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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2150076

J.P.

v.

Calhoun County Department of Human Resources

Appeal from Calhoun Juvenile Court
(JU-15-303.01)

THOMAS, Judge.

J.P. ("the father") and H.M. ("the mother") are the unmarried parents of E.P. ("the child") who was born prematurely on April 22, 2015. Hospital employees contacted the Calhoun County Department of Human Resources ("DHR") to

report that the mother had had no prenatal care, that the mother had uncontrolled diabetes, that the mother had tested positive for marijuana the day before the child was born, that the child had been experiencing feeding difficulties, that the child was suffering from neonatal hypoglycemia, that the parents had displayed "lower mental functioning," and that the mother had alleged and then denied "domestic-violence issues" to hospital employees. Amy Estell, a professional counselor employed by DHR, administered a parenting assessment and concluded that the parents "were not mentally capable of caring for this baby."

One month later, while the child was still in the hospital, DHR filed a complaint in the Calhoun Juvenile Court in which it alleged that the child was a "dependent child" as defined by to § 12-15-102(8), Ala. Code 1975. DHR requested a pick-up order. The juvenile court appointed a guardian ad litem for the child, an attorney for the mother, and an attorney for the father.

A shelter-care hearing was held, after which the juvenile court awarded pendente lite custody of the child to DHR. On June 29, 2015, the juvenile court ordered the father to submit

to a paternity test. On June 30, 2015, the juvenile court appointed, in addition to their separate attorneys, a separate guardian ad litem for each parent. At that time, the father was 36 years old.

A dependency hearing was held on September 23, 2015. On September 24, 2015, the juvenile court entered a judgment, determining that the child was dependent, that reasonable efforts to reunite the family had failed, that placement with the parents was not in the child's best interests, that reasonable efforts to reunite the family would continue, and that the father is the "legal and biological father" of the child. The juvenile court awarded custody of the child to DHR.

On October 7, 2015, the father filed a postjudgment motion, arguing that the evidence presented was insufficient to support the judgment. On October 15, 2015, the juvenile court entered a judgment in which it corrected certain omissions in its September 24, 2015, judgment but did not alter its determinations. On October 22, 2015, the father

filed a timely notice of appeal seeking this court's review of whether sufficient evidence supports the judgment.[1]

"The juvenile court heard ore tenus evidence regarding dependency; therefore, its judgment is accorded a strong presumption of correctness." A.M.W. v. A.G.M., [Ms. 2140518, Sept. 4, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015).

> "'"'[T]he trial court has the advantage of observing the witnesses' demeanor and has a superior opportunity to assess their credibility, [and, therefore, an appellate court] cannot alter the trial court's judgment unless it is so unsupported by the evidence as to be clearly and palpably wrong.'" Ex parte Fann, 810 So. 2d 631, 636

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[1] "We have specifically noted that, in the context of juvenile dependency orders, an order determining that a child is (or that a child remains) dependent coupled with a disposition of that child's custody is a final judgment capable of supporting an appeal. C.L. v. D.H., 916 So. 2d 622, 626 (Ala. Civ. App. 2005); see also Ex parte D.B.R., 757 So. 2d 1193, 1195 (Ala. 1998)(holding 'that a decision of a juvenile court finding that children were dependent and awarding temporary custody to the children's maternal grandparents and the state, constituted a "final judgment, order, or decree"'(citing Potter v. State Dep't of Human Res., 511 So. 2d 190, 192 (Ala. Civ. App. 1986)))."

Marshall Cty. Dep't of Human Res. v. J.V., [Ms. 2140825, Feb. 26, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016).

> (Ala. 2001) (quoting Ex parte D.W.W., 717 So. 2d 793, 795 (Ala. 1998)). The trier of fact, and not this court, has the duty of resolving conflicts in the evidence. Ethridge v. Wright, 688 So. 2d 818, 820 (Ala. Civ. App. 1996).
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> > "'"'[The appellate court is not] allowed to reweigh the evidence in this case. This [issue] ... turns on the trial court's perception of the evidence. The trial court is in the better position to evaluate the credibility of the witnesses ... and the trial court is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence....'"
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> "'Ex parte Patronas, 693 So. 2d 473, 475 (Ala. 1997) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1326 (Ala. 1996)).'
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> "D.C.S. v. L.B., 84 So. 3d 954, 961-62 (Ala. Civ. App. 2011)."

F.W. v. T.M., 140 So. 3d 950, 959 (Ala. Civ. App. 2013).

At the time of the dependency hearing, the child had been in the custody of DHR since her release from the hospital following her premature birth. Neither parent testified or presented witnesses. Testimony presented by DHR demonstrated that, unlike healthy infants, the child had required weekly

medical appointments for a suspected genetic disorder.[2] Estell testified that the father might not remember to transport the child to her weekly medical appointments.[3] Estell testified that the parents did not know how to care for themselves, much less a medically fragile infant; that there had been time to counsel the parents only five times since the child was born; and that the only parenting skills that the parents had grasped were how to prepare a bottle and how to change a diaper. As aptly noted by the child's guardian ad litem:

> "This is not a termination of parental rights; this is dependency; the state will have plenty of time to work with these parents to see if they have the ability to take care of [the child]."

When asked whether the father was able to care for the child, Estell testified that the father had displayed an inability to grasp the basic concepts of caring for an infant and that she would expect him to continue to struggle in light

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[2]Presumably due to her age, the child's doctors were, according to Estell, "trying to narrow down if in fact she does have a genetic issue." The testimony presented focused on attempts to discover the specific diagnosis.

[3]Estell testified that DHR had attempted to teach the father how to use a calendar and that DHR had posted signs to remind the father to brush his teeth twice per day -- an extraordinary step that Estell had never before seen.

of the child's complex medical needs. Estell said that the father, who had no other children, had had little time to prepare to parent the child because the mother had not known that she was pregnant during the majority of her pregnancy. Thus, through no fault of his own, the father, who had displayed appropriate effort, had been afforded neither the time to complete a series of parenting classes nor the opportunity to participate in the child's medical appointments. Regardless, Estell testified that, until the father successfully completed a series of parenting classes and addressed his potential mental-health issues, she would remain concerned that the father was unable to meet the needs of the child.

Estell testified that the father had submitted to mental-health treatment until he was approximately 21 years old and that he had once been committed to an inpatient mental-health facility for, according to the father, depression and anxiety; however, Estell testified that the father was unsure of his diagnosis. The following colloquy occurred between the child's guardian ad litem and Estell:

> "Q. What are your concerns specifically about [the father]?

"A. Just that he doesn't follow through with his own mental health care at the mental health center; he's missed a lot of appointments.

"Q. Now, hold on before you continue on. I think it was two appointments that he missed at mental health; correct?

"A. Two or three. And now he's just now starting his intake process this month.

"Q. And the only reason he was going to mental health was because DHR asked him to?

"A. That's correct.

"Q. That he has gone for more than 10 years, almost 20 years without any mental health treatment because he didn't need it?

"A. He thinks his problems are managed, like the problems he had before.

"Q. So the mental health treatment, that's one of your concerns about [the father]?

"A. Uh-huh.

"Q. What are your others?

"A. The others are the same that I said before, parenting, learning how to parent, learning about what is going on with his child, what her needs are. Because they are just learning about the genetic issue. It would have been employment, but now he's employed apparently. My concerns about him would be no different than the concerns about [the mother]. He still seems to have a very difficult time grasping information, retaining, he's trying. He's trying, I just think he still has a lot to learn.

> "Q. And specifically what is your concern [regarding what] would happen to this child if the child went home to him today?"

Estell answered that she was not concerned that the father would fail to feed or diaper the child. However, Estell said: "My main concern is making sure that they have retained how to care for the child." Estell identified specific parenting responsibilities that the father had not yet retained and could not yet discharge. She said that the father did not yet know "basic things" like an infant's developmental milestones, how to bathe an infant, how to safely install and buckle a child-restraint seat, when to introduce certain foods, when it is safe to leave an infant alone in a room, or how to recognize when an infant needs something or is not feeling well.

The record also demonstrates that the father had displayed an inability to care for himself. The juvenile court had appointed a guardian ad litem for the father, the father had failed to keep all his counseling and medical appointments, the father did not manage his own finances, and a third party received the mother's disability check. Estell said:

> "I think they need to continue in counseling. I know that it was discussed in the [individualized-service-plan meeting] that they have recently beg[u]n working with FOCUS to work with them on specific parenting needs. I would think they would need to do that. I'm going to be addressing substance abuse with them now that FOCUS is in the home [-- a]nd then for [the father] to meet all his doctor appointments at mental health."

Finally, we note that the juvenile court adjudicated the child dependent as to the mother and the father and that the mother did not file a notice of appeal. Because the unmarried parents live together, it appears likely that, if the father had custody, the child would be left in the care of the mother when the recently employed father is at work; thus, the child would potentially be in the care of a noncustodial parent who is unable or unwilling to parent the child. "Obviously, if a parent is unable or unwilling to discharge his or her parental responsibilities to and for the child or the parent's conduct or condition is such that the parent cannot render proper care for the child, it would be in the child's best interests to be removed from the custody of the parent." J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1210 (Ala. Civ. App. 2007). Estell said that DHR could not provide a person to be in the house for an extended period

every day and that, even if DHR was present in the home for two hours "every single day," she would still be "very nervous" about leaving the child in the care of the parents.

The record contains ample clear and convincing evidence to support a finding that, however willing he might be, the father was simply unable to properly care for or supervise the child at the time of the adjudication of her dependency. See C.O. v. Jefferson Cty. Dep't of Human Res., [Ms. 2140752, April 1, 2016] ___ So. 3d ___ (Ala. Civ. App. 2016)(concluding that sufficient evidence supported a finding of dependency when a mother struggled with an addiction to pain medication, had been seen intoxicated, and was incarcerated at the time of trial); T.C. v. Y.R., 162 So. 3d 920, 925 (Ala. Civ. App. 2014)(concluding that sufficient evidence supported a finding of dependency when a parent displayed instability, frequent moves, violent romantic relationships, and refusal to submit to mental-health counseling); and Ex parte T.L.L., 597 So. 2d 1363, 1364 (Ala. Civ. App. 1992)(concluding that sufficient evidence supported a finding of dependency when the parents displayed a history of instability and inattentiveness to the

needs of the child). Accordingly, we conclude that sufficient evidence supports the dependency judgment.

AFFIRMED.

Thompson, P.J., and Pittman, J., concur.

Moore and Donaldson, JJ., dissent, with writings.

MOORE, Judge, dissenting.

This appeal arises from a judgment of the Calhoun Juvenile Court ("the juvenile court") finding E.P. ("the child"), the child of J.P. ("the father") and H.M. ("the mother"), dependent and denying the father and the mother custody of the child. The father appeals, arguing that the evidence does not support the judgment.

In this case, the Calhoun County Department of Human Resources ("DHR") filed a petition asserting the dependency of the child.

> "Our supreme court has declared that [the Department of Human Resources] has the burden of proving dependency by clear and convincing evidence. See Ex parte Floyd, 550 So. 2d 982 (Ala. 1989); and Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004). This burden properly rests with [the Department of Human Resources] because of the fundamental constitutional right to family integrity. See Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). A state may deprive a parent of custody of a child only when a compelling governmental interest, such as the protection of the child, exists. See L.B.S. v. L.M.S., 826 So. 2d 178 (Ala. Civ. App. 2002); and R.S.C. v. J.B.C., 812 So. 2d 361 (Ala. Civ. App. 2001) (plurality opinion). Therefore, the burden should rest with the state, as the party claiming the right to interfere with the integrity of the family, to prove the existence of the compelling circumstances warranting its intrusion. See Santosky, supra."

J.B. v. Cleburne Cty. Dep't of Human Res., 992 So. 2d 34, 49-50 (Ala. Civ. App. 2008) (Moore, J., dissenting). Accordingly, a juvenile court may find a child to be dependent and, on that basis, withhold custody of a child from his or her parents only if the grounds contained in Ala. Code 1975, § 12-15-102(8), are proven by clear and convincing evidence. See Ala. Code 1975, § 12-15-310(b).

DHR basically asserted that the father lacked the mental faculties to properly parent the child such that the father is "unable or unwilling to discharge his or her responsibilities to and for the child." Ala. Code 1975, § 12-15-102(8)a.6. "[T]he law presumes that a custodial parent is fit in every respect to care for his or her children." T.J. v. Calhoun Cty. Dep't of Human Res., 116 So. 3d 1168, 1175 (Ala. Civ. App. 2013). "The law ... does not place the burden on a parent to prove his or her mental-health fitness to the State in order to sustain his or her custody rights." Id. at 1174. The law totally, and rightfully, rejects any contention that the State can withhold custody of a child until DHR has "plenty of time to work with the[] parents to see if they have the ability to take care of [the child]," as the guardian ad

litem inaptly stated. "In order for the State to intrude into the solicitude of a family and to alter the custodial rights of a parent, the State bears the burden of proving by clear and convincing evidence that the parent is unfit to care for the child." Id. at 1175. That evidentiary standard is not lessened in any respect because the case involves "only" a dependency determination and not a permanent termination of parental rights.

"Clear and convincing evidence" is "'"[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion."'" C.O. v. Jefferson Cty. Dep't of Human Res., [Ms. 2140752, April 1, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

> "'[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to

> clearly and convincingly ... establish the fact sought to be proved.'
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> "KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].
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> "To analogize the test set out above by Judge Prettyman [in Curley v. United States, 160 F.2d 229, 232–33 (D.C. Cir. 1947),] for trial courts ruling on motions for a summary judgment in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden'; thus, the appellate court must also look through a prism to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would 'produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion.'"

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). The appellate court does not reweigh the evidence, but determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found clear and convincing. See Ex parte T.V., 972 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus proceedings, this court presumes their correctness. Id. We review the legal conclusions to be drawn from the evidence without a presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

The evidence shows that, shortly after the birth of the child, DHR received a report from hospital staff that the father appeared to be "low functioning."[4] Based on that report, DHR requested that the father undergo a parenting assessment. Amy Estell, a licensed professional counselor, conducted the parenting assessment. DHR did not submit the assessment into evidence. Estell did not testify as to the specific results of that assessment. Although Estell did testify that the father had "struggled" to grasp some "principles," the record contains no clear evidence indicating that the father currently suffers from any mental deficiency.

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[4]The main opinion states:

> "Hospital employees contacted the Calhoun County Department of Human Resources ('DHR') to report that the mother had had no prenatal care, that the mother had uncontrolled diabetes, that the mother had tested positive for marijuana the day before the child was born, that the child had been experiencing feeding difficulties, that the child was suffering from neonatal hypoglycemia, that the parents had displayed 'lower mental functioning,' and that the mother had alleged and then denied 'domestic-violence issues' to hospital employees."

___ So. 3d at ___. That excerpt summarizes the allegations in the dependency petition filed by DHR, most of which were not substantiated by any evidence at trial. In analyzing the evidence to determine whether it supports the judgment, I do not consider any unproven allegations in the petition.

Although Estell alluded to substance-abuse and mental-health problems, her testimony remained vague on those points and DHR did not clarify whether those problems currently affected the father.

More pointedly, the evidence does not establish that the father lacks the ability to meet the minimum requirements to adequately parent the child. The evidence suggests that the child may have a "genetic" disease requiring special medical care, but DHR presented no evidence of the specific care required or that the father necessarily would not be able to provide that care. Estell acknowledged that the father could feed the child and change diapers. Estell criticized both parents for "learning as they go," but she admitted that many new parents also do not know certain developmental milestones and that parents generally depend on advice from pediatricians in that regard. Estell repeatedly stated that she "had concerns" as to whether the father could adequately parent the child; however, Estell did not identify any specific parenting responsibility that the father could not discharge. Whatever information caused Estell "concerns," DHR failed to elicit that information so that the juvenile court reasonably could

determine whether her concerns were valid and proved the inability of the father to care for the child.

DHR charged the father with such intellectual dysfunction that he could not safely parent the child. Through its questioning of Estell it should have proven not only the existence and severity of that alleged mental disability, but also its necessary impediment to the father's discharge of ordinary parenting skills and to those specific parenting skills required by the special needs of the child. Estell hinted at each of those facts, but she did not disclose any specific information to support her conclusory opinions.

> "It must appear to all, that if the facts as they are charged, actually exist, there could be but little difficulty in establishing the same by evidence, which would be perfectly satisfactory in its character; but that disclosed by the record, produces no such conclusion -- the examination of the witnesses was evidently conducted by those unskilled in the art, or not aware of the importance of presenting facts for the consideration of the Court, and although enough is disclosed to induce the belief that the witnesses knew more, and could perhaps have stated facts, which, if disclosed, might have established the material allegations of the bill -- yet it would be highly dangerous, as well as manifestly illegal, for any Court to act on facts which might, but which have not, been established by testimony."

Richardson v. Richardson, 4 Port. 467, 474 (Ala. 1837). Estell's ill-defined and almost totally conclusory testimony, the only evidence upon which the juvenile court could have rested its determination, does not satisfy our exacting standard of review.

A natural parent has a fundamental right to care for his or her child, and the State may infringe upon that right only in cases of clear and convincing evidence of unfitness. See Santosky v. Kramer, 455 U.S. 745, 760 (1982). A judicial determination that a child is dependent authorizes the State to assume the parental decision-making role and to delegate the physical care of a child to third parties. That infringement upon parental autonomy and care, even if temporary, can be justified only in clear cases evincing the necessity for State intervention for the protection of the child. I join Judge Donaldson in concluding that evidence that a new parent will need to learn how to perform his or her parenting duties, that the parent may struggle while in that learning process, and that the State has some unexplained concerns about that parent does not satisfy such a high

evidentiary and substantive standard. Hence, I dissent from the court's decision to affirm the judgment.

Donaldson, J., concurs.

DONALDSON, Judge, dissenting.

I respectfully dissent. No matter how benevolent the intent, the extraordinary power of the government, acting through the judicial branch, to intrude into the parent-child relationship may be invoked only when clear and convincing evidence is presented compelling such action. Government intrusion cannot be based on speculation, conjecture, or value judgments regarding the relative worth of the parent. As we have previously explained, "a parent has a fundamental right to the custody, care, and control of his or her child and ... a parent and a child share a fundamental right to family integrity. ... These rights are accorded strong constitutional protection against State interference." M.E. v. Shelby Cty. Dep't of Human Res., 972 So. 2d 89, 102 (Ala. Civ. App. 2007); see also J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1203 (Ala. Civ. App. 2007)(Moore, J., concurring in the result)("[T]he fundamental constitutional rights of the parents demand proof of dependency to assure that the parental relationship is not subjected to undue state interference."). The erosion of fundamental rights appears to often begin with the best of intentions.

In a dependency proceeding, the evidence must clearly and convincingly establish that the child is dependent at the time of the disposition. See R.F.W. v. Cleburne Cty. Dep't of Human Res., 70 So. 3d 1270, 1272 (Ala. Civ. App. 2011); see also K.B. v. Cleburne Cty. Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result) ("[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in fact be dependent at the time of that disposition."). In this case, the evidence indicated that the 36-year-old father had received mental-health treatment during his youth, possibly for depression and anxiety; that he had stopped receiving treatment between the ages of 18 and 21; and that he had not received treatment since that time because he felt his problems were under control. There is no evidence indicating that, at the time of the trial, the father was suffering from a mental condition that rendered him unwilling or unable to care for the child. Furthermore, there were only unsupported and unspecified "concerns" expressed by a counselor related to the first-time father's ability to recognize age-appropriate behavior, his ability to understand the child's unspecified

medical condition, and his ability to transport the child to medical appointments that had not yet been scheduled. The record indicates that the child's medical condition was still unknown at the time of the dependency hearing; that the parents had a plan in place to transport the child to medical appointments; that the father knew how to hold, feed, and diaper the child; that the father could obtain age-specific information from the pediatrician; and that the father had been receiving counseling for parenting skills.

Dependency determinations are within the juvenile court's realm of discretion only when there is substantial evidence in the record from which the juvenile court could be clearly convinced of the existence of dependency before the government usurps the parent-child relationship. When that evidence is not presented to the juvenile court, there is no discretion to be exercised and the dependency petition must be dismissed. K.C.G. v. S.J.R., 46 So. 3d 499, 501-02 (Ala. Civ. App. 2010). From my review of the record, the finding of dependency here was based on the child's undetermined and unspecified medical condition and on a speculative assessment of the father's potential strengths and weaknesses. No matter

how laudable the intent, the evidence was insufficient to make a dependency finding. As such, the petition should have been dismissed, and I therefore respectfully dissent.