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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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A.V.

v.

Houston County Department of Human Resources

**Appeal from Houston Juvenile Court
(JU-18-101.01)**

FRIDY, Judge.

A.V. ("the father") appeals from a judgment of the Houston Juvenile Court ("the juvenile court") determining that his child, L.V. ("the child"),

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is dependent and transferring custody of the child to the Houston County Department of Human Resources ("DHR"). We reverse and remand.

Background

In April 2017, K.S. ("the mother") gave birth to the child out of wedlock. The father completed an affidavit of paternity and was listed as the father of the child on the child's birth certificate. In February 2018, DHR received a report that the father had struck the mother in the back of the head. In response to that report, Lynn Bennett, a DHR employee, interviewed the mother, who told Bennett that the father had struck the mother in the back of her head with his elbow while she was holding the child and that the blow had left a "knot" in the back of her head. Bennett subsequently spoke to the father by telephone regarding the mother's allegation, and he denied that he had struck the mother. Thereafter, Bennett made an administrative finding that domestic violence was "indicated" and that inadequate supervision by the father was also "indicated." The mother reported the incident to the police, and the father was charged with domestic violence.

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Although DHR did not implement a safety plan in February 2018, the mother agreed that she would not let the father, who lived with the child's paternal grandmother, take the child from the mother's home. Subsequently, however, the mother reported to DHR that she had asked the father to care for the child for a short period while she worked and that he had refused to return the child to her.

On February 27, 2018, DHR commenced a dependency action regarding the child and obtained a pickup order authorizing the removal of the child from the parents' custody. Thereafter, the police located the father and the child at a self-service laundry, removed the child from the father's custody, and transported the child to the juvenile court, where DHR took charge of the child. Bennett testified that the child had been in the father's care between one and two weeks when the child was picked up and that the child was well nourished and in good condition when the police brought the child to the juvenile court.

On March 9, 2018, the juvenile court held a shelter-care hearing and entered an order placing the child in the custody of DHR pendente lite. The father, who was not served with process until May 9, 2018, filed a

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motion to stay the dependency action because a criminal charge of domestic violence stemming from the mother's February 2018 report to the police that he had struck her in the back of the head was pending against him. In response to the father's motion, the juvenile court entered an order staying the adjudication of the child's dependency as to the father pending the adjudication of the domestic-violence charge against him. The mother, who was then incarcerated, consented to the entry of a judgment determining that the child was dependent as to her. Thereafter, the criminal charge of domestic violence against the father was dismissed, and the juvenile court set the trial of the dependency action with respect to the father for February 14, 2020.

The juvenile court conducted a bench trial on February 14, 2020. The evidence at trial indicated that, subsequent to DHR's becoming involved with the family, the father, at the request of DHR, had completed parenting and anger-management classes and had undergone both a psychological assessment and a drug assessment. The father had also maintained employment and a stable place to live since February 2018. The father visited the child consistently and brought items such as a toy,

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a bottle of juice, a bag of gummies, diapers, and wipes to the visits. After each visit, DHR asked the father to undergo a test for illicit drugs, but he appeared for only one of those tests, the results of which were positive for synthetic marijuana, in September 2018. The evidence established, however, that, as a result of a 2018 conviction for possession of a controlled substance – namely, synthetic marijuana -- the father had been undergoing tests for illicit drugs in a program operated by the Houston County Court Referral Office. Angie Gore, a court-referral officer, testified that she had reviewed the father's file and that in the last year he had undergone four six-panel urine tests for the presence of illicit drugs at a facility operated by SpectraCare and that each time the tests were negative for the presence of amphetamines, cocaine, opiates, benzodiazepines, methadone, THC, and abnormal levels of creatinine. Gore testified that typically SpectraCare did not test for synthetic marijuana because, she said, the test results were not accurate due to the constant change in the makeup of synthetic marijuana; however, Gore testified, the father's records indicated that, in October 2019, the father

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had been tested for synthetic marijuana and that the result of that test was negative.

The evidence indicated that the father's driver's license had been suspended but that he had nonetheless driven on occasion after his license had been suspended. The evidence also indicated that the father had pleaded guilty to a charge of possession of synthetic marijuana in 2018, that he had been sentenced to 24 months in prison, that that sentence had been suspended, and that he had been placed on supervised probation for 24 months. The evidence further indicated that he had failed to report to his probation officer on 1 occasion and that he had served 30 days in jail as punishment for that probation violation. When he was released from jail, the court-referral office reported that he was not in compliance with the court-referral program; however, that complaint was subsequently dismissed. The father admitted that he had also been arrested in January 2019 on a charge of possession of synthetic marijuana; however, that charge had not been adjudicated when this action was tried. DHR's caseworker testified that the reason DHR was seeking a determination

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that the child was dependent as to the father was the belief that he was continuing to use synthetic marijuana.

On February 18, 2020, the juvenile court entered a judgment determining that the child was dependent based on the following facts: "[The] mother is incarcerated at [a facility operated by the Alabama Department of Corrections]; [the] father has been convicted of possession of controlled substance (synthetic marijuana) and has another charge pending for possession of controlled substance (synthetic marijuana) since the child came into care." As to the disposition of the child, the juvenile court awarded custody of the child to DHR. The father timely appealed to this court. This court has jurisdiction over the appeal pursuant to Rule 28(A)(1)(c)(i), Ala. R. Juv. P.

Standard of Review

"The right to maintain family integrity is a fundamental right, protected by due process requirements of the Constitution." In re Moore, 470 So. 2d 1269, 1270 (Ala. Civ. App. 1985). "This affords a parent a prima facie right to custody of its child." Id. This presumptive right "may be overcome by clear and convincing evidence demonstrating that the

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parents are currently unable to discharge their responsibilities to and for the child and that the child requires additional care and supervision through the state, i.e., that the child is 'dependent.' " R.F.W. v. Cleburne Cnty. Dep't of Hum. Res., 70 So. 3d 1270, 1272 (Ala. Civ. App. 2011) (citing Ala. Code 1975, § 12-15-102(8)a.6.). "Clear and convincing evidence" is statutorily defined as "[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." Ala. Code 1975, § 6-11-20(b)(4). It is more "than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt." Id. " '[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.' " V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting K.B. v. Cleburne Cnty. Dep't of Hum. Res., 897 So.2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result)).

"On appeal from a judgment finding a child dependent following an ore tenus proceeding, we presume the juvenile court's factual findings are

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correct," and we will not disturb those findings "if they are supported by sufficient evidence." R.F.W., 70 So. 3d at 1272. Our role in considering the sufficiency of the evidence regarding a determination of dependency is not to reweigh the evidence but, instead, to determine "whether the juvenile court, acting in its fact-finding role, reasonably could have determined from its own weighing of the evidence that the dependency of the child was proven by clear and convincing evidence as that standard is defined above." Id.

Analysis

On appeal, the father argues that the juvenile court's judgment is not supported by clear and convincing evidence indicating that the child is dependent. The two facts upon which the juvenile court based its determination that the child was dependent as to the father -- that the father had been convicted of possession of synthetic marijuana and had a second charge of possession of synthetic marijuana pending against him when this action was tried -- are supported by undisputed evidence. The issue, however, is whether those two undisputed facts constituted a

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sufficient basis for the juvenile court's determination that the child is dependent as to the father.

Section 12-15-102(8)a., Ala. Code 1975, defines a "dependent child" as one

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

"....

"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."

The juvenile court implicitly concluded that the father's 2018 conviction for possession of synthetic marijuana and his January 2019 arrest for possession of synthetic marijuana either rendered him unable or unwilling to discharge his responsibilities to and for the child or rendered the child in need of the care and protection of the state. We note that the only drug test that indicated that the father used synthetic

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marijuana was conducted at DHR's request in September 2018, approximately 16 months before the trial of this action in February 2020. All the drug tests conducted by the court-referral office during the year immediately preceding the trial of this action were negative for the presence of illicit drugs. "In a dependency proceeding, the evidence must clearly and convincingly establish that the child is dependent at the time of the disposition." J.P. v. D.P., 260 So. 3d 862, 871 (Ala. Civ. App. 2018) (emphasis added). The record contains no evidence indicating that the father had used synthetic marijuana or any other illicit drug subsequent to his January 2019 arrest for possession of synthetic marijuana, which occurred approximately a year before the trial of this action.

The dissent asserts that the juvenile court could have inferred that the father was using synthetic marijuana at the time of trial from "the totality of the circumstances," ___ So. 3d at ___, which, the dissent says, includes not only the facts the trial court cited in support of its determination that the child was dependent but also evidence that the juvenile court did not cite, such as (1) the father's refusal to submit to drug tests requested by DHR; (2) the father's drug test that was positive

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for the presence of synthetic marijuana in September 2018, well over a year before the trial; and (3) the testimony of a DHR caseworker that the father appeared to be nervous at some of his visits with the child, which the DHR caseworker considered indicative of drug use by the father. We note, however, that the juvenile-court judge herself stated on the record that the father was not legally obligated to submit to the drug tests requested by DHR, so it is highly unlikely that the juvenile court would have deemed the father's refusal to submit to those drug tests as constituting evidence of drug use by the father. We also note that the same DHR caseworker who testified that the father had appeared nervous at some of his visits with the child also testified that the father had behaved appropriately at the visitations with the child.

More importantly, we note that, even if, as the dissent suggests, the evidence would support a finding that the father was using synthetic marijuana when this action was tried, the record contains no evidence indicating that drug use by the father had adversely affected the father's ability to care for the child. See H.A.S. v. S.F., 298 So. 3d 1092, 1103 (Ala. Civ. App. 2019) (holding that evidence indicating that a mother had used

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marijuana did not clearly and convincingly support a conclusion that her child was dependent in her custody based on the mother's drug use when "no evidence in the record indicated that the mother's drug use had actually impacted her ability to rear [her] child").

Considering the totality of the evidence, we conclude that the juvenile court did not have before it clear and convincing evidence indicating that the child was dependent as to the father at the time of the disposition. Consequently, we reverse the judgment of the juvenile court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, Edwards, and Hanson, JJ., concur.

Thompson, P.J., dissents, with writing.

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THOMPSON, Presiding Judge, dissenting.

When making a determination of dependency, the juvenile court exercises its discretion by considering the totality of the circumstances and the best interests of the child. The juvenile court's judgment will be reversed only if it is not supported by the evidence and, thus, is plainly and palpably wrong. H.A. v. Limestone Cnty. Dep't of Hum. Res., 628 So. 2d 948 (Ala. Civ. App. 1993). When considering the sufficiency of the evidence to support a determination of dependency, this Court considers whether the juvenile court's determination was supported by clear and convincing evidence. J.B. v. DeKalb Cnty. Dep't of Hum. Res., 12 So. 3d 100, 112 (Ala. Civ. App. 2008). This Court is not a fact-finder, and, therefore, although we might have reached a different result, this court is not allowed to substitute its judgment for that of the trial court, unless the trial court's resolution of the facts is plainly and palpably wrong. C.B.S. v. Walker Cnty. Dep't of Hum. Res. [Ms. 2180971, July 31, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020).

Mindful that it is within the juvenile court's discretion to determine dependency when the evidence is presented ore tenus, see J.M. v. State

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Dep't of Hum. Res., 686 So. 2d 1253, 1255 (Ala. Civ. App. 1996), I conclude, based on my review of the record, that the Houston County Department of Human Resources ("DHR") presented clear and convincing evidence -- i.e., evidence that is competent, material, and relevant in nature, see § 12-15-311(a), Ala. Code 1975, -- that supports the juvenile court's determination that the child was dependent as to A.V., the father, at the time of disposition. Section 12-15-102(8)a.6., Ala. Code 1975, defines a dependent child as one who is in need of care or supervision because the child's parent is "unable or unwilling to discharge his or her responsibilities to and for the child." The main opinion concludes that the juvenile court's determination that the child was dependent at the time of disposition based on the father's past conviction for possession of a controlled substance and his pending charge for possession of a controlled substance since the child came into DHR's care is not supported by clear and convincing evidence. I disagree.

I recognize that a suspicion of substance-abuse issues and a refusal to participate in DHR drug screens, standing alone, do not constitute clear and convincing evidence that a parent is unable to care for and protect the

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child so as to support the termination of the parent's parental rights. See D.W. v. Jefferson Cnty. Dep't of Hum. Res., 295 So. 3d 1107, 1113 (Ala. Civ. App. 2019)(holding that, without affirmative evidence indicating that the father was abusing drugs, sufficient evidence was not presented that the father had a current drug problem "such that termination of the father's parental rights was warranted"). However, the juvenile court in this case did not terminate the father's parental rights; rather, it found implicitly that the totality of the evidence supported more than a suspicion of drug use and a determination that the father was unwilling to discharge his responsibilities as a parent at the time of disposition.

The record establishes that Beth Lee Wilson, a DHR employee, testified that, after each visit between the father and the child that she observed, she asked the father to take a drug screen and he refused to do so. She further testified that during some of those visits the father's behavior indicated that he was under the influence of drugs. Additionally, evidence was presented indicating that the father had tested positive for synthetic marijuana, his drug of his choice, since DHR had become involved with the family; that the court-referral testing that he had

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participated in typically did not test for synthetic marijuana and that, when it did, the father's negative result was questionable due to the known inaccuracy of the test; that he tested positive for synthetic marijuana in 2018; and that he had been charged in 2019 for possession of a controlled substance -- synthetic marijuana. The foregoing evidence as well as the father's recalcitrant testimony regarding his possession and usage of a controlled substance and his other illegal conduct, in their totality, amount to clear and convincing evidence that the father, at the time of disposition, was unwilling to adjust his circumstance to care for and protect the child.

Moreover, this case is easily distinguishable from S.K. v. Madison County Department Human Resources, 990 So. 2d 887 (Ala. Civ. App. 2008), in which this court held that a juvenile court's finding that the father had failed to participate in some random drug screens did not support the termination of the father's parental rights. In S.K., the father had tested negative in 30 drug screens, had provided plausible employment-related reasons for his 17 "no shows," and had requested an alternative testing site that would eliminate his "no-show" issue.

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Here, the father refused to engage in all but one of the drug screens DHR requested and did not provide plausible reasons for his failure to participate. The record does reflect that the father stated that, after his visitations with the child, he did not have transportation to drive to the DHR drug-screening facility; however, the record also includes testimony from the father's grandmother indicating that she was willing to drive him after the visitations. Unlike the father in S.K. who was attempting to address concerns about the impact of his drug use on his ability to parent the child, the father in this case did nothing to address DHR's concerns and avoided all DHR testing, except for one screen that produced a positive result for synthetic marijuana.

The juvenile court made a dependency determination based on evidence that clearly and convincingly demonstrated that the father is engaging in conduct that prevents him from discharging his responsibilities for the child and unequivocally reflects his unwillingness to adjust his circumstances to meet the needs of the child. See J.L. v. W.E., 64 So. 3d 631, 636 (Ala. Civ. App. 2010)(quoting M.E. v. Shelby Cnty. Dep't of Hum. Res., 972 So. 2d 89, 100 (Ala. Civ. App. 2007))("In

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determining whether a child is dependent," the juvenile court "'may consider any competent evidence relevant to the ability or willingness of the parent to discharge his or her responsibilities to the child ...' "). Early in the proceedings, the juvenile court encouraged the father "to step up to the plate" and to " do what needs to be done to change [his] lifestyle. Can't raise a baby in prison. Okay? I need to make sure this child is safe."

However, the father's continual irresponsible conduct that was still ongoing at the time of disposition -- as evidenced by his refusal to participate in DHR services, his driving with a suspended license, and his recalcitrant testimony regarding his conduct -- amounts to clear and convincing evidence of the father's "unwilling[ness] to discharge his ... responsibilities to and for the child" and supports the juvenile court's judgment determining that the child was dependent as to the father at the time of disposition. Although the juvenile court transferred custody of the child to DHR, the father has an opportunity to continue his relationship with his child if he chooses to develop the skills he needs to take care of, and to be reunited with, his child. Because the totality of the evidence demonstrates that the child is dependent and that it is in the best interest

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of the child that he remain in DHR's custody so that DHR can continue to work with the father to reunite him with his child, the juvenile court's judgment is not plainly and palpably wrong.

Thus, I respectfully dissent.