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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

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CL-2022-1176

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K.D.S.

v.

M.P. and F.P.

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CL-2022-1177

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K.D.S.

v.

M.P. and F.P.

Appeals from Tallapoosa Circuit Court  
(JU-20-19.01 and JU-20-20.01)

PER CURIAM.

These appeals involve the issue of the alleged dependency and the concomitant custodial disposition of two minor children ("the children"), i.e., K.G.S. (born in August 2009) and A.E.S. (born in June 2011), who were born to K.D.S. ("the mother"). Although the record in these appeals does not contain the dependency petitions originally filed in February 2020 in the Tallapoosa Juvenile Court ("the juvenile court") by the children's paternal aunt and uncle, i.e., M.P. and F.P., or in September 2020 by the Tallapoosa County Department of Human Resources ("DHR"), it can be discerned from a supplement to that record, as well as the record in a previous round of appeals taken by the mother and by two previous custodians of the children (appellate case nos. 2200618, 2200619, 2200620, 2200621, 2200625, 2200626, 2200627, and 2200628), that the children were initially found dependent by the juvenile court in April 2021 and were placed in the custody of the paternal aunt and uncle. The appeals from the juvenile court's judgments were transferred in June 2021 to the Tallapoosa Circuit Court ("the circuit court") pursuant to Rules 28(B) and 28(E), Ala. R. Juv. P. After a hearing in September 2022, during which the circuit court received ore tenus testimony from the

children, the mother, the mother's adoptive sister, the program director at the mother's drug-rehabilitation facility, and the paternal aunt and uncle, that court entered judgments in October 2022 that, as amended, found the children to be dependent and placed them in the custody of the paternal aunt and uncle. Although the circuit court's judgments entered as to the children were not identical, they contained similar findings and conclusions; we quote from the judgment as to the older child, K.G.S.:

"The Court conducted an interview of the minor children in chambers. The attorneys were present but the interview was outside the presence of the parties. The children appeared to be well adjusted and happy in the custody of the [paternal aunt and uncle]. The children expressed their strong desire to remain in the [paternal aunt and uncle's] home.... Additionally, the Court received the Report of the Guardian ad Litem, which recommended that custody of the children remain vested in the [paternal aunt and uncle].

"It is clear to the Court[,] based on the mother's testimony and that of others[,] that the mother has primarily been in jail[] or on drugs since the children were placed on [a] Safety Plan [by DHR] in 2018. The mother has six prior felonies. One of these convictions is for Robbery; another is for Robbery, reduced to a conviction for Theft First Degree. She has four pending felony drug charges in [a division of the circuit court]. In her testimony she stated that these charges would be dismissed when she completes rehab, and this opinion is based on assertions of her attorney. The Court cannot find a written agreement containing the details of such a plan. If the State goes forward with those charges, there could be severe consequences for the mother, even pursuant to the presumptive sentencing guidelines. The mother

testified that her plan is to delegate parental authority of the children to others should she be sentenced to prison pursuant to the pending felony charges. Her plan would be the same should she continue to be in a drug treatment center, and in a situation where the children could not reside with or near her. It is clear to the Court that the mother's plan is not in the best interest of the children. It is clear to the Court that even when she was not in jail, the mother failed to maintain any meaningful contact with the children. She has failed to offer emotional, physical, or financial support to the minor children. She has left this support to the custodians of the children.

"The mother is currently a resident of a rehabilitation center. While the Court appreciates that fact, there is a clear and substantial motivation in being in such a facility when you have a criminal record of six prior felonies, and facing four new felony charges. As noted above, those new offenses could carry severe consequences.

"The mother has no home of her own, and owns no vehicle. She works as a waitress on nights and weekends, and owes several thousand dollars in court costs and fines. In summary, she has no viable means of providing financially for herself or the minor children. Upon questioning, the mother admitted that she personally does not have the ability to meet the needs of the children as of the date of this hearing. She has not been able to do so in previous years due to her choices and drug addiction. She has been willing to delegate parental authority to others in the past, and would apparently do so in the future.

"Based on the foregoing, the Court finds as follows:

"1. That [each] child ... is ... dependent.

"2. That it is in the best interest of [each] child that the legal and physical custody of [each] child be placed with the [p]aternal [a]unt and [u]ncle....

"3. That all contact between [each] child and [the] mother shall be based on the mutual agreement of the parties and the wishes of [each] child."

The mother timely appealed to this court following the denial of her postjudgment motions. She asserts that the circuit court erred in determining that the children were dependent, in placing the children in the custody of the paternal aunt and uncle, and in not awarding her visitation subject to a specific visitation schedule.

The mother's first contention concerns the circuit court's dependency determination. Ala. Code 1975, § 12-15-102(8)a., defines a "dependent child" as "[a] child who has been adjudicated dependent ... and is in need of care or supervision" and who meets any of eight delineated circumstances, two of which are pertinent here:

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

"....

"6. [A child w]hose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.

The record reflects that the circuit court ruled from the bench during the hearing that the children were dependent after having heard testimony from the mother in response to questioning from, among others, the circuit-court judge, counsel for the paternal aunt and uncle, counsel for DHR, her own counsel, and the children's guardian ad litem. The mother assails that determination in her brief as having been improperly based upon "remote events," upon "speculation of future events," and "poverty"; further, she invokes caselaw to the effect that a petitioner seeking to prevail on a dependency claim against a parent who uses illicit scheduled drugs must show how that parent's drug use adversely affects that parent's ability to care for the pertinent child or children. However, a careful review of the circuit court's judgment does not indicate that that court based its dependency determination upon any potential impairment of the mother on the basis of current or past drug use per se; rather, at most, the circuit court noted the mother's extensive past and present entanglements with the criminal-justice system stemming from her involvement with drugs and observed that she faced a potential return to prison in the future because of her pending felony charges.

All of the foregoing is arguably immaterial, however, given that the circuit court also determined in its judgments that the mother was presently unable to support the children, i.e., provide for their material needs. The mother admitted in her trial testimony that a half-brother of the children who had been born in 2015 was in the care of paternal grandparents and that she was subject to a monthly support obligation of \$710 per month as to the half-brother. The mother also admitted that she owed her drug-rehabilitation program \$310 biweekly (i.e., a total of \$620 every four weeks) as rent and compensation for services, plus additional fees for drug testing; further, she testified to having to pay "house fees" to the program for supplies and food. The mother testified that she worked at a restaurant at a wage of \$11 per hour, earning approximately \$1,950 per month, and claimed to have between \$200-\$300 per month left over after defraying her expenses; however, the mother did not dispute that she owed \$6,730.30 in court costs stemming from her criminal cases, and she denied currently making any payments to satisfy those obligations. Further, she admitted that she was behind in making support payments with respect to the children's half-brother, although she could not say what her total arrearage was.

As was noted above, dependency, by statute, includes situations in which no parent is "able to provide for the care [or] support ... of [a] child" or when a parent is "unable ... to discharge his or her responsibilities to and for [a] child." The circuit court could properly have drawn the inference from that evidence that the mother's ability to earn income was insufficient to cover all of her existing expenses, much less to cover those plus provide support for teen and "tween" children. Although the mother's brief cites S.K. v. Madison County Department of Human Resources, 990 So. 2d 887 (Ala. Civ. App. 2008), which recites the proposition that poverty "'should not be the criteria for taking away a wanted child from the parents,'" (990 So. 2d at 903 (quoting In re Hickman, 489 So. 2d 601, 602-03 (Ala. Civ. App. 1986))), we would note that both S.K. and Hickman involved appellate review of final judgments terminating parental rights, whereas these appeals involve determinations of dependency. To the extent that the mother contends that the circuit court could not properly find the children dependent based solely upon her inability to support them, this court held to the contrary in A.T. v. A.G., 81 So. 3d 385 (Ala. Civ. App. 2011), affirming a judgment determining that two children were dependent because their



mother was "'unable to provide for the[ir] care, support, and education at this time'"; this court noted that the record in that case contained evidence indicating that the mother had earned no more than \$250 per month from odd jobs and had relied on family members for her support and paying court fees. See A.T., 81 So. 3d at 388, 389. The circuit court thus did not err in finding the children dependent.

The mother next contends that the circuit court acted outside its discretion in placing the children in the custody of the paternal aunt and uncle. However, her argument as to that issue cites no cases, statutes, or other legal authorities and, therefore, fails to comply with the pertinent rule regarding arguments in briefs filed in the appellate courts of this state:

"Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived. "This is so, because" it is not the function of [an appellate court] to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."'"

J.D. v. E.R., 266 So. 3d 1088, 1097 (Ala. Civ. App. 2018) (citations omitted) (quoting White Sands Grp., L.L.C. v. PRS II, LLC., 998 So. 2d 1042, 1058 (Ala. 2008))

Finally, the mother contends that the circuit court erred in directing that "all contact between [each] child and [the] mother shall be based on the mutual agreement of the parties and the wishes of [each] child." We agree with the mother's contention and conclude that that portion of the circuit court's judgment is due to be reversed.

In J.C. v. Houston County Department of Human Resources, 313 So. 3d 1137 (Ala. Civ. App. 2020), cited by the mother, this court reversed a judgment adjudicating a child dependent, awarding custody of the child to a third party, and awarding the mother of the child supervised visitation "as agreed upon and arranged by the parties." 313 So. 3d at 1139. On appeal, the mother in that case argued that the visitation provision, as worded, actually awarded her no specific visitation at all. We agreed. This court held that, consistent with a long line of cases cited in J.C., a court commits reversible error when it awards visitation between a parent and a dependent child solely at the discretion of the custodian. This court reversed the judgment in J.C. because the visitation provision at issue erroneously "g[ave] the custodian the unfettered right to arrange, or to decline to arrange, visitation between

the mother and the child at her sole discretion and provides only an illusory right to visitation in the mother." 313 So. 3d at 1142.

This court can discern no meaningful distinction between the visitation provisions at issue in these cases and the one at issue in J.C. In effect, the trial court's judgments do not preclude the mother from contacting and visiting with the children; instead, they award the mother the right to such contact and visitation solely at the discretion of the custodians (and the children). Based on the wording of the judgments, the mother has a right to contact and to visit with the children, but only if she can agree with the custodians (and the children) as to the time, place, and circumstances of the contact. Just as in J.C., the visitation provisions in these cases award the mother only an illusory right to visitation. We therefore conclude that, as to the issue of the mother's contact with the children, the judgments of the circuit court are due to be reversed. On remand, the circuit court is instructed to set forth a specified visitation schedule in favor of the mother subject only to any valid restrictions that that court may deem to be in the best interests of the children.

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Based upon the foregoing facts and authorities, the judgments of the circuit court are affirmed except as to the aspects pertaining to the mother's contact with the children; in that regard, the judgments are reversed and the cases are remanded for the entry of a judgment consistent with the instructions set forth in this opinion.

CL-2022-1176 -- AFFIRMED IN PART; REVERSED IN PART;  
AND REMANDED WITH INSTRUCTIONS.

CL-2022-1177 -- AFFIRMED IN PART; REVERSED IN PART;  
AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore and Edwards, JJ., concur.

Hanson, J., concurs in part and dissents in part, with opinion,  
which Fridy, J., joins.

HANSON, Judge, concurring in part and dissenting in part.

I concur in the main opinion except insofar as it reverses the judgment of the Tallapoosa Circuit Court ("the circuit court") as to the contact of K.D.S. ("the mother") with the children, K.G.S. and A.E.S.; as to that reversal, I respectfully dissent.

The mother contends that the circuit court erred in directing that "all contact between [each] child and [the] mother shall be based on the mutual agreement of the parties and the wishes of [each] child." The mother 's argument cites J.C. v. Houston County Department of Human Resources, 313 So. 3d 1137, 1142 (Ala. Civ. App. 2020), for the proposition that a provision in a judgment conditioning visitation between the mother and the children upon mutual agreement of the parties is reversible error per se. However, in both J.C. and in the authorities upon which J.C. relied (i.e., L.L.M. v. S.F., 919 So. 2d 307, 314 (Ala. Civ. App. 2005); K.B. v. Cleburne County Department of Human Resources, 897 So. 2d 379, 385-86 (Ala. Civ. App. 2004); D.B. v. Madison County Department of Human Resources, 937 So. 2d 535, 541 (Ala. Civ. App. 2006); and A.M.B. v. R.B.B., 4 So. 3d 468, 471 (Ala. Civ. App. 2007)), the courts rendering the pertinent judgments under review exercised their

discretion to specify that a noncustodial parent would be afforded visitation rights (albeit subject to consent of or particular conduct of custodians). See Ala. Code 1975, § 12-15-314(f)(9) (stating that courts in child-dependency actions "may order visitation between a parent ... and the child ... if the visitation is in the best interests of the child") (emphasis added). In contrast, in these cases, the circuit court did not rule that the mother would be entitled to visitation; rather, contact of any kind occurring in the future between the mother and either of the children was made subject to the wishes of the respective child and the consent of the parties.

"It is well settled that a trier of fact has broad discretion to determine a parent's right to visitation with a dependent child and that the best interests and welfare of the child is the primary consideration in determining whether to award visitation and, if so, the extent of that visitation."

Ex parte C.L., 358 So. 3d 1151, 1154 (Ala. Civ. App. 2022). In these cases, the circuit court, with the assent of the parties and in the presence of counsel, conducted in camera interviews with the children that do not appear in the record on appeal. "In the absence of a transcript of an in camera interview with a child, a reviewing court must assume that the evidence the trial court received during that interview is sufficient to

support that court's judgment." J.S. v. L.M., 251 So. 3d 61, 68 (Ala. Civ. App. 2017) (affirming judgment declining to modify visitation provision); accord M.D. v. E.F., 291 So. 3d 894, 896 (Ala. Civ. App. 2019) (applying principle set forth in J.S. to "affirm [a] juvenile court's judgment with regard to the modification of custody and [a] requirement that the mother's visitation be supervised"). Similarly, it should be conclusively presumed that the circuit court's determination that any contact between the mother and the children is subject to the agreement of the parties and in accordance with the children's wishes is supported by the evidence that cannot be examined and reviewed, and the majority, in my view, errs in failing to apply that conclusive presumption in these cases.

Fridy, J., concurs.