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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200174 and 2200175

T.M.W.

v.

W.S.L. III and C.S.L.

**Appeals from Madison Juvenile Court
(JU-12-734.03 and JU-20-302.01)**

MOORE, Judge.

In appeal number 2200174, T.M.W. ("the mother") appeals from a judgment entered by the Madison Juvenile Court ("the juvenile court")

2200174 and 2200175

modifying her visitation with her older son, P.L. In appeal number 2200175, the mother appeals from a judgment finding her younger son, J.W., dependent and awarding custody of J.W. to W.S.L. III and C.S.L. ("the maternal grandparents"). We reverse the judgments and remand the cases to the juvenile court with instructions.

Procedural History

The mother gave birth to P.L. out of wedlock in September 2008. In 2012, the maternal grandparents initiated a dependency proceeding in the juvenile court relating to P.L. (case number JU-12-734.01). On August 6, 2012, the juvenile court entered a judgment finding P.L. dependent, awarding custody of P.L. to the maternal grandparents, and awarding the mother visitation. The mother married C.W. in 2013. In June 2014, she gave birth to J.W. In 2016, the mother filed a petition to regain custody of P.L. (case number JU-12-734.02). On November 4, 2016, the mother and the maternal grandparents entered into an agreement, which was ratified by the juvenile court, maintaining custody of P.L. in the maternal grandparents but modifying the mother's visitation rights to allow her unsupervised visitation with P.L. each week from 3:00 p.m. on Monday to

2200174 and 2200175

8:00 a.m. on Tuesday, on the first and third weekends of each month, during spring break each year, during alternating weeks in the summer, and on specified holidays.

On March 27, 2020, the maternal grandparents filed a petition (case number JU-20-302.01) alleging that J.W. was dependent and requesting that they be awarded custody of him. The mother subsequently answered that petition. On June 12, 2020, the maternal grandparents filed a petition (case number JU-12-734.03) requesting that the juvenile court suspend the mother's visitation with P.L. On June 23, 2020, the mother filed, in case number JU-12-734.03, a counterclaim seeking a modification of the custody and visitation provisions of the November 2016 judgment regarding P.L.; she also requested that the juvenile court hold the maternal grandparents in contempt for their having failed to allow her to exercise her court-ordered visitation with P.L.

The juvenile court consolidated the petitions and counterclaim for trial, which was held over the course of two days -- on September 22 and 23, 2020. Thereafter, on November 10, 2020, the juvenile court rendered a judgment that was entered in both case number JU-12-734.03 and case

2200174 and 2200175

number JU-20-302.01. With regard to J.W., the juvenile court found him to be dependent, awarded custody of J.W. to the maternal grandparents, and awarded the mother unsupervised visitation every Sunday from 1:00 p.m. to 8:00 p.m. With regard to P.L., the juvenile court reduced the mother's unsupervised visitation to every Sunday from 1:00 p.m. to 8:00 p.m. and denied all other requested relief. The mother filed a postjudgment motion in both cases on November 12, 2020; that motion was denied on November 24, 2020. The mother filed her notices of appeal on December 1, 2020. This court consolidated the appeals.

Issues

The mother first contends that the juvenile court erred in adjudicating J.W. to be a dependent child without sufficient evidence. Second, the mother maintains that the juvenile court erred in modifying her visitation with P.L.

The Evidence

At trial, the juvenile court received the following evidence relevant to these appeals. The mother met C.W. ("the father"), who is the father of both P.L. and J.W., in 2006, when she was 16 years old and residing

2200174 and 2200175

with the maternal grandparents. The mother testified that, during their relationship, the father had abused, manufactured, and sold illegal drugs and had committed acts of domestic violence against her. The maternal grandparents testified that, when the mother began dating the father, the father introduced the mother to illegal drugs and that the mother began using marijuana and doctor shopping for oxycodone, a narcotic pain medication. The mother admitted that in her teenage years she had developed an addiction to a brand of oxycodone known as Roxicodone. The maternal grandparents encouraged the mother to end her relationship with the father, but she continued to see him, eventually becoming pregnant and giving birth to P.L. in September 2008.

In 2012, the maternal grandparents obtained sole physical and legal custody of P.L. through dependency proceedings in the juvenile court. At that time, the mother had agreed that she was not in a position to properly care for P.L. and further agreed that the maternal grandparents should take care of P.L. at least temporarily until she could be in a position to care for him independently. The maternal grandfather testified that he had wanted the mother to enroll in higher education

2200174 and 2200175

classes and that he and the maternal grandmother had stated their intent to care for P.L. until the mother could improve her circumstances to become a proper caretaker.

According to the maternal grandfather, instead of taking advantage of the opportunities presented to her, the mother had, instead, focused on continuing her relationship with the father, marrying him in July 2013. A year later, in June 2014, J.W. was born of the marriage and the mother and the father began raising J.W. together. In 2016, the mother commenced an action against the maternal grandparents in the juvenile court to regain custody of P.L. As a result of that litigation, the parties agreed that the maternal grandparents would maintain sole legal and physical custody of P.L. but that the visitation rights of the mother would be expanded to give her more parenting time with P.L. The maternal grandparents did not claim that J.W. was dependent during the course of those proceedings. The mother also filed for a divorce from the father in 2016, but she subsequently dismissed that action in an attempt to reconcile with the father from whom she had separated.

2200174 and 2200175

In 2017, the mother moved into a rental house with J.W. in Hazel Green. The mother allowed the father to visit J.W. in her home, but those visits ceased in 2017. The mother testified that, in September 2017, she and J.W. had left the father alone in the house during one visit and that, when they returned, she discovered the father using illegal drugs. The father threatened her physically when she demanded that he leave. The mother subsequently obtained an ex parte protection-from-abuse order against the father that expired after she failed to follow up to obtain a final protection order.

Subsequently, the mother entered into a series of relationships with other people, sometimes engaging in sexual activity and inviting them to stay overnight with her in the house she shared with J.W. In 2018, the father pleaded guilty to trafficking methamphetamine. The mother commenced a new action seeking a divorce from the father in the fall of 2019 while he was serving his two-year prison sentence. After the father's release, the mother and the father reached a settlement agreement, which was ratified by the Morgan Circuit Court on August 9, 2020, pursuant to which the mother was awarded sole physical and sole legal custody of

2200174 and 2200175

J.W., subject to standard unsupervised visitation by the father. The mother testified that, despite the terms of that agreement, the father's visits with J.W. have consistently been supervised by T.W. and B.W. ("the paternal grandparents") with whom the father resides. The maternal grandparents introduced no evidence as to the father's current circumstances.

J.W. was attending kindergarten at a local elementary school during the 2019-2020 school year. The mother stated that, because J.W. was struggling with learning despite her routinely working with him to foster his education, she took him to a physician who referred him to another physician who diagnosed J.W. with attention-deficit/hyperactivity disorder ("ADHD") in early 2020. The kindergarten closed in March 2020 due to COVID-19 protocols. The mother testified that the combination of the child's having ADHD and the interruption in his learning activity due to the COVID-19 pandemic resulted in J.W.'s failing to advance sufficiently to start first grade. The mother testified that she had decided after consultation with J.W.'s teacher, principal, and tutor that he should repeat kindergarten.

2200174 and 2200175

During late 2019 and early 2020, while the father was incarcerated, the mother began a relationship with T.G., a man with an extensive criminal history, including for domestic violence, who the mother knew abused illegal substances. The mother testified that she experienced a chaotic upheaval in her life during her relationship with T.G. In February 2020, the mother was arrested for possession of marijuana while in the company of T.G. The mother admitted that she had had a history of using alcohol, marijuana, and Suboxone for treatment of her oxycodone dependency and that she was using marijuana during February 2020, but she claimed that the marijuana found on her at the time of her arrest had belonged to T.G.

At some point, T.G. shot a gun into the mother's house while no one was there. On February 19, 2020, the mother reported that T.G. had damaged her front door in an attempt to enter her house and had threatened to kill her. On March 14, 2020, T.G. entered the house and engaged in an altercation with the mother in which he threw a candle at her, breaking it. Despite those incidents, as well as another occasion when the mother reported that T.G. had stolen her automobile, the

2200174 and 2200175

mother allowed T.G. to move into her house, which she acknowledged was a poor decision. The mother later evicted T.G. from the house at the end of March 2020 after obtaining a preliminary protection-from-abuse order against him. The mother testified that T.G. had agreed to have no further contact with the mother as part of the protection-from-abuse proceedings.

The children were not present and did not witness most of the domestic-violence incidents between the mother and T.G., but both were present in the mother's house during the incident on March 14, 2020, and were initially asleep in their bedrooms. P.L., who was visiting overnight at the time, was awakened by the altercation and was so alarmed by what he had heard occur between the mother and T.G. that he demanded to immediately return to the home of the maternal grandparents around midnight that night. The mother complied with that request. The maternal grandfather testified that P.L. had been traumatized by that incident and that he had informed the maternal grandparents that he did not want to return to the mother's house for visits. According to the maternal grandfather, he reached out to the mother to discuss the matter, but, he said, she had refused to talk to him about it so he and the

2200174 and 2200175

maternal grandmother had filed their petitions to obtain custody of J.W. and to suspend the mother's visitation with P.L.

Delois Spears, a social worker with the Madison County Department of Human Resources ("DHR"), testified that, on March 30, 2020, she received a report that the mother was using illegal drugs, was abusing alcohol, and was participating in domestic violence with T.G. Spears met with the maternal grandparents who, she said, had described to her the mother's substance-abuse and domestic-violence history. Spears also interviewed P.L. and J.W. who gave her their versions of the domestic-violence incident that had occurred on March 14, 2020, but had not recalled any other similar episodes. On April 6, 2020, Spears visited the mother's house. She found the house to be tidy with a sufficiently stocked food supply and no presence of alcohol. She observed J.W. with the mother, and, she said, they had appeared appropriately bonded. Spears asked the mother to submit to a hair-follicle drug test, which was positive for cannabis. The mother admitted that she previously had smoked marijuana but also tendered a letter from her physician indicating that she was using cannabidiol oil, commonly referred to as CBD oil, which,

2200174 and 2200175

Spears said, explained the positive cannabis test at that time. The mother informed Spears that she was enrolled in a pretrial-diversion program to address her marijuana-possession charge. The mother showed Spears the protection-from-abuse order that had been entered against T.G. restricting him from contacting the mother. Spears also visited the house of the paternal grandparents and observed the house and their interactions with J.W., who often stayed there while the mother was working, and she found those interactions to be appropriate. Spears closed the case after concluding that there were no safety concerns for J.W. and with the understanding that the mother would complete the pretrial-diversion program. Spears later issued a letter finding the reports of abuse or neglect of J.W. to be not indicated.¹

In April 2020, J.W. went missing. The mother testified that she had returned home from work one afternoon and had fallen asleep for approximately 30 minutes. When she awoke, J.W. was not in the house

¹A "not indicated" disposition denotes that "credible evidence and professional judgment does not substantiate that an alleged perpetrator is responsible for child abuse or neglect." § 26-14-8(a)(2), Ala. Code 1975.

2200174 and 2200175

and the front door was open. According to the mother, she went outside and called for J.W., but he did not respond. The mother then telephoned H.S., a friend, the paternal grandfather, and Lt. Stan Bice of the Madison County Sheriff's office, a longtime family friend. Lt. Bice advised her to contact the police to help search for J.W., but the mother did not call the police because she did not want the maternal grandparents to learn of the incident. Lt. Bice testified that he had telephoned the maternal grandfather to inquire as to whether he knew of J.W.'s whereabouts and that the maternal grandfather had informed him that he did not. The paternal grandfather arrived at the mother's house about five minutes after receiving the call from the mother and located J.W. at a neighbor's house two doors down from the mother's.

The mother did not formally visit again with P.L. after March 14, 2020, until some point in August 2020. The mother testified that, not long after she took P.L. home on the night of March 14, 2020, she sent P.L. a text communication indicating that she was giving up on trying to maintain her relationship with him. The mother stated that she perceived that the maternal grandparents were trying to control her relationship

2200174 and 2200175

with P.L. The mother testified that her relationship with her parents had deteriorated to the point that she did not want to talk to them or be with them. The mother sometimes disparaged the maternal grandparents to P.L. and others and she kept J.W. away from them almost entirely, declining almost all of their invitations to holiday and family gatherings and often refusing to give J.W. gifts from them. When the maternal grandparents insisted that they accompany P.L. to J.W.'s sixth birthday party in June 2020, the mother refused, so P.L. did not attend the party.

Nevertheless, between March 2020 and August 2020, P.L. initiated telephone communication with the mother and arranged to meet the mother without the knowledge or the presence of the maternal grandparents. The mother also testified that, during that period, she made several requests to visit with P.L., to no avail, until, in August 2020, the maternal grandmother agreed to allow P.L. to meet the mother and J.W. at a local shopping mall. The mother testified that her visits with P.L. had resumed only after the maternal grandparents were served with her petition to hold them in contempt for denying her visitation. The maternal grandmother testified that the mother did not request visits

2200174 and 2200175

with P.L. during the relevant period and that the mother had refused to communicate with her even about the welfare of P.L. The maternal grandfather indicated that, while their petition to suspend visitation was pending, they had insisted on supervising any visits between the mother and P.L. in reliance on the advice of their counsel. Eventually, after the August 2020 shopping-mall visit, the mother again began exercising unsupervised visitations with P.L. according to the schedule set forth in the November 2016 agreement ratified by the juvenile court. The maternal grandmother testified that those visits had gone well without any incident or concerns.

At trial, Lt. Bice testified that he had known the mother since she was a teenager. He opined that the mother made "grossly negligent" choices when selecting romantic partners, choosing violent criminals with low moral character. Lt. Bice testified that the mother had told him after her arrest for marijuana possession that she would continue to use the drug because she did not believe that there was anything wrong with it and that she did not care who knew. Lt. Bice further testified that the mother had deliberately hindered investigations into the domestic-

2200174 and 2200175

violence incidents involving T.G. and that she had appeared drunk, defiant, and belligerent on one occasion, swigging a half gallon of whiskey in front of the investigating officers. According to Lt. Bice, the mother had initially disregarded his advice to commence a protection-from-abuse action against T.G., which, he said, had led to T.G.'s remaining in her life longer than he should have. Lt. Bice also faulted the mother for making the poor decision not to call the police when J.W. went missing. Lt. Bice testified that the mother was unreasonable when dealing with the maternal grandparents and in refusing to reconcile with them. According to Lt. Bice, the mother does not always put the best interests of her children first.

The maternal grandfather testified that P.L. loves the mother and wants a relationship with her but that he is frustrated by her inconsistency in visiting with him. The maternal grandfather testified that the mother would be consistent with her visits for a time but would sometimes miss visits for as long as a month after beginning a new romantic relationship. According to the maternal grandfather, P.L. had questioned why the mother prioritizes her romantic relationships over her

2200174 and 2200175

relationship with him. The maternal grandmother testified that P.L. had been in counseling since 2015 in part because of his anxiety over his problems with the mother. The maternal grandfather testified that the visits between P.L. and the mother were going well at the time of the trial but that he was concerned that P.L. could have a panic attack if the mother engaged in bad behavior again in P.L.'s presence. The maternal grandfather did not request that the juvenile court reduce or eliminate the mother's visits; instead, he asked that P.L. be allowed to end his visits with the mother if he began exhibiting any anxiety.

The mother testified that she could adequately care for J.W. and that all of the maternal grandparents' concerns had been addressed. The mother testified that she had not seen T.G. since March 2020 and that there had been no incidents of domestic violence since he had quit contacting her. The mother testified that she had completed substance-abuse classes, and she presented a certificate to that effect; she also testified that she had been routinely tested for drugs and that all the drug tests had been negative for any illegal substances. The mother testified that, at the time of trial, she was using only Zoloft and Xanax, which had

2200174 and 2200175

been prescribed to treat her anxiety. Lindsey Long, a pretrial coordinator employed by the Madison County District Attorney's office, confirmed the mother's testimony and indicated that the lone criminal charge against the mother for marijuana possession, a misdemeanor, would soon be discharged upon her paying \$300 and submitting two more months of clean drug tests. The mother was attending to J.W.'s educational needs by pursuing treatment of his ADHD and by assisting him with formal and informal tutoring as he began his second year of kindergarten. A neighbor and a friend testified that the mother was maintaining a proper home for J.W. that was free of any safety concerns. The mother testified that she was independently supporting J.W. through her own house-cleaning business, which she had owned for six years, and a part-time job at a Wal-Mart store. Clients of the mother's house-cleaning business testified that she is trustworthy and that they had no concerns with allowing her unsupervised access to their homes.

Spears testified at trial that she was unaware of the extent of the mother's past drug use and domestic-violence history because the mother had not been fully forthcoming with her. However, Spears testified that

2200174 and 2200175

DHR "can't hold them [parents] accountable for something that happened in the past" and that the mother had tested positive only for cannabis in April 2020, which, according to Spears, had not warranted removing J.W. from the mother's custody. Spears further testified that she was not concerned that J.W. was at risk from domestic violence because the mother and T.G. were no longer together and T.G. was not in the home. Additionally, Spears noted that J.W. and P.L. had not disclosed any other episodes of domestic violence beyond the March 14, 2020, incident in which T.G. was the perpetrator. Ultimately, Spears testified that she had not had any concerns about the mother's ability to properly and safely parent J.W. at the time of her visit in April 2020. Spears testified that, after she had closed the case, she learned from the mother that J.W. had briefly gone missing, but, she said, she had not believed that that incident required her to reopen her investigation because J.W. had been quickly found safe at a neighbor's house. In her report submitted to the juvenile court, the guardian ad litem for the children opined that J.W. was healthy, happy, and bonded to the mother and that it was in the best interests of J.W. that the maternal grandparents' dependency petition should be

2200174 and 2200175

denied, particularly in light of the mother's recent stability. At trial, the children's guardian ad litem testified that she did not have any concerns about the safety or education of the children under the mother's care.

The Judgment

In the final judgment, the juvenile-court judge summarized her impression of the evidence as follows:

"8. The Mother admitted that her life was chaotic during the spring of 2020, and that her parents had legitimate concerns. She basically testified that everything is now resolved and that as of the time of trial, neither [P.L. nor J.W.] is dependent. The Mother admitted she had to take [P.L.] home to her parents during the middle of the night during one of her visitation periods due to the circumstances at her home. The Mother also testified that [J.W.] failed kindergarten at the end of the school year 2020, but this was due to COVID and not due to her home environment or lack of proper parenting.

"9. The Court took the testimony of [Lt. Bice] who responded to several calls for service for domestic violence situations at the home of the Mother. [Lt. Bice] is also a long time friend of the family, and was able to give testimony both in his official capacity in law enforcement and as a witness on other occasions outside of his employment. His familiarity with circumstances of all the family members goes back at least two decades.

"10. [Lt. Bice] testified that [the mother's] primary problem is her choice of men. She poorly chooses men to be involved with who bring crime, drug use and instability to her

life. This poor choice in men has been an on-going problem since before the birth of [P.L.] in 2008. This continued chaotic lifestyle is what led [the maternal grandparents] to petition the court in 2012 for custody of [P.L.], since the chaos was affecting the child. Neither the [maternal] grandparents nor the mother disputed the overall observations and impressions of [Lt. Bice].

"At one point during [Lt. Bice's] testimony, he testified that [the mother] was 'less drunk' when pressed about whether or not on one particular occasion he thought [the mother] was drunk. A parent can be together at some points in time, but overall not be able to properly parent a child, just like a 'drunk' can be sober on some occasions. Just because the Mother is 'less chaotic' on the day of trial, does not mean that she can properly parent her children when the court case is over. Th[e] Mother has a very, very long history of more than ten (10) years of instability, substance and alcohol abuse, domestic violence and poor choice in crime-ridden boyfriends that she brings to the home. [J.W.] has failed kindergarten, and this Court does not attribute the failure to COVID. The failure is due to the admitted chaotic environment in the Mother's home.

"The Mother also did not properly supervise [J.W.]. He left the home and the Mother could not find him when she said she 'woke up from her nap.' This is disturbing to the Court. Even more disturbing, and frankly inexcusable to the Court, is the Mother's response in not calling the police, even when directed to do so by [Lt. Bice]. The Mother clearly has other priorities in her life, other than the health, safety and welfare of her children. There is not any evidence that the Mother will not continue with the same lifestyle that she has pursued since the [maternal] grandparents first came to court in 2012 seeking custody of [P.L.]. The Mother promises that she has broken off all relationships with these men, and that she is

2200174 and 2200175

focused on her children. The Court finds this promise to be self-serving and not sincere. The Court bases this finding on the very long history of poor parenting and the consequences that [J.W.] has already suffered in failing kindergarten and not being protected when he went missing and [the mother's] failing to call the police, even when directed to do so by [Lt. Bice]. [J.W.] is also vulnerable due to his young age. Further, the Mother did not even restrict [the father's] contact with [J.W.] in her uncontested divorce from [the father], even though she says his visitation is restricted. The argument of the Mother's counsel, that the child must be dependent on the day of trial, still has to take into account the totality of the circumstances, not just solely the events on the day of trial. The best indicator of future behavior is past behavior. Th[e] Mother has ten (10) years of poor parenting, and several instances of recent poor parenting that have adversely affected the health, safety and welfare of [J.W.]. The Court concludes that [J.W.] is a dependent child. The Court also concludes that there has not been a material change of circumstances to sustain a change of custody as to [P.L.]."

As noted, the judgment finds J.W. to be a dependent child, awards custody of J.W. to the maternal grandparents, and restricts the mother's unsupervised visitations with both J.W. and P.L. to Sundays from 1:00 p.m. to 8:00 p.m. The mother filed a postjudgment motion to alter, amend, or vacate the judgment. In that motion, the mother argued that the juvenile court had unduly emphasized the mother's past history and did not account for current circumstances showing that J.W. was not a

2200174 and 2200175

dependent child and that visits with P.L. were proceeding normally. The juvenile court conducted a hearing on the postjudgment motion. At that hearing, the juvenile-court judge responded to the mother's argument as follows:

"Okay. I think I was pretty clear in the order that this case has a very long history and so the snapshot that you take of somebody, they may not be as chaotic on some days as they are on other days. That's the best way I know how to describe it.

"I didn't find that this mother has changed her ways and her lifestyle. She admitted that her life was chaotic in the spring [of 2020] and she understood why her parents filed what they did. ... It would seem to me that she would have changed her ways a long time ago when she lost custody of the first child. But her continued conduct in that same direction is going to result in the same outcome. You're going to have the same consequences. And she did not convince me in her testimony that she intends to change her ways.

"I believe she thinks she could come up here and mirror what you say that today I'm together and that gets you your child back. It gets you the child back that's already been awarded to them plus I can't take the other child. She has a long history of serious chaos that I think has adversely affected [J.W.].

"Now I think if she had not had so much chaos, maybe she would have got the -- if the [ADHD] medication needed to be gotten that maybe she could have gotten that started. I don't think she attended to this child's needs like she should

2200174 and 2200175

have. The other child had to be returned home in the middle of the night because of the chaos at her house.

"So, you know, the -- you can get it reversed in the Court of Civil Appeals. I'll do whatever the Court of Civil Appeals says, but I am going to look at this case at a snapshot in time and disregard the previous how many years? ...

"....

"10 years. Just because the best predictor of future behavior is past behavior. And this mother has a long history.

"Even aside [Lt. Bice] ... I didn't rely so much heavily on his testimony as that it confirmed the aura of this case. And you can't put that in a transcript.

"I watched the mother. I'm watching her now. She did not have any sincerity or remorse about her lack of parenting that these children have suffered, any desire to change her ways in the future. She may have a couple of months where she's doing fine. And I get the impression that [the maternal grandparents] are going to allow her to have under the order that I set out as 'other times as the parties may agree' to allow for that fluctuation of her chaos and not so much chaos and back to chaos again. I can't just move the kids around based on when the mother is chaotic and when she's not. She's got a long history of it. And [Lt. Bice] confirmed what my feeling was in the case listening to her testimony and looking at the pleadings and looking at all the past litigation.

"....

"DHR doesn't give children back until [parents] have sustained stability. And she doesn't have sustained stability.

2200174 and 2200175

"....

"The testimony before the Court was she had not exercised her visitation for several months. And I took that into -- that was part of the factor that I took into consideration of whether or not I believed her to be a fit and proper parent not only to [P.L.] but also to [J.W.]. She was keeping them separated. That wasn't the only -- it was a factor.

"You know, and another factor was my assessment of her sincerity and her remorse of which there was zero. Zero. It was just 'Judge, I'm not doing it today, so, therefore, you have to give my kids back.' That's not the way it works.

"....

"DHR does not give children back until they have sustained stability and she doesn't have -- she didn't have sustained stability at the time I took the testimony in my opinion based on her history. And she didn't appear to me to have the desire to have sustained or the -- I should say the appreciation to illustrate to all of us that she's going to have sustained stability going forward because she's gone back to the same thing in the spring of this year that she did that resulted in [P.L.] being in the custody of [the maternal grandparents] to begin with. That's just -- that's the way I took it.

"And it was just the aura of the case. The -- my watching her the entire time we were here for two days.

"....

"Two days. You know, and I watch [the maternal grandparents] and I, and I listened to the tenor of her

2200174 and 2200175

testimony and I just don't think she has an appreciation for what it means to provide a stable home life for her children. I just don't think she has it. I'm sorry, I mean, I just don't think she does. So that's why --

"....

"-- that's why I ruled the way I did.

"....

"And I didn't find the mother having like an incident of neglect or an incident of abuse. It's the chaos that she testified to, her instability, these men coming in and out. And it wasn't even so much the drugs, but it was just the same situation that brought [P.L.] into [the maternal grandparents'] care she's now allowed [J.W.] to be part of. That's what I'm trying to emphasize.

"And I didn't get the feelings from the mother that she had any appreciation for the seriousness of that and from going forward that she's going to change her ways from the past 10 years. She's just going to continue to do -- well, based on the evidence that I had and based on the long history of it, I don't have any reasonable belief that all of a sudden she's going to change. She hasn't changed thus far. She might. Hope she does."

The juvenile court declined to alter, amend, or vacate the judgment insofar as it had adjudicated J.W. to be a dependent child, had awarded his custody to the maternal grandparents, and had limited the mother's visitation with both children.

Analysis

The mother initially argues that the judgment of the juvenile court adjudicating J.W. to be a dependent child is not supported by clear and convincing evidence.

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

"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.

"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.

"3. Whose parent, legal guardian, legal custodian, or other custodian neglects or refuses, when able to do so or when the service is offered without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child.

2200174 and 2200175

"4. Whose parent, legal guardian, legal custodian, or other custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the compulsory school attendance laws of this state.

"5. Whose parent, legal guardian, legal custodian, or other custodian has abandoned the child, as defined in subdivision (1) of [§] 12-15-301.

"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.

"7. Who has been placed for care or adoption in violation of the law.

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

In these cases, the evidence indicated that J.W. was born of the marriage between the mother and the father. The mother and the father separated when J.W. was two years old, and J.W. moved into an appropriate rental home with the mother in a child-friendly neighborhood. The mother has provided almost exclusive financial and emotional support for J.W. since that time, raising the child as a single mother. No witness testified that the mother had ever mistreated J.W. in any way, and, as

2200174 and 2200175

Spears testified and the juvenile court recognized, the mother was not found "indicated" for ever abusing or neglecting J.W. See note 1 and accompanying text, supra. According to witnesses who observed the daily care provided by the mother to J.W., the mother appropriately parents J.W. and shares a beneficial emotional bond with him. The maternal grandparents could not offer any testimony to the contrary because they had interacted with the mother and J.W. hardly at all during his lifetime. At the time of trial, the mother was working and providing for J.W. appropriately. The mother was maintaining a proper home free of illegal-drug use or domestic violence. According to Spears and J.W.'s guardian ad litem, the mother's circumstances at the time of the trial were not threatening the safety or welfare of J.W.

The juvenile court found that the mother had a pattern of exposing J.W. to a chaotic lifestyle. The evidence shows that, with the exception of the circumstances existing in the spring of 2020, the mother has been a consistent positive presence in J.W.'s life. The mother has remained steadily employed since J.W. was born; they have lived together the entirety of J.W.'s life; and she has financially and emotionally supported,

2200174 and 2200175

fed, clothed, bathed, and otherwise attended to his daily needs since birth. J.W. loves and depends upon the mother for his primary care. The mother sent J.W. to kindergarten at an appropriate age and provided a tutor for him. The mother has maintained health insurance for J.W. and has taken him to multiple doctors to ascertain the source of any learning disability he might have.

The circumstances prevailing in the spring of 2020 certainly were not ideal, but the evidence shows that they were not indicative of J.W.'s upbringing under the mother's care. Moreover, the maternal grandparents failed to present any evidence of how the circumstances in the spring of 2020 had adversely affected J.W. No witness testified that the mother had ever parented J.W. while under the influence of marijuana or any other illegal substance or that her marijuana use had impaired her ability to properly parent J.W. Spears testified unequivocally that DHR does not necessarily remove children from the homes of parents based on a positive marijuana test and that, in this case, DHR had determined that J.W. did not need to be removed from the mother's custody due to her marijuana usage. As for domestic violence, Spears testified that J.W.

2200174 and 2200175

recollected only the one incident between the mother and T.G. From her interview with J.W., Spears apparently determined that the mother had adequately protected J.W. from any emotional or physical harm during that incident. Spears testified further that DHR did not consider J.W. to be at risk of future domestic violence because the mother had ended her relationship with T.G.

The juvenile court concluded that J.W. had failed kindergarten as a result of the mother's chaotic lifestyle; however, no witness testified that J.W. had failed kindergarten or that he had had to repeat kindergarten because of any omission on the part of the mother. The mother testified that J.W. had learning difficulties attributable to ADHD and an interruption in his schooling and tutoring, which, she said, had led her, upon consultation with J.W.'s teacher, principal, and tutor, to decide that he should repeat kindergarten while she sought treatment for his ADHD. The juvenile court did not receive any evidence from any source indicating that J.W. was not receiving appropriate educational instruction due to the mother's lifestyle choices, that J.W. was missing school, that the mother was not actively participating in his education, or that the mother's

2200174 and 2200175

conduct had interfered with his learning. In her comments during the postjudgment-motion hearing, the juvenile-court judge speculated that the mother might have obtained medication for J.W.'s ADHD sooner if not for the chaos in her life, but the evidence shows that the mother was carefully weighing the decision whether to medicate J.W. at all before the spring of 2020, and no evidence was presented indicating that the mother had failed J.W. in any manner by not immediately obtaining the medication for treatment of his ADHD. In fact, the maternal grandmother testified that she had been similarly cautious about medicating J.W. We have carefully examined the record and find no evidentiary support for the juvenile court's determination that the mother was not appropriately attending to J.W.'s educational needs due to her conduct or otherwise.

The mother did fail to properly supervise J.W. on the one occasion when he slipped out of the house unattended to go to a neighbor's house. However, the evidence shows that J.W. was never in danger on that occasion. Spears testified that DHR did not consider that isolated incident a sufficient basis for reopening an investigation of the mother, who Spears maintained had never abused or neglected J.W.

2200174 and 2200175

The maternal grandparents failed to present evidence to indicate that the mother had failed to adjust her circumstances to eliminate the issues that they contended required separation of the family. The maternal grandparents did not contest that the mother had tested negative on all drug tests administered to her since April 2020, that she had ended her Suboxone and marijuana usage, and that, except for prescribed medications, she was drug-free. The maternal grandparents also presented no evidence to dispute that the mother's home had remained free of domestic violence since she had ended her relationship with T.G. The maternal grandparents criticized the mother for allowing J.W. to visit with the father, but they did not present any evidence regarding the father's current circumstances or attempt to prove that J.W. was being harmed by visiting with the father under the supervision of the paternal grandparents. The evidence fairly indicates that, following her separation from T.G., the mother had resumed the same stable lifestyle she had been sustaining since at least 2016 when she first moved into the house in Hazel Green with J.W. The mother had, in fact, continued to raise J.W. throughout the underlying dependency proceedings, and,

2200174 and 2200175

according to the undisputed evidence, the child was stable, healthy, happy, safe, and secure in that environment at the time of trial. In her report, J.W.'s guardian ad litem emphasized the mother and J.W.'s return to stability when recommending that the juvenile court deny the maternal grandparents' dependency petition.

The juvenile-court judge expressed concern that, based on her past conduct, the mother might not maintain her current circumstances and might expose J.W. to further chaos that would disrupt his upbringing. As defined by statute, a "dependent child" is one who currently "is in need of care or supervision" due to one or more of the circumstances enumerated in § 12-15-102(8)a. "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). Although a juvenile court may properly consider the past conduct of a parent,

"past conduct must be relevant to conditions that would cause the child to be dependent at the time of the disposition. ... Evidence of a parent's past conduct is admissible if it assists the juvenile court in assessing and weighing the evidence

2200174 and 2200175

regarding current conditions, but evidence of past conditions cannot be the sole basis for finding a child to be dependent."

Id. at 872.

As we have noted already, the record does not contain clear and convincing evidence from which the juvenile court could have determined that that the mother's lifestyle and conduct in the spring of 2020 deprived J.W. of adequate care and supervision even during that time. We acknowledge the juvenile-court judge's concern that the mother could, in the future, engage in conduct that could endanger J.W., but the dependency of a child can rest only on clear and convincing evidence.

"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. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.' "

L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting § 6-11-20 (b)(4), Ala. Code 1975).

"It is not enough that the evidence raises only a question as to the dependency of a child. T.H. v. Jefferson Cnty. Dep't of

2200174 and 2200175

Human Res., 70 So. 3d 1236, 1247 (Ala. Civ. App. 2010) (Per Moore, J., with two judges concurring in the result). "The fear of harm to the child ... must be a real one predicated upon hard evidence; it may not be simply gut reaction or even a decision to err-if-at-all on the side of caution." In re Jertrude O., 56 Md. App. [83,] 100, 466 A.2d [885,] 894 [(1983)]. Unless [the petitioner] presents 'clear and convincing evidence,' the dependency petition must be dismissed. § 12-15-310(b), Ala. Code 1975."

T.J. v. Calhoun Cnty. Dep't of Hum. Res., 116 So. 3d 1168, 1175 (Ala. Civ. App. 2013) (per curiam, with Bryan and Moore, JJ., concurring and Pittman, J., concurring in the result).

To affirm a judgment adjudicating a child dependent, this court must determine that there was substantial evidence before the juvenile court that, based upon the juvenile court's weighing of that evidence, could have produced in the mind of that court a firm conviction as to the current dependency of the child and a high probability as to the correctness of that conclusion. See C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (citing Ex parte McInish, 47 So. 3d 767 (Ala. 2008)). The record in these cases shows that the mother may have many faults and, as Lt. Bice testified, that she has made a series of poor choices not necessarily in the best interests of J.W. and P.L., but the record does

2200174 and 2200175

not contain substantial evidence from which the juvenile court could have been clearly convinced that J.W. is currently in need of care or supervision for any of the reasons enumerated in § 12-15-102(8)a. Thus, we conclude that the juvenile court erred in adjudicating J.W. to be a dependent child.

The mother next argues that the juvenile court erred in reducing her visitation with P.L. To obtain a modification of a visitation order, the burden rests on the petitioner to prove a material change of circumstances since the entry of the most recent judgment concerning visitation and that the modification would serve the best interests of the child. See Griffin v. Griffin, 159 So. 3d 67, 70 (Ala. Civ. App. 2014). This court presumes the correctness of a judgment modifying the visitation privileges of a noncustodial parent following a bench trial at which the fact-finder received oral testimony. See S.M.M. v. J.D.K., 208 So. 3d 1118, 1120 (Ala. Civ. App. 2015).

"The matter of visitation rests soundly within the broad discretion of the trial court, and a trial court's determination regarding visitation must be affirmed absent a finding that the judgment is unsupported by any credible evidence and that the judgment, therefore, is plainly and palpably wrong."

Watson v. Watson, 634 So. 2d 589, 590 (Ala. Civ. App. 1994).

2200174 and 2200175

In these cases, the mother and the maternal grandparents entered into an agreement in November 2016, which the juvenile court ratified, establishing the visitation privileges of the mother. Since that time, the mother had been living independently of the father while caring for J.W. P.L. had been visiting the mother and J.W. mainly in the mother's home in Hazel Green. By all accounts, the visits were going well until the March 14, 2020, domestic-violence episode involving T.G. The maternal grandfather testified that he and the maternal grandmother had filed their petition to suspend the mother's visitation after P.L. indicated that he was scared to go back to the mother's home. However, by the time of trial, P.L., who had been undergoing counseling, had indicated that he wanted to resume visits. In fact, P.L. had begun visiting with the mother overnight in her home without incident, and, even according to the maternal grandmother, those visits were proceeding well and without incident. In sum, the record discloses that, by the time of trial, the circumstances that led to the 2016 visitation agreement had resumed. In light of the situation that existed at the time of trial, the maternal grandfather testified that the maternal grandparents wanted the

2200174 and 2200175

visitation order modified only to require the mother to terminate visits if P.L. exhibited anxiety while in the mother's care. No one testified that it would be in the best interest of P.L., who desired a greater relationship with the mother, to drastically reduce the mother's visitation to one day per week for seven hours.

Based on the foregoing, we conclude that no material change of circumstances persisted at the time of the trial such that the mother's visitations with P.L. should have been reduced or that reducing the mother's visitations would be in the best interest of P.L. Therefore, the juvenile court erred in reducing the mother's visitations with P.L.

Conclusion

Based on the foregoing, we reverse the juvenile court's judgment finding J.W. dependent and awarding custody of J.W. to the maternal grandparents; we also reverse the juvenile court's judgment reducing the mother's visitation with P.L. These cases are remanded to the juvenile court with instructions for the juvenile court to vacate the judgment in each case, to enter a new judgment in case number JU-20-302.01 dismissing the dependency petition filed by the maternal grandparents

2200174 and 2200175

relating to J.W., to enter a new judgment in case number JU-12-734.03 denying the maternal grandparents' petition to modify the visitation rights of the mother with respect to P.L., and to take such other actions as are consistent with this opinion.

2200174 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2200175 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Edwards, Hanson, and Fridy, JJ., concur.

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

2200174 and 2200175

THOMPSON, Presiding Judge, dissenting.

The standard of review applicable to this court's review of a dependency judgment based on evidence presented ore tenus to a trier of fact and the presumption of correctness afforded to a judgment reached after the receipt of ore tenus evidence is as follows:

"On appeal from a judgment finding a child dependent following an ore tenus proceeding, we presume the juvenile court's factual findings are correct. J.W. v. C.H., 963 So. 2d 114, 119 (Ala. Civ. App. 2007). Those findings will not be disturbed if they are supported by sufficient evidence. Ex parte Floyd, 550 So. 2d 982, 984 (Ala. 1989). In passing on the question of the sufficiency of the evidence as to a finding of dependency, this court does not reweigh the evidence; instead, this court determines 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. J.B. v. DeKalb County Dep't of Human Res., 12 So. 3d 100, 112 (Ala. Civ. App. 2008)."

R.F.W. v. Cleburne Cnty. Dep't of Hum. Res., 70 So. 3d 1270, 1272 (Ala. Civ. App. 2011).

The evidence indicates that, until W.S.L. III and C.S.L. ("the maternal grandparents") filed their actions in the juvenile court, T.M.W. ("the mother") had continued in her relationship with another abusive

2200174 and 2200175

man, that she had exposed the children to that abuse in her home, and had continued to use illegal drugs. The mother presented evidence at the September 2020 hearing indicating that, since April 2020, i.e., for approximately four to five months before the dependency hearing, she had not used illegal drugs and was no longer involved with a violent man. The record also indicates that the mother divorced the children's father in the month before the dependency hearing without seeking to restrict the father's access to the children by court order.

The juvenile court acknowledged in its November 10, 2020, judgment that the mother was claiming to be able to parent the children and to meet their needs such that J.W. was not dependent and such that her visitation with P.L. should not be modified and that the mother had presented evidence indicating that, in the few months before the dependency hearing, the mother had not used illegal drugs or been involved in another violent relationship. However, the juvenile-court judge found in that judgment that it did not believe that the mother had actually implemented a change in her parenting but, instead, was merely acting in conformity with expectations to prevent a dependency finding.

2200174 and 2200175

In the November 10, 2020, judgment, in her comments made during the hearing on the mother's postjudgment hearing, and in the November 24, 2020, postjudgment order, the juvenile-court judge made clear that she had carefully observed the parties during the ore tenus hearing. In addition to the portion of the judgment quoted in the main opinion, the juvenile court stated in its November 10, 2020, judgment:

"(7) The Court took extensive testimony over a two (2) day period. The Court had an opportunity to observe the Mother and the grandparents, not just during their respective testimony, but at all times during the proceeding with respect to their mannerisms and facial expressions during the testimony of other witnesses."

In its November 24, 2020, postjudgment order, the juvenile court reiterated:

"The Court heard extensive testimony and evidence provided by the parties and, as it indicated during the hearing on the [mother's] postjudgment motion, it gave careful attention to the demeanor of the witnesses, particularly that of the [mother]. It was readily apparent to this Court that the [mother] has little self-introspection and that she is either incapable or unwilling to put the needs of her children above her own interests."

The main opinion clearly would have reached a different result than did the juvenile court. However, the

2200174 and 2200175

"contested evidence, taken in context, exemplifies the reason for the ore tenus presumption, 'that is, that the trial court is in the ... position of discerning the demeanor and other like intangibles which do not transfer so readily in a transcript.' Shepherd v. Shepherd, 531 So. 2d 668, 671 (Ala. Civ. App. 1988). Stated another way, 'the deference given to the trial court by the ore tenus rule is, in part, due to the trial court's unique position to see and/or hear something that may not be apparent on the face of the written record.' ... Willing v. Willing, 655 So. 2d 1064, 1068 (Ala. Civ. App. 1995) [(Thigpen, J., concurring in part and dissenting in part)]. See Dobbins v. Dobbins, 602 So. 2d 900, 901 (Ala. Civ. App. 1992) ('The reason for the ore tenus rule is [well established], i.e., that the trial court had the opportunity to observe the witnesses as they testified, to judge their credibility and demeanor, and to observe what this court cannot perceive from a written record.')."

Ex parte Fann, 810 So. 2d 631, 638 (Ala. 2001).

The evidence, as set forth in the record and discussed by the juvenile-court judge, leads me to conclude that "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." R.F.W. v. Cleburne Cnty. Dep't of Hum. Res., 70 So. 3d at 1272 (citing J.B. v. DeKalb Cnty. Dep't of Hum. Res., 12 So. 3d 100, 112(Ala. Civ. App. 2008)). I would affirm the juvenile court's judgment. Therefore, I dissent.