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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

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T.B.

v.

Lee County Department of Human Resources

Appeal from Lee Juvenile Court
(JU-14-317.01 and JU-14-317.02)

MOORE, Judge.

T.B. ("the father") appeals from a judgment entered by the Lee Juvenile Court ("the juvenile court") adjudicating C.L. ("the child") dependent, awarding custody of the child to M.G. and J.G. ("the custodians"), and finding that the Lee

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County Department of Human Resources ("DHR") had "made reasonable efforts to prevent removal and/or reunite [the] child and [the] parents." We affirm.

Procedural History

On August 13, 2014, DHR filed a petition alleging that the child was dependent (case no. JU-14-317.01). On August 21, 2014, the father was adjudicated the father of the child. On September 9, 2014, the father petitioned for custody of the child (case no. JU-14-317.02). After a trial, the juvenile court entered a judgment pertaining to both claims on June 22, 2015, adjudicating the child dependent, awarding custody of the child to the custodians, and awarding the father unsupervised visitation with the child on the first, third, and fifth weekends of every month, as well as on certain holidays. The trial court also ordered that, beginning October 16, 2015, the father's visitation would increase to "every other Friday from 5 pm until the following Wednesday at 9am" and that DHR was to continue to provide supervision services.

On July 1, 2015, the father filed a postjudgment motion. The juvenile court entered an order on July 20, 2015,

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purporting to deny the father's postjudgment motion; however, that order was a nullity because the motion was deemed denied by operation of law on July 15, 2015. See Rule 1(B), Ala. R. Juv. P.; Rule 59.1, Ala. R. Civ. P. On July 6, 2015, the father filed his notice of appeal.¹

Facts

The child was born on July 29, 2011. The child's mother testified that she had allowed A.L., who was her boyfriend at the time, to sign the child's birth certificate as the child's father. She testified that the father had come and seen the child when she was born and that he had seen the child approximately three times from the time the child was six months old until the child was a year old. The mother testified that the father had known that he was the child's father. The father testified that he had thought he could be the child's father but that he had not known for sure that he was the father until he had taken a DNA test that confirmed his paternity. The father admitted that he had failed to take

¹The father's notice of appeal was held in abeyance and was deemed filed upon the denial, by operation of law, of the father's postjudgment motion on July 15, 2015. See Rule 4, Ala. R. App. P.

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any initiative to confirm whether the child was his. The father testified that he had lost contact with the mother and the child for approximately a year after the child turned one.

The mother testified that, on July 12, 2012, she and the child began living with her boyfriend, M.G., Jr., and his parents, who are the custodians. The mother testified that, sometime thereafter, the father began visiting with the child again at the father's mother's home for a few hours at a time and that he had maintained that visitation schedule for approximately three months, at which time, she said, she told him that he could no longer visit the child until he began paying child support. She testified that, on some occasions, the child had returned from visits with the father and her diaper would not have not been changed. The mother also testified that, sometime shortly before the trial, the custodians had kicked their son and her out of their house because they were using drugs. She testified that the father had not been aware of her drug problem. She testified that she had entered into a safety plan with DHR, pursuant to which she agreed that the child would live with the custodians. The

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mother testified that the father had never paid child support for the child.

Mindy Carter, the DHR caseworker, testified that she had met with the father in December 2014 at his house. She testified that the father's house was very clean, that there was a room set up for the child, that there was plenty of food in the house, and that the utilities were active. She testified that the father had failed to show up for a subsequent meeting with her. She also testified that she had not been able to make contact with the father but that there had been no proven concerns about the child being with the father. She testified that, during a visitation exchange, she had observed the child showing no fear of going with the father. The mother also admitted that DHR's court report indicated that the father was forming a strong bond with the child. Carter testified that no services had been offered to the father. She testified that, at the time of the trial, it was her recommendation that the father complete a parenting class to help him with co-parenting, as well as with age-appropriate parenting skills for the child.

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At the time of the trial, the father had been exercising unsupervised visitation with the child on the first, third, and fifth weekends of each month since February 2015 pursuant to a pendente lite order. He testified that he had missed two visitations with the child because he had had to work. The mother testified that the father's weekend visitations had been going "ok" but that the child had returned from visitations sweaty and with ant bites all over her.

The father testified that he had moved approximately one month before the trial. He testified that the child has her own bedroom and toys and that the house has food and working utilities. He testified that he is employed and that he also receives food stamps. He testified that he is able to provide for the child. He admitted that, although the juvenile court had, during the pendency of the underlying actions, ordered him to put aside \$300 per month to prove that he could afford to take care of the child, he had failed to do so. He testified that he had passed all drug tests. He admitted that his 17-year-old girlfriend had spent the night at his house when the child was present.

Discussion

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On appeal, the father argues that the juvenile court erred in determining that the child was dependent. According to Ala. Code 1975, § 12-15-102(8), a part of the Alabama Juvenile Justice Act ("the AJJA"), Ala. Code 1975, § 12-15-101 et seq., a "dependent child" is

"a. A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:

"1. Whose parent, legal guardian, legal custodian, or other custodian subjects the child or any other child in the household to abuse, as defined in subdivision (2) of Section 12-15-301 or neglect as defined in subdivision (4) of Section 12-15-301, or allows the child to be so subjected.

"2. Who is without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child.

"3. Whose parent, legal guardian, legal custodian, or other custodian neglects or refuses, when able to do so or when the service is offered without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child.

"4. Whose parent, legal guardian, legal custodian, or other custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the

compulsory school attendance laws of this state.

"5. Whose parent, legal guardian, legal custodian, or other custodian has abandoned the child, as defined in subdivision (1) of Section 12-15-301.

"6. Whose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.

"7. Who has been placed for care or adoption in violation of the law.

"8. Who, for any other cause, is in need of the care and protection of the state."

The father points out that because he demonstrated his financial commitment to the child, maturity, and parenting ability sufficiently for the juvenile court to award him extensive unsupervised parenting time with the child, the juvenile court must have determined that he was a fit and proper custodian. See J.W. v. T.D., 58 So. 3d 782, 793-94 (Ala. Civ. App. 2010) (Moore, J., dissenting) (arguing that a judgment adjudicating a child dependent but awarding a noncustodial parent long periods of unsupervised visitation is inconsistent). The father argues that, if he is fit to parent

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the child, as the award of unsupervised visitation implies, then the child cannot be considered a dependent child.

In Ex parte L.E.O., 61 So. 3d 1042 (Ala. 2010), our supreme court rejected the argument made by the father. The court held:

"It is a reasonable interpretation of [former] § 12-15-1(10)[, Ala. Code 1975, the predecessor to § 12-15-102(8),] to require that, in determining whether a child is 'in need of care or supervision,' the juvenile court must consider whether the child is receiving adequate care and supervision from those persons legally obligated to care for and/or to supervise the child."

61 So. 3d at 1047. By that definition, a child is dependent if the custodial parent cannot provide adequate care and supervision for the child even if the noncustodial parent can provide such care and supervision. See G.H. v. Cleburne Cnty. Dep't of Human Res., 62 So. 3d 540, 544 (Ala. Civ. App. 2010). In this case, the mother was, at all pertinent times, the legal custodian of the child. The father does not challenge the juvenile court's judgment to the extent that it found that the mother was unable or unwilling to provide adequate care and supervision for the child. Therefore, the juvenile court did not err in adjudicating the child to be dependent.

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The father next argues that the juvenile court erred by finding that DHR had made reasonable efforts to unite him with the child. Section 12-15-312, Ala. Code 1975, provides, in pertinent part:

"(a) When the juvenile court enters an order removing a child from his or her home and places the child into foster care or custody of the Department of Human Resources pursuant to this chapter, the order shall contain specific findings, if warranted by the evidence, within the following time periods while making child safety the paramount concern:

"(1) In the first order of the juvenile court that sanctions the removal, whether continuation of the residence of the child in the home would be contrary to the welfare of the child. This order may be the pick-up order that the juvenile court issues on the filing of a dependency petition.

"(2) Within 60 days after the child is removed from the home of the child, whether reasonable efforts have been made to prevent removal of the child or whether reasonable efforts were not required to be made.

"(3) Within 12 months after the child is removed from the home of the child and not less than every 12 months thereafter during the continuation of the child in out-of-home care, whether reasonable efforts have been made to finalize the existing permanency plan.

"(b) As used in this chapter, reasonable efforts refers to efforts made to preserve and reunify

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families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the home of the child, and to make it possible for a child to return safely to the home of the child. ..."

The father's argument assumes that DHR has a duty to use reasonable efforts to unite a child with a father with whom the child has never resided, a legal point that the father failed to raise at any time to the juvenile court. "This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court." Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992). Therefore, we cannot address the father's argument on this point.²

Finally, the father argues that the juvenile court erred in awarding custody of the child to the custodians because, he says, that award violates Ala. Code 1975, § 12-15-314(a)(3)c. That Code section provides:

"(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:

²Because the issue is not properly before us, we do not reach any determination as to whether, under § 12-15-312, a juvenile court must use reasonable efforts to unite a child with a parent with whom the child has never resided.

"....

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

"....

"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."

(Emphasis added.) The plain language of § 12-15-314(a)(3)c. requires a juvenile court to award custody to an appropriate relative over a nonrelative unless the juvenile court finds it is not in the best interests of the child. See C.K.L. v. C.L.M., [Ms. 2140408, Aug. 14, 2015] ___ So. 3d ___ (Ala. Civ. App. 2015). In this case, the juvenile court impliedly found that, at the time of the trial,³ it was in the best interest of the child to remain in the custody of the custodians with whom the child had been living for the three years preceding

³We note that the juvenile court awarded the father escalating visitation with the child, ordered DHR to continue supervising the case, and stated at the trial that it would consider changing custody to the father in the future.

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the trial. Based on our review of the record, we cannot say that the juvenile court exceeded its discretion in making its custodial disposition. See F.W. v. T.M., 140 So. 3d 950, 960 (Ala. Civ. App. 2013) (holding that custodial disposition of dependent child to a nonrelative is a discretionary ruling).

Conclusion

Based on the forgoing, we affirm the judgment of the juvenile court.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ.,
concur.