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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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J.C.

v.

Houston County Department of Human Resources

Appeal from Houston Juvenile Court
(JU-16-144.03)

EDWARDS, Judge.

In July 2019, J.C. ("the mother") became involved in an altercation with her boyfriend, B.C. L.H. ("the child") witnessed the altercation and intervened to protect the mother. As a result, the Houston County Department of Human

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Resources ("DHR") became involved with the family and placed the child in the home of a family friend, B.J.L. ("the custodian"), pursuant to a safety plan. In September 2019, DHR filed in the Houston Juvenile Court ("the juvenile court") a petition seeking to have the child declared dependent.

On January 30, 2020, the juvenile court held a trial on the dependency petition. After the trial concluded, the juvenile court entered a judgment declaring the child dependent and awarding her custody to the custodian. The juvenile court's judgment awards supervised visitation to the mother "as agreed upon an arranged by the parties." The mother appeals, challenging the judgment insofar as it declares the child dependent and insofar as it awards no specific visitation to her.

We begin our review of the mother's challenge to the dependency determination with the following well-established principles. The juvenile court's factual findings in a dependency case in which the evidence has been presented ore tenus are presumed correct, see T.D.P. v. D.D.P., 950 So. 2d 311 (Ala. Civ. App. 2006), and that "'presumption is based on the [juvenile] court's unique position to directly observe the

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witnesses and to assess their demeanor and credibility.'" Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007) (quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). When a 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. K.C. v. Jefferson Cty. Dep't of Human Res., 54 So. 3d 407, 413 (Ala. Civ. App. 2010). In addition, the juvenile court may consider the totality of the circumstances when making a finding in a dependency proceeding. G.C. v. G.D., 712 So. 2d 1091, 1094 (Ala. Civ. App. 1997).

A "dependent child" is defined in Ala. Code 1975, § 12-15-102(8), to include:

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

"1. Whose parent, legal guardian, legal custodian, or other custodian subjects the child or any other child in the household to abuse, as defined in [Ala. Code 1975, §] 12-15-301[,], or neglect as defined in [§] 12-15-301, or allows the child to be so subjected.

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

".....

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

".....

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

A finding of dependency must be supported by clear and convincing evidence. Ala. Code 1975, § 12-15-310(b). This court

"'must ... look through ["the prism of the substantive evidentiary burden," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986),] 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.'"

K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016) (quoting Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008), quoting in turn Ala. Code 1975, § 25-5-81(c) (defining "clear and convincing evidence" in the context of a workers'

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compensation claim)). However, we are not permitted to reweigh the evidence presented to the juvenile court. D.M. v. Jefferson Cty. Dep't of Human Res., 232 So. 3d 237, 242 (Ala. Civ. App. 2017).

The evidence adduced on the dependency issue at trial was composed largely of the testimony of Charlotte Proffitt, a court-appointed special advocate; Tori Nelson, the DHR caseworker, also briefly testified. After their testimony concluded, the juvenile court declared from the bench that it had determined that the child was dependent. DHR then presented the testimony of the custodian and of the child as evidence bearing on the issue of disposition. See Ala. Code 1975, § 12-15-311(a).

Nelson testified that DHR had asked the mother to complete anger-management classes, a substance-abuse assessment, counseling, and random drug testing. Nelson stated that the mother had completed the substance-abuse assessment and anger-management classes. According to Nelson, the mother had tested positive for methamphetamine on two drug tests -- a hair-follicle test administered in July 2019 and a urine test administered in October 2019.

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Nelson also testified that the child, as a result of the death of her father, receives approximately \$700 per month in Social Security death benefits. However, Nelson said that the mother had not paid those benefits to the child or to the custodian. In fact, Nelson said that the mother had not paid the custodian any money until after an October 23, 2019, individualized-service-plan meeting. Nelson said that, since October 23, 2019, the mother had been paying the custodian only \$200 per month.

Proffitt testified that the mother had left Alabama to move to Rhode Island in November 2019 and that she remained there at the time of the trial in January 2020, which she did not attend. According to Proffitt, the mother had explained to her during a telephone conversation that she needed to stay in Rhode Island "for her sobriety." Proffitt said that the mother had admitted to her over the telephone that she had smoked marijuana in December 2019.

According to Proffitt, she was very concerned about the relationship between the mother and the child. She said that the mother had last visited the child the week before Thanksgiving 2019 and that the mother had then left for Rhode

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Island. Proffitt characterized the mother's relationship with the child as emotionally abusive and manipulative. She explained that, when the child would not immediately return the mother's telephone calls or had not, for example, committed to spending Thanksgiving with the mother, the mother had threatened suicide or had threatened to never see the child again. Proffitt testified that the mother also had told Proffitt on more than one occasion that "I want that 'B' put in foster care"; Proffitt also said that the mother had conveyed a similar sentiment to the child. When asked about the effect the mother's comments had had on the child, Proffitt testified that the child had been disturbed by conversations with the mother containing those comments. Proffitt said that when she had confronted the mother about her inappropriate remarks, which Proffitt said the mother had admitted to having made, the mother would curse her and hang up, only to call back later to apologize for her outburst.

Proffitt testified that the mother had relayed a threat of suicide to her on no less than five occasions. In fact, Proffitt said that the mother had threatened to commit suicide as recently as the Sunday or the Monday before the dependency

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trial. According to Proffitt, the mother had been diagnosed with bipolar disorder, panic disorder, and tardive dyskinesia. She said that the mother had been prescribed medication but that she was unaware if the mother was properly taking that medication. However, she described the mother's behavior and attitude beginning around Thanksgiving 2019 as being erratic. Proffitt also testified that the mother had anger toward the child and that she would punish the child by making the inappropriate comments to hurt her. In addition, Proffitt said that the mother was angry at her about her report to the court.

Proffitt indicated that, initially, the mother had appeared to cooperate with DHR's services. However, she explained that, in her opinion, the mother had "snapped" right before Thanksgiving 2019 and that "things took a turn of events." She characterized the mother as being frustrated when the child did not want to spend as much time with the mother as the mother desired.

The mother argues that the evidence presented to the juvenile court was not clear and convincing evidence demonstrating that the child was dependent. She attacks

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Proffitt's testimony as not being sufficient because Proffitt is not an expert in mental health and because DHR did not otherwise prove the mother's mental-health diagnoses or the effect the mother's statements had had on the child's mental health. Although we agree that Proffitt is not an expert, the mother did not object at trial to Proffitt's testimony on the ground that she had not been qualified as an expert. Although Proffitt's testimony is merely lay testimony, the opinions contained within her testimony were "(a) rationally based on [her] perception ... and (b) helpful to a clear understanding of [her] testimony or the determination of a fact in issue," Rule 701, Ala. R. Evid., and, thus, the juvenile court was free to consider her opinion testimony.

Proffitt's testimony indicated that the mother attempts to control the child through the use of emotional abuse. Proffitt further indicated that she had observed that the child was disturbed by the mother's comments, which, she commented, "would be emotionally disturbing to anyone." One basis for concluding that a child is dependent is the parent's subjecting a child to "abuse," which is defined to include "[h]arm or risk of harm to the emotional health, physical

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health, or welfare of a child." Ala. Code 1975, § 12-15-301(4) (emphasis added). The evidence before the juvenile court, which it clearly found credible, supports a conclusion that the mother, who has threatened to kill herself, to never see the child again, and to have the child placed in foster care, has subjected the child to emotional abuse that affects her welfare. The mother had, in fact, left the state and had not seen the child as she had threatened. Thus, there is ample basis for the juvenile court's dependency finding.¹

The mother also argues that the juvenile court erred by not awarding her specified visitation with the child. As noted above, the juvenile court awarded the mother supervised visitation "as agreed upon and arranged by the parties." DHR attempts to justify the juvenile court's award of visitation at the sole discretion of the custodian by focusing on the fact that visitation with a dependent child must be based on the best interest of the child. See, e.g., P.S. v. M.S., 101 So. 3d 228, 233 (Ala. Civ. App. 2012) (quoting Floyd v.

¹Having so concluded, we do not separately consider whether the mother's apparent drug use or the exposure of the child to domestic violence in the mother's household are sufficient independent bases for concluding that the child is dependent.

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Alabama Dep't of Human Res., 550 So. 2d 980, 981 (Ala. Civ. App. 1988)) ("This court has repeatedly stated that the trial court's only parameter [for awarding visitation to the parent of a dependent child] is the best interests and welfare of the child."). DHR also states in its brief that, in light of the mother's conduct, "the appropriateness of [the mother's] behavior and demeanor should be evaluated by [the custodian] on each occasion that [the mother] desires to visit with [the child]." See, generally, Ex parte Thompson, 51 So. 3d 265, 272 (Ala. 2010) ("A trial court in establishing visitation privileges for a noncustodial parent must consider the best interests and welfare of the minor child and, where appropriate, as in this case, set conditions on visitation that protect the child.").

We do not disagree with either proposition advanced by DHR. However, we have repeatedly explained that failing to set a visitation schedule and allowing visitation to be at the sole discretion of a custodian is error.

"This court has previously held that it is reversible error for a juvenile court to leave the matter of a noncustodial parent's visitation rights to the sole discretion of a custodial parent or other legal custodian of the child. See, e.g., L.L.M. v. S.F., 919 So. 2d 307 (Ala. Civ. App. 2005)

(reversing a juvenile court's visitation award that placed the father in control of the mother's visitation with the child), and K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379 (Ala. Civ. App. 2004) (reversing a juvenile court's visitation award that essentially conditioned the mother's right to visitation with her child upon the consent of the child's aunt and uncle); see also D.B. v. Madison County Dep't of Human Res., 937 So. 2d 535, 541 (Ala. Civ. App. 2006) (plurality opinion reversing a juvenile court's judgment that made the mother's visitation "subject to any conditions and limitations deemed to be necessary and appropriate" by the child's great aunt, who was awarded custody of the child)."

A.M.B. v. R.B.B., 4 So. 3d 468, 471-72 (Ala. Civ. App. 2007).

The juvenile court's judgment in the present case does not provide that the custodian may decline to allow visitation if the mother is under the influence of alcohol or drugs, which would be judicious bases for the custodian's right to veto a particular visitation. See, e.g., Watkins v. Lee, 227 So. 3d 84, 89 (Ala. Civ. App. 2017) (affirming a judgment containing a visitation provision that permitted the custodial parent to decline to allow the noncustodial parent to exercise visitation if the custodial parent believed that the noncustodial parent was under the influence of alcohol or drugs or would be placing the child in danger). Instead, the juvenile court's judgment, as worded, gives the custodian the

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unfettered right to arrange, or to decline to arrange, visitation between the mother and the child at her sole discretion and provides only an illusory right to visitation in the mother. The juvenile court's judgment, insofar as it awarded the mother visitation at the sole discretion of the custodian, is therefore reversed.

In conclusion, we affirm the judgment of the juvenile court insofar as it concluded that the child was dependent as a result of the conduct or condition of the mother. However, because the juvenile court awarded the mother visitation at the sole discretion of the custodian, we reverse the judgment insofar as it pertains to visitation, and we remand the cause to the juvenile court for it to enter an amended visitation provision in compliance with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

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