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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

2131064

J.S.L.

v.

Jefferson County Department of Human Resources

Appeal from Jefferson Juvenile Court
(JU-12-443.03)

THOMAS, Judge.

J.S.L. ("the mother") is the mother of J.Z.L. ("the child"), who was born on November 29, 2012. The child's father is unknown. On December 5, 2012, the Jefferson Juvenile Court adjudicated the child dependent and awarded her

custody to the Jefferson County Department of Human Resources ("DHR").[1] The juvenile court's dependency judgment required the mother to submit to a substance-abuse assessment, to obtain and maintain housing, to complete domestic-violence-prevention classes, and to complete a series of parenting classes. The child was first placed with J.S., and, then, three weeks later, she was placed in foster care, where she remained at the time of the termination-of-parental-rights trial pertaining to the child.[2] On September 19, 2013, DHR requested an order relieving it of the duty to provide reasonable services designed to reunite the family; the juvenile court entered the requested order after a hearing in December 2013. The mother failed to appear at the hearing; therefore, DHR's request was unopposed.

On March 12, 2014, DHR filed a petition seeking the termination of the parental rights of the mother and the child's unknown father. DHR asserted that the child is the mother's fifth child and that the mother's parental rights to

[1]The mother stipulated to the child's dependency.

[2]The mother and J.S. first claimed that J.S. was the mother's cousin; however, J.S. later admitted that she was not related to the mother.

the child's four half siblings ("the siblings") have been involuntarily terminated due to the mother's drug abuse, acts of domestic violence, and acts of physical abuse of the siblings. The termination judgments pertaining to the siblings were entered between 2002 and 2008. DHR asserted that the mother had failed to adjust her circumstances to meet the needs of the child, had failed to visit the child, and had failed to take advantage of reunification services provided by DHR; that those conditions were unlikely to change in the foreseeable future; and that no viable alternatives to termination of parental rights existed.

On September 3, 2014, the juvenile court entered a judgment terminating the mother's parental rights and awarding DHR permanent custody of the child.[3] The juvenile court based its termination judgment on its findings that the mother's parental rights to the siblings had been involuntarily terminated, that the mother had "not ever cooperated" with DHR, that the mother was unemployed, that the mother resided in subsidized housing, and that the mother had failed to

[3]The juvenile court had served the unknown father with notice of the proceedings by publication, and its September 3, 2014, judgment terminated the parental rights of the unknown father as well.

support the child. The juvenile court noted that the mother had visited the child and that she had completed a drug-treatment program, a domestic-violence-prevention program, and a series of parenting classes. On September 16, 2014, the mother filed a notice of appeal seeking this court's review of whether the juvenile court's judgment is supported by clear and convincing evidence.

> "This court's standard of appellate review of judgments terminating parental rights is well settled. A juvenile court's factual findings, based on ore tenus evidence, in a judgment terminating parental rights are presumed to be correct and will not be disturbed unless they are plainly and palpably wrong. See, e.g., F.I. v. State Dep't of Human Res., 975 So. 2d 969, 972 (Ala. Civ. App. 2007). Under express direction from our supreme court, in termination-of-parental-rights cases this court is 'required to apply a presumption of correctness to the trial court's finding[s]' when the trial court bases its decision on conflicting ore tenus evidence. Ex parte State Dep't of Human Res., 834 So. 2d 117, 122 (Ala. 2002) (emphasis added). Additionally, we will reverse a juvenile court's judgment terminating parental rights only if the record shows that the judgment is not supported by clear and convincing evidence. F.I., 975 So. 2d at 972."

J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007) (footnote omitted). A juvenile court may terminate parental rights only when the evidence presented is

"clear and convincing evidence, competent, material, and relevant in nature." § 12-15-319(a), Ala. Code 1975.

The termination-of-parental-rights trial was held on July 10, 2014, and on August 21, 2014. Before the testimony began on the first day of the trial, the mother's attorney requested a continuance because, she argued, that same morning the mother had informed her for the first time that she had successfully completed a substance-abuse program. The mother's attorney stated that she had telephoned Kiwanna Morris, an employee of the Aletheia House, who had confirmed the mother's claim, and Morris additionally reported to the mother's attorney that she had the records of the mother's series of negative drug screens and the results of the mother's psychological evaluation. The attorney for DHR opposed the continuance, and the juvenile court declined to continue the trial, but it recommended requesting that Morris make documentation available to the court. However, at the close of the first day of the trial, the juvenile-court judge stopped the trial and stated orally:

> "Okay. What's happening here is [the mother has] stuff nobody knows[,] including [her] lawyer, I think, which is sort of a surprise to everyone. All right, I am of a mind to end [the] trial right now

> and just wait and resume it later. And here is why, (speaking to the DHR attorney) because there's evidence here that would be important to me to know that no one -- there's not an attorney in here that knew any of this existed.
>
> "....
>
> "Here's what I want you to do. I'm going to stop this trial right now and nothing is going to change. We're just going to put it off and get this evidence [regarding what the mother is] doing. You (speaking to the mother) really need to communicate with your attorney."

Testimony at the two-day trial indicated that DHR had assigned the child's case to two caseworkers, first to Scarlett Holt in December 2012 and then to Adrian Hall in October 2013. Holt testified that the child was removed from the mother's custody at birth because the mother's parental rights to the siblings had been terminated. Under cross-examination by the child's guardian ad litem, Holt admitted that the child was removed from the mother's custody "based on previous issues," that DHR was not aware of the mother's "situation" at the time the child was born, that the mother was not tested for illegal substances when the child was born, and that the child was negative for illegal substances. The juvenile-court judge stated orally to the child's guardian ad litem: "Now, the [dependency] petition ha[d] to do with the

history." Hall testified that the juvenile court had relieved DHR of its duty to provide reasonable efforts to reunite the family in December 2013 because of the "prior [termination-of-parental-rights] cases."

The mother testified that she and the child had tested negative for illegal substances at the time of the child's birth, although she admitted that she had smoked marijuana until 2011. Hall testified that DHR's concerns regarding possible drug abuse were based upon the mother's history and that she did not suspect that the mother was using illegal substances. Morris testified that from January 2014 through June 2014 the mother had successfully participated in intensive, outpatient, substance-abuse group therapy at the Aletheia House. Morris praised the mother's progress; she said that the mother had participated in learning about avoiding triggers, developing coping skills, and building a support system. Morris testified that she had been trained to observe behaviors that indicate drug abuse and that the mother had never done or said anything to make Morris suspect that the mother abused drugs. Although the mother and Morris testified that the mother had submitted to a number of drug

screens, the documentary evidence did not support their testimony. The mother testified that she had desired to take a hair-follicle drug screen but that DHR had refused to provide a referral for such a drug screen because it was no longer providing services to the mother.

Regardless of whether the mother needed substance-abuse treatment or whether she eventually completed that treatment, the testimony demonstrated that the juvenile court had ordered the mother to undergo drug assessment and drug screening and that she had failed to comply with those orders before January 2014. As of October 2013, the mother had failed to submit to a substance-abuse assessment and she had submitted to random drug screening only once. Holt said that the mother had complained of transportation issues, and Holt admitted that she had never provided bus passes to the mother. Hall said that she had provided bus passes but that the mother had still failed to submit to random drug screening. The mother testified that she used the bus passes Hall provided to go to the Aletheia House for counseling. Hall said that the mother had not requested, and DHR had not provided, any additional financial assistance for the mother's drug screens. The

mother said that she had failed to appear for random drug screening because she did not have reliable transportation, because she did not have $10 for the drug test, and because she forgot to follow through with the requirements of random drug screening.

Hall testified that in 2014 the mother completed parenting classes at the Exchange Club as well as domestic-violence-prevention classes at the YWCA, and, Holt testified, DHR was no longer concerned about the risks of domestic violence in the mother's home. Morris testified that the mother had joined a supportive church.

Holt testified that the mother lived in federally subsidized housing. Holt had visited the mother's residence once per month, and Holt said that it was clean and appropriate, although the mother smoked cigarettes. Hall agreed that the mother had maintained housing; however, Hall testified that, in December 2013, the mother did not have electricity or food in the house. Hall said that the mother had reported that she did not have adequate income, so she lived with friends or in hotels. The mother confirmed that the house had been without electricity for two months.

Thereafter, Hall said, electric service was restored. Hall said that she had made an unannounced visit to the mother's residence two days before the termination trial began, that the mother had not been present so she did not go inside, and that the grass had been overgrown.

The mother admitted that she had failed to submit to a psychological evaluation at the time DHR had requested it. The mother testified that, three weeks before the termination trial began, Hall had again indicated to her that she needed to submit to a psychological evaluation. The mother said that she arranged to have her psychological evaluation administered at "Choices," that she had not received the results of the evaluation, and that Medicaid had covered the cost of the evaluation. She said that she was currently attending Choices once per month for counseling.

Holt and Hall said that the mother had never provided support for the child, although, they said, she had purchased clothing and gifts for the child. Holt testified that the mother was unemployed and that she received a monthly Social Security disability benefit based on a learning disability. The mother testified that she received $710 per month because

she had been diagnosed with a "mild intellectual disability." Morris described the mother as quiet and self-conscious, and, Morris said, the mother could complete an assigned task if she understood the task.

Hall said that the mother had visited the child "most of the time" and that the mother had to be encouraged to interact with the child at the visits. She said that the mother took photographs of the child but that she had to be prompted to hold the child or to play games with her. Hall said that, based upon her observations, the mother would need help caring for the child if the child were in her custody.

Holt said that she had investigated the mother's aunt and J.S. as relative resources in 2012. The maternal aunt did not pursue placement of the child. DHR placed the child with J.S.; however, J.S., who is not the mother's relative (see supra note 2), relinquished custody after three weeks, and she reported that the mother had harassed her and had threatened J.S.'s mother. Hall said that she had investigated two additional relative resources in the "early part" of 2014 but that placement was not approved as to either resource.

Thus, the evidence presented by DHR demonstrated that the juvenile court's December 5, 2012, dependency judgment had required the mother to submit to a substance-abuse assessment, to complete domestic-violence-prevention classes, and to complete a series of parenting classes. Although commendable to some degree, the mother's completion of those requirements in 2014 amount to "last-minute efforts undertaken in anticipation of the impending termination-of-parental-rights trial." A.M.F. v. Tuscaloosa Cnty. Dep't of Human Res., 75 So. 3d 1206, 1213 (Ala. Civ. App. 2011)(citing J.D. v. Cherokee Cnty. Dep't of Human Res., 858 So. 2d 274, 277 (Ala. Civ. App. 2003)). Viewing the evidence before the juvenile court, including the mother's history and her current conditions, the determination that the mother's intellectual disability rendered the mother unable to discharge her parental responsibilities to and for the child and that that condition was unlikely to change in the foreseeable future is supported by clear and convincing evidence. § 12-15-319(a), Ala. Code 1975. Furthermore, the juvenile court heard testimony indicating that DHR's reasonable efforts to rehabilitate the mother had failed, § 12-15-319(a)(7), that

the mother's parental rights to the child's siblings had been involuntarily terminated, § 12-15-319(a)(8), that the mother had failed to support the child, § 12-15-319(a)(9), and that the mother had failed to cooperate with DHR, § 12-15-319(a)(12). Accordingly, the juvenile court's judgment terminating the mother's parental rights to the child is affirmed.

AFFIRMED.

Pittman and Donaldson, JJ., concur.

Thompson, P.J., dissents, without writing.

Moore, J., dissents, with writing.

MOORE, Judge, dissenting.

The Jefferson Juvenile Court ("the juvenile court") entered a judgment terminating the parental rights of J.S.L. ("the mother") to J.Z.L. ("the child"). On appeal, the mother and the guardian ad litem for the child argue that the judgment is not supported by clear and convincing evidence of grounds for termination. I agree.

Alabama Code 1975, § 12-15-319, sets out the exclusive grounds for which parental rights may be terminated. J.B. v. DeKalb Cnty. Dep't of Human Res., 12 So. 3d 100, 110 (Ala. Civ. App. 2008) (plurality opinion). That statute provides that parental rights may be terminated only based on clear and convincing evidence that the parent is unable or unwilling to adequately parent the child. See Fitzgerald v. Fitzgerald, 539 So. 2d 281 (Ala. Civ. App. 1988) (applying the predecessor to § 12-15-319). Specifically, § 12-15-319(a) provides that a juvenile court may terminate parental rights based only on clear and convincing evidence demonstrating

> "that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them unable to properly care for the

> child and that the conduct or condition is unlikely to change in the foreseeable future."

Notably, the termination statute "speaks in present and future terms." S.K. v. State Dep't of Human Res., 993 So. 2d 15, 23 (Ala. Civ. App. 2008). "This court has consistently held that the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence." D.O. v. Calhoun Cnty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003); see also Ex parte T.V., 971 So. 2d 1, 6 (Ala. 2007). When determining whether the state has proven that parental rights should be terminated, the juvenile court is tasked with assessing a parent's ability to parent not as it existed in the past, but as it exists in its present state as of the date of the trial and its likely state going forward. See S.U. v. Madison Cnty. Dep't of Human Res., 91 So. 3d 716 (Ala. Civ. App. 2012) (Per Moore, J., with four Judges concurring in the result).

Although "[a juvenile] court may consider the past history of the family," Ex parte State Dep't of Human Res., 624 So. 2d 589, 593 (Ala. 1993), a juvenile court cannot base

a decision to terminate parental rights solely on past parental conduct, conditions, or circumstances. See In re K.A.W., 133 S.W.3d 1, 10 n.6 (Mo. 2004) ("'[I]t is inappropriate to use prior determinations of neglect as dispositive on the neglect issue at the time of the termination hearing. Courts are generally required to make new findings of fact based on the changed conditions in light of the parents' history of neglect and likely future neglect. ... Most courts will agree that neglect must exist at the time of the termination hearing, and that it is inappropriate to terminate a parent's rights on the basis of neglect that happened in the remote past and no longer exists.'" (quoting 32 Am. Jur. Proof of Facts 3d Parental Rights § 6 (2003))).

> "[B]ased on the plain language of the statute, and as clarified by our caselaw, the mere fact that, at one time, the parent may have committed conduct or suffered from a condition that rendered the parent unable to properly care for the child does not authorize a juvenile court to terminate parental rights. See V.M. v. State Dep't of Human Res., 710 So. 2d 915, 921 (Ala. Civ. App. 1998). Rather, the test is whether [the Department of Human Resources] has presented clear and convincing evidence demonstrating that the parental conduct or condition currently persists to such a degree as to continue to prevent the parent from properly caring for the child."

M.G. v. Etowah Cnty. Dep't of Human Res., 26 So. 3d 436, 442 (Ala. Civ. App. 2009) (plurality opinion). If clear and convincing evidence shows that parental conduct, conditions, or circumstances requiring separation of the family persists, then, and only then, may a juvenile court deem a parent "'irremediably unfit'" and terminate that parent's parental rights on that basis. A.E.T. v. Limestone Cnty. Dep't of Human Res., 49 So. 3d 1212, 1217 (Ala. Civ. App. 2010) (quoting D.M.P. v. State Dep't of Human Res., 871 So. 2d 77, 94 (Ala. Civ. App. 2003)).

In the present case, the evidence shows that, because of problems with marijuana usage and domestic violence between the mother and her paramour, the juvenile court had terminated the parental rights of the mother to four of her children between 2002 and 2008. Section 12-15-319(a)(8), Ala. Code 1975, requires a juvenile court, when deciding whether a parent is unable or unwilling to discharge his or her parental responsibilities to and for a child, to consider the prior involuntary termination of that parent's parental rights to a sibling of the child. No Alabama appellate opinion has

thoroughly discussed the effect of a prior termination judgment on a present termination petition.

In Florida Department of Children & Families v. F.L., 880 So. 2d 602 (Fla. 2004), the Florida Supreme Court construed § 39.806(1)(i), Fla. Stat., which, at that time, provided:

> "'(1) The department, the guardian ad litem, or any person who has knowledge of the facts alleged or who is informed of those facts and believes they are true may petition for the termination of parental rights under any of the following circumstances:
>
> "'....
>
> "'(i) When the parental rights of the parent to a sibling have been terminated involuntarily.'"

880 So. 2d at 607. Some lower Florida courts had determined that that statute created a rebuttable presumption in favor of the termination of the parental rights to a child when the parental rights to a sibling of that child have been previously terminated, placing the burden on parents to rebut that presumption. See, e.g., A.B. v. Department of Children & Families, 816 So. 2d 684 (Fla. Dist. Ct. App. 2002). Other lower Florida courts had questioned the constitutionality of such a rebuttable presumption. See, e.g., F.L. v. Department of Children & Families, 849 So. 2d 1114 (Fla. Dist. Ct. App. 2003). The Florida Supreme Court agreed with the latter line

of cases, holding that, as a matter of due process, the state bears the burden of proving that reunification with a parent poses a substantial risk of harm to the child even in cases involving a prior involuntary termination of parental rights to a sibling. The Florida Supreme Court held that, in order to validly terminate parental rights on the basis of a prior termination judgment, a court cannot rely solely on the undisputed evidence indicating that parental rights to a sibling have been involuntarily terminated but must also determine that whatever led to the earlier termination likely continues so as to expose the child to a substantial risk of parental harm and that termination of parental rights is the least restrictive way of protecting the child from that harm. 880 So. 2d at 608-10. See also In re Jah'za G., 141 Conn. App. 15, 60 A.3d 392 (2013) (court did not err in taking judicial notice of termination of mother's parental rights to sibling based on physical assault of sibling when court did not rely solely on that previous judgment but also received evidence indicating that mother had not rehabilitated herself and that she posed significant risk to child).

In D.O., supra, this court held that the necessity for proving current conditions arises directly from the requirement that clear and convincing evidence support a judgment terminating parental rights, which is mandated by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Santosky v. Kramer, 455 U.S. 745 (1982). Thus, the same constitutional concerns that informed the decision of the Florida Supreme Court in F.L., supra, apply equally in Alabama. Accordingly, under § 12-15-319, a juvenile court may terminate parental rights based on evidence of a prior involuntary termination of parental rights to a sibling of the child only when the evidence further shows that the parental conduct, conditions, or circumstances that led to the prior involuntary termination of his or her parental rights to the child's sibling currently persists so as to prevent the parent from being able to properly care for the child.

In this case, the evidence in the record shows that, when the mother gave birth to the child on November 29, 2012, the Jefferson County Department of Human Resources ("DHR") immediately obtained custody of the child. Scarlett Holt, a

social worker for DHR, testified that DHR removed the child from the mother based solely on her "previous issues," with no investigation of her current circumstances. The record indicates that DHR filed a dependency petition, which the juvenile-court judge stated "ha[d] to do with the history" of the mother; that petition was granted in December 2012 based on a stipulation by the mother.

DHR failed to present any evidence indicating that the mother had continued to use marijuana or any other illegal drug since 2011. Nevertheless, the juvenile court ordered the mother to undergo a drug assessment and drug screening. The mother did not immediately or consistently comply with that order. The record indicates that the mother, who had missed over 10 scheduled drug screens, waited until January 2014 to commence an outpatient substance-abuse program and that, while participating in that program, she was drug tested only twice. However, Adrienne Hall, the social worker who oversaw the mother's case from October 2013 through the trial dates in July and August 2014, testified that she never suspected that the mother was using illegal drugs at any point. Kiwanna Morris, the mother's substance-abuse counselor, also testified

that the mother did not exhibit any signs of illegal drug use from January 2014 through June 2014 while undergoing therapy.

When deciding whether a parent is unable or unwilling to discharge his or her parental responsibilities to and for a child, a juvenile court must consider whether the parent's "excessive use of alcohol or controlled substances, of a duration or nature ... render[s] the parent unable to care for needs of the child." Ala. Code 1975, § 12-15-319(a)(2). In this case, not only did DHR fail to present any evidence indicating that the mother was using any controlled substances, much less excessively using such substances, but DHR also presented absolutely no evidence regarding the effect of marijuana use on parenting ability either in the abstract or in the specific case of the mother.

DHR also presented no evidence indicating that the mother was participating in domestic violence. The mother testified, without contradiction, that she was not in any romantic relationship and that she lived alone. Hall testified that the mother had completed domestic-violence-prevention classes at the YWCA and that DHR was no longer concerned about the risks of domestic violence in the mother's home. DHR did not

present any evidence indicating that the mother's conduct or condition presented any risk of physical harm to the child. See Roe v. Conn, 417 F.Supp. 769, 779 (M.D. Ala. 1976) ("The State's interest ... become[s] 'compelling' enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing." (emphasis added)); In re Moore, 470 So. 2d 1269, 1271-72 (Ala. Civ. App. 1976) (holding that the state need not wait until a child is actually harmed before terminating parental rights, but must present clear and convincing evidence that the child is subjected to an undue risk of harm by maintenance of the parent-child relationship). DHR thus failed to prove that any of the circumstances that led to the prior terminations between 2002 and 2008 continued so as to render the mother unable to parent the child.

DHR also failed to present any other evidence indicating that the mother lacked the present ability to adequately parent the child. Hall testified that the mother had completed parenting classes, indicating she held the minimum parenting skills to care for the child. Hall did testify that, during visitations, the mother had to be prompted to

interact with the child, but that testimony alone does not show that the mother lacks proper parenting skills. Some evidence also indicates that the mother has an intellectual or learning disability, but DHR offered no evidence indicating that the impairment would prevent the mother from adequately parenting the child. The mother receives $710 per month in government benefits due to her disability, which is her only income, but DHR did not present any evidence indicating that the mother would be ineligible for further financial assistance in order to meet the material needs of the child. See Ala. Code 1975, § 12-15-319(a)(9).

The mother did fail to cooperate with DHR's efforts to obtain a psychological assessment and to arrange for drug screening and treatment. Partly for that reason, DHR sought and obtained an order in December 2013 relieving it of the duty to use reasonable efforts to reunite the mother with the child based on the ground that those efforts had failed. See Ala. Code 1975, § 12-15-319(a)(7). However, when deciding whether reasonable efforts by DHR leading toward rehabilitation have failed, a juvenile court must determine the reasonableness of the efforts DHR made and assess the

effects of those efforts on the ability of the parent to adequately care for the child. T.B. v. Cullman Cnty. Dep't of Human Res., 6 So. 3d 1195, 1199 (Ala. Civ. App. 2008) (citing H.H. v. Baldwin Cnty. Dep't of Human Res., 989 So. 2d 1094 (Ala. Civ. App. 2007)). In order to terminate parental rights, a juvenile court must find that reasonable rehabilitation efforts have failed such that the parental conduct, conditions, or circumstances that inhibited the ability of the parent to properly care for the child continue at the time of trial in such a degree as to prevent family reunification. See, e.g., B.J.K.A. v. Cleburne Cnty. Dep't of Human Res., 28 So. 3d 765 (Ala. Civ. App. 2009). That inquiry focuses not on whether the parent complied with, or even followed, the rehabilitation plan proffered by DHR, but concerns solely whether the barrier to family reunification remains after rehabilitation efforts have been concluded. See, e.g., S.K. v. State Dep't of Human Res., 993 So. 2d 15 (Ala. Civ. App. 2008) (Per Moore, J., with Thompson, P.J., concurring in the result only and Pittman and Bryan, JJ., concurring in the result) (fact that parents used faith-based pastoral counseling instead of more scientific counseling

recommended by the Department of Human Resources did not indicate that parents lacked sufficient skills to parent children); see also R.T.B. v. Calhoun Cnty. Dep't of Human Res., 19 So. 3d 198, 205 (Ala. Civ. App. 2009) (although parent has achieved all goals of rehabilitation plan, juvenile court may still terminate parental rights upon finding that parent still lacks sufficient ability to care for child). In this case, DHR presented no evidence indicating that the mother's lack of cooperation with its rehabilitation plan rendered her presently unable to adequately parent the child, and it failed to present any evidence indicating that the mother currently suffers from any psychological or drug problem interfering with her parenting ability as a direct result of her noncompliance with DHR's rehabilitation efforts.

Finally, DHR did not present any evidence indicating that the efforts undertaken independently by the mother in 2014 to complete substance-abuse counseling, parenting classes, and domestic-violence classes did not adequately address any of those perceived barriers to family reunification. The main opinion states that the juvenile court could have been convinced that "the mother's completion of those requirements

in 2014 amount to 'last-minute efforts undertaken in anticipation of the impending termination-of-parental-rights trial.' A.M.F. v. Tuscaloosa Cnty. Dep't of Human Res., 75 So. 3d 1206, 1213 (Ala. Civ. App. 2011) (citing J.D. v. Cherokee Cnty. Dep't of Human Res., 858 So. 2d 274, 277 (Ala. Civ. App. 2003))." ___ So. 3d at ___. If so, the timing would not present any grounds for termination. As explained above, a juvenile court must determine whether, at the time of the trial, a parent currently lacks the ability to parent the child. Nothing in the law allows a juvenile court to terminate parental rights on the ground that a parent had only recently acquired the means or ability to adequately parent the child. Because of the fundamental rights at stake, see Santosky v. Kramer, 455 U.S. 745, a juvenile court cannot take the view that a parent who completes rehabilitation only shortly before trial is just "too late."

A juvenile court can lawfully determine that rehabilitation efforts have only "temporarily removed or merely hidden" barriers to family reunification, see J.W.M. v. Cleburne Cnty. Dep't of Human Res., 980 So. 2d 432, 439 (Ala. Civ. App. 2007) (plurality opinion), and that, despite the

efforts of a parent at rehabilitation, the parent remains "'irremediably unfit.'" A.E.T., 49 So. 3d at 1217 (quoting D.M.P. v. State Dep't of Human Res., 871 So. 2d at 94). However, that determination must be based on "clear and convincing evidence," see Ala. Code 1975, § 12-15-319(a), which is defined as

> "[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. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

Ala. Code 1975, § 6-11-20(b)(4). See also L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002); and Ex parte T.V., 971 So. 2d at 9.

When determining the sufficiency of the evidence in an appeal from a termination judgment, this court is "required ... to determine whether clear and convincing evidence supports" the factual findings of the juvenile court. Ex parte T.V., 971 So. 2d at 9. In Ex parte McInish, 47 So. 3d 767 (Ala. 2008), the supreme court approved of the following language from then Judge Murdock's special concurrence in KGS

Steel, Inc. v. McInish, 47 So. 3d 749, 761 (Ala. Civ. App. 2006):

> "'[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.'"

Ex parte McInish, 47 So. 3d at 778. In the present context, the standard of review does not allow this court to reweigh the evidence, but requires this court to

> "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 at 778 (quoting Ala. Code 1975, § 25-5-81(c)).

The McInish standard of review has been used in numerous termination-of-parental-rights cases since 2008. See, e.g., H.T. v. Cleburne Cnty. Dep't of Human Res., [Ms. 2130528, Oct. 10, 2014] ___ So. 3d ___, ___ n.6 (Ala. Civ. App. 2014); F.L. v. K.P., 155 So. 3d 1024, 1026 (Ala. Civ. App. 2014); B.C. v. A.A., 143 So. 3d 198, 203 (Ala. Civ. App. 2013); T.J. v.

Calhoun Cnty. Dep't of Human Res., 116 So. 3d 1168, 1175 (Ala. Civ. App. 2013); S.U. v. Madison Cnty. Dep't of Human Res., 91 So. 3d 716, 723 (Ala. Civ. App. 2012); and T.H. v. Jefferson Cnty. Dep't of Human Res., 70 So. 3d 1236, 1247-48 (Ala. Civ. App. 2010) (Per Moore, J., with Thompson, P.J., and Bryan, J., concurring in the result). That standard of review does not remove the presumption of correctness afforded to a juvenile court's factual findings in cases involving oral testimony, see H.T., supra, but it does clarify that a judgment terminating parental rights is "plainly and palpably wrong" within the meaning of the ore tenus rule, see J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007), when the factual conclusions underpinning that judgment are not supported by a sufficient quantum of evidence from which a juvenile court reasonably could have been clearly convinced of their correctness. Ex parte McInish, supra; see also J.C., 986 So. 2d at 1200 (Moore, J., concurring in the result) ("A judgment terminating parental rights is 'plainly and palpably wrong' if based on factual findings that are unsupported by clear and convincing evidence.").

In this case, the judgment cannot be affirmed on the ground that DHR proved that the mother did not genuinely rehabilitate herself. DHR did not present any evidence, much less clear and convincing evidence, indicating that the mother had any current problems preventing her from properly caring for the child. DHR did not even attempt to prove that the mother had only temporarily or unsatisfactorily addressed her past problems through her own rehabilitation efforts. DHR made no effort to undermine the programs the mother completed or the progress she achieved. Hence, the juvenile court did not have any evidentiary basis to conclude that the mother had not successfully overcome her past problems.

In his brief to this court, the child's guardian ad litem, a lawyer for over 40 years, states that "no case in this [lawyer's] experience has caused greater angst to the soul of this humble lawyer than the case presently before this [c]ourt," because, "as the record now stands before this [c]ourt ... [DHR] has failed to meet its heavy burden by clear and convincing evidence." I share the concerns of the guardian ad litem. I agree that the record does not contain clear and convincing evidence to support either statutory

ground for the termination of the mother's parental rights and that the judgment of the juvenile court should be reversed. Therefore, I respectfully dissent.