Rel: October 21, 2022



# ALABAMA COURT OF CIVIL APPEALS

## OCTOBER TERM, 2022-2023

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**2210259**

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**A.C.B.**

**v.**

**A.B.B. and J.E.B.**

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**2210260**

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**A.C.B.**

**v.**

**A.B.B. and J.E.B.**

**Appeals from Cleburne Juvenile Court**
**(JU-18-23.05 and JU-18-24.05)**

THOMPSON, Presiding Judge.

In July 2021, A.B.B. ("the uncle") and J.E.B. ("the aunt") filed in the Cleburne Probate Court ("the probate court") petitions seeking to adopt their nieces, Z.S.B. and L.J.B. ("the children"). In their adoption petitions, the aunt and the uncle alleged that the children's father, J.B. ("the father"), was deceased and that the children's mother, A.C.B. ("the mother"), had impliedly consented to the adoptions by virtue of her abandonment of the children. See § 26-10A-9(a)(1) and (3), Ala. Code 1975.

The mother filed in the probate court an opposition to the adoption petitions and requested that the actions be transferred to the Cleburne Juvenile Court ("the juvenile court"). On September 20, 2021, the probate court entered orders transferring the adoption actions to the juvenile court, pursuant to § 12-12-35, Ala. Code 1975 ("Adoption proceedings, primarily cognizable before the probate court, may be transferred to the [juvenile] court on motion of a party to the proceeding in probate court.").

The juvenile court conducted a hearing at which it received ore tenus evidence over the course of two days. On November 29, 2021, the juvenile court entered orders finding that the mother had impliedly

consented to the adoptions through her abandonment of the children and her failure to maintain a significant parental relationship with the children; in those orders, the juvenile court further concluded that adoption was in the best interests of the children. Also on November 29, 2021, the juvenile court entered orders in which it approved the adoption of each child by the aunt and the uncle. For ease of reference, we refer to the orders entered on November 29, 2021, collectively as "the November 29, 2021, judgments."

The mother filed a postjudgment motion addressing the November 29, 2021, judgments on December 10, 2021. On that same date, the mother filed notices of appeal. The mother's appeals were held in abeyance pending the disposition of her postjudgment motion, which occurred when that motion was denied by operation of law. See Rule 59.1, Ala. R. Civ. P.; Rule 4(a)(5), Ala. R. App. P.; and Rule 1(B), Ala. R. Juv. P. The mother's appeals became effective on December 27, 2022. See Rule 6(a), Ala. R. Civ. P.; see also Rule 4(a)(5), Ala. R. App. P.; A.P. v. Covington Cnty. Dep't of Hum. Res., 293 So. 3d 892, 898 (Ala. Civ. App. 2019). This court consolidated the mother's appeals.

The record indicates the following facts. Z.S.B. was born in 2006, and L.J.B. was born in 2010. The mother also has an older child who had reached the age of majority at the time of the trial of these actions. No information concerning that child is set forth in the record on appeal.

Following L.J.B.'s birth, the mother began using illegal drugs and, according to the aunt and the uncle, battled addiction. However, the mother stopped using illegal drugs at some point, and, although her addiction caused strain in her marriage, the mother remained married to the father. In 2015, the father was killed in a motor-vehicle accident.

In the fall of 2015, after the father's death, the mother suffered a relapse into addiction, and she attended a substance-abuse-treatment program until approximately early 2016. During the time the mother attended that program, the children lived with their maternal grandparents, C.R. and P.R. ("the maternal grandparents"). The mother relapsed again in March 2017 and attended a seven-month-long substance-abuse-treatment program. The children again lived with the maternal grandparents while the mother was in that treatment program. According to the aunt, the children lived with the maternal grandparents during the remainder of the 2016-2017 school year but spent much of the

summer of 2017 with the aunt and the uncle. The aunt testified that the mother did not communicate with the children during the time she was in the treatment program in 2017. The children returned to the mother's home in August 2017, after she had completed the treatment program.

In January 2018, the Cleburne County Department of Human Resources ("DHR") investigated the mother, apparently based on a report of substance abuse, and it removed the children from her custody at that time. It appears that DHR filed separate dependency actions pertaining to the children, who were placed in the home of the maternal grandparents, apparently pursuant to a safety plan. C.R., the maternal grandmother, testified that, from January through March 2018, the mother came to her home several times each week to help the children with homework and to put them to bed. However, the maternal grandmother stated, "at some point, she was not doing that." The aunt testified that the mother was arrested on February 28, 2018, and that, in March 2018, the mother agreed, as a part of a plea agreement in the criminal case pending against her, to attend a substance-abuse-treatment program in Mississippi.

The aunt testified that the children resided with the maternal grandparents, who live in Heflin near the mother, from January 2018 through May 2018 but that the children spent the majority of their weekends during that time with the aunt and the uncle. The aunt and the uncle live in Villa Rica, Georgia. We take judicial notice that the aunt and the uncle's home is approximately 40 miles from Heflin. The aunt also testified that, with the exception of a weeklong trip to the beach with the maternal grandparents, the children had resided in her home during the summer of 2018. The maternal grandmother disputed that testimony, stating that that the children had visited the aunt and the uncle for much of the summer of 2018 but that they "came home" in July, apparently at the time of the beach vacation.

The aunt testified that, at the maternal grandmother's request, she returned the children to the maternal grandparents' home on August 1, 2018, so that the children could prepare to begin the 2018-2019 school year. However, according to the aunt, after she took the children to the maternal grandparents' home, the maternal grandparents asked the aunt and the uncle to meet them at the courthouse to "catch up" on "the case" involving the children. It appears from the record that dependency

actions pertaining to the children and initiated by DHR were still pending in the juvenile court and that similar dependency actions filed by the aunt and the uncle also remained pending. The aunt testified that, when she and the uncle arrived at the courthouse, the maternal grandparents and their attorney asked the aunt and the uncle if they would take permanent custody of the children and that the maternal grandparents and/or their attorney represented to the aunt and the uncle that the juvenile court was willing to enter a judgment that same day that would award the aunt and the uncle custody of the children. The aunt stated that she and the uncle agreed to take permanent custody of the children and that the maternal grandparents "vouched" for them and their suitability to rear the children before the juvenile court.

The attorneys' questions and the testimony of the parties and the witnesses indicate that, on August 1, 2018, the juvenile court entered judgments awarding the aunt and the uncle permanent custody of the children. The parties did not include copies of those judgments in the record on appeal. Regardless, it is undisputed that the children have lived with the aunt and the uncle since August 1, 2018. The record does contain November 17, 2018, judgments of the juvenile court, entered in response

to petitions filed by the aunt and the uncle, finding the children dependent and awarding custody of the children to the aunt and the uncle. It is not clear from the record whether the aunt and the uncle's dependency actions were pending before the August 1, 2018, hearing (and the entry of the August 1, 2018, judgments), or whether the August 1, 2018, judgments addressed only the dependency petitions filed by DHR.

The aunt testified that, between February 2018 and November 2018, the mother had almost no contact with the children and provided no support for them.[1] The aunt stated that the mother had telephoned the children only twice during that time, that both calls occurred in September 2018, and that the mother sounded as if she were under the influence of drugs or alcohol during both of those telephone calls. The aunt contradicted the maternal grandmother's testimony that the mother had contacted the children from jail during the spring of 2018. The aunt testified that she had obtained, via a subpoena, recordings of the 110 telephone calls the mother had made from jail and that the mother spoke with the children in only 1 of those 110 calls. The rest of the telephone

[1]The aunt and the uncle testified that, since the children were placed in their custody, they have received funds from the government for the benefit of the children as a result of the father's death.

calls, according to the aunt, were to the mother's parents and to men the mother knew.

The aunt testified that, during one of the two September 2018 telephone calls, she invited the mother to visit the children in person in October 2018. The mother agreed to that visit but then did not attend the scheduled visit. Later in October 2018, the mother was again arrested on drug-related charges and incarcerated. We note that the mother stated that that arrest occurred in September 2018. The aunt testified that, as a condition of the mother's release from jail, the mother agreed to attend another substance-abuse-treatment program. In November 2018, on the day the mother left jail and was traveling to the treatment program, the aunt and uncle arranged for the children to visit the mother for approximately one hour.

It is undisputed that the mother left that treatment program in late November 2018 or early December 2018 and that she had no contact with the children in December 2018. The mother testified that, during the time immediately after she left the treatment program in late 2018, she maintained contact with the maternal grandmother. The mother testified that the maternal grandmother told her that the aunt and the uncle had

asked that the mother not contact the children for a period in late 2018. The aunt testified that, based on the advice of the children's counselor, she had asked the maternal grandparents to refrain from contacting the children until possibly December 2018. The aunt explained that the children's counselor had advised that the children be allowed to settle into the aunt and the uncle's home and to understand that the aunt and the uncle had permanent custody of them before resuming contact with the mother and her family. The aunt later explained that the children had frequently bounced between the homes of the mother and the maternal grandparents from the time of their father's death in 2015 until August 1, 2018, and that the children needed and wanted stability.

According to the aunt, the mother made no attempt to communicate with the children or to contribute to their support between November 2018 and May 2019. The mother stated that she did not contact the children between November 2018 and January 2019 because of the aunt's request, but the mother attempted to explain her failure to attempt to contact the children after January 2019. In January 2019, the mother was again arrested and remained incarcerated through March 2019. The mother stated that, as a condition of her release, she began attending a

year-long substance-abuse-treatment program called "Oxford Outreach" and that the rules of that program prevented her from having telephone calls or visits for one month. After that, according to the mother, she could have one 15-minute telephone call each day, assuming that she was current on her "rent" at the program and was not being punished for an infraction of the program rules. The mother presented no evidence regarding how frequently she was not current on her rent or was punished for rules infractions so that she could not contact the children. We note, however, that the record indicates that the mother maintained contact with the maternal grandmother during that time.

In May 2019, the mother contacted the aunt, asking to reestablish contact with the children. The aunt arranged a June 2019 visit for the mother, but then, the aunt said, after the visit the mother failed to contact the children for the rest of June 2019. According to the aunt, the mother called the children twice in July 2019 for a total of 21 minutes, twice in August 2019 for a total of 21 minutes, three times in September 2019 for a total of 15 minutes, three times in October 2019 for a total of 22 minutes, three times in November 2019 for a total of 20 minutes, and three times in December 2019 for a total of 23 minutes. During those

months, the mother's telephone calls were not made on any schedule, and the mother failed to make calls when she had promised the children that she would call. The aunt testified that, initially, the children were disappointed when the mother would not call but that they had eventually reached a point at which they were surprised when the mother did call.

At some point in the summer or fall of 2019, the maternal grandparents initiated actions in the juvenile court against the aunt and the uncle in which they sought an award of custody of the children; for ease of reference, we refer to those actions as "the .03 actions." On January 3, 2020, the juvenile court entered in the .03 actions judgments that incorporated an agreement reached by the parties. The January 3, 2020, judgments provided, among other things, that the aunt and the uncle would maintain custody of the children and that the mother would have three hours of supervised visitation with the children on the first and third weekends of each month. The agreement, which was incorporated into the January 3, 2020, judgments in the .03 actions, provided that the mother agreed to maintain consistent contact with the

children and to call the children weekly on Tuesdays between 5:30 p.m. and 6:30 p.m. Another part of those judgments specifies:

> "Should the mother fail to visit a total of two (2) times or call a total of two (2) times without there having been an intervening emergency or act of God, the mother's visitation/contact will become at the discretion of [the aunt and the uncle]. In the event of an emergency, the mother will provide proof to [the aunt and the uncle]."

The aunt and the uncle each testified that they had entered into the agreement that was incorporated into the January 3, 2020, judgments to provide some structured contact between the mother and the children; the aunt testified that she and the uncle believed that structured and consistent contact with the mother would be in the children's best interests. The mother appears to have visited the children fairly consistently in compliance with the terms of that agreement. However, by June 2020, the aunt and the uncle considered the agreement "ended" because the mother had failed to make two of her weekly telephone calls. The mother testified that, when she was supposed to make one of those calls, she had been asked to pick up a client of the substance-abuse-treatment program from jail; she characterized that duty as "job related." The mother claimed that she also missed the other telephone call for "job related" reasons because, she said, she slept through the time to call the

children because she had been working earlier in the day. The aunt testified that, after June 2020, the mother still missed some scheduled telephone calls with the children but that her telephone contact with them had started to be a little more consistent. However, according to the aunt, the mother would sometimes request additional telephone contact but not make those additional telephone calls.[2]

The aunt and the uncle allowed the mother some unsupervised visits with the children during the summer of 2021. Those unsupervised visits ended, according to the aunt, in the fall of 2021 because the visits occurred at the soccer fields where each of the children played soccer; therefore, those visits were supervised.

In August 2021, the mother filed actions in the juvenile court seeking an award of unsupervised visitation with the children and a

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[2]When asked if the mother's pattern of contacting the children had changed after the entry of the January 3, 2020, judgments, the aunt answered:

> "No. The pattern has stayed about the same. She just missed more visits. I mean, she missed more phone calls and showed up late to a visit, just a few things like that. But more missed calls, and then she would ask -- several times, she asked for additional phone calls and then neglected to make those phone calls."

schedule for contacting the children by telephone. In September 2021, the aunt and the uncle initiated the adoption actions. The aunt and the uncle each testified that they had been considering filing the adoption actions and had looked for attorneys to represent them in the spring of 2021. They insisted that the adoption actions were not brought in retaliation for the mother's initiation of her actions in the juvenile court. Instead, they said, the children were anxious about the possibility of returning to the mother's custody, either now or at some point in the future, because of the pending litigation. The aunt testified that their adopting the children would give the children stability, permanency, and "peace of mind."

Both the aunt and the uncle stated that, if the adoption petitions were granted, they would continue to encourage visitation between the children and the mother. The aunt and the uncle believed that the children wanted to visit the mother and that it would be in the children's best interests to maintain contact with her. However, they also stated that the children wanted and needed to be assured that they were in a permanent home and would grow up in that home.

Each of the children testified at the hearing. Both children stated that, although they loved the mother and wanted to continue to visit with her, they wanted to be adopted by the aunt and the uncle. Much of the children's testimony was in the form of reading a letter each had drafted before the hearing. The children detailed incidents of neglect and exposure to drugs and drug users during the time they had lived with the mother after the father's death. Both children testified regarding the fear and uncertainty they had experienced while living with the mother and their coping with her frequent use of illegal substances. The children also expressed their fears that they would be returned to the mother's custody and never allowed to see the aunt and the uncle. However, each child was confident that, if the adoption petitions were granted, they would continue to see and visit the mother.

The aunt and the uncle have five biological children who range in age from 12 years to 3 years. The uncle is a pastor, and the aunt home-schools all seven of the children. The aunt and the uncle each testified that they can support the children and that they had never received any financial support from the mother for the benefit of the children. On cross-examination, the uncle stated that he and the aunt receive

approximately $1,400 per month in "death benefits" for the children; the uncle stated, however, that those benefits came as a result of the death of the children's father.

The aunt and the uncle also presented the testimony of Sonia Martin, a bonding expert, who stated that the children were "crying out for permanency." Martin testified that the children were bonded with the aunt and the uncle and that, if permanency for the children was achieved, it would be beneficial to the children to visit the mother. We note that Martin appeared to define adoption as the only method of obtaining that permanency for the children. Martin stated that she was unable to assess the bond between the mother and the children because the mother had not cooperated with Martin's requests that she be allowed to evaluate that bond.

On appeal, the mother first argues that the juvenile court erred in entering the November 29, 2021, judgments because, she contends, the doctrines of res judicata and collateral estoppel precluded the juvenile court from considering the aunt and the uncle's claims. The mother contends that the entry of the juvenile court's January 3, 2020,

judgments in the .03 actions precludes consideration of whether she impliedly consented to the adoptions.

In explaining the doctrines of res judicata and collateral estoppel, this court has stated:

> "'Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.
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> > "'"The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label 'claim preclusion,' while collateral estoppel ... refers to 'issue preclusion,' which is a subset of the broader res judicata doctrine."
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> "'Little v. Pizza Wagon, Inc., 432 So. 2d 1269, 1272 (Ala. 1983) (Jones, J., concurring specially). See also McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998). In Hughes v. Martin, 533 So. 2d 188 (Ala. 1988), this Court explained the rationale behind the doctrine of res judicata:
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> > "'"Res judicata is a broad, judicially developed doctrine, which rests upon the ground that public policy, and the interest of the litigants alike, mandate that there be an end to litigation; that those who have contested an issue shall be bound by the ruling of the court; and that issues once tried shall be considered forever settled between those same parties and their privies."
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> "'533 So. 2d at 190. The elements of res judicata are

> "'"(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions."
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> "'Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). "If those four elements are present, then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation." 723 So. 2d at 636. Res judicata, therefore, bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action.
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> "'The corollary to the above-stated rationale is that the doctrine of res judicata will not be applied to bar a claim that could not have been brought in a prior action. Old Republic [Ins. Co. v. Lanier], ... 790 So. 2d [922,] 928 [(Ala. 2000)]. See also United States v. Maxwell, 189 F. Supp. 2d 395, 406 (E.D. Va. 2002); Restatement (Second) of Judgments, § 26(1)(c) (1982), Restatement (Second) of Judgments, § 51(1)(a). "In order for a judgment between the same parties to be res judicata, it must, among other things, ... involve a question that could have been litigated in the former cause or proceeding." Stephenson v. Bird, 168 Ala. 363, 366, 53 So. 92, 93 (1910).'"

Ex parte H.A.S., 308 So. 3d 533, 540-41 (Ala. Civ. App. 2020) (quoting Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 516-17 (Ala. 2002)) (footnotes omitted).

With regard to the doctrine of collateral estoppel, our supreme court has explained:

> "'For the doctrine of collateral estoppel to apply, the following elements must be established:
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> > "'"'(1) that an issue in a prior action was identical to the issue litigated in the present action; (2) that the issue was actually litigated in the prior action; (3) that resolution of the issue was necessary to the prior judgment; and (4) that the same parties are involved in the two actions.'
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> > "'"Smith v. Union Bank & Trust Co., 653 So. 2d 933, 934 (Ala. 1995). '"Where these elements are present, the parties are barred from relitigating issues actually litigated in a prior [action]."' Smith, 653 So. 2d at 934 (quoting Lott v. Toomey, 477 So. 2d 316, 319 (Ala. 1985))."
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> "'Biles v. Sullivan, 793 So. 2d 708, 712 (Ala. 2000). "Only issues actually decided in a former action are subject to collateral estoppel." Leverette ex rel. Gilmore v. Leverette, 479 So. 2d 1229, 1237 (Ala. 1985) (emphasis added). The burden is on the party asserting collateral estoppel to prove that the issue it is seeking to bar was determined in the prior adjudication. See Adams v. Sanders, 811 So. 2d 542, 545 (Ala. Civ. App. 2001) ("Because we have no transcript of the trial in the district court, the burden is on Sanders to show that the district court determined that he was not negligent."). See also United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975) ("The burden ... is on [the one asserting collateral estoppel] to establish that the issue he seeks to foreclose from litigation in the present prosecution was necessarily decided in his favor by the prior verdict.").'"

Walker v. City of Huntsville, 62 So. 3d 474, 487 (Ala. 2010) (quoting Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d at 520).

Initially, with regard to the mother's arguments on the issue of collateral estoppel, we note that it is undisputed that, in the .03 actions in the juvenile court that resulted in the January 3, 2020, judgments, neither the issue of the mother's implied consent to the adoption of the children nor the issue of her alleged abandonment of the children was "actually decided" as a part of that action. Walker v. City of Huntsville, 62 So. 3d at 487. Thus, the circumstances do not satisfy all the required elements for collateral estoppel to act as a bar in these cases, as the mother contends it should in her appellate brief. "'The burden is on the party asserting collateral estoppel to prove that the issue it is seeking to bar was determined in the prior adjudication.'" Stewart v. Brinley, 902 So. 2d 1, 10 (Ala. 2004) (quoting Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d at 520). The mother has not met that burden. Accordingly, we conclude that she has failed to demonstrate that the doctrine of collateral estoppel, or issue preclusion, applies in these cases. Walker v. City of Huntsville, 62 So. 3d at 487.[3]

[3]We note that the mother contends that the aunt and the uncle had an "adequate opportunity to litigate" the issue of implied consent in the .03 actions. However, the additional element that a party had an "adequate opportunity to litigate" an issue for the purposes of the application of the doctrine of collateral estoppel applies only when the

Although the mother cannot establish that collateral estoppel bars the aunt and the uncle's claims, we recognize that the mother has focused most of her argument in her appellate brief on her assertion that the doctrine of res judicata, or claim preclusion, see McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998), bars the purported relitigation of the issue of the mother's implied consent to the adoptions. In making those arguments, the mother simply contends that the parties to the .03 actions in the juvenile court and to the two adoption actions are the same. However, the mother presented little evidence concerning the .03 actions. The testimony of the witnesses indicates only that the maternal grandparents filed those actions against the aunt and the uncle. The aunt testified that the maternal grandparents agreed to dismiss those actions if she and the uncle agreed to provide some schedule of visitation to the mother. The record contains no indication that the mother asserted any claim in the .03 actions or that she was a party to those actions.

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prior action involved administrative proceedings. Ex parte Buffalo Rock Co., 941 So. 2d 273, 277 (Ala. 2006); Ex parte Shelby Med. Ctr., Inc., 564 So. 2d 63, 68 (Ala. 1990); Smith v. Alabama Aviation & Tech. Coll., 683 So. 2d 426, 430 (Ala. Civ. App. 1995).

In their appellate brief submitted to this court, the maternal grandparents allege that the mother "joined" the .03 actions. However, statements made by counsel in an appellate brief are not evidence. Ex parte Edwards, 299 So. 3d 238, 243 (Ala. 2020); Ex parte Safeway Ins. Co. of Alabama, 947 So. 2d 380, 383 (Ala. 2006). It was the mother's burden to establish the existence of all four of the elements of the doctrine of res judicata. Dupree v. PeoplesSouth Bank, 308 So. 3d 484, 489 (Ala. 2020); Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d at 516. If the mother could not present evidence supporting the existence of each of the required elements of the doctrine of res judicata, her defense necessarily fails. Id. The record does not demonstrate that the parties to the adoption actions, i.e., the aunt and the uncle and the mother, were the same as the parties to the .03 actions in the juvenile court. Further, the mother has not advanced on appeal any argument that, because the maternal grandparents were parties to the .03 actions, there was a "substantial identity of parties" to the actions. See Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998); Ex parte H.A.S., supra. Accordingly, we cannot say that the mother has demonstrated that the

aunt and the uncle's claims should be barred by the application of the doctrine of res judicata.

Out of an abundance of caution, we also note that we disagree with the mother's argument, asserted as a part of her argument that the aunt and the uncle's claims are precluded under the doctrine of res judicata, that the same "cause[s] of action" were presented in the .03 actions and in the adoption actions. As the mother points out on appeal, the application of the doctrine of res judicata or claim preclusion is not limited to the exact cause of action but may also include "'all legal theories and claims arising out of the same nucleus of operative facts.'" Austill v. Prescott, 293 So. 3d 333, 346 (Ala. 2019) (quoting Old Republic Ins. Co. v. Lanier, 790 So. 2d 922, 928 (Ala. 2000)). The mother contends that the aunt and the uncle could have litigated in the .03 actions issues such as whether the children's best interests were served by continued visitation with the mother and maintaining a relationship with her or whether the mother had abandoned the children.

However, this court has held that actions involving adoption and actions involving dependency or the termination of parental rights are not the same causes of action. See T.C.M. v. W.L.K., 208 So. 3d 39, 44

(Ala. Civ. App. 2016) ("We have often explained that adoption actions in probate court and dependency and/or termination actions in juvenile court are not the same causes of action and that, in many instances, dependency or termination actions and adoption actions occur simultaneously."); J.J. v. J.B., 30 So. 3d 453, 457 (Ala. Civ. App. 2009) ("[A]doption proceedings are not duplicative of the juvenile-court proceedings."); B.C. v. Cullman Cnty. Dep't of Hum. Res., 169 So. 3d 1059, 1061 (Ala. Civ. App. 2015) ("This court has noted that the juvenile court is 'concerned with a different issue than the probate court and that [their respective judgments] are separate judgments rendered on different facts under different law.'"(quoting D.B. v. J.E.H., 984 So. 2d 459, 462 (Ala. Civ. App. 2007))); and D.B. v. J.E.H., 984 So. 2d at 462 ("Insofar as the custodians argue that the retention of the adoption proceeding by the probate court resulted in inconsistent judgments, we conclude that the juvenile court was concerned with a different issue than the probate court and that the judgments are not inconsistent but instead are separate judgments rendered on different facts under different law.").

In the .03 actions in the juvenile court, the maternal grandparents asserted claims seeking to modify custody of the children and visitation

with those children. Even assuming that the mother "joined" the .03 actions, the mother has not cited to any authority supporting her theory that those custody-modification and visitation-modification claims necessitated the litigation of the issues of the mother's abandonment of the children or her implied consent to their adoption. Given the foregoing authority providing that dependency actions in the juvenile court are separate causes of action from adoption actions asserted in the probate court, we cannot hold that a custody-modification action that sets forth no dependency allegations would be equivalent to a probate-court adoption action such that the doctrine of res judicata would prevent the consideration of the probate-court adoption action. We reject the mother's argument that, under the facts of this case, the adoption actions were barred by the doctrines of res judicata or collateral estoppel by virtue of the juvenile court's entry of the January 3, 2020, judgments.

Finally, the cases discussed with regard to this issue generally pertain to the attempted modification of an earlier judgment. In these appeals, however, no such attempted modification is at issue; the adoption actions do not involve a modification of the January 3, 2020, judgments. Nevertheless, the principles discussed above would remain

applicable: the juvenile court was not precluded under the doctrine of collateral estoppel from considering in the adoption actions evidence relevant to the issue of implied consent relating to periods occurring before the entry of the January 3, 2020, judgments because in the .03 actions the juvenile court did not receive ore tenus evidence on the custody claims asserted in those actions -- i.e., those claims were never "actually litigated" -- before it entered the January 3, 2020, judgments.

The mother also argues that the aunt and the uncle should be deemed "equitably estopped" or "judicially estopped" from seeking to adopt the children. In making those arguments, the mother contends that the aunt and the uncle have taken a position in the adoption actions that is contrary to the position taken in the .03 actions in the juvenile court.

> "The three essential elements of equitable estoppel are:
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> > "'(1) The person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.'"

Mid-South Credit Collection v. McCleskey, 587 So. 2d 1212, 1213 (Ala. Civ. App. 1991) (quoting General Elec. Credit Corp. v. Strickland Div. of Rebel Lumber Co., 437 So. 2d 1240, 1243 (Ala. 1983)).

With regard to judicial estoppel, our supreme court has stated:

> "In Ex parte First Alabama Bank, [883 So. 2d 1236 (Ala. 2003),] this Court 'embrace[d] the factors set forth in New Hampshire v. Maine[, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001),] and join[ed] the mainstream of jurisprudence in dealing with the doctrine of judicial estoppel.' 883 So. 2d at 1246. As this Court stated:
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> > "'The [New Hampshire v. Maine] Court held that for judicial estoppel to apply (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) the party must have been successful in the prior proceeding so that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled'" (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)); and (3) the party seeking to assert an inconsistent position must "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 532 U.S. at 750-51, 121 S. Ct. 1808. No requirement of a showing of privity or reliance appears in the foregoing statement of factors to consider in determining the applicability of the doctrine of judicial estoppel.'
>
> "883 So. 2d at 1244-45."

Middleton v. Caterpillar Indus., Inc., 979 So. 2d 53, 60-61 (Ala. 2007).

In A.L.D. v. Calhoun County Department of Human Resources, 2 So. 3d 855 (Ala. Civ. App. 2008), this court questioned whether the doctrine of judicial estoppel could be applicable in actions involving child custody or in juvenile-court actions involving allegations that a child is dependent. In that case, A.L.D., a maternal grandmother, had been awarded custody of her dependent grandchild in 2006. However, during an investigation into the placement of a sibling of that child, the Calhoun County Department of Human Resources ("the Calhoun County DHR") learned that information that A.L.D. had been convicted of child endangerment in 2003 had either not been known at the time of, or had been omitted from, a 2006 home study upon which the 2006 custody decision had been partially based. The juvenile court in that case, after a dependency hearing in 2007, entered a judgment finding the grandchild at issue dependent. In her appeal of the dependency judgment, A.L.D. argued, among other things, that the Calhoun County DHR should have been judicially estopped from presenting evidence regarding her 2003 conviction and the facts set forth in the 2006 home study.

On appeal, this court affirmed the dependency judgment, rejecting the argument that the doctrine of judicial estoppel should apply in that case. This court explained:

> "For purposes of judicial estoppel, this new evidence distinguishes the relationship between A.L.D. and the [juvenile] court in the 2007 dependency proceeding from their relationship at the time of the 2006 custody determination. The new evidence precludes [the Calhoun County] DHR's position from being 'clearly inconsistent' with its 2006 recommendation. See [Ex parte] First Alabama Bank, 883 So. 2d [1236,] 1244-45 [(Ala. 2003)]. It also precludes any perception that the trial court was 'misled' as contemplated by the second New Hampshire v. Maine[, 532 U.S. 742 (2001),] factor. Id."

A.L.D. v. Calhoun Cnty. Dep't of Hum. Res., 2 So. 3d at 861. This court also held that courts must also consider the child's best interests, stating:

> "In light of the new evidence the trial court received at the November 19, 2007, hearing, applying the doctrine of judicial estoppel as A.L.D. suggests would unduly restrict the trial court's ability to consider the best interests of the child. Accordingly, we hold that the doctrine of judicial estoppel does not apply in this case …."

Id.

In her appellate brief, the mother does not specifically address the applicability of either judicial estoppel or equitable estoppel or formulate an argument that one of those forms of estoppel should apply in these cases. Instead, the mother merely refers to "estoppel" or "the doctrine" in

asserting that the aunt and the uncle should be barred from seeking to adopt the children based on a claim that she had impliedly consented to the adoptions. The mother insists that the aunt and the uncle maintained "inconsistent" positions in the .03 actions and in the adoption actions. In making that argument, the mother contends that, by entering into the agreement in the .03 actions to allow the mother minimal supervised visitation with the children, the aunt and the uncle misled her to her detriment. In other words, the mother contends that the aunt and the uncle, to maintain their current adoption actions, were required in the .03 actions either to vehemently oppose any award of visitation to her or to allege that she had abandoned the children, which, apparently in her view, should have been alleged as part of a claim to terminate her parental rights in those actions.

However, as we have already noted, the .03 actions involved custody-modification and visitation-modification claims asserted by the maternal grandparents. The record does not indicate that the mother was a party to the .03 actions such that she could have been "misled" by any litigation strategy or theory that the aunt and the uncle might have employed, or, in the case of judicial estoppel, how either the court in the

03 actions or the court in the adoptions actions could have been misled.[4] The aunt and the uncle did not assert claims against the mother in the .03 actions initiated by the maternal grandparents.

We note that, in another part of her brief, but not in the same section as her estoppel arguments, the mother refers to text messages sent from the aunt to the maternal grandmother in 2018 in which the aunt stated that she and the uncle had no intention of seeking to terminate the mother's parental rights. The mother does not contend, in her estoppel arguments, that those text messages should bar the aunt and the uncle from seeking to adopt the children.

Regardless of whether we consider only the January 3, 2020, judgments or whether we also consider the 2018 text messages when evaluating the mother's estoppel arguments, the mother fails to identify how she might have relied upon those judgments or messages to her detriment. The mother does not contend that, in reliance on the text messages, she elected not to visit the children and was therefore "misled" into engaging in behavior that might result in her being deemed to have

[4]It appears that the mother was arguably a third-party beneficiary of the agreement settling the claims asserted by the maternal grandparents in the .03 actions.

impliedly consented to the proposed adoptions. The mother also does not contend that she began visiting the children after the entry of the January 3, 2020, judgments only because she believed that the children could not be adopted; she does not assert that she would have visited the children more often had she understood or believed that the aunt and the uncle would use her failure to maintain contact with the children as a basis for seeking to adopt them. "[F]or the doctrine of estoppel to apply, the defendant must prove a change in position in reliance upon an act or omission of the other party." First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415, 424 (Ala. 1982). The mother has not demonstrated such a "change in position" in reliance on the aunt and the uncle's allowing her to visit the children, after periods of no contact, such that the aunt and the uncle were equitably estopped from seeking to adopt the children.

Moreover, the aunt and the uncle each testified that they entered into the agreement upon which the January 3, 2020, judgments were based because they believed that continued, regular contact with the mother was in the children's best interests and because they hoped that the terms of that agreement and the judgments would force the mother

to maintain contact with the children. The mother relies on the aunt and the uncle's belief that contact with her was in the children's best interests to bolster her contention that the aunt and the uncle were precluded from seeking to use her past conduct as a basis for seeking to adopt the children. However, the aunt testified that the children wanted both to see the mother and to be adopted, and the testimony of each of the children supports the aunt's testimony. A trial court must consider the best interests of the children when addressing the issue of estoppel in the context of an action involving a child. A.L.D. v. Calhoun Cnty. Dep't of Hum. Res., 2 So. 3d at 861. We cannot say that the aunt and the uncle's belief that contact with the mother would benefit the children, and that their hope, when entering into the agreement upon which the January 3, 2020, judgments are based, that a schedule of visitation would benefit the children, should bar them from reconsidering that position, if they so desired, in another proceeding. Further, there is evidence in the record to support the conclusion that the adoption of the children and the children's continued contact with the mother are not mutually exclusive options. The juvenile court could have determined that the stability available to the children through adoption, particularly when the aunt

and the uncle approve of contact with the mother, if that contact best supported the children's best interests, would be in the children's best interests.

The mother next argues that, even if this court rejects her collateral-estoppel, res judicata, judicial-estoppel, and equitable estoppel arguments, the juvenile court erred in allowing the children to be adopted by the aunt and the uncle. Under the Alabama Adoption Code ("the AAC"), § 26-10A-1 et seq., Ala. Code 1975, unless a parent's parental rights are terminated, a parent must consent to the adoption of his or her child. J.D.S. v. J.W.L., 204 So. 3d 386, 398-90 (Ala. Civ. App. 2016) (citing S.A. v. M.T.O., 143 So. 3d 799, 802-03 (Ala. Civ. App. 2013)). A parent may give express consent to the proposed adoption. See § 26-10A-7, Ala. Code 1975. Alternatively, a parent's consent to a proposed adoption may be implied by the parent's conduct. See § 26-10A-9, Ala. Code 1975 (governing implied consents to a proposed adoption).

In these actions, the mother opposed the proposed adoptions, i.e., she did not give her express consent to the adoption of the children. The aunt and the uncle, however, proceeded under § 26-10A-9, alleging that, by leaving the children without support and by failing to visit or

communicate with them for extended periods, the mother gave her implied consent to the adoption of the children. Section 26-10A-9 provides:

> "(a) A consent or relinquishment required by Section 26-10A-7[, Ala. Code 1975,] may be implied by any of the following acts of a parent:
>
> > "(1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to the birth.
> >
> > "(2) Leaving the adoptee without provision for his or her identification for a period of 30 days.
> >
> > "(3) Knowingly leaving the adoptee with others without provision for support and without communication, or not otherwise maintaining a significant parental relationship with the adoptee for a period of six months.
> >
> > "(4) Receiving notification of the pendency of the adoption proceedings under Section 26-10A-17[, Ala. Code 1975,] and failing to answer or otherwise respond to the petition within 30 days.
> >
> > "(5) Failing to comply with Section 26-10C-1[, Ala. Code 1975].
>
> "(b) Implied consent under subsection (a) may not be withdrawn by any person."

In each of the November 29, 2021, judgments, the juvenile court found that the mother had impliedly consented to the proposed adoptions under § 26-10A-9(a)(1) and (3). In other words, the juvenile court found both that the mother had abandoned the children and that she had knowingly failed to maintain a parental relationship with the children for a period of six months. We observe that a finding that a parent has impliedly consented to an adoption must be established by clear and convincing evidence. See § 26-10A-25(b)(2), Ala. Code 1975 (stating that a probate court shall enter a final decree of adoption if clear and convincing evidence establishes that consent has been obtained). The record must contain

> "'"[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."'"

J.D.S. v. J.W.L., 204 So. 3d at 390 (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn § 6-11-20(b)(4), Ala. Code 1975).

In the November 29, 2021, judgments, the juvenile court explained its decisions as follows:

> "The court finds that A.C.B., the natural mother, impliedly consented to the adoption on the grounds provided in § 26-10A-9(a)(1) and § 26-10A-9(a)(3), Ala. Code 1975.
>
> "Abandonment, § 26-10A-9(a)(1)
>
> "The natural mother abandoned the adoptee[s] for a period of six months between February 28, 2018, and September 2018. During this period, the mother made no contact whatsoever with the adoptee[s], made no attempt to visit, and provided no financial support.
>
> "The natural mother abandoned the adoptee[s] for a second period of six months between November 3, 2018, and May 3, 2019. During this period, pursuant to uncontroverted testimony at trial, the natural mother made no contact whatsoever with the adoptee[s], made no attempt to visit, and provided no financial support.
>
> "Failure to Maintain a Significant Parental Relationship, § 26-10A-9(a)(3)
>
> "Furthermore, the mother failed to maintain a parental relationship for a period exceeding six months. As the Alabama Supreme Court stated in Ex parte A.M.F., 997 So. 3d 1008 (Ala. 2008), 'maintaining a significant parental relationship with a child entails more than mere sporadic showing of interest or concern.' …
>
> "In the present case, the natural mother testified that she has been employed and working for at least fourteen months. The [aunt and the uncle] gave uncontroverted testimony that the natural mother has never provided

> support for the child[ren] while the child[ren] [have] been in their care.
>
> "From February 2018 to May 2019, the natural mother only visited the child[ren] once, and only called sporadically in those eighteen (18) months. The natural mother had opportunity to reach out to the adoptee[s], and the [aunt and the uncle] even contacted her several times to arrange visits. However, the [aunt and the uncle's] efforts were rebuffed by the natural mother.
>
> "A natural parent's implied consent to an adoption, once given, cannot be withdrawn. § 26-10A-9(b), Ala. Code 1975. In light of an uncontroverted six-month period of abandonment and her failure to maintain a significant parental relationship, the court finds that the natural mother has consented to the adoption[s]."

On appeal, the mother contends that the facts of these cases are similar to the facts in other cases concerning implied consent, in which the appellate courts have held that a parent's actions did not amount to such consent. We note that the theory and law governing implied consent has changed over time. Before 1990, the adoption code in Alabama required the express consent to the adoption by the child's parent unless that parent had abandoned the child. For instance, former Title 27, § 3, Ala. Code 1940 (1958 Recomp.), provided in pertinent part:

> "No adoption of a minor child shall be permitted without the consent of his parents, but the consent of a parent who has abandoned the child, or who cannot be found, or who is insane or otherwise incapacitated from giving such consent, or who

> has lost guardianship of the child, through divorce proceedings, or by the order of a juvenile court or court of like jurisdiction, may be dispensed with, and consent may be given by the guardian if there be one, or if there be no guardian by the state department of public welfare. …"

Schwaiger v. Headrick, 281 Ala. 392, 203 So. 2d 114 (1967), was decided in 1967, when, under former Title 27, § 3, one method by which a parent could be deemed to have provided anything other than express consent to a proposed adoption was the parent's abandonment of that child. The adoption code in existence at that time contained no definition of the term "abandonment." The opinion in Schwaiger v. Headrick, supra, does not set forth the length of time the father in that case failed to visit the child or to provide support for the child, as was required in a judgment that had divorced him from the child's mother, but it indicates that the father attempted to provide some support to the child. In reversing a judgment finding that the father had abandoned the child such that his consent to the proposed adoption could "be dispensed with," our supreme court stated that the father's failure to support the child "under the circumstances here presented, and his failure to visit the child under existing misunderstandings in the family, does not, in our judgment, constitute abandonment within the purview of [former]

Section 3, Title 27, Code of 1940." Schwaiger v. Headrick, 281 Ala. at 394, 203 So. 2d at 116.

Similarly, Butler v. Giles, 47 Ala. App. 543, 258 So. 2d 739 (Civ. 1972), was decided in 1972 under former Title 27, Section 3. The issue was whether the circuit court, in an appeal from a probate court's judgment finding that the father had abandoned the child, had erred in determining that the father in that case had not abandoned the child and in reversing the probate court's judgment. At the time the adoption petition was filed in that case, the mother and the stepfather who was attempting to adopt the child alleged that the father had not tried to visit the child in approximately two years; the father disputed that testimony and stated that the mother and the stepfather had thwarted his attempts to visit the child. 47 Ala. App. at 545, 258 So. 2d at 740. The father had paid approximately two-thirds of his child-support obligation during that time. 47 Ala. App. at 546, 258 So. 3d at 741. This court, relying on Schwaiger v. Headrick, supra, affirmed the circuit court's judgment finding that the father's actions had not constituted an abandonment of the child under former Title 27, § 3. 47 Ala. App. at 42, 258 So. 2d at 741-42.

In 1990, the Alabama Legislature enacted the AAC, including § 26-10A-9. Although § 26-10A-9 has subsequently been amended, the substance of what are now subsections (a)(1) and (a)(3) have not been altered.

When it enacted the AAC in 1990, the legislature, for the first time, included a definition of the term "abandonment" for the purposes of adoption. That term was, and currently is, defined as:

> "A voluntary and intentional relinquishment of the custody of a minor by [a] parent, or a withholding from the minor, without good cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or the failure to perform the duties of a parent."

§ 26-10A-2(1), Ala. Code 1975. We note that that definition mirrors the definition of "abandonment" originally adopted in the 1984 Child Protection Act, former § 26-18-1 et seq., Ala. Code 1985, which has been repealed and replaced by the Alabama Juvenile Justice Act, § 12-15-101 et seq., Ala. Code 1975. The Committee Comment to § 26-10A-2 states that "[t]he definition of 'abandonment' in subdivision (1) is derived from [former] Ala. Code § 26-18-3 (1975)"; § 12-15-301(1), Ala. Code 1975, a

part of the current Juvenile Justice Act, provides a substantially similar definition of "abandonment."

This court considered what are now § 26-10A-9(a)(1) and (3) in K.L.B. v. W.M.F., 864 So. 2d 333 (Ala. Civ. App. 2002). In that case, the father visited and provided support for his child pursuant to a divorce judgment until August 2017, when a dispute arose between the father and the mother and the stepfather after the father had disciplined the child using a belt and had left bruises on the child. The mother and the stepfather refused to allow the father visitation after August 2017, and the father stopped contributing to the child's support in February 2018. In November 2018, the stepfather filed a petition seeking to adopt the child, and he argued in that petition that the father had impliedly consented to his adoption of the child. The father opposed the proposed adoption. However, the juvenile court in that case determined that the father had failed to maintain a "significant parental relationship" with the child for six months. K.L.B. v. W.M.F., 864 So. 2d at 340.

The main opinion in K.L.B. v. W.M.F. discussed the holdings of Butler v. Giles, supra, and Schwaiger v. Headrick, supra, which, as noted above, discussed the application of former Title 27, § 3, which had

provided that a parent's consent to an adoption could be implied if the parent had abandoned a child. See 864 So. 2d at 341-42. The main opinion then concluded, as did the court in Schwaiger v. Headrick, supra, that "we cannot construe the conduct of the father in this case 'to evince a settled purpose to [forgo] all parental duties and relinquish all parental claims' to his daughter." K.L.B. v. W.M.F., 864 So. 2d at 342. Thus, the main opinion followed Butler v. Giles, supra, and Schwaiger v. Headrick, supra, which each held that the evidence did not support a finding of abandonment.

Further, in K.L.B. v. W.M.F., supra, the main opinion proceeded to analyze the issue whether the implied consent of a parent could be withdrawn, as the express consent to an adoption can be under certain circumstances. The main opinion concluded that an implied consent to an adoption could be withdrawn but that,

> "even if the father's conduct were sufficient to imply his consent at one time to his daughter's adoption, we do not believe there is sufficient evidence in the record in this case to support a conclusion that the child's best interests would be served by not allowing her father to withdraw that consent."

K.L.B. v. W.M.F., 864 So. 2d at 351.

K.L.B. v. W.M.F., supra, was released on January 18, 2002. On April 17, 2002, perhaps in response to the main opinion in K.L.B. v. W.M.F., supra, our legislature amended § 26-10A-9 to add what is now subsection (b). Subsection (b) provides that "[i]mplied consent under subsection (a) may not be withdrawn by any person."

The mother contends that the facts of the cases discussed above are sufficiently similar to the facts of these cases to support the conclusion that she did not impliedly consent to the proposed adoptions. The mother's arguments on appeal conflate the concepts of abandonment under § 26-10A-9(a)(1) and the failure to maintain a significant parental relationship under § 26-10A-9(a)(3), much as those concepts were conflated in K.L.B. v. W.M.F., supra. We first address the mother's arguments insofar as she asserts that the juvenile court erred in determining that she had abandoned the children during two separate six-month periods.

In her appellate brief, the mother has asserted a number of challenges to the findings that she had abandoned the children, contending, for example, that she had contacted the children by telephone a few more times than the juvenile court found that she had.

The mother also argues that the periods during which she failed to contact or visit the children were slightly shorter than six months and that, therefore, she had not abandoned the children under § 26-10A-9(a)(1). We decline to analyze each of those arguments pertaining to the abandonment issue, however. With regard to whether there is evidentiary support for a finding of abandonment, the mother is arguably correct that our precedents have been remarkably forgiving of a parent who has failed to contact or support his or her child for an extended period. Schwaiger v. Headrick, supra; Butler v. Giles, supra; K.L.B. v. W.M.F., supra. Those precedents would seem to dictate that the mother's failure to maintain contact with or to support the children for extended periods did not constitute an abandonment of the children. We note, however, that those precedents were decided before the enactment of § 26-10A-9(b), which provides that an implied consent may not be withdrawn. The courts in those cases considered the parents' renewed contact with or interest in the children after the adoption actions had been filed, but the results of those cases might have been different had the court been required to consider a statute such as § 26-10A-9(b). We do not determine that issue, however.

The juvenile court cited, as an alternate reason for finding implied consent, that the mother had given her implied consent to the proposed adoptions under § 26-10A-9(a)(3). In reaching the November 29, 2021, judgments, the juvenile court found that the mother had failed to maintain a significant parental relationship with the children for the 15-month period between February 2018 and May 2019 because, during that period, she only visited the children one time and maintained only sporadic and infrequent telephone contact with the children. This court may affirm a judgment that is correct for any reason, even if the court below has cited an incorrect reason as one basis for its judgment. Boykin v. Magnolia Bay, Inc., 570 So. 2d 639, 642 (Ala. 1990); K.T.D. v. K.W.P., 119 So. 3d 418, 430 (Ala. Civ. App. 2012). Thus, we may affirm the juvenile court's judgments if the mother is unable to demonstrate that the juvenile court in these cases erred in reaching its alternative finding that she failed to maintain a significant parental relationship with the children under § 26-10A-9(a)(3). Accordingly, we address that issue.

The mother contends that the evidence does not support a finding that she impliedly consented to the proposed adoptions under § 26-10A-9(a)(3). We note that it is undisputed that the mother has never

contributed to the support of the children, even during the approximately 14-month period when she was employed. The mother asserts in her appellate brief that she had "established a joint account with the maternal grandparents for things that the children needed." The maternal grandmother testified, however, that she was a joint owner on the mother's bank account and that she sometimes took some money out of that account to use for the children when the children lived with her. The maternal grandmother testified that the money in that account was from benefits received as a result off the death of the children's father. The mother was not working at the time money from that account was used for the benefit of the children, and she made no attempts on her own to contribute to the support of the children since they have been in the aunt and the uncle's home.

Thus, in arguing that the juvenile court erred in determining that she "[k]nowingly [left] the adoptee[s] with others without provision for support and without communication, or not otherwise maintaining a significant parental relationship with the adoptee[s] for a period of six months," see § 26-10A-9(a)(3), the mother briefly contends that the juvenile court erred in finding that she had left the children without any

provision for support.[5] Instead, however, the mother focuses her arguments on the contention that she occasionally communicated with the children and that, therefore, the evidence does not support a conclusion that she failed to maintain a significant parental relationship with the children.

The mother challenges the evidentiary support for that part of the juvenile court's finding that she did not maintain a significant parental relationship with the children from February 2018 through the spring of that year. The mother contends that, in the spring of 2018, the children primarily resided with the maternal grandparents and, therefore, that the aunt had no knowledge of how frequently she contacted the children. The mother points to her own testimony that she kept in contact with the children from February through May 2018, when, she admits, she "went off the deep end."

However, the mother was arrested in early March 2018 and was incarcerated for much of that spring. The aunt testified that she had

[5]The mother contended below that the children received government benefits, but the evidence establishes that those benefits were provided as a result of the death of the children's father. The mother does not otherwise dispute that she has not contributed to the support of the children.

obtained recordings of the mother's telephone calls during that incarceration and that the mother had contacted the children only once during that time. Thereafter, the children lived with the aunt and the uncle, and, according to the aunt, the mother did not visit the children and contacted them by telephone only twice; the aunt alleged that the mother sounded under the influence of drugs or alcohol during both of those telephone calls. The aunt arranged a visitation for the children with the mother in November 2018, which occurred for one hour after the mother left jail and before she left to attend a substance-abuse-treatment program.

The evidence indicates that the mother frequently contacted her parents and others through May 2019 but that she did not contact the children after her March 2018 arrest. As the mother points out, in October 2018, the aunt and the uncle, on the advice of the children's counselor, asked that, for a brief period, the mother and maternal grandparents not see the children and allow the children to settle into their home. However, the aunt estimated that that brief period lasted through December 2018 or January 2019. Regardless, the mother never contacted the aunt and the uncle, or the children, to learn of that request;

instead, she stated that she learned of the aunt and the uncle's request when she contacted her own parents. The mother did not contact the aunt and the uncle until May 2019 to request to speak with the children. At that point, the mother had been released from incarceration after a March 2019 arrest and had spent two months in a substance-abuse-treatment program. The aunt testified that, even after May 2019, she had frequently asked the mother to contact the children regularly and as scheduled but that the mother had not done so and had spoken only minimally, and sporadically, with the children through January 2020, when the maternal grandparents and the aunt and the uncle entered into the agreement incorporated into the January 3, 2020, judgments in the .03 actions.

In her appellate brief, the mother relies on J.D.S. v. J.W.L., 204 So. 3d 386, 390 (Ala. Civ. App. 2016), which, upon a cursory review, would seem to support the mother's argument that our caselaw supports the determination that the evidence did not support a finding that she had failed to maintain a significant parental relationship with the children. The mother in J.D.S. v. J.W.L. alleged that the father in that case had slowly reduced exercising his court-ordered visitation and that visitation

had ceased all together in March 2012. The father claimed that he had last seen the child in November 2012, and he admitted that he had stopped attempting to contact the child in January 2013. The father claimed that a difficult relationship with the child's mother, his work schedule, and financial difficulties had prevented him from visiting the child. The father in that case opposed a March 2015 petition filed by the child's stepfather seeking to adopt the child that was based on his claim that the father had impliedly consented to the adoption. We note, however, that, in that case, the father had continued to provide support for the child through the time of the adoption hearing. 204 So. 3d at 393.

In addressing the father's appeal in that case, this court analyzed a number of earlier cases, including in K.L.B. v. W.M.F., supra, Butler v. Giles, supra, and Schwaiger v. Headrick, supra. This court's discussion in J.D.S. v. J.W.L., supra, of those earlier cases, however, calls into question the holding in that case. Butler v. Giles, supra, and Schwaiger v. Headrick, supra, both involved the issue whether a child had been abandoned, and those cases were decided before the 1990 legislation that defined the term "abandonment" for the purposes of the AAC. As explained earlier in this opinion, K.L.B. v. W.M.F., supra, also relied

upon the caselaw concerning whether a parent had abandoned the child so as to support a finding that that parent had impliedly consented to a proposed adoption of his or her child. The main opinion in K.L.B. v. W.M.F., supra, however, did not specifically address the juvenile court's finding, set forth in the judgment being appealed in that case, that the father had failed to maintain a significant parental relationship with the child. The main opinion in K.L.B. v. W.M.F. supra, seems to have equated the abandonment of a child under § 26-10A-9(a)(1) with the failure to maintain a significant parental relationship with a child under § 26-10A-9(a)(3). In doing so, the main opinion failed to consider that in 1990, i.e., after the decisions in Butler v. Giles, supra, and Schwaiger v. Headrick, supra, the legislature added what is now subsection (a)(3) to the AAC's implied-consent statute. It is generally presumed that the legislature did not take useless action. See City of Montgomery v. Town of Pike Rd., 35 So. 3d 575, 584 (Ala. 2009) ("Moreover, '[c]ourts will attempt to give meaning to a legislative enactment and it is presumed that the Legislature did not do a vain and useless thing.'" (quoting Alidor v. Mobile Cnty. Comm'n, 291 Ala. 552, 558, 284 So. 2d 257, 261 (1973))). Thus, by failing to analyze the facts of the case separately under

subsection (a)(3) of § 26-10A-9 and by applying the holdings in previous abandonment cases decided under § 26-10A-9(1), the main opinion in in K.L.B. v. W.M.F., supra, failed to give effect to the intent of the legislature when it amended § 26-10A-9 in 1990.

Similarly, in J.D.S. v. J.W.L., supra, this court, although noting that the probate court in that case had relied upon § 26-10A-9(a)(3) in reaching its judgment, again failed to address the applicability of subsection (a)(3) of § 26-10A-9. Instead, relying on K.L.B. v. W.M.F., supra, and earlier cases decided under § 26-10A-9(a)(1), i.e., the abandonment subsection of § 26-10A-9, this court reversed the judgment in J.D.S. v. J.W.L., supra, that had determined that the father had given his implied consent to the adoption of the child in that case. This court stated:

> "The record in this case shows that the father failed to act in a responsible manner in fulfilling his parental obligations to the child. The record would further support a determination by the probate court that the best interests of this child appear to be served by the adoption of the child by the stepfather. However, the legislature has provided that the adoption cannot occur without the father's consent, which in this case must be found by implication through clear and convincing evidence. Although the father failed to make contact with the child for approximately two years prior to the filing of the adoption petition, the father had maintained a relationship with his child for eight years before his absence

> and consistently paid child support even throughout the adoption proceedings. The father testified that he failed to visit the child because of financial problems and a difficult work schedule, not because he intended to abandon the child. He further testified that his situation had since improved and that he wanted to be involved in his child's life. Like the fathers in K.L.B. [v. W.M.F., 864 So. 2d 333 (Ala. Civ. App. 2002)], Butler [v. Giles, 47 Ala. App. 534, 258 So. 2d 739 (Civ. 1972)], and Schwaiger [v. Headrick, 281 Ala. 392, 203 So. 2d 114 (1967)], we cannot construe the evidence as being sufficient to clearly convince the fact-finder that this father's conduct 'evince[d] a settled purpose to [forgo] all parental duties and relinquish all parental claims to the child.' Schwaiger, 281 Ala. at 394, 203 So. 2d at 116. Therefore, we conclude that there was not clear and convincing evidence demonstrating that the father impliedly consented to the adoption."

J.D.S. v. J.W.L., 204 So. 3d at 393.

It is not clear that this court would have decided Butler v. Giles, supra, and Schwaiger v. Headrick, supra, in the same manner had those cases been presented to this court currently, especially given the addition of what is now subsection (a)(3) to § 26-10A-9. This court, in analyzing those cases, might have considered the child's need for stability and permanency and otherwise focused on the child's bests interests in considering a parent's failure to maintain contact with and to support a child for extended periods, even up to years at a time. T.L.L. v. M.S.L., 646 So. 2d 34, 35 (Ala. Civ. App. 1993) ("The best interests of the child

are always paramount in any case."); Dunn v. Dunn, 972 So. 2d 810, 815 (Ala. Civ. App. 2007). We acknowledge that this court has interpreted the Comment to § 26-10A-7, "as well as the Comment following Ala. Code 1975, § 26-10A-24," Ala. Code 1975, as "leav[ing] no doubt that questions of consent take priority over issues regarding whether the proposed adoption is in the best interests of a proposed adoptee." S.A. v. M.T.O., 143 So. 3d at 803. However, Butler v. Giles, supra, and Schwaiger v. Headrick, supra, contain no mention of the best interests of the children at issue in those cases, and the main opinion in K.L.B. v. W.M.F., supra, did not mention the child's best interests in its consideration of whether the father in that case had impliedly consented to the proposed adoption but did mention the concept of best interests of a child in the analysis of another issue.[6] Regardless, that precedent applies only to the

[6]In J.D.S. v. J.W.L., supra, the best interests of the child was mentioned only in a quote from S.A. v. M.T.O., supra, stating that the issue of a parent's consent takes priority over the issue whether a proposed adoption is in the child's best interests. We note, however, that, even in that statement in S.A. v. M.T.O., supra, this court did not foreclose the consideration of a child's best interests in determining the issue of implied consent, which is particularly relevant when a parent is accused of having failed to maintain a significant parental relationship with the child.

consideration of whether a parent has abandoned a child under § 26-10A-9(a)(1), and, in these cases, the juvenile court found, as an alternative determination, that the mother had also impliedly consented to the proposed adoptions under § 26-10A-9(a)(3). This court may affirm the judgments if they are correct under the latter finding. Boykin v. Magnolia Bay, Inc., supra; K.T.D. v. K.W.P., supra.

The legislature did not define the phrase "maintaining a significant parental relationship" as it is used in § 26-10A-9(a)(3) of the AAC. However, in another context, this court has defined the term "significant" as "'"important; of consequence," or "having or expressing a meaning."'" Ex parte Collins, 184 So. 3d 1036, 1038 (Ala. Civ. App. 2015) (quoting White v. Harrison-White, 280 Mich. App. 383, 390, 760 N.W.2d 691, 696 (2008), quoting in turn Random House Webster's College Dictionary (2005)). The term "maintain" has been defined as follows:

> "'The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep from change; keep from falling, declining, or ceasing; keep in existence or continuance; keep in force; keep in good order; keep in proper condition; keep in repair; keep up; preserve; preserve from lapse, decline, failure, or cessation; provide for; rebuild;

> repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold.'"

Downs v. Downs, 978 So. 2d 768, 774 (Ala. Civ. App. 2007) (Moore, J., dissenting) (quoting Black's Law Dictionary 953 (6th ed. 1990) (emphasis omitted)). The version of Black's Law Dictionary relied upon in Downs v. Downs, supra, further provides that "[n]egatively stated, [maintain] is defined as not to lose or surrender; not to suffer or fail or decline." Black's Law Dictionary 953 (6th ed. 1990).

Moreover, in S.A. v. M.T.O., supra, this court interpreted § 26-10A-9(a)(3) by stating:

> "The AAC provides that a consent required under § 26-10A-7[, Ala. Code 1975,] may be implied by, among other things, a parent's '[k]nowingly leaving the adoptee with others without provision for support and without communication, or not otherwise maintaining a significant parental relationship with the adoptee for a period of six months.' Ala. Code 1975, § 26-10A-9(a)(3) (emphasis added). Consistent with settled rules of statutory construction, we must interpret the general phrase 'not otherwise maintaining a significant parental relationship' in this context with reference to the specified circumstance listed, i.e., knowingly leaving an adoptee both without support and without communication. Cf. Foster v. Dickinson, 293 Ala. 298, 300, 302 So. 2d 111, 113 (1974) ('The words, "or otherwise" in law when used as a general phrase following an enumeration of particulars are commonly interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned, receiving ejusdem generis interpretation.').

> "….
>
> "… That said, however, it must be remembered that the legislature of Alabama has seen fit to mandate that a mother's consent to a proposed adoption of her child shall be required and that that consent may be deemed implied under subsection (a)(3) of § 26-10A-9 only from the existence of a six-month period during which that mother has '[k]nowingly le[ft] the adoptee with others without provision for support and without communication' or has similarly failed to act to maintain a significant parental relationship."

143 So. 3d at 804.

In S.A. v. M.T.O., supra, this court reiterated that consent "may be deemed implied under subsection (a)(3) of § 26-10A-9 only from the existence of a six-month period during which [the parent] has '[k]nowingly le[ft] the adoptee with others without provision for support and without communication' or has similarly failed to act to maintain a significant parental relationship." 143 So. 3d at 804. In that case, the evidence demonstrated that the mother had engaged in voluntary actions that could result in a finding of implied consent to the adoption for a period of approximately four months but that, once the Etowah County Department of Human Resources had intervened and a juvenile court had removed custody of the child from the mother, the mother's actions thereafter were deemed involuntary. Id. After the involuntary removal of

the child from the mother's custody, the mother exercised court-ordered visitation, and, therefore, this court concluded that the mother had done "all she could" to maintain a significant parental relationship with the child, noting that the period before the order removing custody from her was not of sufficient length to support a finding of implied consent under § 26-10A-9. Id. at 804-05. See also S.P. v. J.R., 206 So. 3d 637, 640 (Ala. Civ. App. 2016) (reversing a judgment that had found that a father had impliedly consented to an adoption under § 26-10A-9(a)(3) when, the court noted: "[T]he only six-month period in which the father failed to visit the child was during the father's seven-month incarceration. However, the evidence is undisputed that the father continued to pay child support during that period."); and I.B. v. T.N., 194 So. 3d 221, 233-34 (Ala. Civ. App. 2015) ("As in S.A.[ v. M.T.O., supra], the mother in this case lost custody of the child by involuntary judicial action of the juvenile court. We cannot conclude, under these facts, that a loss of custody by action of the juvenile court equates to the mother's knowingly leaving the child with others.").

The definitions discussed above and the language of S.A. v. M.T.O., supra, indicate that the legislature, in enacting § 26-10A-9, did not

require the complete abandonment of a child by the parent in order for subsection (a)(3) to apply. In this case, the mother repeatedly left the children in the care of family members for extended periods of time after the children suffered the death of their father in 2015, including the 15-month period between February 2018 and May 2019 identified by the juvenile court in the November 29, 2021, judgments. It can also be argued that the mother did not maintain a significant parental relationship with the children even after May 2019. Regardless, we agree with the juvenile court that the evidence supports determinations both that the mother failed to communicate with the children or the aunt and the uncle for at least six months between February 2018 and May 2019 and that she failed to maintain a significant parental relationship with the children during the same period. During that time, the mother failed to preserve her relationship with the children, and she allowed the children's relationship with her to suffer and decline. The evidence fully supports the conclusion that the children have been emotionally impacted by the mother's conduct and that they want to be adopted to obtain a consistent, significant, i.e., consequential and important, relationship with parental figures -- in this case, the aunt and the uncle.

We acknowledge that the factual and procedural posture of these cases is unusual. The mother had reasserted some interest in the children after periods of failing to maintain communication with them and failing to provide them any support, during which periods she failed to maintain a significant parental relationship with the children. We note that the mother has not argued, either before the juvenile court or before this court, that § 26-10A-9(a)(3) required that she have no significant parental relationship with the children immediately preceding the aunt and the uncle's filing of their adoption actions. Also, although the mother contends that the aunt and the uncle should be equitably estopped from seeking to adopt the children, she makes no argument that the language of § 26-10A-9 refers to conduct immediately preceding the filing of an adoption action or to conduct at the time of the hearing on an adoption petition. In other words, the mother has not framed an argument concerning the specific language of the statute or the intent of the legislature. "It is neither the function nor the duty of this court to create an argument on behalf of an appellant or to perform an appellant's legal research." R.W.S. v. C.B.D., 244 So. 3d 987, 991 (Ala. Civ. App. 2017).

Similarly, the mother has not appealed the November 29, 2021, judgments by challenging subsection (b) of § 26-10A-9 and arguing that, assuming that the juvenile court correctly determined that she had impliedly consented to the proposed adoptions, the juvenile court should have allowed her to withdraw that consent. The only mention the mother makes of § 26-10A-9(b) is in a footnote in her brief in which she contends that the aunt and the uncle should be equitably estopped from relying on § 26-10A-9 in seeking to have her consent to the proposed adoptions implied by virtue of her conduct. Accordingly, any arguments challenging § 26-10A-9(b) are deemed to have been waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982).

In her appellate brief, the mother has argued that her conduct since January 2020 indicates that she did not consent to the proposed adoptions of the children during the earlier periods in which she failed to communicate with them, support them, or maintain a significant parental relationship with them. Thus, in essence, the mother contends that her conduct since January 2020 should cancel out or negate her conduct from February 2018 through May 2019. As the juvenile court noted, however, our legislature has provided that, unlike express

consent, an implied consent to an adoption, once given, may not be withdrawn. § 26-10A-9(b). This court is bound to interpret and give effect to the unambiguous language of a statute. Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala.1998). The language of § 26-10A-9(b) is clear and unambiguous, and it plainly sets forth the intent of the legislature. Accordingly, we must also construe § 26-10A-9(b) of the AAC in the same manner as did the juvenile court. Given the arguments in the mother's appellate brief, we cannot say that the mother has demonstrated that the juvenile court erred in reaching its conclusion.

Lastly, the mother also contends in her appellate brief that the juvenile court erred in finding that the proposed adoptions were in the children's best interests. The mother points out that the aunt and the uncle stated that they believed that the mother having continuing contact with the children could serve the children's best interests and that the children wanted to maintain a relationship with the mother. However, the aunt testified that the mother's inconsistent contact with the children had been detrimental to the children but that she believed that contact with the mother, together with the permanency of the proposed adoptions, would be beneficial for the children. The aunt

emphasized that the children needed permanency and stability, which she believed would be afforded the children through the proposed adoptions, and that she and the uncle would continue to encourage the children's relationship with the mother. The children testified that they love the mother and wanted to continue to visit with her. However, each child stated that she wanted to be adopted by the aunt and the uncle to eliminate the possibility of again being uprooted from the home in which they lived, which has occurred frequently since the death of the children's father. The record indicates that the aunt and the uncle have provided a stable home and environment for the children. The evidence also supports the conclusion that the aunt and the uncle have supported the children's relationship with the mother and that they will continue to do so in a manner that serves the interests of the children while also providing the children the stability and permanency the children need and desire. Given the evidence in the record on appeal, we cannot say that the mother has demonstrated error.

The juvenile court's November 29, 2021, judgments are affirmed.

2210259 -- AFFIRMED.

2210260 -- AFFIRMED.

Hanson, J., concurs.

Moore, Edwards, and Fridy, JJ., concur in the result, without opinions.