On June 8, 2021, the Randolph County Department of Human Resources ("DHR") filed separate petitions requesting that the juvenile court terminate the parental rights of the father and the mother to M.D. and C.D. The mother answered the petitions on August 11, 2021.

A trial on the merits of the termination-of-parental-rights petitions was held on October 21, 2021. At the commencement of the trial, the mother's attorney stated: "[M]y client is not present. She would request a continuance based upon allegedly having Covid. And I would have to object to proceeding without her." The juvenile court asked if the mother's attorney had been provided any documentation indicating that the mother had tested positive for COVID-19, and the mother's attorney responded in the negative. The juvenile court denied the mother's motion to continue and proceeded with the trial. At the conclusion of the trial, the guardian ad litem for M.D. and C.D. ("the children") recommended that the mother's parental rights to the children be terminated; however,

This court determined that those appeals had been taken from a nonfinal judgment, and we dismissed those appeals by a separate order.

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the guardian ad litem recommended that the petitions to terminate the father's parental rights be denied.

On October 22, 2021, the juvenile court entered a separate judgment in each case, terminating the parental rights of the father and the mother to each child. The father filed a postjudgment motion in each case on October 23, 2021. On October 28, 2021, the mother also filed a postjudgment motion in each case. The juvenile court denied both parties' postjudgment motions on November 8, 2021. The father filed his notice of appeal in each case on November 15, 2021, and the mother filed her notice of appeal in each case on November 22, 2021.

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)

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(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)).

"'[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 ruling ... 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

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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 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).

Facts

Kiera Simmons, a social-service caseworker for DHR, testified that DHR originally became involved with the parents and the children in 2011 because of concerns of inadequate shelter and inadequate supervision. She testified that DHR again became involved with the family in 2014 because of the parents' drug use. Simmons testified that, in 2019, DHR received a third report involving the family, which indicated that H.D., the children's sibling, had scratches on him. The most recent report regarding the family was received in August 2020 and involved allegations that the mother was using methamphetamine, that there were needles laying all around the family's house, that there was no food in the house for multiple days, that the children were dirty, and that the parents had been involved in domestic violence. Simmons specifically testified that law-enforcement officers had become involved

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with the family because of allegations that the father had attempted to run the mother's automobile off the road while the children were in the vehicle with the mother. She testified that DHR had investigated the allegations and that both parents had been found indicated for physical abuse.

Simmons testified that the mother had initially enrolled in a drug-rehabilitation program at Grace Recovery for Women but that she had left the program after approximately two weeks. Simmons testified that the mother had informed her that she had gone to a detoxification program in Clay County for two or three days, but, Simmons said, she had been unable to confirm that information. According to Simmons, the mother had also entered a drug-rehabilitation program at Hosanna's House but had stayed in that program only two days. Ava Maria Gregory Campbell, who is the executive director for Grace Recovery for Women and who conducts substance-abuse assessments, testified that the mother completed a substance-abuse assessment in December 2020. According to Campbell, the mother had admitted to using methamphetamine and had tested positive for methamphetamine.

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Campbell testified that she had recommended that the mother complete a high-intensity drug-rehabilitation program. According to Simmons, the mother had enrolled in a drug-rehabilitation program at the Lovelady Center in December 2020 and had stayed for approximately a month before she left the program. The mother tested positive for drugs at that time. The mother returned to the rehabilitation program at the Lovelady Center for another month but left the program again in March 2021. Finally, the mother entered a drug-rehabilitation program called Real Life Recovery. However, the mother was discharged from that program approximately two weeks before the trial because she had failed to return to the program after being allowed to leave to address some medical issues and because she had admitted that she had used methamphetamine. Campbell testified that the mother had contacted her two weeks before the trial stating that she was going to return to Grace Recovery for Women to update her drug assessment; however, according to Campbell, the mother had not actually done so.

Simmons testified that the mother had not had stable housing or employment and that she had not consistently communicated with or

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visited the children. In fact, Simmons testified that the mother had missed 18 visits with the children and had missed 3 of the 5 monthly visits leading up to the trial. Other than bringing snacks and gifts to visitations, the mother had provided no support for the children. At the time of the trial, the mother had a pending felony charge for possession of a controlled substance.

With respect to the father, the evidence indicated that he had completed two drug assessments. Campbell testified that the father's first substance-abuse assessment was completed in September 2020 and that it had resulted in a recommendation for detoxification. According to Campbell, following that assessment, the father had enrolled in an uncertified program. She testified that the father had come to her for a second substance-abuse assessment and that she had recommended that he attend a high-intensity drug-treatment program. According to Campbell, a high-intensity program usually lasts between 16 and 28 days and includes 25 hours of treatment per week. She testified that she had also recommended that the father receive further treatment after he completed a high-intensity program.

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The father testified that he was enrolled in a program at Seven Springs from December 23, 2020, until January 17, 2021. The father testified, however, that he had been informed that Seven Springs was not an intensive-rehabilitation program but, instead, was a sober-living house. He testified that he had been drug-free for 30 days at that time, but, he said, when the mother picked him up from Seven Springs in January 2021, she "threw a syringe at [him]" and he began using drugs again. According to the father, he did not immediately attempt to enter an intensive drug-rehabilitation program after relapsing because, he said, he was going through a difficult time. He testified that the mother had him arrested in May 2021 for allegedly violating a protection-from-abuse order. According to the father, he had not violated the order. The father testified that he had realized around the time of that arrest that he could not help the mother and that he needed to focus on helping himself and the children. He testified that he had filed for a divorce from the mother and that he planned to go through with the divorce.

The father testified that he had entered the inpatient drug-rehabilitation program at Rapha House in May 2021. Campbell testified

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that Rapha House program qualifies as an intensive drug-treatment program. The father testified that he had completed the inpatient program at Rapha House and had then completed an outpatient program at Rapha House. He testified that he had been discharged from Rapha House in September 2021, approximately one month before the trial. The father testified that, since he had completed the programs at Rapha House, he had been attending Alcoholics Anonymous and Celebrate Recovery meetings. According to Simmons, although she had requested that the father provide her with copies of sign-in sheets to show that he had been attending Alcoholics Anonymous meetings, the father had not provided those sign-in sheets.

The father testified that, at the time of the trial, he had not used drugs in over five months. He testified that, despite having had weekend passes away from Rapha House, he had not had a positive drug screen when he returned. He also testified that he had taken a drug test at DHR's request on the Monday preceding the trial and that the results of that test were negative. Simmons testified that, although the father had changed his circumstances to meet the needs of the children, she was

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concerned about his history of drug use and the possibility that he would again relapse into drug use. She testified that the father had done well at some points but had then fallen back into using drugs. She admitted, however, that the father had not tested positive for drugs in the five months preceding the trial and that she had not previously seen the father do well for that length of time. Simmons testified that, because of the timeline of the termination-of-parental-rights cases, DHR did not have the time that it would require to continue to monitor the father to be sure that he continued his sobriety.

Simmons testified that the father had initially failed to maintain consistent communication with the children but that, when he entered drug rehabilitation, his contact increased. She testified that he had visited approximately 12 times in the 14 months since DHR had become involved with the family in August 2020. She testified that the father had missed 24 visits, not including the visits he had missed when he was in drug rehabilitation. The father testified that he did not think that he had missed many visits. He admitted that he had been unable to visit the children when he was participating in the drug-rehabilitation

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programs at Rapha House, but, he said, he had set up visitation with the children after he was discharged. Simmons testified that the father's visitation had been consistent since he completed the drug-rehabilitation programs.

Simmons also testified that, although the father was employed at the time of the trial, his employer had fired him on two different occasions -- once when he did not show up for work and another time when he was arrested. The father testified, however, that he had lost his job only one time. According to Simmons, although the father had paid some child support, he had accumulated an arrearage. The father testified that he had sent the necessary documents to his employer to get his child support withheld from his paycheck. The father testified that, although he had not maintained stable housing during the 14 months preceding the trial, he had obtained a 2-bedroom house since he was discharged from Rapha House. He testified that his house had been inspected by a DHR worker and that DHR had not requested that any improvements be made to the house. Simmons testified that the only concerns she had about the father's house were that it has only two bedrooms and that there was

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some problem with the floor that the father said he was working on fixing. She testified that the house had a bunk bed in one bedroom for his two female children to sleep in and a mattress and a television in the other bedroom. According to Simmons, the father had stated that he was sleeping on the couch. Simmons testified that, at the time of the trial, C.D. had been in the same foster home with H.D. for 10 months and that M.D. had been in a separate foster home for 7 months. She also testified that the children are bonded to their respective foster parents and that it would be detrimental to remove the children from their respective foster homes. She testified that the children's respective foster parents want to adopt them. According to Simmons, two of the father's three children had stated that they did not want to go back to live with the father. The father, on the other hand, testified that the children frequently ask him about coming home.

Simmons testified that DHR had tried multiple relative placements but that those relative placements had all fallen through. She testified that DHR had ultimately been unable to locate any relative who was willing and able to take custody of the children.

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Discussion

I. The Father's Appeals

The father first argues that there was not sufficient evidence, considering his current circumstances, to prove grounds for termination of his parental rights. Section 12-15-319(a), Ala. Code 1975, provides, in pertinent part:

"If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her] responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] 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 parent[]. In a hearing on a petition for termination of parental rights, the court shall consider the best interests of the child."

"[T]he 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 Cnty. Dep't of Hum. Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003).

In H.P. v. Jefferson County Department of Human Resources, [Ms. 2200467, Oct. 8, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021), this court

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considered multiple appeals filed by H.P., the mother of three children, challenging the termination of her parental rights to those children. This court noted that the Jefferson County Department of Human Resources had become involved with H.P. because of her drug use. Therefore, this court had to consider whether there was sufficient evidence in the record from which the juvenile court could have been clearly convinced that the mother had not stopped using drugs. The evidence indicated that H.P. "had failed to complete outpatient drug-rehabilitation treatment multiple times and had rejected multiple recommendations to enter inpatient drug-rehabilitation treatment." ___ So. 3d at ___. However, Kenya Franklin, a case manager for the comprehensive addiction and pregnancy program at the University of Alabama at Birmingham, "testified that she had seen a change in the mother beginning ... when the mother began inpatient treatment at Aletheia House." ___ So. 3d at ___. The evidence indicated that, "[b]y 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." ___ So. 3d at ___.

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The mother's therapist at Aletheia House testified that the mother was at a low risk for relapse. This court ultimately determined that there was not "clear and convincing evidence indicating that the mother would be unable to parent the children in the foreseeable future," and we reversed the judgments terminating the mother's parental rights to the children. ___ So. 3d at ___.

In A.A. v. Jefferson County Department of Human Resources, 278 So. 3d 1247, 1249 (Ala. Civ. App. 2018), this court considered an appeal filed by A.A., the mother of one child, challenging a judgment terminating her parental rights. This court noted that A.A. had a history of drug use and that she had continued to use drugs even after completing an outpatient treatment program. However, we also noted that A.A. "had subsequently pursued additional drug treatment in which she resided at the respective treatment facilities for the seven months leading up to the trial," 278 So. 3d at 1253, and this court concluded that,

"[c]onsidering 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

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current drug problem that interfered with her ability to properly care for the child[.]'"

278 So. 3d at 1253 (quoting M.G. v. Etowah Cnty. Dep't of Hum. Res., 26 So. 3d 436, 443 (Ala. Civ. App. 2009)).

In M.G. v. Etowah County Department of Human Resources, 26 So. 3d 436, this court considered an appeal from a judgment terminating the parental rights of M.G. with respect to her four youngest children. This court noted that, although the Etowah County Department of Human Resources had indicated that there was concern that M.G. would relapse into drug use, "[the Etowah County] DHR did not present any evidence from the drug-rehabilitation professionals who had treated [M.G.] regarding the depth of [M.G.'s] drug addiction or the extent of her recovery." 26 So. 3d at 443. This court noted further that M.G. had been drug-free for 16 months and that "[o]ne of [Etowah County] DHR's witnesses testified that [M.G.] had never stopped using drugs for as long as 16 months before." Id. Moreover, M.G. had acquired stable housing and employment by the time of the trial. The evidence indicated that, although M.G. had missed some visitations with the children, she had visited consistently in the six months leading up to the trial. This court

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concluded that, because the Etowah County Department of Human Resources had produced no evidence indicating that M.G. was using drugs at the time of the trial and no evidence "indicating that relapse was so likely or imminent that [M.G.] should have been considered as having a current drug problem that interfered with her ability to properly care for the children," id., the judgment was due to be reversed.

We conclude that the facts in these cases are similar to those in H.P., A.A., and M.G. Like the mothers in H.P. and A.A., the father in the present cases had initially failed to conquer his drug problem despite having access to drug-rehabilitation programs. Although at one point he had achieved sobriety for 30 days, he had relapsed after leaving a sober-living facility. However, the father subsequently completed inpatient and outpatient drug-rehabilitation programs at Rapha House and had been drug-free in the five months leading up to the trial. Although Simmons testified that DHR was concerned about the possibility of the father's relapsing into drug use, she admitted that he had not tested positive for drugs in the five months preceding the trial and that she had not previously seen the father do well for that length of time. Based on

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the foregoing evidence, we conclude that, like in H.P., A.A., and M.G., "DHR produced no evidence indicating that relapse was so likely or imminent that the [father] should have been considered as having a current drug problem that interfered with [his] ability to properly care for the children." M.G., 26 So. 3d at 443. Moreover, like the mother in M.G., the father in the present cases had housing and employment at the time of the trial. Further, although the father had initially been inconsistent in his visitations with the children, he consistently visited with the children after he had ceased using drugs. It appears that the resolution of the father's drug issues had prompted improvement across the board in the father's life. Based on the foregoing evidence and considering this court's decisions in H.P., A.A., and M.G., we conclude that the juvenile court in the present cases could not have been clearly convinced that the father was "unable or unwilling to discharge [his] responsibilities to and for the child[ren], or that the conduct or condition of the [father] renders [him] unable to properly care for the child[ren] and that the conduct or condition is unlikely to change in the foreseeable future." §12-15-319(a). Therefore, we reverse the juvenile court's

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judgments terminating the parental rights of the father to the children and remand the cases for further proceedings consistent with this opinion.

II. The Mother's Appeals

On appeal, the mother makes various arguments challenging the judgments terminating her parental rights. We find her argument that the juvenile court did not exhaust all viable alternatives to termination to be dispositive, so we pretermite discussion of the mother's other arguments.

As noted, before a juvenile court may terminate parental rights, the juvenile court must consider and exhaust all other viable alternatives. In this case, the mother argues that, as an alternative to terminating her parental rights, the juvenile court could have placed the children with the father and allowed her to exercise visitation with the children. The juvenile court obviously rejected that alternative upon determining that the father's parental rights should be terminated. However, this court has now reversed the judgments terminating the father's parental rights. Our disposition of the father's appeals now requires DHR to use

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reasonable efforts to reunite the children with the father under the supervision of the juvenile court. If that reunification can be achieved safely and in accordance with the best interests of the children, see Ala. Code 1975, § 12-15-101(b)(3), the father would be able to exercise custody of the children.

In J.C.D. v. Lauderdale County Department of Human Resources, 180 So. 3d 900, 901 (Ala. Civ. App. 2015), this court noted that "termination of the parental rights of a noncustodial parent is not appropriate in cases in which the children can safely reside with the custodial parent and the continuation of the noncustodial parent's relationship does not present any harm to the children." Of course, "[t]he determination of whether a viable alternative to termination of parental rights exists is a question of fact to be decided by the juvenile court," J.B. v. Cleburne Cnty. Dep't of Hum. Res., 991 So. 2d 273, 282 (Ala. Civ. App. 2008), and "[t]he [juvenile] court must consider the best interest of the child when looking at less drastic alternatives [to termination]," Haag v. Cherokee Cnty. Dep't of Pensions & Sec., 489 So. 2d 586, 588 (Ala. Civ. App. 1986). Therefore, it is for the juvenile court to determine, after

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exhaustion of DHR's efforts to reunite the children with the father, whether, as an alternative to terminating her parental rights, placement of the children with the father with visitation by the mother would constitute a viable alternative to termination of the mother's parental rights. At this juncture it would be premature for this court to express any opinion on that point.

We, therefore, reverse the judgments terminating the mother's parental rights and remand the cases. On remand, the juvenile court is instructed to consider whether placement of the children with the father would serve as a viable alternative to termination of the mother's parental rights and any further action consistent with this opinion. See W.A. v. Calhoun Cnty. Dep't of Hum. Res., 211 So. 3d 849, 853-54 (Ala. Civ. App. 2016) ("However, because we are reversing the judgment insofar as it terminated the father's parental rights and, therefore, the father may prove to be a suitable custodian who could supervise visitation of the mother and the child, which would be a viable alternative to terminating the mother's parental rights, we also reverse the judgment

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insofar as it terminated the mother's parental rights, ... and we remand the cause for further proceedings consistent with this opinion.").

2210148 and 2210149 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2210165 and 2210166 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

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

Thompson, P.J., concurs in the result, without opinion.