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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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K.A.B.

v.

J.D.B.

**Appeal from DeKalb Juvenile Court
(JU-16-355.01)**

MOORE, Judge.

K.A.B. ("the mother") appeals from a judgment of the DeKalb Juvenile Court ("the juvenile court") awarding custody of K.J.B., her child with J.D.B. ("the father"), to the

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father. We dismiss the appeal in part and affirm the judgment of the juvenile court.

Procedural History

On August 18, 2016, the DeKalb County Department of Human Resources ("DHR") filed a petition requesting that the juvenile court issue a pickup order for the child. DHR alleged, among other things, that the child was a dependent child and was in need of care or supervision based on the following:

"[DHR] became involved when [it] received a call from the Fort Payne Police Department on August 17, 2016. The mother ... had stopped breathing and was unresponsive. She was transported by ambulance to DeKalb Regional Medical Center, where she was resuscitated. [The mother] has a history of narcolepsy. She does not have the narcolepsy under control in order to be able to take care of the ... child.... No other relatives could be found at this time for placement of the ... child."

On August 24, 2016, the juvenile court entered a shelter-care order that, among other things, adjudicated the child to be a child "in need of shelter care," vested custody of the child with DHR, appointed a guardian ad litem to represent the child, and appointed an attorney to represent the mother. DHR filed a motion on August 30, 2016, seeking, among other things, an order preventing the mother from entering DHR's

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premises. On September 14, 2016, the guardian ad litem filed a motion seeking to suspend the mother's visitation with the child. A 30-day review hearing was conducted on September 15, 2016, and, on September 19, 2016, the juvenile court entered an order that, among other things, directed that the child's custody remain vested with DHR, adjudicated the child a dependent child, suspended the mother's visitation with the child until completion of a psychological evaluation, ordered the mother not to go on or about the premises of DHR, and ordered the mother and the father to each pay child support in the amount of \$245 each month.

Following a review hearing on December 15, 2016, the juvenile court entered an order on December 20, 2016, maintaining custody of the child with DHR, reaffirming the child's dependency, continuing the monthly child-support payments to be made by the mother and the father, and setting the case for a review hearing. On January 3, 2017, the mother filed a "motion of notice of continuing objection to the DHR court report as entered from the December 15, 2016, conference and hearing," asserting that DHR had, among other things, failed to correct certain false and prejudicial statements in

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a report it filed at the December 15, 2016, hearing. On that same date, the mother filed a motion to alter, amend, or vacate the juvenile court's December 20, 2016, order, reiterating the assertions made in her motion regarding her continuing objection to DHR's court report.

On January 16, 2017, the father filed a pleading seeking immediate placement, pendente lite custody, and permanent custody of the child. Following a hearing, the juvenile court entered a review order on January 31, 2017, directing, among other things, that any and all court reports entered into evidence by previous order of the court were to be retracted and stricken from the record; that custody of the child was vested with DHR; that reasonable efforts had been made to prevent removal of the child from the home; that the mother was allowed alternate counselors in light of her objection to the counselors that had been provided by DHR; and that the mother was to pay child support in the amount of \$246 per month.

On March 13, 2017, the mother filed an "answer" and a "counterclaim," apparently in response to both DHR's dependency petition and the father's pleading seeking custody

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and in which she sought a return of the child to her custody. The father filed, on March 15, 2017, a motion to strike the mother's answer and counterclaim as untimely; he also filed an answer to the mother's counterclaim. The mother filed a response to the father's motion to strike on March 17, 2017. On March 24, 2017, the mother filed a motion seeking to transfer the case to the DeKalb Circuit Court. The juvenile court entered an order on June 2, 2017, denying the mother's motion to transfer¹ and setting the case for a final hearing.

A permanency hearing was conducted on August 11, 2017, and an order was entered on August 28, 2017, continuing custody of the child with DHR, adjudicating the child as dependent, and changing the child's permanency plan to adoption with no identified resource. On September 14, 2017, a final hearing was held, and, on September 15, 2017, the juvenile court entered a final judgment that, among other things, awarded custody of the child to the father, subject to the award of supervised visitation to the mother, and

¹The juvenile court's order stated that the father's motion to transfer was denied. Because the mother, and not the father, had filed a motion to transfer, we infer that the juvenile court intended to deny the mother's motion to transfer.

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permitted DHR to close its file on this matter. The mother filed her notice of appeal to this court on September 29, 2017. (C. 190).

Facts

The father testified that he and the mother had lived together for four years before they divorced in 2015. According to the father, he had not appeared for the divorce hearing; the divorce judgment, which was entered as an exhibit at the final hearing in this matter, awarded the mother sole legal and physical custody of the child, subject to the father's right to supervised visitation, and ordered the father to pay child support to the mother in the amount of \$508 per month. The father admitted that, at the time of the final hearing in the dependency proceedings, he was in arrears on his child-support payments, but, he stated, he had given the mother what he could. The father testified that the mother had allowed him unsupervised visitation with the child following their divorce until their relationship had deteriorated in November 2015; according to the father, he had not seen the child from November 2015 until he had been contacted by the child's guardian ad litem in August 2016.

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According to the father, once he and the mother had separated, he had moved to Indiana where he had received support from a number of relatives. He stated that he had lived in Indiana for two years; that, at the time of the final hearing, he was living in a two-bedroom house where the child would have his own bedroom; and that he could financially afford to care for the child with earnings from his employment as a "key holder" at Pet Value and from certain "GI" military benefits he receives monthly. The father admitted that he had undergone two drug tests since the case had been initiated and that both of those tests had been positive for marijuana. The father testified that a prescription medication had resulted in false-positive test results for marijuana; however, John Rice, the director of the DeKalb County Court Referral Program, testified that at least one of the father's positive drug-test results had been sent out for confirmation and that the lab results had confirmed the presence of marijuana. Rice testified also that the father had submitted to a drug test on September 14, 2017, and that the results of that test had been negative for all substances.

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The mother testified that she had cared for the child since he was born and that the father had abandoned her and the child. According to the mother, the father had mistreated the child during the parties' marriage, but, she said, she had allowed him unsupervised visitation with the child following their divorce because his behavior had improved. The mother testified that, at the time of the final hearing, she was living in a townhouse in Fort Payne and that she did not pay rent because the townhouse was in federally subsidized housing. (R. 137-38, 165). According to the mother, she has had cancer four times; she has spinal problems; she has been diagnosed with narcolepsy; and she had been exposed to black mold, which had caused her to stop breathing on the occasion in August 2016 that had resulted in the child's being removed from her custody. She stated that, at the time of the final hearing, she was taking several medications, including two hormone pills, which, she said, can cause blackouts, heart attacks, and strokes. The mother testified that, on the date the child was removed for her custody, she had been taken to the hospital and that she had left the hospital "against medical wishes" the next morning to appear at court with

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regard to the child because she "was told to be [in court] at 10:00 a.m."

The mother testified that she draws Social Security disability benefits each month but that she is "in the negative every month" after paying for her medications, electricity, car insurance, and other expenses. She testified that she had been arrested for assault but that the case resulting from that arrest had been dismissed. At the close of the final hearing, the juvenile court allowed the mother to enter into evidence exhibits indicating that she had been found to be "not indicated" for inadequate supervision of the child, among other things. Laina Long, a service caseworker for DHR, testified that she had received the child's case at the end of December 2016. According to Long, DHR had offered the mother counseling and the mother was on "Color Code" drug testing at the time of the final hearing. Long testified that the mother's counseling had been unsuccessful, that the mother had been indicated for inadequate supervision of the child, and that the mother had a history of blackout episodes and erratic behavior. She stated that, although the mother had failed to provide DHR

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with requested information and medical records, the mother had submitted to a psychological evaluation, which resulted in a recommendation that the mother have limited contact with the child and that she show more stability in her emotional functioning such that she no longer blacks out. According to Long, DHR did not recommend returning the child to the mother, and, she said, if the case were to continue, DHR would pursue termination of the mother's parental rights.

Long testified that a home study had been completed on the father in April 2017 in Indiana and that placement of the child with the father had not been recommended as a result of the father's having positive drug-test results. According to Long, the home study showed the father to be otherwise appropriate, and, she said, had it not been for the failed drug tests, DHR would have attempted to place the child with the father. She stated that she believed that the father was capable of providing for the child's needs.

Daphne Simpson, the mother's counselor, testified that she did not feel like the mother had made a lot of progress. She stated that the mother had been diagnosed with histrionic personality disorder, which means that the mother's mood can

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shift quickly and that she can be manipulative. According to Simpson, the mother had become very upset and argumentative during their last session; Simpson stated that she had stopped her sessions with the mother because the mother had not made progress and because she did not feel that further counseling with the mother would be successful. Simpson testified that the mother did not believe that there was a problem and that, even when she felt the mother had progressed, the mother would revert to her previous patterns of behavior. Simpson stated that she had concerns regarding the mother's ability to care for the child based on her lack of progress in counseling.

Analysis

The mother appears to argue on appeal that the juvenile court lacked jurisdiction to award the father sole physical custody of the child, thereby modifying the parties' divorce judgment, which had awarded her sole physical custody of the child. In A.G. v. Ka.G., 114 So. 3d 24, 26 (Ala. 2012), our supreme court explained:

"Subject to two exceptions, when a circuit court acquires jurisdiction regarding an issue of child custody pursuant to a divorce action, it retains jurisdiction over that issue to the exclusion of the juvenile court. C.D.S. v. K.S.S., 963 So. 2d 125, 129 (Ala. Civ. App. 2007); Ex parte K.S.G., 645 So.

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2d 297, 299 (Ala. Civ. App. 1992). Those two exceptions are: 1) when emergency circumstances exist that threaten the immediate welfare of the child; and 2) when a separate dependency action is instituted. M.P. v. C.P., 8 So. 3d 316 (Ala. Civ. App. 2008)."

In the present case, because DHR initiated an action alleging the child's dependency, the second exception referred to in A.G. is applicable here, and, thus, the juvenile court was within its jurisdiction to enter an award of custody of the child to the father. Id. To the extent the mother asserts that a termination-of-parental-rights hearing was required before the juvenile court could award custody of the child to the father, we note that no petition seeking to terminate the mother's parental rights appears in the record on appeal, and, thus, such a hearing was not required in order for the juvenile court to award custody of the child to the father.

The mother next argues on appeal that the juvenile court erred in failing to comply with § 12-15-308, Ala. Code 1975, which requires, in pertinent part, that, when a child alleged to be dependent has been removed from the custody of a parent and has not been returned to that parent, a hearing shall be held within 72 hours from the time of the removal to determine whether continued shelter care is required and that the

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custodial parent from whose custody the child was removed shall receive notice of that hearing. The mother asserts that a hearing was not conducted within 72 hours of the child's removal from her custody, that she had not been served with notice of DHR's dependency petition and request for a pickup order at the time the child was removed from her custody, that the juvenile court's shelter-care order was untimely entered, and that the allegations in DHR's dependency petition were insufficient to justify the entry of the shelter-care order.

In T.J. v. Winston County Department of Human Resources, 233 So. 3d 361, 365 (Ala. Civ. App. 2017), this court addressed a similar argument in a termination-of-parental-rights case and explained, in pertinent part:

"On appeal, the mother and the father first argue that the juvenile court erred in failing to hold a hearing within 72 hours of the initial removal of the child from the home of the parents. We note, however, that the initial order awarding [the Department of Human Resources] custody of the child is 'no longer in effect; [that order was] supplanted by later orders in which the juvenile court expressly found the child to be dependent [and thereafter by the judgment terminating the parents' parental rights]. Thus, "no relief ordered by this court can change" the custody provisions of [the] initial order[], and, therefore, the argument pertaining to [that order] is moot.' M.B. v. R.P., 3 So. 3d 237, 247 (Ala. Civ. App. 2008). We therefore dismiss the parents' appeal to the extent

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that it challenges the initial pickup order removing the child from their custody."

In the present case, like in T.J., the juvenile court's shelter-care order has been supplanted by a final judgment that awards sole physical custody of the child to the father. Because no relief ordered by this court can modify the shelter-care order entered by juvenile court, these issues are moot. See T.J., supra. Accordingly, we dismiss the mother's appeal to the extent it challenges the juvenile court's shelter-care order or the juvenile court's purported failure to hold a 72-hour hearing. With regard to the mother's assertion that she did not have notice of DHR's request for a pickup order, we note that the mother stated at the final hearing that, when she was taken to the hospital, she was informed that a hearing would be conducted the next morning. She also testified that she had left the hospital "against medical wishes" to attend the scheduled hearing in order to prevent the child's removal from her care. Accordingly, it appears that the mother was afforded notice of the hearing, as required by § 12-15-307, Ala. Code 1975.

The mother appears to argue that the juvenile court's judgment adjudicating the child dependent on September 19,

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2016, violated § 12-15-122, Ala. Code 1975, which requires, among other things, that a summons be issued to the parents of a child who has been alleged to be dependent. The mother does not argue specifically that she did not receive a summons to the proceedings that first resulted in the child being found dependent. Indeed, she asserts in her brief on appeal that she was permitted to speak on her own behalf at the 30-day review hearing, after which the juvenile court adjudicated the child dependent. There is no transcript in the record on appeal of the September 15, 2016, hearing, and there is no indication that the mother objected at the 30-day review hearing to any lack of notice. Regardless, the mother appeared at both that hearing and the final hearing, after which the juvenile court entered the judgment awarding custody of the child to the father. Accordingly, we conclude that the mother was not denied due process in violation of § 12-15-122. See, e.g., Patton v. Holland, 491 So. 2d 946 (Ala Civ. App. 1986) (appearance in person and by attorney at custody proceeding waived service of the summons); and Niver v. State Dep't of Human Res., 521 So. 2d 1326, 1328 (Ala. Civ. App. 1987).

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The mother next argues that the guardian ad litem failed to comply with § 12-15-304, Ala. Code 1975, by requesting that the mother's visitation be suspended. Section 12-15-304, among other things, outlines the duties of a guardian ad litem. We note, however, that the juvenile court's judgment suspending the mother's visitation in response to the guardian ad litem's request and recommendation has been supplanted by the final judgment. Accordingly, this issue on appeal is moot and the mother's appeal is due to be dismissed insofar as it involves this issue. See T.J., supra.

The mother argues generally that the juvenile court did not require "substantiated evidence" and that the juvenile court refused to "remove prejudicial and bias[ed] [hearsay] from statements, documents, or unfounded by evidence." The mother does not point this court to specific statements or documents that she asserts contain prejudicial or biased information. We note, however, that, in response to a motion by the mother, the juvenile court entered a review order on January 31, 2017, directing, among other things, that any and all court reports entered into evidence by previous orders of the court be retracted and stricken from the record. Thus,

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the juvenile court did not refuse to correct any prejudicial statements but, rather, granted the mother's requested relief to that end. We interpret the remainder of the mother's argument as an assertion that the juvenile court's judgment awarding custody of the child to the father is not supported by clear and convincing evidence.

We note that the juvenile court did not make an express finding that the child remained dependent in its final judgment. "However, this court has held that when the evidence in the record supports a finding of dependency and when the trial court has made a disposition consistent with a finding of dependency, in the interest of judicial economy this court may hold that a finding of dependency is implicit in the trial court's judgment." J.P. v. S.S., 989 So. 2d 591, 598 (Ala. Civ. App. 2008). In the present case, the juvenile court had consistently reaffirmed its initial finding that the child was dependent as to the mother, who was the child's legal and custodial parent, before entering a final judgment awarding custody of the child to the father. The mother argues that the juvenile court's judgment modified the custody of the child as awarded in the judgment divorcing the mother

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and the father. As discussed above, however, the juvenile court did not modify the parties' divorce judgment. Rather, the juvenile court's jurisdiction to make an award of custody is derived from DHR's filing of a dependency petition, see A.G., supra; thus, a finding that the child remained dependent as to the mother was implicit in the juvenile court's judgment. Accordingly, we proceed to analyze whether the juvenile court's judgment is supported by clear and convincing evidence.

As argued by the mother on appeal, a finding of dependency must be based on clear and convincing evidence, which 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., 206 So. 3d 621, 627 (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.'

"KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].

"To analogize the test set out ... 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). This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus evidence, this court presumes their correctness. Id. We review the legal conclusions to be drawn from the evidence without a

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presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

Section 12-15-102(8)a., Ala. Code 1975, defines a "dependent child" as "[a] child who has been adjudicated dependent by a juvenile court and is in need of care or supervision" and who falls within a number of circumstances, including a child whose parent "is unable or unwilling to discharge his or her responsibilities to and for the child," § 12-15-102(8)a.6., Ala. Code 1975, or "[w]ho, for any other cause, is in need of the care and protection of the state," § 12-15-102(8)a.8., Ala. Code 1975. In the present case, the juvenile court made extensive findings of fact from the testimony presented, which indicate, among other things, that the mother suffers from a number of health problems; that the mother was taking multiple prescribed medications, some of which cause her to have blackouts; that the mother had, on at least one occasion, blacked out while the child was in her care, resulting in the mother having to be hospitalized; that the mother had been unsuccessful in counseling and had not progressed; that the mother's behavior had been erratic since the initiation of DHR's dependency proceeding such that she

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had been banned from DHR's premises; that the mother could be a danger to herself; and that the mother's psychological evaluation had recommended that she have limited contact with the child. We conclude that the juvenile court's findings of fact are supported by clear and convincing evidence of the child's dependency as to the mother.

Section 12-15-314, Ala. Code 1975, provides, in pertinent part, that, if a child is found to be dependent, the juvenile court may, among other things, transfer legal custody of the child to 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." § 12-15-314(a)(3)c., Ala. Code 1975. In the present case, the juvenile court considered evidence indicating that, at the time of the final hearing, the father was employed, was living in a home suitable for the child, and has a family support system near his residence. Moreover, the juvenile court heard testimony indicating that DHR had denied the father's request to assume custody of the child based solely on the father's positive drug-test results, having otherwise concluded that the father was a suitable placement for the child, and that

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the father had produced a negative drug-test result before the final hearing. The juvenile court's implicit finding that the father is qualified to receive and care for the child is supported by clear and convincing evidence.

The mother asserts that the juvenile court erred in failing to allow the mother to present evidence that would have shown her "cooperation with all services and the letter of 'Not Indicated.'" The mother appeared pro se at the final hearing. At that hearing, the mother sought to present evidence indicating that she had received a letter from DHR stating that she had been "not indicated" for inadequate supervision of the child, among other things. The juvenile court allowed the mother to enter that letter, dated October 3, 2016, as an exhibit, and it was admitted as the mother's Exhibit 2. Thus, the mother was not denied the opportunity to present that evidence to the juvenile court. Notably, the juvenile court did not recite the testimony from Long that the mother had been indicated for inadequate supervision and risk of harm in its final judgment. As discussed above, the juvenile court's judgment finding the child dependent as to the mother and awarding custody of the child to the father is

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supported by additional evidence without considering whether the mother was or was not indicated for inadequate supervision by DHR. Thus, any purported error as to the juvenile court's admission or rejection of certain evidence speaking to that issue would be harmless. See Rule 45, Ala. R. App. P.

The mother also appears to argue that the juvenile court erred in concluding that reasonable efforts had been made to reunite her with the child. We note that the juvenile court did not make specific findings in its final judgment regarding whether DHR had made reasonable efforts to reunite the mother with the child. The mother cites § 12-15-312(a), Ala. Code 1975, which provides, in pertinent part, that,

"[w]hen the juvenile court enters an order removing a child from his or her home and places the child into ... [the] custody of the Department of Human Resources ..., the order shall contain specific findings, if warranted by the evidence, within the following time periods while making child safety the paramount concern:

"....

"(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."

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In the present case, the juvenile court's final judgment did not place the child in the custody of DHR. Rather, it awarded custody of the child to the father and directed DHR to close its case. The mother fails to cite any authority indicating that the juvenile court was required to make specific findings regarding reasonable efforts in its final judgment disposing of the case, in contravention of Rule 28(a)(10), Ala. R. App. P. Accordingly, we decline to further address that argument on appeal.

Conclusion

As discussed previously in this opinion, we dismiss the mother's appeal insofar as we are unable to afford her relief. We otherwise affirm the juvenile court's judgment.

APPEAL DISMISSED IN PART; AFFIRMED.

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