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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2210394

A.D.W.H.

v.

C.L.

**Appeal from Autauga Juvenile Court
(JU-21-54.01)**

EDWARDS, Judge.

On April 12, 2021, C.L. ("the maternal aunt") filed a petition in the Autauga Juvenile Court ("the juvenile court") in which she sought custody of J.H. ("the child"). The maternal aunt was proceeding pro se, and she used a form entitled "Petition" provided to her by the juvenile-court clerk's office. She checked the box on the form indicating that she

2210394

was alleging that the child was delinquent, and, in the area provided on the form for stating allegations supporting the claim that the child was "delinquent," she wrote only the following: "Asking for joint custody with [the child's maternal grandmother, J.M.]. I'm on a safety plan with DHR." Inexplicably, the juvenile-court intake officer certified the petition as containing legally sufficient information to establish subject-matter jurisdiction, venue, and probable cause. The maternal aunt's petition was assigned case number JU-21-54.01.

The following day, the Autauga County Department of Human Resources ("DHR") filed a petition in the juvenile court seeking to have the child declared dependent; that petition was assigned case number JU-21-54.02.¹ DHR's petition alleged that DHR had received a report that the child's parents, A.D.W.H. ("the mother") and J.H. ("the father"), had been using methamphetamine in the home when the child was present, that the father had tested positive for several illegal drugs, and

¹We have before us only the record in case number JU-21-54.01. We have no explanation regarding why the record includes not only DHR's petition in case number JU-21-54.02, but also, as will be discussed *infra*, a dependency petition filed by the child's maternal grandmother, J.M., which was assigned case number JU-21-54.03.

2210394

that the mother had refused or failed to submit to drug testing. DHR indicated that the maternal aunt and J.M. ("the maternal grandmother") had expressed interest in seeking custody or kinship guardianship of the child.

The maternal grandmother filed a dependency petition on April 16, 2021. The handwritten allegations set out by the maternal grandmother largely pertained to her inability to secure funds to pay the filing fee; however, she stated that she had contacted DHR and that the mother and the father were using drugs. Her petition was assigned case number JU-21-54.03.

Pursuant to Ala. Code 1975, § 12-15-308, the juvenile court held a shelter-care hearing in case number JU-21-54.01 on April 14, 2021, after which it entered a shelter-care order awarding pendente lite custody of the child to the maternal aunt. The juvenile court held an adjudicatory hearing on May 12, 2021, after which it entered a judgment on May 17, 2021, in case number JU-21-54.01 implicitly determining that the child was a dependent child, awarding the maternal aunt temporary custody of the child, and requiring DHR to provide protective supervision; the

2210394

mother did not appeal from that judgment.² In September 2021, the juvenile court held a review hearing, after which it entered an order in case number JU-21-54.01 stating that the child remained dependent, relieving DHR of the duty to provide protective supervision, and indicating that it intended to dismiss case number JU-21-54.02, DHR's dependency action.³ In the September 2021 order, the juvenile court also set the maternal aunt's dependency petition for a final dispositional trial to be held in November 2021; however, the trial was continued until January 25, 2022.

On January 25, 2022, the mother filed a "motion to dismiss" all three dependency petitions.⁴ In her motion, the mother claimed that the

²In D.P. v. Limestone County Department of Human Resources, 28 So. 3d 759, 762 (Ala. Civ. App. 2009), we explained that "this court has always treated formal dependency adjudications as final and appealable judgments despite the fact that they are scheduled for further review by the juvenile court."

³Although the September 2021 order entered in case number JU-21-54.01 indicated that DHR's dependency action would be dismissed, we are not aware of whether the dismissal of case number JU-21-54.02 was accomplished by the entry of an appropriate order in that action.

⁴Although the State Judicial Information System case-action-summary sheet indicates that the motion to dismiss was filed on January

2210394

petitions had each failed to state a claim for which relief could be granted because, she contended, none of the petitions had alleged that the child had been neglected or abused by the mother. The mother's motion also referred to reports of the child's guardian ad litem and DHR that had been admitted into evidence, which, she argued, had also failed to allege facts indicating that the mother had abused or neglected the child. Relying on A.V. v. Houston County Department of Human Resources, [Ms. 2190464, Feb. 26, 2021] ___ So. 3d ___, ___ (Ala. Civ. App. 2021), the mother further argued in the motion that the allegations and evidence of drug use by the mother would not be sufficient to support the conclusion that the mother's ability to rear the child had been negatively impacted and, therefore, could not support a finding of dependency. The juvenile court denied the mother's motion to dismiss on January 27, 2022.

On January 28, 2022, the juvenile court entered a judgment in case number JU-21-54.01, the action initiated by the maternal aunt's petition,

26, 2022, the motion does not bear any indicia of having been filed with the clerk's office, and the mother's counsel referred to the motion at the January 25, 2022, trial, indicating that the mother's motion was filed in open court.

2210394

again finding the child to be dependent, awarding custody of the child to the maternal aunt, awarding the mother supervised visitation, and closing the case to further review. In that judgment, the juvenile court noted that the mother had not been present at the trial on January 25, 2022, that the mother's counsel had "made his objection known for the record on the mother's behalf," and that the other "parties" had announced that they had reached an agreement. The judgment further stated that the juvenile court had "considered said agreements [sic], the pleadings, evidence, [and] testimony in response to the mother's objection." The mother filed a timely notice of appeal from the January 28, 2022, judgment in case number JU-21-54.01.

On appeal, the mother first argues that the juvenile court erred in denying the motion to dismiss the maternal aunt's petition. We first question whether the motion to dismiss, having been filed more than nine months after the filing of the petition, more than eight months after the entry of the initial dependency judgment in May 2021, and on the day of the final dispositional trial on January 25, 2022, was, in fact, a motion to dismiss. The mother's motion challenged the sufficiency of the

2210394

allegations in the maternal aunt's petition, and, therefore, appeared to be a motion to dismiss for failure to state a claim upon which relief could be granted. See Rule 12(b)(6), Ala. R. Civ. P. Such a motion tests the sufficiency of a complaint or petition. See Driskill v. Culliver, 797 So. 2d 495, 497 (Ala. Civ. App. 2001) (quoting Public Rels. Couns., Inc. v. City of Mobile, 565 So. 2d 78, 81 (Ala. 1990) ("A Rule 12(b)(6) motion serves to 'test[] the sufficiency of the pleadings to determine if the plaintiff has stated a claim upon which relief can be granted.'"). However, the issue of the child's dependency had initially been resolved in the May 2021 dependency judgment. Although the May 2021 dependency judgment was subject to review, and although the juvenile court was required to determine that the child remained dependent at the time of the entry of each dispositional judgment, see H.C. v. S.L., 251 So. 3d 793, 794 (Ala. Civ. App. 2017), any insufficiency of the allegations in the initial petition would have been resolved by the juvenile court's consideration of the evidence presented at the May 2021 adjudicatory hearing. Certainly, "Rule 12(h)(2)[, Ala. R. Civ. P.,] 'protects' a [Rule] 12(b)(6)[, Ala. R. Civ. P.,] defense from waiver, if [that defense is] not raised in the pleadings

2210394

by allowing the defense to be made 'in any pleading permitted or ordered under Rule 7(a), [Ala. R. Civ. P.,] or by motion for judgment on the pleadings, or at the trial on the merits,'" Sims v. Lewis, 374 So. 2d 298, 301 (Ala. 1979) (emphasis added), but Rule 12(h)(2) does not permit the assertion of a Rule 12(b)(6) defense by motion filed after a trial on the merits. Although juvenile dependency actions contemplate more than one trial and more than one final judgment, see D.P., 28 So. 3d at 762, we cannot conceive of a situation in which the issue whether the initial petition stated sufficient allegations to support a determination of dependency would not have become moot after the entry of the initial dependency judgment, entered pursuant to a stipulation of dependency or evidence of dependency that was adduced at trial, especially in light of the automatic amendment of the pleadings to conform to the evidence provided under Rule 15(b), Ala. R. Civ. P. See A.D. v. R.P., 345 So. 3d 657, 665 (Ala. Civ. App. 2021) (explaining, in the context of an appeal involving the denial of a Rule 12(c), Ala. R. Civ. P., motion for a judgment on the pleadings, that "[t]o allow this court to revisit on appeal whether the mother's pro se petition made sufficient, specific factual averments to

2210394

withstand a Rule 12(c) motion after the juvenile court has heard evidence on all factors relevant to the termination of parental rights would be wasteful of judicial resources and would undermine the language and spirit of Rule 15(b) by allowing deficiencies in the pleadings to affect the result of the trial before the juvenile court").

In the present case, the juvenile court, more than eight months before the mother filed her motion to dismiss, considered the merits of the various dependency petitions at the May 2021 adjudicatory hearing, after which it entered a judgment on May 17, 2021, implicitly determining that the child was dependent and awarding the maternal aunt temporary custody. The mother did not appeal the May 2021 dependency judgment, and we presume that the juvenile court had before it evidence that supported its determination that the child was dependent at that time. The maternal aunt's petition would have been amended by the evidence presented at the May 2021 adjudicatory hearing pursuant to Rule 15(b). The mother's January 2022 challenge to the sufficiency of the maternal aunt's petition came far too late.

2210394

Accordingly, we will not review the juvenile court's denial of the mother's motion to dismiss.

The mother next contends in her brief on appeal, as she did in the juvenile court, that her alleged drug use is not sufficient, alone, to support the determination that the child was dependent. Indeed, in A.V. we explained that evidence indicating that a parent might engage in the use of drugs is not sufficient, alone, to support the conclusion that a child is dependent; to support a finding of dependency, a juvenile court must have evidence "indicating that [such] drug use by the [parent] had adversely affected the [parent's] ability to care for the child." ___ So. 3d at ___; see also H.A.S. v. S.F., 298 So. 3d 1092, 1103 (Ala. Civ. App. 2019) (concluding that evidence indicating that a mother had used marijuana was not clear and convincing evidence sufficient to support the conclusion that her child was dependent in her custody based on the mother's drug use when "no evidence in the record indicated that the mother's drug use had actually impacted her ability to rear [her] child").

We first note that, before a juvenile court may make a custodial disposition after a dispositional trial, the juvenile court must determine

2210394

that the child at issue remains dependent. See H.C., 251 So. 3d at 794. The transcript of the final dispositional trial in the present case, which spans a total of seven pages, indicates that no testimony was taken and that no exhibits were admitted at the trial. Instead, the juvenile court heard arguments of counsel and accepted an agreement that parties other than the mother, who was not present, had reached. The mother's counsel objected to the agreement and stated on the record that "the only evidence that's ever been entered before the Court is that she tested positive for drugs." He specifically argued that the "evidence" did not support a finding that any drug use by the mother "had adversely affected the [mother's] ability to care for the child." A.V., ___ So. 3d at ___.

We have explained that a dependency determination must be supported either by a stipulation of the parties or by evidence of dependency. L.F. v. Cullman Cnty. Dep't of Hum. Res., 175 So. 3d 183, 185 (Ala. Civ. App. 2015). The procedural facts of L.F. are quite similar to those of the present case. The mother in L.F. appeared at a hearing set on petitions seeking to have her children declared dependent. 175 So. 3d at 184. The attorney for the Cullman County Department of Human

2210394

Resources ("the Cullman County DHR") informed the court that the parties had reached an agreement, only to have the mother's counsel indicate that the mother objected to the agreement. Counsel then discussed on the record issues concerning the mother's visitation and the scheduling of a mental-health evaluation of the mother. No testimony was taken and no exhibits were admitted by the court. After the hearing, the court entered a judgment declaring the children dependent and awarding the custody of the children to the Cullman County DHR. The mother appealed.

We reversed the judgment, explaining as follows:

"Section 12-15-310, Ala. Code 1975, provides that a child may be found dependent following an adjudicatory hearing. If a parent has denied the allegations of dependency, or if the parent has failed to respond to the allegations, 'the juvenile court shall proceed to hear evidence on the petition.' § 12-15-310(b), Ala. Code 1975. Section 12-5-311(a), Ala. Code 1975, further provides that a child may be adjudicated dependent based on 'clear and convincing evidence, competent, material, and relevant in nature.'

"In this case, the mother did not file any formal response to the dependency petitions, so the juvenile court had an imperative duty to hear evidence on the petitions pursuant to § 12-15-310. See also Rule 25(A), Ala. R. Juv. P. (If the allegations of the juvenile petition are denied, the juvenile

court shall direct that testimony of witnesses be taken. A dependency hearing shall be conducted consistent with legal and due-process requirements and shall proceed generally in a manner similar to the trial of a civil action before the court sitting without a jury.'). However, on the date scheduled for the adjudicatory hearing, the juvenile court did not hear any evidence. It heard only assertions of counsel regarding the scheduling of a mental-health evaluation and the visitation between the mother and one of the children. The colloquy between counsel and the judge did not amount to evidence of dependency. See Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005) ('The unsworn statements, factual assertions, and arguments of counsel are not evidence.').

"....

"'Ordinarily, a juvenile court cannot find a child dependent without receiving clear and convincing evidence establishing the dependency of the child. See Ala. Code 1975, § 12-15-310(b). However, nothing in the law prevents parties from stipulating to the dependency of a child. "A stipulation is a judicial admission, dispensing with proof, recognized and enforced by the courts as a substitute for legal proof." Spradley v. State, 414 So. 2d 170, 172 (Ala. Crim. App. 1982). Therefore, when parties stipulate to the dependency of a child, a juvenile court may find a child dependent without clear and convincing evidence establishing the child's dependency.'

"K.D. v. Jefferson Cnty. Dep't of Human Res., 88 So. 3d 893, 896 (Ala. Civ. App. 2012). A stipulation would have obviated the need for clear and convincing evidence of dependency. A

2210394

thorough review of the record does not reveal any stipulation of dependency, however. To the contrary, the record indicates that the mother's counsel informed the juvenile court that the parties were 'not on the same page' in regard to any agreement relating to the children."

L.F., 175 So. 3d at 184-85.

As the mother in this case correctly contends, allegations or evidence concerning a parent's drug use are not sufficient, alone, to form the basis of a dependency finding. Moreover, the transcript of the January 25, 2022, dispositional trial not only lacks evidence supporting the conclusion that the child was dependent, but also lacks any evidence at all. Accordingly, the juvenile court's January 28, 2022, judgment, like the judgment in L.F., must be reversed.

Based on the foregoing, we reverse the juvenile court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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