

Rel: January 15, 2021

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190836, 2190837, and 2190838

L.C.

v.

Jefferson County Department of Human Resources

Appeals from Jefferson Juvenile Court
(JU-16-1339.02, JU-16-1343.02, and JU-19-219.01)

THOMPSON, Presiding Judge.

L.C. ("the mother") separately appeals from three judgments entered by the Jefferson Juvenile Court ("the juvenile court"), each one involving

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one of her three children, G.F. (appeal no. 2190836), J.F. (appeal no. 2190837), and N.C. (appeal no. 2190838). In separate judgments, the juvenile court terminated the mother's parental rights to the older children, J.F. and G.F. ("the older children"). The juvenile court also entered a judgment in which it found N.C., the youngest child ("the youngest child"), to be dependent and placed the youngest child in the custody of J.C. ("the maternal aunt").¹ The three actions were tried together.

The record and the evidence presented at the trial indicate the following. The older children were, respectively, five years old and four years old at the time the judgments were entered. The youngest child was a year old at that time. The Jefferson County Department of Human Resources ("DHR") first became involved with the family in July 2016,

¹No legal fathers of the children were named in the termination-of-parental-rights petitions relating to the older children or the dependency petition relating to the youngest child, in which it was asserted that the children's birth certificates did not name a father. Any potential legal fathers were served by publication. No one claiming to be the father of any or all of the children appeared in the actions, and no one claiming to be a father of any or all of the children has appealed from the juvenile court's judgments.

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after police were called to the parking lot of a Walmart store on the morning of July 28, 2016, regarding a child who had been left unattended in a vehicle. The mother testified that she had stopped the Walmart store to purchase one item she had been unable to buy at an earlier stop. She said that G.F., who was one year old at the time, was the only child with her. The mother said that because G.F. was asleep and she had believed that it would not take her long to purchase just one item, she had left G.F. in the vehicle with the windows partially down. When she came out of the Walmart store, the mother said, the police and paramedics had already removed G.F. from the vehicle. Video recordings indicated that the mother had been inside the store for 18 minutes. The mother conceded that G.F. was "filthy" when she was removed from the vehicle and treated by the paramedics.

The mother also acknowledged that, at first, she had provided police with an incorrect name and had neglected to tell them that she had another child. The record is not fully developed regarding this point, but the older children were taken into protective custody. Tijuana Nevel, the third DHR social worker to work with the mother after the July 2016

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incident at the Walmart store, testified that she was first assigned to the mother's case in March 2018. Nevel said that she attempted to contact the mother but was unable to reach her for a number of months. Nevel said that she also had contacted family members of the mother but that they had not known where the mother was living. Nevel said that the mother eventually contacted her in November 2018.

The mother testified that she had been evicted from her house and had stopped communicating with DHR in May 2018. She also stated that she had not visited the older children from March 2018 through November 2018. The mother said that, in September 2018, she had been "feeling [her] moods and stuff change" and had been having suicidal thoughts, so she checked herself into the psychiatric ward at the University of Alabama at Birmingham ("UAB") Hospital. She remained at the hospital for seven days, then was discharged and given a prescription for Zoloft, an anti-depressant, to take as needed and was advised to seek counseling. In October 2018, the mother became a resident at Mary's Shelter, a place for homeless women and children, in Baldwin County. She was pregnant with the youngest child at that time. Mary's Shelter required the mother

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to undergo a psychological assessment through AltaPointe Health in March 2019. The mother testified that that assessment indicated that no additional counseling or mental-health treatment was needed.

Nevel said that the mother contacted her from Mary's Shelter in November 2018. In December 2018, DHR filed petitions seeking to terminate the mother's parental rights to the older children. Those petitions were based on allegations that the older children had been in DHR's custody since July 2016 and that the mother had made "little progress towards reunification" with those children. The petitions also alleged, among other things, that the mother had made no effort to visit the older children in eight months. Whether the mother had abandoned the older children was not an issue in the trial court.

The youngest child was born in Baldwin County on January 2, 2019. The Baldwin County Department of Human Resources ("the Baldwin County DHR") filed a dependency petition regarding the youngest child on January 7, 2019. Nevel testified that she first met the mother at the shelter-care hearing for the youngest child in Baldwin County on January 7, 2019, after which the Baldwin County DHR was awarded custody of the

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youngest child. On February 15, 2019, the matter regarding the youngest child was transferred from Baldwin Juvenile Court to the Jefferson Juvenile Court. After a hearing on April 17, 2019, the juvenile court awarded custody of the youngest child to the maternal aunt. That same day, the juvenile court continued the termination-of-parental-rights trials regarding the older children on DHR's motion. DHR explained that, at that time, the mother was making substantial progress.

On May 21, 2019, Dr. Jack Carney, a licensed psychologist, administered a battery of psychological tests to the mother. Much of the trial regarding the termination of the mother's parental rights focused on Dr. Carney's descriptions of the tests, the results of those tests, and how they reflected the mother's psychological state. Based on his evaluation of the mother, Dr. Carney diagnosed her with a "borderline" IQ, narcissistic personality disorder, major depressive disorder, and attention-deficit disorder. Dr. Carney testified that the test results revealed a probability that the mother would in all likelihood respond in certain ways to different situations. For example, based on her scores on one test, Dr. Carney said, the mother was likely to be inattentive, she may "zone out,"

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she may not always appreciate dangerous situations the children may be in, and she may make "unnecessary mistakes."

On another test, the mother scored high on "self-deception." People with similar scores, Dr. Carney said, were likely to be "rigid" and to fail to take ownership of problems. Other test results indicated to Dr. Carney that the mother was likely to become easily frustrated with a child. The conditions diagnosed cause the mother to place her needs ahead of the needs of others, Dr. Carney said. He recommended parenting classes, anger-management classes, medication, and counseling for the mother.

In addition to administering the psychological tests to the mother, Dr. Carney observed the mother with the older children over the course of several hours. He testified that the mother had ignored the younger of those two children and that although she had been slightly more responsive to the oldest child, overall, he found her to be "cold" and indifferent to the older children and their needs, and he did not believe she had the capacity to care for or protect the children. During the visitations he had observed, Dr. Carney said, the older children went to their foster mother, with whom they had lived for only three months, for

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reassurance and, he noted, they were already more attached to or bonded with the foster mother than with the mother. Such conduct was consistent with the results of his psychological assessment of the mother, Dr. Carney said. As a result of the testing and his observations of the mother, Dr. Carney testified, he believed that it was unlikely that the mother would be able to improve sufficiently in the foreseeable future such that she could parent the children. He therefore recommended the termination of the mother's parental rights to the older children.

Nevel testified that DHR had made referrals for the mother to obtain in-home services in 2017 and again in 2019. She said that DHR had been unable to contact the mother in 2017, so the mother did not receive services at that time. In 2019, the mother was at Mary's Shelter, and she could not receive the in-home services there. Upon leaving Mary's Shelter, the mother obtained employment and a stable residence. Nevel testified that DHR did not have concerns with the mother in those areas.

At a July 31, 2019, individualized service plan ("ISP") meeting with the mother, Nevel said, the mother was advised that she was required to receive and complete therapy for narcissistic personality disorder.

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However, Nevel said, the mother never obtained the recommended counseling services, telling Nevel that she did not need those services. The mother referred to the results of the assessment through AltaPointe as the basis for her refusal. The mother testified that she recalled taking part in the July 31, 2019, ISP meeting but that she did not recall being asked to attend therapy. She also denied receiving any letters from Nevel regarding the need for her to undergo therapy. Nevel testified that she had mailed four letters to the mother regarding her need for therapy. The mother testified that she had told Nevel that she did not need the therapy or treatment recommended by Dr. Carney. She also testified that she did not need the counseling the doctors at UAB Hospital had recommended. The mother's mental health remained a concern for DHR, Nevel testified.

The mother testified that she had not visited the children from May 2018 through November 2018 because of her depression. In January 2019, the mother began regular visitation with the children. Before her psychological assessment by Dr. Carney in May 2019, the mother had unsupervised visitation with the children. Once the COVID-19 coronavirus pandemic caused an end to in-person visitation, the mother

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talked with the children on the telephone. However, after the first day of testimony on March 5, 2020, the mother contacted the children only once before the next trial date on July 10, 2020. The second day of the trial had been continued because of lockdowns caused by the coronavirus pandemic. On July 10, 2020, the mother testified that she had not contacted the children because, she said, in a March 27, 2020, virtual meeting conducted via the internet, the older children had referred to their foster mother as "mom." Although the juvenile court had instructed the mother at the March 5, 2020, hearing to obtain mental-health counseling, the mother testified that she had not complied with that instruction. She has never sought the treatment recommended by Dr. Carney.

On July 15, 2020, the juvenile court entered three judgments -- one regarding each child. The judgments regarding the older children were essentially identical. In those judgments, the juvenile court found that the mother was unable to discharge her responsibilities to those children.

The juvenile court also found that the mother's conduct and conditions were such as to render her unable to properly care for the older children

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and were unlikely to change in the foreseeable future. Furthermore, the juvenile court found, the mother had failed to adjust her circumstances to meet the needs of the older children. It also found that there were no suitable relatives to take custody of the older children and there were no viable alternatives to the termination of the mother's parental rights to the older children. Accordingly, the juvenile court terminated the mother's parental rights as to the older children. Regarding the youngest child, the juvenile court entered a judgment in which it found that that child was dependent, and it awarded custody of the youngest child to the maternal aunt.

The mother did not file a postjudgment motion. On July 23, 2020, she filed timely notices of appeal to this court.

On appeal, the mother argues that the juvenile court's judgments terminating her parental rights to the older children were not supported by clear and convincing evidence.

" 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

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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, at the time the termination petitions were filed, provided, in relevant part, the following statutory grounds for termination of parental rights:

"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 the needs of the child.

",...

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"(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.

"....

"(10) Failure by the parents to maintain regular visits with the child in 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."²

As mentioned, in its judgments terminating the mother's parental rights to the older children, the juvenile court found that the mother was unable to discharge her responsibilities to and for the older children, that her conduct and condition were such as to render her unable to properly

²Section 12-15-319, including subsection (a), was amended effective March 11, 2020. See Act No. 2020-34, Ala. Acts 2020. Those amendments are not relevant to the disposition of these appeals.

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care for the older children, and that her condition was unlikely to change in the foreseeable future. The juvenile court further found that the mother had failed to adjust her circumstances to meet the older children's needs.

"A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. P.S. v. Jefferson Cty. Dep't of Human Res., 143 So. 3d 792, 795 (Ala. Civ. App. 2013). '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)). Although a juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct, K.P. v. Etowah Cty. Dep't of Human Res., 43 So. 3d 602, 605 (Ala. Civ. App. 2010), '[t]his 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.' K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016). That is, this court ' "must ... look through [the prism of the substantive evidentiary burden,' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (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.,

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219 So. 3d at 653 (quoting Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008), quoting in turn Ala. Code 1975, § 25-5-81(c))."

J.C. v. Madison Cnty. Dep't of Hum. Res., 293 So. 3d 901, 907 (Ala. Civ. App. 2019).

The record contains little evidence regarding the mother's conduct or DHR's efforts toward rehabilitating the mother between the time the older children were removed from the mother's custody in July 2016 and March 2018, when Nevel began working as the mother's social worker. The evidence is undisputed that, from the end of March 2018 through November 2018, the mother did not visit with or contact the older children and did not have contact with DHR between May 2018 and November 2018. Nevel said that the mother's family did not know of her whereabouts during that time. During that period, the mother checked herself into UAB Hospital for a week because of psychological issues, including suicidal thoughts, then later moved to Mary's Shelter, a homeless shelter for women in Baldwin County. It was while she was a resident at Mary's Shelter that the mother eventually contacted DHR again.

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After reconnecting with DHR, the mother began regularly visiting with the children again. The mother's visitations went well, and eventually she was permitted to have unsupervised visitation with the older children. However, after Dr. Carney provided his psychological assessment and diagnosis of the mother's mental condition, DHR required the mother's visitations to be supervised. As the mother points out, she had adequate housing and had maintained a steady job for a year before the trial, and DHR was not concerned with those issues. However, Nevel said, DHR was concerned with the mother's psychological issues as identified by Dr. Carney.

Dr. Carney's recommendation that the mother's parental rights be terminated is based on what he believes is the mother's likely behavior based on her test results rather than on her actual behavior. DHR accepted that anticipated behavior as its primary basis for going forward with the petitions to terminate the mother's parental rights to the older children. There is no evidence indicating that the mother's unsupervised visits with the children after January 2019 were in any way

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inappropriate, and the sole basis for returning the mother to supervised visitation appears to be the results of her psychological assessment.

At the time of the trial, the mother had been steadily employed since leaving Mary's Shelter, and Nevel said that DHR was not concerned about the mother's financial condition. Similarly, DHR had found that the mother's residence was suitable for the children. A review of the record indicates that, at the time of the trial, the only evidence indicating a cause for concern about the mother's mental condition was her probable reaction to different situations, as identified by Dr. Carney, based on the results of his assessment of the mother and not on any specific behavior noticed by DHR.

Admittedly, these are close cases. There are aspects of the mother's behavior that are worrisome and give the members of this court pause. Foremost among our concerns is the length of time the older children have been in foster care. More than four years have passed since the incident at the Walmart store that resulted in the removal of the older children from the mother's custody. Additionally, the mother has refused to obtain the counseling and mental-health treatment that Dr. Carney has

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recommended. The mother did not believe that she needed such treatment. Although doctors at UAB Hospital had also recommended that the mother obtain treatment for depression, the mother did not heed their recommendation, either. However, the mother points out that a psychological examination to which she submitted because it was required for her stay at Mary's Shelter did not result in a determination that the mother suffered from mental illness or a recommendation that she receive counseling.

Furthermore, after the first day of the trial, the juvenile court instructed the mother to obtain counseling. Even then, when there was a four-month delay between the first day of the trial on March 5, 2020, and the next trial date of July 10, 2020, the mother made no effort to seek counseling services from any source.

We must weigh our concerns against the permanency of terminating the mother's parental rights, especially when there is evidence indicating that the mother is indeed improving her situation. This court has also recognized that "the termination of parental rights is a drastic measure, and we know of no means by which those rights, once terminated, can be

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reinstated." V.M. v. State Dep't of Hum. Res., 710 So. 2d 915, 921 (Ala. Civ. App. 1998). In Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990), our supreme court wrote: "Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances."

In these cases, the mother has obtained a steady job and stable, suitable housing. She had been able to exercise unsupervised visitation with the children until Dr. Carney advised DHR of his psychological assessment of the mother. Under the circumstances, concern about the mother's predicted behavior is merely speculation and, therefore, does not constitute evidence, let alone clear and convincing evidence, of her inability or unwillingness to parent the older children. DHR did not present any evidence indicating that the mother's recent actual conduct, as opposed to her predicted conduct, has been detrimental to the older children. Accordingly, we conclude that the evidence does not reflect egregious circumstances requiring the drastic measure of terminating the mother's parental rights to the older children. Thus, the judgments terminating the mother's parental rights to the older children are due to

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be reversed. In reaching this holding, we do not express an opinion as to whether the mother has been rehabilitated sufficiently to avoid having her parental rights terminated at another time if the mother continues to fail to address her mental health. We hold only that DHR failed to prove by clear and convincing evidence that the termination of her parental rights at this point is warranted.

Because we reverse the judgments terminating the mother's parental rights to the older children, we pretermitt any discussion of the other issues the mother has raised on appeal regarding those judgments. However, none of the arguments the mother makes on appeal pertain to the juvenile court's judgment finding the youngest child to be dependent and awarding custody of that child to the maternal aunt. It is well settled that arguments not raised in an appellate brief are deemed waived. Tucker v. Cullman–Jefferson Cntys. Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) (stating that issues not raised and argued in brief are waived); Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."). Accordingly, the judgment regarding the youngest child is affirmed.

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2190836 -- REVERSED AND REMANDED.

2190837 -- REVERSED AND REMANDED.

2190838 -- AFFIRMED.

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