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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0517

J.M.

v.

Marshall County Department of Human Resources

Appeal from Marshall Juvenile Court
(JU-19-10.02)

MOORE, Presiding Judge.

J.M. ("the mother") appeals from a judgment entered by the Marshall Juvenile Court ("the juvenile court") terminating her parental rights to L.R. ("the child"). We reverse the juvenile court's judgment and remand the case with instructions.

Procedural History

On December 31, 2019, the Marshall County Department of Human Resources ("DHR") filed a petition seeking to terminate the parental rights of the mother and of D.R., the child's father, to the child. The juvenile court conducted a trial on the petition on May 24, 2021, in the absence of the mother, and, on May 27, 2021, the juvenile court entered a judgment terminating the parental rights of the mother.¹ On June 10, 2021, the mother moved the juvenile court to set aside the judgment to the extent that it terminated her parental rights on the ground that she had failed to appear at the trial because she had not received notice of the trial date; on June 22, 2021, the juvenile court granted the mother's postjudgment motion.

The juvenile court rescheduled the trial of the petition to terminate the mother's parental rights to November 2, 2021, but the trial was continued four different times, including once on the juvenile court's own motion and twice upon DHR's motion. The trial eventually commenced on April 16, 2023, and was concluded on May 3, 2023. But see Ala. Code

¹The juvenile court also terminated the parental rights of D.R. in the May 27, 2021, judgment; D.R. did not appeal that judgment.

1975, § 12-15-320(a) ("The trial on the petition for termination of parental rights shall be completed within 90 days after service of process has been perfected."). On July 10, 2023, the juvenile court entered a judgment ("the final judgment") terminating the mother's parental rights to the child. But see id. ("The trial court judge shall enter a final order within 30 days of the completion of the trial."). In the final judgment, the juvenile court determined, among other things:

"1. That the mother has abandoned the child as defined by the Code of Alabama (1975).

"2. That the mother has failed to provide for the material needs of the child.

"3. That reasonable efforts by [DHR] leading toward the rehabilitation of the mother with the child[] were waived by Order on September 11, 2019. The mother did not object to this waiver of reasonable efforts by DHR.

"4. That the mother has displayed a lack of effort to adjust her circumstances to meet the needs of the child.

"5. That the mother of the ... child is unwilling to discharge her responsibilities to and for the child, and, that the conduct and condition of the mother is such as to render her unable to properly care for the child, and that such conduct and condition is unlikely to change in the foreseeable future.

"6. Therefore[,] that by clear and convincing evidence, the court finds that grounds for the termination of parental rights of the [mother] exists.

"7. That all viable alternatives to the termination of the parental rights of the [mother] have been considered and rejected.

"8. Therefore, the parental rights of [the mother] to the above-named ... child are hereby terminated. The petition is hereby GRANTED."

The mother timely filed her notice of appeal to this court on July 21, 2023.

Issues

The mother argues that the juvenile court erred in finding that she had abandoned the child and that she had failed to provide for the material needs of the child. The mother also argues that the juvenile court had no other grounds for terminating her parental rights because, she says, she had adjusted her circumstances through her own rehabilitation efforts to meet the needs of the child by the time of the trial.

Standard of Review

At trial, the burden rested on DHR, as the petitioner, to prove its allegations by clear and convincing evidence, see Ala. Code 1975, § 12-15-319(a), which is "" [e]vidence that, when weighed against evidence in

opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion."'" C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

On appeal, this court reviews the juvenile court's factual findings to determine if they are supported by sufficient evidence.

"[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to clearly and convincingly ... establish the fact sought to be proved.'

"KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].

"... [F]or trial courts ruling ... in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden[.]' [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)]; thus, the appellate court must also look through a prism to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would 'produce in the mind [of

the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion.'" "

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus evidence, this court presumes their correctness. Id. We review the legal conclusions to be drawn from the evidence without a presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

Analysis

Section 12-15-319(a), Ala. Code 1975, provides, in pertinent part:

"If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her] responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parent[]."

In determining whether a parent is unable or unwilling to discharge his or her parental duties and whether to terminate parental rights, a

"juvenile court shall consider the following factors including, but not limited to, the following:

"(1) That the parent[] ha[s] abandoned the child, provided that in these cases, proof shall not be required of reasonable efforts to prevent removal or reunite the child with the parent[].

"....

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parent[] have failed.

"....

"(9) Failure by the parent[] to provide for the material needs of the child or to pay a reasonable portion of support of the child where the parent is able to do so.

"....

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review."

§ 12-15-319(a).

In the final judgment, the juvenile court expressly found that DHR had proven that the mother had abandoned the child, see § 12-15-

319(a)(1); that the mother had failed to provide for the material needs of the child, see § 12-15-319(a)(9); that DHR had been relieved of the duty to use reasonable efforts to reunite the mother and the child without objection from the mother, see § 12-15-319(a)(7); and that the mother had displayed a lack of effort to adjust her circumstances to meet the needs of the child, see § 12-15-319(a)(12). Based on those factors, the juvenile court concluded that DHR had presented grounds upon which it could terminate the mother's parental rights and that it should exercise its discretion to terminate the mother's parental rights.

Our review of the record shows that the juvenile court did not receive sufficient evidence to sustain its finding that the mother had abandoned the child. In termination-of-parental-rights cases, "abandonment" is defined in Ala. Code 1975, §12-15-301(1), to mean:

"A voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, 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 failure to perform the duties of a parent."

DHR failed to present any evidence indicating that the mother had committed any of the acts set forth in § 12-15-301(1).

The mother exercised custody of the child from the time the child was born on March 27, 2013, until DHR intervened into the family in November 2018, when DHR became concerned that the mother had an ongoing substance-abuse problem that was impairing her ability to properly care for the child. On November 13, 2018, the mother agreed to a safety plan whereby the child was temporarily placed with D.R., the child's father, while the mother exercised supervised visitation with the child. The safety plan failed after the child was found to have been returned to the mother without supervision. In March 2019, DHR summarily removed the child from the mother's custody and commenced dependency proceedings, which resulted in DHR's obtaining custody of the child and placing the child into foster care. The mother lost custody of the child only involuntarily through the action of the state.

After the mother lost custody of the child, she retained her right to visitation. See Ala. Code 1975, § 12-15-102(23). The mother argues that the undisputed evidence showed that she had consistently exercised that right. We agree. At trial, DHR called a series of DHR social workers and a DHR supervisor to testify about, among other things, the mother's interaction with the child from 2019 through 2023. Every DHR witness

who was questioned on the subject testified that the mother had consistently visited with the child in accordance with the visitation schedule and plan implemented by DHR. That plan included in-person supervised visits and telephone calls at different intervals over the years, and the mother rarely missed a visit. The mother also informally requested, and formally filed a motion requesting, additional visitation with the child, to which DHR agreed. Additionally, the mother attended to the child during hospital stays when allowed. The mother did not regularly attend doctor's appointments and school functions, but DHR never included those events in the mother's visitation plan, and she was not informed of them. The evidence indicates that telephone calls between the mother and the child ceased a few months before the trial but not due to the mother's voluntarily action or omission.

DHR presented substantial evidence indicating that the mother had a longstanding substance-abuse problem, but DHR presented no evidence indicating that the mother, while exercising custody of the child, had failed to perform the basic parental duties to protect, to educate, to care for, to provide for, to maintain, and to support the child. See Ex parte M.D.C., 39 So. 3d 1117, 1121 (Ala. 2009) (quoting M.D.C. v. K.D.,

39 So. 3d 1105, 1110 (Ala. Civ. App. 2008) (Moore, J., dissenting)). DHR also did not present any evidence indicating that, after the mother lost custody of the child, she had failed to perform her residual parental duties and responsibilities to and for the child. See Ala. Code 1975, § 12-15-102(23) (defining "residual parental rights and responsibilities" to mean "[t]hose rights and responsibilities remaining with a parent after a transfer of legal custody of a child ..., including, but not necessarily limited to, the right of visitation, the right to withhold consent to adoption, the right to determine religious affiliation, and the responsibility for support, unless determined by order of the juvenile court not to be in the best interests of the child"). It was undisputed that the mother did not pay child support, but the juvenile court never entered a child-support order, so the mother did not "fail" to support the child. See B.L. v. Elmore Cnty. Dep't of Hum. Res., 324 So. 3d 829, 837 (Ala. Civ. App. 2020) (holding that, in absence of an order requiring parent to pay child support in compliance with Ala. Code 1975, § 12-15-314(e), parent could not be found to have failed to pay child support).

The juvenile court also did not receive sufficient evidence indicating that the mother had failed to provide for the material needs of the child.

The record is devoid of any evidence indicating that the mother had ever failed to provide the child with medical care. In its petition to terminate the mother's parental rights, DHR alleged that the mother had not provided adequate food and clothing for the child, but DHR made no attempt to substantiate that allegation with any evidence. DHR did present some evidence that called into question whether the mother had provided the child with adequate shelter. That evidence indicated that the mobile home where the mother and the child had resided was temporarily under renovation in November 2018 and that, after the renovations were completed, the mobile home was heated by a woodburning device and had no operating water heater. The DHR social worker who was on the child's case in November 2018 testified that she did not summarily remove the child after observing the condition of the mobile home, implying that the mobile home, although not in optimal condition, had provided adequate shelter for the child. Another DHR witness testified that DHR did not have any knowledge of the condition of the mobile home at the time of the trial because, despite repeated requests for access, no DHR social worker had been inside the mobile

home since 2018. The mother testified that the mobile home was in a suitable condition for the child.

We conclude that the juvenile court erroneously determined that the mother had abandoned the child and that she had failed to provide for the material needs of the child. We further conclude that those erroneous determinations were not harmless because, after an examination of the entire cause, it appears that that error has "probably injuriously affected substantial rights of the [mother]." Rule 45, Ala. R. App. P. The juvenile court was obviously influenced by those two unproven factors, listed as its first two findings in the final judgment, to exercise its discretion to terminate the parental rights of the mother. The juvenile court did cite two other factors contributing to its decision -- that DHR had been relieved of using reasonable family-reunification efforts without objection from the mother and that the mother had displayed a lack of effort to adjust her circumstances to meet the needs of the child-- which, we conclude, are supported by sufficient evidence. However, we cannot say that the juvenile court would have reached the same determination absent its consideration of the first two factors cited in the final judgment. See J.S. v. S.B., 357 So. 3d 660 (Ala. Civ. App. 2022)

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(holding that juvenile court's mistaken finding of fact was not harmless error when that finding influenced ultimate determination to deny petition to modify custody of child).

Conclusion

Based on the foregoing, we reverse the final judgment entered by the juvenile court and remand the case with the following instructions. On remand, the juvenile court shall vacate the findings that the mother abandoned the child and that the mother failed to provide for the material needs of the child. The juvenile court shall then reconsider whether the petition to terminate the mother's parental rights should be granted or denied in the absence of those findings. The juvenile court shall then enter a new judgment reflecting its decision. See generally Chapman v. Chapman, 218 So. 3d 339, 348 (Ala. Civ. App. 2016) (remanding case with instructions for trial court to reconsider judgment "without taking into consideration the erroneous findings of fact that [were] unsupported by the evidence").

REVERSED AND REMANDED WITH INSTRUCTIONS.

Hanson and Fridy, JJ., concur.

Edwards, J., concurs in the result, with opinion.

EDWARDS, Judge, concurring in the result.

I concur in the result of the opinion reversing the judgment terminating the parental rights of J.M. ("the mother"). As the opinion explains, the juvenile court made two factual findings -- that the mother abandoned L.R. ("the child") and that the mother failed to provide for the material needs of the child -- that are unsupported by the evidence. As a result, this court cannot conclude that, in this particular case, the erroneous findings made by the Marshall Juvenile Court ("the juvenile court") did not impact the substantial rights of the mother such that they may be considered harmless error. See Rule 45, Ala. R. App. P. ("No judgment may be reversed ..., unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.").

When considering whether to terminate parental rights, a juvenile court is required to determine whether "the parent[] of a child [is] unable or unwilling to discharge [his or her] responsibilities to and for the child, or [whether] the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is

unlikely to change in the foreseeable future." Ala. Code 1975, § 12-15-319(a). Section 12-15-319(a) recites several factors for the juvenile court's consideration, including abandonment, § 12-15-319(a)(1), and the failure to provide material support for the child, § 12-15-319(a)(9). However, even if the juvenile court finds clear and convincing evidence of one or more of the factors set out in § 12-15-319(a), it is not required to terminate a parent's parental rights; the statute specifically states that the juvenile court "may terminate" a parent's rights.

Although "[w]e can affirm a judgment on a basis not asserted to the trial court, and we can affirm a judgment if we disagree with the reasoning of the trial court in entering the judgment, as long as the judgment itself is proper," M.G. v. State Dep't of Hum. Res., 44 So. 3d 1100, 1106 (Ala. Civ. App. 2010) (quoting Verchot v. General Motors Corp., 812 So. 2d 296, 305 (Ala. 2001), quoting in turn Progressive Specialty Ins. Co. v. Hammonds, 551 So. 2d 333, 337 (Ala. 1989)), we are permitted to affirm only when the record reveals a valid legal ground to do so. M.G., 44 So. 3d at 1106. In this particular case, this court cannot conclude that the juvenile court would have determined that termination of the mother's parental rights was warranted if it did not include in its

consideration that she had abandoned the child and that she had failed to provide for the material needs of the child. The authority to determine exactly when a parent's shortcomings are sufficient to warrant the extreme sanction of termination of parental rights is reposed in the juvenile court and not this court. Because in this particular case we cannot be certain, either from the text of the juvenile court's judgment or from matters contained in the record, that the loss of the particular factors (abandonment and failure to materially support the child) would not change the juvenile court's ultimate decision that termination of parental rights is warranted under the totality of the circumstances, I agree that we cannot determine that the erroneous factual findings made by the juvenile court in this termination-of-parental-rights judgment would amount to merely harmless error.

Although I agree that considering the unsupported factual findings to be mere harmless error in the present case could potentially result in this court unintentionally substituting its judgment of the facts and circumstances of this termination-of-parental-rights action for that of the juvenile court, I am not certain that we cannot ever conclude that an erroneous factual finding in a termination-of-parental-rights judgment

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amounts to mere harmless error. I can conceive of possible appeals in which this court could, in fact, have a basis for concluding that a juvenile court's judgment should be affirmed, despite the fact that one or more of the factual findings in that judgment are unsupported by the evidence. Accordingly, I concur in the result.