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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2141034

W.A.

v.

Calhoun County Department of Human Resources

2141047

D.M.

v.

Calhoun County Department of Human Resources

Appeals from Calhoun Juvenile Court
(JU-14-395.02)

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PITTMAN, Judge.

W.A. ("the father") and D.M. ("the mother") separately appeal from a judgment of the Calhoun Juvenile Court ("the juvenile court") terminating their parental rights to N.A. ("the child"), a child born in January 2014. We reverse the trial court's judgment and remand the cause.

Procedural History

In April 2015, the Calhoun County Department of Human Resources ("DHR") petitioned the juvenile court to terminate the mother's and the father's parental rights to the child. Following a bench trial in August 2015, the juvenile court entered a judgment terminating their parental rights. The mother and the father each timely filed postjudgment motions, which were denied by operation of law when the juvenile court failed to rule on them within 14 days. See Rule 1(B), Ala. R. Juv. P. Thereafter, the mother and the father each timely appealed. A court reporter was present at trial, recorded the testimony, and transcribed the testimony for inclusion in the record on appeal; therefore, the parties' appeals are properly before us pursuant to Rule 28(A)(c)(ii), Ala. R. Juv. P.

Factual Background

Charles Parker, a DHR caseworker, testified that, on August 14, 2014, he had responded to a report that a man who appeared to be intoxicated was trying to cross a public road in Anniston with a baby while there was heavy traffic on the road. When Parker arrived on the scene, he learned that the man who was the subject of the report was the father and that the baby involved in the incident was the child. Parker testified that the father had appeared to be intoxicated, that the father had been arrested for public intoxication, and that subsequent testing had indicated that the father had marijuana and cocaine in his system. The father testified that he had not been intoxicated during the August 14, 2014, incident and that he had merely been upset. Parker testified that he had not been able to locate the mother for approximately a week after the August 14, 2014, incident and that that incident had resulted in the juvenile court's placing the child in DHR's custody.

The mother and the father have never been married. DNA testing indicated that the father was indeed the father of the child, and he consented to an adjudication that he was the

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child's father in the termination-of-parental-rights action. In addition to the child, the mother has given birth to six other children ("the other six children"), all of whom were fathered by men other than the father. The father does not have any other children.

The mother does not have custody of any of the other six children. She consented to the termination of her parental rights to one of the other six children, and her parental rights to another were involuntarily terminated in 2009.

In August 2012, the mother pleaded guilty to a felony charge of obstructing justice. She was sentenced to a year and a day in prison, but the prison sentence was suspended, and she was placed on probation for two years. Her probation was subsequently revoked, and she was incarcerated at Julia Tutwiler Prison from sometime in August 2013 until January 10, 2014. The mother admitted that both she and the father had engaged in acts of domestic violence before the juvenile court had placed the child in DHR's custody.

On October 16, 2014, DHR held an Individualized Service Plan ("ISP") meeting ("the first ISP meeting") that was attended by both the mother and the father. Under the heading

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"What Must Occur for DHR to No Longer Be Involved with Your Family," the plan adopted at the first ISP meeting stated: "The care givers must demonstrate that they have protective capacity to meet the basic needs of the minor child. The care givers must be able to demonstrate that they can deal with life management without depending on illegal drugs to help them cope." With regard to the parents' substance abuse, the plan adopted at the first ISP meeting provided that the parents would receive random drug screens and random hair-follicle tests from authorized providers as necessary. The plan further stated that "[the parents] will be placed on the same color [i.e., testing schedule] due to transportation issues." (Emphasis added.) In addition, the plan adopted at the first ISP meeting provided that the parents would "have a drug assessment completed through IRC Drug Court to identify if there are any drug addiction and/or any mental health issues and follow all recommendations." The plan adopted at the first ISP meeting also provided that the parents would have weekly supervised visitation at DHR's offices and that DHR would provide transportation for the child to and from the visits. Under the heading "Goals Currently Identified with No

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Steps/Services; Steps/Services to be Addressed in the Future," the plan adopted at the first ISP meeting stated: "[The father] and [the mother] will maintain stable housing and income in order to provide for [the child's] basic needs."

Initially, the parents lived together; however, at some point they both began living in shelters. The mother subsequently began living with her grandfather and was living with him when the termination-of-parental-rights action was tried. The father was still living in a shelter when the action was tried.

The mother failed all of her drug tests and never underwent a drug assessment. The father underwent a drug assessment and was referred to the drug court. After he failed two drug tests, the drug-court judge ordered the father to participate in a drug-rehabilitation program at New Directions, a private provider of drug testing and drug-rehabilitation services. The father testified that he had begun a drug-rehabilitation program at New Directions but had not completed the program because he did not have transportation to and from New Directions. He further testified that he planned to resume participating in the

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program shortly after the trial and that he intended to complete it.

On March 3, 2015, DHR held another ISP meeting ("the second ISP meeting"), which was not attended by the parents. At the second ISP meeting, the permanency plan was changed from reuniting the child with the parents to termination of the parents' parental rights and adoption of the child by a relative or other unidentified person. Following the second ISP meeting, DHR ceased all drug testing of the parents, ceased visiting them monthly, and reduced their visitation with the child from once per week to twice per month.

The mother testified that she had not been regularly employed since the child had been placed in DHR's custody. The father testified that he was receiving Social Security disability benefits for an injury to his left hand and that he was not regularly employed, although he sometimes worked "off the books" at a car wash.

Standard of Review

"A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. Bowman v. State Dep't of Human Res., 534 So. 2d 304, 305 (Ala. Civ. App. 1988). 'Clear and convincing evidence' is "[e]vidence that, when weighed against evidence in opposition, will produce

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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." L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting Ala. Code 1975, § 6-11-20(b)(4))."

K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d 602, 605

(Ala. Civ. App. 2010).

"In reviewing factual findings in termination-of-parental-rights judgments, this court has a narrow standard of review that allows us to disturb those findings only when they are so unsupported by the evidence as to be plainly and palpably wrong. See J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007). If a fact-finder reasonably could have been clearly convinced from the evidence in the record that a parent is unwilling or unable to discharge his or her parental responsibilities to and for the child, this court may not reverse a judgment terminating parental rights arising from ore tenus proceedings in a termination-of-parental-rights case. See J.B. v. DeKalb County Dep't of Human Res., 12 So. 3d [100] at 111 [(Ala. Civ. App. 2008)]."

M.H. v. Jefferson Cty. Dep't of Human Res., 42 So. 3d 1291,

1294 (Ala. Civ. App. 2010).

Analysis

The Father's Appeal

The father argues, among other things, that the juvenile court erred in terminating his parental rights because, he says, DHR failed to make reasonable efforts to reunite him

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with the child. The undisputed evidence indicates that DHR knew that the father did not own an automobile and that, despite that knowledge, it never offered the father assistance in traveling to and from visitation or to and from New Directions where he was participating in a drug-rehabilitation program. The DHR employee who supervised the parents' visitation with the child testified that she knew the father had missed some of his visits with the child because he did not have transportation and that he had been late to some of his visits because he had had to walk to the visitation site. The ISP plan adopted after the first ISP meeting noted that there were transportation issues and made provision for transportation of the child to and from visitation but made no provision for transportation of the parents to and from visitation. Nonetheless, despite their lack of transportation, the parents attended the majority of their scheduled visits with the child. The father testified that his lack of transportation prevented him from completing the drug-rehabilitation program at New Directions.

Moreover, although DHR had required the father to obtain and maintain stable housing and employment as a condition of

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being reunited with the child, DHR never offered the father assistance in obtaining suitable housing or suitable employment. Furthermore, the DHR caseworker assigned to the child's case testified that, although DHR had in-home services it could provide parents, it had never offered the father such services.

When the juvenile court entered its initial order removing the child from the parents' custody and placing him in DHR's custody, DHR had a duty under the Alabama Juvenile Justice Act, Ala. Code 1975, § 12-15-101 et seq., to make reasonable efforts to reunite the child with the father. See Ala. Code 1975, § 12-15-312(b). Those reasonable efforts that DHR was required to make included efforts to rehabilitate the father. D.M. v. Limestone Cty. Dep't of Human Res., 164 So. 3d 1164, 1170 (Ala. Civ. App. 2014). Whether DHR's efforts had been reasonable and whether those efforts had succeeded were questions of fact to be determined by the juvenile court. Id. In this case, the juvenile court found that DHR's efforts had been reasonable. In reviewing that factual determination, "this court has a narrow standard of review that allows us to disturb those findings only when they are so unsupported by

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the evidence as to be plainly and palpably wrong." M.H. v. Jefferson Cty. Dep't of Human Res., 42 So. 3d at 1294. DHR identified the causes of the father's inability to care for the child properly as (1) his use of illegal drugs, (2) his failure to maintain stable housing, and (3) his failure to maintain a stable income. In order to address his use of illegal drugs, DHR provided the father with drug testing and required him to undergo a drug assessment and follow all recommendations made in the drug assessment. However, DHR ceased providing drug testing in February 2015, shortly before it made the decision to seek termination of the father's parental rights. The father underwent the drug assessment and followed the recommendation that he participate in the drug court's program. However, when he subsequently failed two drug tests, the drug-court judge ordered the father to participate in a drug-rehabilitation program at New Directions. The father began the drug-rehabilitation program at New Directions but stopped participating before he completed the program because, he testified, he did not have transportation to and from New Directions. Although he had not completed that drug-rehabilitation program, the juvenile court did not have any

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evidence before it indicating that the father had used illegal drugs since February 2015 because DHR had ceased testing him that month and because DHR had not made its customary monthly visits to his place of abode. DHR never offered any services whatsoever to address the father's failure to maintain stable housing and a stable income. Because DHR failed to provide the father with transportation assistance, because DHR ceased all efforts to assist the father with overcoming his drug-addiction problem six months before the trial, and because DHR made no effort whatsoever to rehabilitate the father with respect to his housing and income problems, we conclude that the juvenile court's finding that DHR made reasonable efforts to reunite the child with the father is so unsupported by the evidence as to be plainly and palpably wrong. Therefore, we reverse the juvenile court's judgment insofar as it terminated the father's parental rights. Because the father's failure-to-make-reasonable-efforts argument is dispositive, we pretermit discussion of his other arguments.

The Mother's Appeal

DHR was not under a duty to make reasonable efforts to reunite the child with the mother because her parental rights

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to one of the child's siblings had been involuntarily terminated. See Ala. Code 1975, § 12-15-312(c) ("Reasonable efforts shall not be required to be made with respect to a parent of the child if the juvenile court has determined that the parental rights of the parent to a sibling of the child have been involuntarily terminated"). 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 insofar as it terminated the mother's parental rights, see, e.g., K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d at 605 ("A juvenile court is required to apply a two-pronged test in determining whether to terminate parental rights: (1) clear and convincing evidence must support a finding that the child is dependent; and (2) the court must properly consider and reject all viable alternatives to a termination of parental rights." (quoting B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004) (emphasis added))), and

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we remand the cause for further proceedings consistent with this opinion.

2141034 -- REVERSED AND REMANDED.

2141047 -- REVERSED AND REMANDED.

Thompson, P.J., and Donaldson, J., concur.

Moore, J., concurs specially.

Thomas, J., dissents, with writing.

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MOORE, Judge, concurring specially.

Toward the end of the hearing, W.A. ("the father") moved the Calhoun Juvenile Court ("the juvenile court") to dismiss the petition to terminate his parental rights on the ground that the Calhoun County Department of Human Resources ("DHR") had not used reasonable efforts to rehabilitate him and to reunite the family. The juvenile court denied that motion, stating:

"And I note for the record that on February 18th, 2015, there was a dispositional review, the state was present as well as both parents, as well as both attorneys. And the most appropriate plan that was stated for the record was relative placement, relative custody and/or adoption and reasonable efforts have been made at this time to reunite. And there was no mention on the record of any objection by either parent's attorney as to the permanency plan and/or objection to the, or argument as to the reasonable efforts being provided by the department at that time. So [father's] motion is denied. ..."

The juvenile court apparently took the position that the father had waived his argument by failing to object to the factual determination made by the juvenile court in an earlier proceeding that DHR had made reasonable efforts. However, in Ex parte F.V.O., 145 So. 3d 27 (Ala. 2013), the supreme court held that a permanency order changing the permanency plan from family reunification to adoption with termination of parental

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rights based on a factual finding that DHR had made reasonable family-reunification efforts and that those efforts had failed does not constitute an adjudication of the issue of the reasonableness of DHR's efforts that would support an appeal. Accordingly, a parent apparently can raise the issue of the reasonableness of DHR's parental-rehabilitation efforts in a termination-of-parental-rights proceeding and on appeal from a judgment terminating parental rights even though the parent never stated any objection to DHR's efforts throughout the rehabilitation process itself.

As noted in the main opinion in F.V.O. v. Coffee County Department of Human Resources, 145 So. 3d 11 (Ala. Civ. App. 2012), which I authored and which the supreme court reversed in Ex parte F.V.O., supra, the legislature intended that parents should litigate the reasonableness of DHR's efforts to reunite the family during the dependency proceedings when the juvenile court is actually overseeing the rehabilitation process. In establishing the requirement of annual permanency hearings in DHR cases like this one, the legislature gives parents a presumptively reasonable time of one year to rehabilitate themselves. See M.A.J. v. S.F., 994 So. 2d 280

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(Ala. Civ. App. 2008). If, as required by § 12-15-312, Ala. Code 1975, DHR is not assisting the parents with reasonable efforts during that period, the parent should bring that matter to the attention of the juvenile court so that it can redirect DHR as necessary and assure compliance with the time constraints intended by the legislature.

In this case, the juvenile court found that the father had not raised any objection to the reasonableness of DHR's rehabilitation efforts throughout the earlier dependency proceedings. However, based on the holding in Ex parte F.V.O., supra, that failure did not prevent the father from raising the issue for the first time in the termination-of-parental-rights proceeding, one year after DHR had acquired custody of the child. I agree with the holding of this court that DHR did not make reasonable efforts to rehabilitate the father, but I write specially to point out that the procedure used to reach that decision unduly prolongs the rehabilitation process and frustrates the legislative objective to timely resolve these cases. The juvenile court will now have to restart the rehabilitation process 18 months into the child's out-of-home placement, a delay that could easily have been

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avoided if the law required the father to raise his objection in a timely manner as the legislature intended.

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THOMAS, Judge, dissenting.

Although I recognize the Department of Human Resources' duty to make reasonable efforts to rehabilitate parents whose children have been removed from their custody, a parent must make "an effort to address his or her issues and improve his or her circumstances." A.M.F. v. Tuscaloosa Cty. Dep't of Human Res., 75 So. 3d 1206, 1212 (Ala. Civ. App. 2011). It is well settled that a juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct. D.P. v. Madison Cty. Dep't of Human Res., 23 So. 3d 1156, 1158 (Ala. Civ. App. 2009). Furthermore, when the juvenile court has not made specific factual findings in support of its judgment, we must presume that the juvenile court made those findings necessary to support its judgment, provided that those findings are supported by the evidence. D.M. v. Walker Cty. Dep't of Human Res., 919 So. 2d 1197, 1210 (Ala. Civ. App. 2005). The juvenile court in this case heard the testimony and observed the demeanor of the witnesses, and it determined that the Calhoun County Department of Human Resources ("DHR") had made reasonable efforts to rehabilitate the parents, that those

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efforts had failed, "that the parents are unable or unwilling to discharge their parental responsibilities to and for the child," and "that the parents are in such condition or course of conduct ... that they are unable to properly care for the child." I would not disturb those findings.

D.M. ("the mother") and W.A. ("the father") each tested positive for drugs regularly between the time the child was placed in DHR custody in August 2014 and February 2015. The parents took several drug screens, but they also refused to take drug screens after a visitation, citing as an excuse that they had a job interview. The mother failed to complete a drug assessment. The father began, but did not complete, drug treatment.

The mother and the father lost their home, and each chose different living arrangements. The father admitted that DHR "didn't know about the situation that we was in" regarding housing. At the time of trial, the mother was living with her grandfather, who had declined to be a resource for the child, and the father was living in a local Salvation Army shelter.

A lack of reliable transportation was an issue for the parents. In spite of the lack of transportation, the

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testimony at trial indicated that the parents routinely attended visitation with the child, even if they were sometimes late, for several months after the child entered foster care. In fact, the testimony at trial indicated that the parents attended 90% of their visits. However, the mother and the father both missed all three visits in May 2015, and the father also missed one visit in June 2015.

The father's inability to complete drug treatment appears to have been caused, in part, by the lack of transportation from his mother's house, where he lived for a time, to the drug-treatment classes; however, the record does not reflect that he reported to DHR that his inability to secure transportation was a problem for him. In addition, he admitted that he would sometimes catch the bus or walk to the drug-treatment classes, indicating that he was able, at times, to secure transportation to the classes.

DHR is not omniscient. The parents indicated that they had not informed DHR of certain of their issues, and DHR had no way to know that the parents were unable to meet the Individualized Service Plan goals solely because of a lack of transportation when the parents did not reveal that

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information. The parents did not establish a stable home, they failed every drug test they were given, and they have not addressed their drug-abuse issues.

A parent's efforts to change his or her circumstances must come to fruition in a timely manner. We have explained that a child's need for permanency will outweigh a parent's fruitless efforts, stating that, "[a]t some point, ... [a] child's need for permanency and stability must overcome the parent's good-faith but unsuccessful attempts to become a suitable parent." M.W. v. Houston Cty. Dep't of Human Res., 773 So. 2d 484, 487 (Ala. Civ. App. 2000).

"[I]n M.A.J. v. S.F., 994 So. 2d 280, 291 (Ala. Civ. App. 2008), this court held that the 12-month period between foster-care placement and the 12-month permanency hearing required by former Ala. Code 1975, § 12-15-62(c) [now § 12-15-315(a)], is sufficient time within which the parents may 'prove that their conduct, condition, or circumstances have improved so that reunification may be promptly achieved.' In M.A.J., we further held that the circumstances of a particular case should dictate the length of the rehabilitation period allowed a particular parent. M.A.J., 994 So. 2d at 291 (quoting Talladega County Dep't of Human Res. v. M.E.P., 975 So. 2d 370, 374 (Ala. Civ. App. 2007)) ('[T]he point at which the child's needs overcome the parent's right to be rehabilitated must be determined based on the facts of each individual case.').

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B.J.K.A. v. Cleburne Cty. Dep't of Human Res., 28 So. 3d 765, 771 (Ala. Civ. App. 2009).¹ The parents made no significant progress in the year following the removal of the child from their custody, and the termination of their parental rights was, in my opinion, warranted under the facts and circumstances of this case. Accordingly, I dissent.

¹Because of the limited period during which rehabilitation should be achieved, I agree with the ideas expressed by Judge Moore in his special concurrence that a parent facing a termination of parental rights should challenge the reasonableness of efforts being made to rehabilitate him or her earlier in the process at a permanency hearing instead of waiting until the termination-of-parental-rights trial to complain that the Department of Human Resources has failed to make appropriate efforts. See ___ So. 3d at ___.