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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180216 and 2180217

A.P.

v.

Covington County Department of Human Resources

Appeals from Covington Juvenile Court
(JU-15-118.05 and JU-16-48.04)

2180218, 2180219, and 2180220

D.T.H.

v.

Covington County Department of Human Resources

**Appeals from Covington Juvenile Court
(JU-11-137.05, JU-15-118.05, and JU-16-48.04)**

DONALDSON, Judge.

A.P. ("the mother") and D.T.H. ("the father") appeal from judgments of the Covington Juvenile Court ("the juvenile court") terminating the father's parental rights to W.T.H, G.H., and J.H. ("the children") and the mother's parental rights to G.H. and J.H. We reverse the judgments and remand the causes.

Facts and Procedural History

The father and the mother are the unmarried parents of G.H., born in October 2008, and J.H., born in January 2011. The father is a parent of W.T.H., born in June 2004. After W.T.H.'s mother passed away when he was four or five years old, W.T.H. began living with the father and the mother. In March 2016, the juvenile court granted the Covington County Department of Human Resources ("DHR") emergency custody of the children, and the children have been in the legal custody of DHR since then. G.H. and J.H. are in the foster care of T.P. and J.P. W.T.H. is in the foster care of another couple. The parents' visitations with the children were required to be supervised.

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On September 15, 2017, DHR filed complaints seeking the termination of the father's parental rights to the children and of the mother's parental rights to G.H. and J.H. The father answered the complaints and filed a counterclaim seeking custody of the children or, in the alternative, visitation with them. A guardian ad litem was appointed to represent the best interests of the children.

On November 29, 2017, and on January 31, 2018, the trial court conducted a trial. At the trial, the father and the following DHR employees testified: Ladarious Benson, Andrea Hobbie, and Melinda Barton. Barton supervised the parents' case with DHR. Benson worked with the mother and the father from the end of 2015 to March 2017. According to Benson, DHR's initial concerns were the children's missing school days and doctor's appointments, reports of drug use, and overall stability of the home. Hobbie testified that she began working with the mother and the father in April 2017. Hobbie testified that she had the following safety concerns regarding returning the children to the parents: substance abuse, mental instability, financial instability, and housing instability.

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The DHR employees testified that there were regular Individualized Service Plan ("ISP") meetings at which goals were set for the parents and that the parents did not comply or provide proof that they had met many of the goals. Benson testified that the parents' financial situation was part of the reason that the parents did not meet the ISP goals. The DHR employees testified that the parents had generally been uncooperative throughout much of the time that the children were in DHR's legal custody. In his testimony, the father denied being uncooperative with DHR but admitted that he did not achieve many of the goals set.

Benson testified that the mother and the father each underwent a psychological evaluation. Hobbie testified that, based on her psychological evaluation, the mother had a borderline personality disorder. Benson testified that, as a result of the psychological evaluations, drug counseling was recommended to the mother and marital counseling was recommended to both parents but that the mother and the father did not follow the recommendations.

Hobbie testified that the parents were asked to participate in counseling services, mental-health services,

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drug screening, and substance-abuse treatment, but not parenting classes, because, she said, the parents were not ready for reunification with the children. According to Hobbie, the mother received a drug-treatment assessment on August 1, 2017, but did not receive drug treatment services because she had said that she had been sober for 180 days. Hobbie testified that the parents did not participate in other requested services.

According to Benson, the parents have not received any drug treatments or counseling services. The father testified that he had attended a number of Narcotics Anonymous meetings and that he had attended some of the meetings with the mother. Benson testified that, while he worked with the mother, the results for the mother's drug screens were as follows: one positive for opiates and oxycodone, one passed, two refused, and one involving a diluted sample. Benson also testified that the mother had tested positive for methamphetamine and amphetamine. Hobbie testified that, while she worked with her, the mother submitted to the drug screens and tested positive once for "spice" in November 2017.

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Benson testified that the father tested positive in March 2016 for methamphetamine. Benson and Hobbie testified that the father did not test positive for illegal drugs while they worked with him but that he did not participate in some drug screens. Barton and Hobbie testified that the mother had reported that the father had used someone else's urine for some drug screens. The father tested positive on November 29, 2017, for Suboxone.

In his testimony, the father admitted that he had taken methamphetamine resulting in his first positive drug test and that he had taken part of a Suboxone pill resulting in the positive drug test on November 29, 2017. The father testified that he did not take any illegal drugs between the two positive drug tests and that he had not taken any illegal drugs since the Suboxone pill. He testified that he had taken part of a Suboxone pill a few days before the positive drug test because he had hurt his ankle. The father testified that he had never been charged with illegal-drug possession, and he denied having a problem with illegal drugs.

According to the testimony of the DHR employees, the mother and the father moved from place to place, were behind

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on paying rent and utilities, and lived with friends for a time. Benson testified that, during the time he worked with them, the parents informed him that they were working at jobs in which they were paid informally and that he never received confirmation of their employment. Hobbie testified that the father had reported working at several different jobs, that the mother had reported that she was interested in babysitting and cleaning houses, but that neither parent had provided proof of any employment.

Barton testified that orders entered on October 22, 2016, required the mother and the father each to pay \$100 a month for each of their children. The \$100 amount consisted of \$90 for their ongoing child-support obligation for each child and \$10 for a child-support arrearage. Barton testified that the mother and the father have made some of the court-ordered payments but were in arrears.

Benson testified that the mother had been incarcerated for some old warrants and that both the mother and the father had been incarcerated for failure to appear in court regarding nonpayment of child support. Benson testified that the mother also went to jail for an incident around Christmas in 2016

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regarding which DHR had received a report indicating that the mother had assaulted T.P. in front of G.H. and J.H. and had caused harm to T.P.'s son. The father testified that he had been incarcerated for obstruction of justice when the children were taken into emergency custody. He testified that he had been incarcerated in April 2017 and again in September 2017 for not paying child support and for not appearing in court regarding child-support matters.

In his testimony, the father acknowledged that he and the mother did not have stable housing for much of the time that the children were in DHR's care. The father testified that, after each time he was incarcerated for not appearing in court regarding child-support matters, he lost his job, the mother and the father lost their housing, and all their possessions were stolen. In her testimony, Hobbie agreed that the parents' incarcerations resulted in financial instability.

According to the father's testimony, he and the mother ended their relationship around July 2017. The father testified that he had been in a relationship with another woman for around four or five months and that they were living together and engaged to be married. During the portion of the

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trial held on January 31, 2018, the father testified that he had not been incarcerated in the last six months, that he had made child-support payments, that he had maintained employment, that he had not missed any visitations, and that he had purchased a trailer with three bedrooms that is located on real property owned by his fiancé's family. The father also testified that he had taken and passed drug tests for the past few months. The father testified that he was currently employed by a construction company and that he did most of his work in the Montgomery area.

Hobbie testified that the father had requested that she visit his latest residence. According to Hobbie, the father was not at the residence when she visited unannounced, and she did not attempt to revisit the residence because the permanency plan had changed to adoption rather than returning the children to the parents.

Benson testified that the mother and the father initially did well in attending visitations with the children except when they were incarcerated. According to Benson, when DHR started requiring that the mother and the father take drug screens in order to have visitations, the mother and the

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father began to miss some visitations. Hobbie testified that, when she worked with the parents, the mother attended most of the visitations, the father missed a few, and both missed some visitations because of their incarcerations but that the parents generally attended the visitations with G.H. and J.H. Hobbie testified that, while she was working with him, the father had not maintained consistent visitation and contact with W.T.H. In his testimony, the father denied not having contact with W.T.H. in the months before the trial.

According to the father, the jobs that he has held have not allowed him to take more than a day off a month and that DHR did not provide for weekend visitations with the children. The father testified that he lost three jobs because of having to attend DHR-related activities. The father testified that driving to the drug-testing facility, waiting for the drug testing, and attending the visitations all on the same day took up a large part of the day. According to the father, he could not take off that much time so frequently, and, therefore, he had refused some drug screens and consequently had missed some visitations with the children.

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According to Hobbie, the mother began living near T.P and J.P. around October 2017. Hobbie testified that T.P. and J.P. allowed the mother to have visitation with G.H. and J.H. in their home and that the mother helped with bathing those children. Barton testified that the father has attended all visitations with W.T.H. since November 29, 2017, and that he has attended every visitation with G.H. and J.H. in 2018. Both Barton and the father testified that, since November 29, 2017, DHR had reduced the number of visitations and had increased the period of each visitation. Barton testified that the father was able to take time off from work to attend the visitations. The father testified that the new scheduling allowed him to attend court hearings and visitations on the same days. Barton testified that the children show affection for the father and that he engages with the children during his visitations. Barton testified that G.H. and J.H. were very attached to the mother.

T.P. testified that she and the mother are cousins but that they consider themselves sisters. According to T.P., her stepfather was married to the mother's mother, but she and the mother had lived for a time with a man who claimed that he was

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their biological father. T.P. testified that the mother lives across the road from her residence with T.P.'s mother-in-law. According to T.P., the mother has a loving relationship with G.H. and J.H., and, she said, the mother helps them take baths, helps with the homework, and plays with them. T.P. testified that, since her last incarceration ending on October 31, 2017, the mother has changed her lifestyle and has been drug-free.

The juvenile court also received the sworn testimony of Maci Jessie, the guardian ad litem for the children, who was subjected to examination by counsel. In her testimony, Jessie recommended that legal custody of G.H. and J.H. be transferred to T.P and J.P. but that, if that alternative was not viable, the parents' rights to those two children should be terminated. Jessie recommended that the father's parental rights to W.T.H. be terminated. Among other testimony, Jessie stated: "I think that this case presents a very unusual fact circumstance that their mother is involved in [G.H.'s and J.H.'s] daily life. She is there with them almost every single day. She lives across the street." Jessie added that the mother had not obtained stable employment. According to

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Jessie, the parents had not shown sufficient progress to obtain custody of the children, but she also testified: "So, I don't think that it would be a terrible idea to keep the case open to services for a couple of months to see if there were further efforts by the parents to be able to rehabilitate for purposes of reunification."

On June 26, 2018, DHR filed a request for the entry of final judgments, asserting that more than four months had passed since the last day of trial.

On July 5, 2018, the juvenile court entered an order approving and adopting a permanency plan for adoption by the children's respective current foster parents with a concurrent plan of adoption without an identified resource. In its order, the juvenile court stated that it had conducted a hearing on March 12, 2018, during which no testimony was offered and a court report by DHR was received into evidence. A transcript of that hearing and a copy of the court report are not in the record.

On November 26, 2018, the trial court entered judgments terminating the father's parental rights to the children and terminating the mother's parental rights to G.H. and J.H. On

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December 7, 2018, the father filed a notice of appeal to this court. On December 10, 2018, the mother filed a postjudgment motion, asserting, in relevant part:

"1. Since the date of court, circumstances have occurred that would warrant the court reconsidering its ruling.

"2. The foster parent, [T.P.], has been diagnosed with a spinal cord disease that impedes her ability to care for the minor children.

"3. [The mother] lives next door to [T.P.], and her minor children. She assists [T.P.] and primarily cares for her minor children when she is not at her job.

"4. [The mother] reasonably fears [T.P.] will be sent to a nursing home and that her minor children will go in to foster care.

". . . .

"7. [The mother] reasonably fears her minor children--that she cares for and maintains a healthy relationship with--will eventually go into foster care which will be devastating to the minor children.

"8. [The mother] is drug free and would be willing to take a hair follicle test that dates back one year or more.

"9. [The mother] has been employed for one year on a full time basis as a sitter for a medically fragile child and can provide proof of employment.

"10. The natural mother has been residing at the same place, next door to the minor children, since the termination hearing.

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"WHEREFORE, [the mother] requests the Court to reconsider or set this matter for a hearing as soon as possible."

The record does not indicate that a hearing was conducted on the mother's postjudgment motion.

On December 10, 2018, the mother filed a notice of appeal to this court. On December 24, 2018, the mother's postjudgment motion was denied by the operation of law.¹ See Rule 1(B), Ala. R. Juv. P. (providing that, unless the period is extended, postjudgment motions in juvenile cases that remain pending for 14 days are denied by operation of law). On that date, the mother's notice of appeal became effective. See Rule 4(a)(5), Ala. R. App. P. ("A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59, Alabama Rules of Civil Procedure, shall be held in abeyance until all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59 are ruled upon; such a notice of appeal shall become effective upon the date of disposition of the last of all such motions."); Parker v. Parker, 946 So. 2d

¹On January 17, 2019, the juvenile court entered an order stating that the mother's postjudgment motion was denied by the operation of law.

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480, 485 (Ala. Civ. App. 2006) (holding that a party's notice of appeal was held in abeyance after the filing of the other party's postjudgment motion and until all postjudgment motions were ruled upon). We have jurisdiction over the appeals pursuant to § 12-3-10, Ala. Code 1975, and Rule 28, Ala. R. Juv. P. The appeals of the mother and the father have been consolidated ex mero motu. On May 31, 2019, after the record had been compiled, the appeals were submitted on the briefs of the mother, the father, and DHR.

Discussion

Both the mother and the father contend that insufficient evidence supported the juvenile court's decision to terminate their parental rights.

"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. Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990)."

B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004). Section 12-15-319(a), Ala. Code 1975, provides the following statutory grounds for termination of parental rights, in relevant part:

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"If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parents. In determining whether or not the parents are unable or unwilling to discharge their responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

". . . .

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for needs of the child.

". . . .

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parents have failed.

". . . .

"(9) Failure by the parents to provide for the material needs of the child or to pay a reasonable portion of support of the child, where the parent is able to do so.

"(10) Failure by the parents to maintain regular visits with the child in

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accordance with a plan devised by the Department of Human Resources, or any public or licensed private child care agency, and agreed to by the parent.

"(11) Failure by the parents to maintain consistent contact or communication with the child.

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review."

The father argues that the termination of his parental rights to the children was not supported by clear and convincing evidence of his current conditions.

"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 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)). '[A juvenile] court's decision in proceedings to terminate parental rights is presumed to be correct when the decision is based upon ore tenus evidence, and such a decision based upon such evidence will be set aside only if the record shows it to be plainly and palpably wrong.' Ex parte State

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Dep't of Human Res., 624 So. 2d 589, 593 (Ala. 1993)."

Montgomery Cty. Dep't of Human Res. v. A.S.N., 206 So. 3d 661, 664 (Ala. Civ. App. 2016). "This court has consistently held that the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence." D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003).

The mother also argues that the juvenile court's decision to terminate her parental rights was based on past rather than current conditions.² The mother asserts that the juvenile court's 10-month delay in entering the judgments substantially impaired her rights in the proceedings. Section 12-15-320(a), Ala. Code 1975, provides, in relevant part: "Termination of parental rights cases shall be given priority over other

²In addition, the mother argues that maintaining the current custodial arrangement of G.H. and J.H. staying with T.P. and J.P. was a viable alternative to the termination of her parental rights. Because we determine that the judgments are reversible based on another issue raised by the mother, we preterm discussion of the mother's argument regarding viable alternatives.

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cases. ... The trial court judge shall enter a final order within 30 days of the completion of the trial." Rule 25(D), Ala. R. Juv. P., provides, in relevant part: "In termination-of-parental-rights cases, the juvenile court shall make its finding by written order within 30 days of completion of the trial."

In C.P.M. v. Shelby County Department of Human Resources, 185 So. 3d 461 (Ala. Civ. App. 2015), the parents appealed the judgment terminating their parental rights. The parents had filed a joint postjudgment motion indicating that their circumstances had changed since the conclusion of the trial 11 months before the entry of the judgment, and we considered the father's argument on appeal "that the juvenile court's delay of approximately 11 months between the end of testimony and the entry of the judgment demonstrated that the judgment was not supported by clear and convincing evidence of the father's current conditions or conduct relating to his willingness or ability to care for the child." Id. at 466-67. Although the judgment was not entered in compliance with the procedural requirement in § 12-15-320(a) and Rule 25(D) that a juvenile court enter a final order within 30 days of the completion of

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the trial, we further examined whether the father in that case had demonstrated that his rights were substantially impaired by the noncompliance. "[A] violation of a mandatory provision contained in a statute requires reversal only if the failure to comply impairs a substantial right of the appealing party." M.H. v. Cleburne Cty. Dep't of Human Res., 158 So. 3d 471, 475-76 (Ala. Civ. App. 2014). Because a termination of parental rights must be based on clear and convincing evidence of a parent's current circumstances or condition, we concluded that the 11-month delay in the entry of the judgment in that case substantially impaired the father's rights.

In this case, the mother filed a postjudgment motion asserting that her circumstances had changed since the last day of trial and that she could provide evidence of her current circumstances. The mother cites C.P.M. in support of her argument on appeal that the juvenile court's judgments were not based on her current circumstances. We agree that the judgments in this case could not have been based on the mother's current circumstances and that, therefore, the juvenile court's nearly 10-month delay in entering the

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judgments substantially impaired her rights in the proceedings.³

On January 31, 2018, the father testified that he had stable housing, that he was gainfully employed, that he was financially stable, that he was making child-support payments, that he was passing drug screens, and that he was attending visitations with the children. We note that the evidence indicates that the children had a bond with the father. Although a juvenile court may consider a parent's history in determining whether "the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future," § 12-15-319(a), see D.M. v. Walker Cty. Dep't of Human Res., 919 So. 2d 1197, 1212 (Ala. Civ. App. 2005), we conclude that in this case, as in C.P.M., the judgments terminating the father's parental rights entered

³We note that no testimony was taken at the March 12, 2018, hearing regarding the permanency plans for the children. Even if the mother and the father did not offer further testimony regarding the issue of the termination of their parental rights on that date, we conclude that the delay of more than eight months from that date in entering the judgments would still have been prejudicial to the mother's rights.

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nearly 10 months after the last day of trial could not have been based on the father's current circumstances.

Conclusion

For the foregoing reasons, we reverse the judgments terminating the parental rights of the mother and the father, and we remand the causes to the juvenile court for proceedings consistent with this opinion.

2180216 and 2180217 -- REVERSED AND REMANDED.

2180218, 2180219, and 2180220 -- REVERSED AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ.,
concur.