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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2010

1090565

Ex parte L.E.O. and P.O.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: L.E.O. and P.O.

v.

A.L. and J.I.P.)

(Madison Juvenile Court, JU-07-1751.01; Court of Civil Appeals, 2080395)

PER CURIAM.

L.E.O. and P.O. ("the petitioners") filed a petition in the Madison Juvenile Court ("the juvenile court") seeking the custody of J.I.P., Jr., a now seven-year-old boy who has been living with them for several years ("the child"), and alleging that the child is a dependent child. The child's parents are J.I.P. ("the father") and A.L. ("the mother"). The petitioners are not related to the child; he lives with them with the consent of the mother. After a proceeding at which it heard ore tenus evidence, the juvenile court held that the child was not dependent and dismissed the petition for lack of jurisdiction. The petitioners appealed. The Court of Civil Appeals affirmed the juvenile court's decision without an opinion; Judge Bryan dissented, with an opinion. We granted certiorari review to consider whether the Court of Civil Appeals' judgment conflicted with applicable caselaw. We conclude that it does, and we reverse the judgment.

I. Factual Background and Procedural History

The father and the mother married in 2002 in Huntsville. At that time, the father was a member of the United States Army and was stationed at Ft. Hood, Texas; the mother moved to Ft. Hood shortly after the marriage. The child was born in

June 2003. From November 2003 until January 2004, the mother and the child stayed with the child's paternal grandmother in California while the father remained at Ft. Hood. The mother and the child returned to Ft. Hood in January 2004, and, when the father was deployed to Iraq in March 2004, the mother and the child returned to Huntsville. The petitioners, whose daughter had attended high school with the mother, began babysitting for the mother, and they befriended her and the child.

The petitioners say that while the father was on leave in October 2004, he took the child to California without the mother's knowledge and obtained a temporary-custody order there. The father returned to Iraq in November 2004, leaving the child in California with the paternal grandmother. The mother contested the custody proceedings in California and instituted divorce proceedings in the Madison Circuit Court ("the divorce court"). The California court determined that it did not have jurisdiction over the child, and in March 2005 the divorce court awarded custody of the child to the mother, and he was returned to Alabama. The petitioners paid the mother's legal bills related to those proceedings.

The father left the Army in August 2005 and returned to California. Also in August 2005, the divorce court held a pendente lite hearing at which the father appeared. The judge determined that the father had been guilty of domestic violence, ordered him to attend an anger-management program and a parenting class, required that his visitation with the child be supervised until he had completed those classes, and ordered him to pay child support in accordance with the child-support guidelines, Rule 32, Ala. R. Jud. Admin. L.E.O. brought the child to the office of the mother's attorney on the date of the pendente lite hearing in the divorce court so the father could visit with the child. At the time of the hearing in the juvenile court in December 2008, the father had not seen the child since the visit in 2005, although he had talked to the child on the telephone.

The final hearing in the father and mother's divorce case was held in June 2006. The father was notified of the hearing, but he did not attend. The final divorce judgment awarded custody of the child to the mother, suspended the father's visitation rights until he completed a parenting class, and ordered him to attend an anger-management program.

The divorce court found that the father had not provided any support for the child or provided the information necessary for calculating a child-support obligation, but the divorce judgment did not contain any requirement that the father pay child support. That judgment was mailed to the father at the paternal grandmother's residence. The father denied receiving a copy but admitted that he was living with his mother at the address on file with the court when the judgment was entered and that he did not ever contact the court to obtain a copy of the judgment.

In the meantime, the petitioners' involvement with the child increased. The child progressed from occasionally spending the weekend with the petitioners to living with them on an ongoing basis. The petitioners provided for all the child's needs without financial support from either the mother or the father. In August 2007, the petitioners filed a petition in the juvenile court seeking custody of the child in which they alleged that he was dependent. The mother filed an answer admitting the allegations of the petition and consenting to the petitioners' obtaining custody of the child. She did not appear at any subsequent hearings in the juvenile

court. In August 2008 the father was added as a party to the juvenile court proceedings, and it was ordered that he be served.

The petitioners contend that the father knew they were involved in the child's life in August 2005 when L.E.O. brought the child to visit with the father in the mother's attorney's office. The mother had told him that the petitioners were like grandparents to the child, but the father says that neither the mother nor the petitioners ever told him that the mother had allowed the child to begin living with the petitioners. Approximately three years before the final hearing in the juvenile court, the father telephoned P.O. to inquire about the child. The petitioners say that P.O. "offered to serve as a conduit for information and a receptacle for any gifts or support that the father [might] want to send" but that he never contacted her again. The father denies that P.O. made any such offer. The petitioners say they have had the same address and telephone numbers since the child began living with them. The father says he has also had the same address and telephone number since he left the Army and returned to California.

In August 2008, L.E.O. telephoned the father and left a message for him. The paternal grandmother returned the call, and L.E.O. told her that the child was living with the petitioners and that they had instituted custody proceedings in the juvenile court. In explaining why he had not seen the child from August 2005 until the hearing in the juvenile court in December 2008, the father testified that he had been trying to arrange for visitation through the mother but that she always had an excuse as to why he should not come to Alabama. The father also stated that the mother, the maternal grandmother, and the mother's friends had threatened him with physical violence if he came to Alabama. The father testified that he had offered to send the mother money for the child but that she would tell him she did not know her complete address. Then, he said, she would never call him back or answer his telephone calls. He said that the mother often changed her address and telephone number, which made it difficult for him to keep in touch with her. The father testified that, after he learned about the custody proceedings initiated in the juvenile court by the petitioners, he saved his money to be

able to afford airplane tickets in order that he and the paternal grandmother could attend the hearing.

L.E.O. was 51 years old at the time of the hearing in the juvenile court. He and P.O. had been married for 29 years and have two adult daughters. L.E.O. had been employed as the manager of the service department for an automobile dealership after retiring from his former job as a police officer. He was unemployed at the time of the hearing because the dealership for which he worked had closed, but he anticipated no problems in finding another job in the automobile-service industry. P.O. works as a fifth-grade teacher at the school where the child attended kindergarten. The petitioners take the child to Sunday School and church and consider him a part of their family.

The father was 26 years old at the time of the hearing. He stated that, although he lived with his mother, he paid her rent, he was employed full time, and he attends college. He testified that he had investigated day-care arrangements for the child if they are needed and that he had confirmed that he could add the child to the health-care insurance coverage he receives as a former member of the military. The paternal

grandmother testified that numerous family members lived nearby in California who were anxious to provide a support network for the father and the child. Both the father and the paternal grandmother testified that they love the child and want him to be a part of their lives but that the father's attempts to keep in touch with the child have been continuously thwarted by the mother. They also testified that they had no knowledge that the mother had relinquished custody of the child to the petitioners until the father was served with the summons in this case.

The juvenile court held that the child "is not a dependent child and this court lacks jurisdiction." The juvenile court dismissed the petition on that basis. The Court of Civil Appeals affirmed the judgment of the juvenile court dismissing the petition, without an opinion. L.E.O. v. A.L., [No. 2080395, October 9, 2009] ___ So. 3d ___ (Ala. Civ. App. 2009).

II. Analysis

Judge Bryan dissented from the Court of Civil Appeals' no-opinion affirmance. His dissent is based on his conclusion that the petitioners demonstrated that the juvenile court "was

plainly or palpably wrong in concluding that the child ... was not a dependent child" under Alabama law. ___ So. 3d at ___. Specifically, Judge Bryan concluded that the petitioners had produced substantial evidence showing that the father had abandoned the child. He noted that before the December 2008 hearing in the juvenile court the father had not seen the child since 2005 and that he had not provided any financial support for the child. Judge Bryan states that the father testified that his visitation with the child had been thwarted by the mother and that he had been unaware that the child was living with the petitioners. Judge Bryan then states:

> "The father's abandonment of the child for approximately three years cannot be excused simply because he contends that he was unaware of the child's circumstances. The fact that he was unaware of who was caring for and providing for his child during that time further convinces me that he had abandoned the child. The evidence produced by [the petitioners] unequivocally shows that the father had 'with[held] from the child, without good cause or excuse, ... his presence, care, love, protection, maintenance, or the opportunity for the display of filial affection,' had 'fail[ed] to claim the rights of a parent,' and had 'fail[ed] to perform the duties of a parent.' § 26-18-3(1), Ala. Code 1975 (now codified at § 12-15-301(1), Ala. Code 1975), thereby demonstrating that the child was dependent."

___ So. 3d at ___.

A child is dependent if, at the time a petition is filed in the juvenile court alleging dependency, the child meets the statutory definition of a dependent child. When the petition was filed in the present case, the definition of a "dependent child" read as follows:[1]

> "A child:
>
> "a. Who, for any reason is destitute, homeless, or dependent on the public for support; or
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> "b. Who is without a parent or guardian able to provide for the child's support, training, or education; or
>
> "c. Whose custody is the subject of controversy; or
>
> "d. Whose home, by reason of neglect, cruelty, or depravity on the part of the parent, parents, guardian, or other person in whose care the child may be, is an unfit and improper place for the child; or
>
> "e. Whose parent, parents, guardian, or other custodian neglects or refuses, when able to do so or when such service is offered without charge, to provide or allow medical, surgical, or other care necessary for the child's health or well-being; or
>
> "f. Who is in a condition or surroundings or is under improper or insufficient guardianship or

[1]Effective January 1, 2009, as part of a comprehensive rewrite of the Alabama Juvenile Justice Act, § 12-15-1(10), Ala. Code 1975, where the definition of "dependent child" was found, was amended and renumbered. The definition, as amended, can now be found at § 12-15-102(8).

control as to endanger the morals, health, or general welfare of the child; or

"g. Who has no proper parental care or guardianship; or

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

"i. Who has been abandoned[2] by the child's parents, guardian, or other custodian; or

"j. Who is physically, mentally, or emotionally abused by the child's parents, guardian, or other custodian or who is without proper parental care and control necessary for the child's well-being because of the faults or habits of the child's parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them; or

"k. Whose parents, guardian, or other custodian are unable to discharge their responsibilities to and for the child; or

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[2]Abandonment is defined as follows:

"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 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."

§ 26-18-3(1), Ala. Code 1975 (amended and renumbered as § 12-15-301(1), Ala. Code 1975). The language of the current statute is substantially similar.

> "l. Who has been placed for care or adoption in violation of the law; or
>
> "m. Who for any other cause is in need of the care and protection of the state; and
>
> "n. In any of the foregoing, is in need of care or supervision."

§ 12-15-1(10), Ala. Code 1975 (emphasis added) (amended and renumbered as § 12-15-102(8)a., Ala. Code 1975).

A child who falls into one of the categories described in § 12-15-1(10)a. through m., including a child who has been abandoned, and, in that foregoing condition, is "in need of care or supervision" meets the statutory definition of a dependent child.[3] It is a reasonable interpretation of § 12-

[3]The same is true under the current statute, § 12-15-102(8)a., which defines a "dependent child" as follows:

> "a. A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:
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> "....
>
> "5. Whose parent, legal guardian, legal custodian, or other custodian has abandoned the child, as defined in subdivision (1) of Section 12-15-301.
>
> "....
>
> "8. Who, for any other cause, is in need of the care and protection of the state."

15-1(10) to require that, in determining whether a child is "in need of care or supervision," the juvenile court must consider whether the child is receiving adequate care and supervision from those persons legally obligated to care for and/or to supervise the child. The child is entitled to the care or supervision from those persons with the authority to take appropriate actions on behalf of the child, such as, for example, to enroll the child in school, to authorize medical care for the child, and to obtain insurance for the benefit of the child. This interpretation comports with the purposes of the Alabama Juvenile Justice Act, now § 12-15-101 et seq., Ala. Code 1975, among which are to provide children with permanency and to foster family preservation.[4]

[4]Although the petitioners alleged in their petition that the child is dependent, they did not specifically allege that the child was "in need of care or supervision." They did allege facts that, if true, would fall within some of the alternatives for dependency set forth in subsections a. through m. of § 12-15-1(10). The Court of Civil Appeals has held that such factual allegations, together with the allegation that the child was dependent and that the child's best interests would be served by awarding custody to the petitioners, are sufficient to invoke the jurisdiction of the juvenile court under the dependency statute. J.W. v. N.K.M., 999 So. 2d 526 (Ala. Civ. App. 2008). In J.W., the Court of Civil Appeals determined that the allegation that the child was "in need of care or supervision" pursuant to subsection n. of § 12-15-1(10) was implicit in the petitioner's dependency complaint. We conclude that the same is true in this case--

In the present case, the juvenile court concluded, based on ore tenus evidence, that even though dependency had been alleged, the child was not, in fact, a dependent child. "The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). "The trial court's judgment in cases where the evidence is heard ore tenus will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment." River Conservancy Co. v. Gulf States Paper Corp., 837 So. 2d 801, 806 (Ala. 2002).

Although we acknowledge that the juvenile court heard ore tenus evidence at the hearing, we agree with Judge Bryan that no credible evidence supports the juvenile court's conclusion. The juvenile court apparently believed the father's testimony that he had been deceived by the mother as to the child's whereabouts and that she had made the father's communication and visitation with the child difficult and unworkable at

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the allegation that the child was in need of care or supervision was implicit in the petition. See also T.T.T. v. R.H., 999 So. 2d 544 (Ala. Civ. App. 2008).

best. Even so, the father's failure to pursue his right to visit with the child or to provide financially for the child for a period of over three years strongly supports a finding that he had abandoned the child. The father testified at the hearing as follows in response to questions from the petitioners' attorney:

> "Q. Sir, Judge [William K.] Bell told you in the transcript of that hearing in August of 2005 that you would have to enroll in an anger-management class, did he not?
>
> "A. I understand that, ma'am, but I thought it was a temporary hearing so I didn't know it was mandatory at that time.
>
> "Q. You didn't understand that that was an order of the court?
>
> "A. It was a temporary hearing.
>
> "Q. Yes, sir. And did you go -- excuse me. Did you go to a temporary parenting class, a temporary anger-management class?
>
> "A. I don't know if there is one, ma'am.
>
> "Q. You thought because it was a temporary hearing you didn't have to comply?
>
> "A. I didn't know it was mandatory, but I did when the paper was received.
>
> "Q. Well, sir, after August of 2005 did you take any actions to find out what was going on in your custody hearing in Alabama?

"A. Yes, I had called my ex-wife.

"Q. Did you ever verify with the Circuit Court of Madison County or with Judge William K. Bell, what actions had been taken in your case after you appeared here in August of 2005?

"A. No, I have not.

"Q. You didn't think it was important?

"A. It's not that I didn't think it was important. I didn't have funds for a lawyer, I didn't have funds for a plane ticket to come here.

"Q. Did you even pick up the phone, sir? Did you pick up the phone and call?

"A. I didn't know I could.

"....

"Q. Let's just cut to the chase. Since 2005 how much support have you paid for this child?

"A. I've provided for him when he was with me, but other than that nothing.

"Q. Well, he hasn't been with you since 2005; is that correct?

"A. Yes, he has, February to March 2005.

"Q. All right. Since March of 2005 your answer would be nothing?

"A. That's correct.

"Q. And since you were aware in June of 2008 that he was living with the [petitioners] you still didn't provide any financial support for him; is that correct?

"A. This is correct.

"....

"Q. And you say that you have never paid financial support for [the child] because when you [would] call [the mother] she wouldn't give you a valid address; is that right?

"A. That's correct.

"Q. But yet, sir, you were able to get Christmas presents to him; is that correct?

"A. Correct.

"Q. At an address that you had in your possession in December of 2007; is that correct?

"A. This is correct.

"Q. And did you ever bother sending a child-support check to that address?

"A. No. I spent the money that I would have sent on gifts for her daughter--I believe it's her daughter and my son.

"Q. And what did you buy your son?

"A. I bought him various toys.

"Q. And do you think that toys are more important than the shelter and clothing and food that he requires?

"A. No. I wasn't aware he didn't have any of that.

"Q. Well, do you understand, sir, that you're under a responsibility to provide that for him?

"A. I wasn't ordered by the Court to pay child support.

"Q. I'm talking about morally, sir?

"A. I tried, yes.

"Q. Sir, how many times did you send a child support check to [the mother] or the [petitioners]?

"A. I haven't sent a check."

The father had been awarded visitation rights with the child under the pendente lite order, although his visitation with the child was suspended by the divorce judgment until he completed an anger-management program and a parenting class. However, he did not complete those classes until shortly before the hearing in the juvenile court. He did not seek any relief from the divorce court when the mother continually thwarted his requests to talk to the child or when, he said, the mother and members of her family threatened him physically if he came to Alabama to see the child; likewise, he sought no assistance from the divorce court in ascertaining the whereabouts of the child. Furthermore, the father made no effort whatsoever to contribute financially to the child's support or to assure himself that the child was adequately taken care of, despite the mother's repeated household moves

and evasiveness about the child. The father's stated excuse for his failure to provide financial support for the child was that he did not know the child had material needs that were not being met and that he thought he was not bound by the pendente lite order of the divorce court that ordered him to pay child support. The father simply assumed that the mother was adequately caring for the child, and he never attempted to assure himself that the child had basic essentials such as food, shelter, clothing, and medical care. The father made no effort to determine who was meeting the child's needs and abdicated his responsibility to contribute to the financial support of the child.

As a general rule, "[i]n matters concerning child custody and dependency, the trial court's judgment is presumed correct on appeal and will not be reversed unless plainly and palpably wrong." Ex parte T.L.L., 597 So. 2d 1363, 1364 (Ala. Civ. App. 1992). After reviewing the record in this case, we conclude that the juvenile court was plainly and palpably wrong when it found that the child was not dependent and dismissed the case; therefore, the Court of Civil Appeals erred in affirming the juvenile court's judgment dismissing

the case on that basis. We conclude that, at the time the petitioners sought custody of the child and a finding of dependency, the child had been abandoned by both persons legally obligated to care for and/or to supervise him. The mother had allowed the petitioners to assume physical custody of the child and thereafter assumed no responsibility for his care or supervision. The father had not seen the child or provided any financial support for a period of over three years. The child was, therefore, dependent as that term is defined by § 12-15-1(10), Ala. Code 1975.

III. Conclusion

We reverse the judgment of the Court of Civil Appeals and remand the case for that court to remand the case to the juvenile court with instructions for the juvenile court to make a finding of dependency and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur.

Murdock, J., dissents.

MURDOCK, Justice (dissenting).

In my view, the main opinion misapprehends the meaning of the "in-need-of-care-and-supervision" requirement of Ala. Code 1975, § 12-15-1(10)n. In the process, the Court today renders null time-honored jurisprudence that extends to well before the creation of the State Department of Human Resources and the enactment of the Alabama Juvenile Justice Act and that, until today, has served to limit the reach of the State through these mechanisms. In doing so, it sets the stage for unnecessary intrusion by the State, through the Department of Human Resources and other mechanisms of the juvenile court system, into situations where a parent has exercised his or her natural and constitutionally protected right to make appropriate arrangements for the care and supervision of his or her child when the parent is unable to provide that care and when the person with whom the parent has placed the child (who in a given case could be a grandmother or other close relative of the child) is giving the child appropriate love, care, and attention -- situations in which it cannot in any sense be said that, if the State does not intervene, the child

will be without appropriate care and supervision. I therefore am compelled to dissent.

The child in this case is not "in need of care or supervision." The main opinion correctly recognizes that under Ala. Code 1975, § 12-15-1(10) (emphasis added) (since amended and renumbered as § 12-15-102(8)), there are two elements that must be satisfied for a child to be deemed a "dependent child" as that term is defined in § 12-15-1(10). "A child who falls into one of the categories described in § 12-15-1(10)a. through m., including a child who has been abandoned, and, in that foregoing condition, is 'in need of care or supervision' [see § 12-15-1(10)n.] meets the statutory definition of a dependent child." ___ So. 3d at ___. The main opinion then proceeds, however, to collapse the second element into the first element, stating:

> "It is a reasonable interpretation of § 12-15-1(10) to require that, in determining whether a child is 'in need of care or supervision,' the juvenile court must consider whether the child is receiving adequate care and supervision from those persons legally obligated to care for and/or to supervise the child. The child is entitled to the care or supervision from those persons with the authority to take appropriate actions on behalf of the child, such as, for example, to enroll the child in school, to authorize medical care for the child, and to obtain insurance for the benefit of the child. This

> interpretation comports with the purposes of the Alabama Juvenile Justice Act, now § 12-15-101 et seq., Ala. Code 1975, among which are to provide children with permanency and to foster family preservation."

___ So. 3d at ___ (some emphasis added).

I first note that the approach taken by the main opinion misdirects the clearly intended focus of the second element of the definition of a dependent child. Nothing in the second element focuses on who is failing to provide care or supervision, i.e., that it must be those legally obligated to do so. That is the focus of the list of categories that make up the first element. A "dependent child" is:

> "A child:
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> "a. Who, for any reason is destitute, homeless, or dependent on the public for support; or
>
> "b. Who is without a parent or guardian able to provide for the child's support, training, or education; or
>
> "c. Whose custody is the subject of controversy; or
>
> "d. Whose home, by reason of neglect, cruelty, or depravity on the part of the parent, parents, guardian, or other person in whose care the child may be, is an unfit and improper place for the child; or
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> "e. Whose parent, parents, guardian, or other custodian neglects or refuses, when able to do so or

> when such service is offered without charge, to provide or allow medical, surgical, or other care necessary for the child's health or well-being; or
>
> "f. Who is in a condition or surroundings or is under improper or insufficient guardianship or control as to endanger the morals, health, or general welfare of the child; or
>
> "g. Who has no proper parental care or guardianship; or
>
> "h. Whose parent, parents, guardian, or custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the compulsory school attendance laws of this state; or
>
> "i. Who has been abandoned by the child's parents, guardian, or other custodian; or
>
> "j. Who is physically, mentally, or emotionally abused by the child's parents, guardian, or other custodian or who is without proper parental care and control necessary for the child's well-being because of the faults or habits of the child's parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them; or
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> "k. Whose parents, guardian, or other custodian are unable to discharge their responsibilities to and for the child; or
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> "l. Who has been placed for care or adoption in violation of the law; or
>
> "m. Who for any other cause is in need of the care and protection of the state ...."

Ala. Code 1975, § 12-15-1(10)(emphasis added) (now amended and renumbered as Ala. Code 1975, § 12-15-102(8)). Instead, the

focus of the second element is on the present condition of the child, i.e., whether (i.e., there remains a question to be answered), in addition to the fact that those legally obligated to provide for the child are unable or unwilling to do so as described in the first element, the child also is "in need of care or supervision."

By propounding the second element, the legislature obviously contemplated that the first element of the definition could be satisfied as to a child, but not the second element; otherwise there would be no need for the second element. Thus, a child might be "abandoned by [his or her] parents," but not be "in need of care or supervision."[5]

[5]The same approach applies under the current statute, § 12-15-102(8), which defines a "dependent child" as follows:

> "a. A child who has been adjudicated dependent by a juvenile court and is in need of care or supervision and meets any of the following circumstances:
>
> > "1. Whose parent, legal guardian, legal custodian, or other custodian subjects the child or any other child in the household to abuse, as defined in subdivision (2) of Section 12-15-301 or neglect as defined in subdivision (4) of Section 12-15-301, or allows the child to be so subjected.
> >
> > "2. Who is without a parent, legal guardian, or legal custodian willing and

In fact, it is upon this well settled rationale that grandparents and other relatives have been directed by our courts to file custody cases in the circuit court, rather than dependency cases, which fall within the exclusive jurisdiction

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> able to provide for the care, support, or education of the child.
>
> "3. Whose parent, legal guardian, legal custodian, or other custodian neglects or refuses, when able to do so or when the service is offered without charge, to provide or allow medical, surgical, or other care necessary for the health or well-being of the child.
>
> "4. Whose parent, legal guardian, legal custodian, or other custodian fails, refuses, or neglects to send the child to school in accordance with the terms of the compulsory school attendance laws of this state.
>
> "5. Whose parent, legal guardian, legal custodian, or other custodian has abandoned the child, as defined in subdivision (1) of Section 12-15-301.
>
> "6. Whose parent, legal guardian, legal custodian, or other custodian is unable or unwilling to discharge his or her responsibilities to and for the child.
>
> "7. Who has been placed for care or adoption in violation of the law.
>
> "8. Who, for any other cause, is in need of the care and protection of the state."

of the juvenile court. The Court of Civil Appeals recently noted in K.C.G. v. S.J.R., [Ms. 2080973, March 26, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010):

> "Juvenile courts, as courts of limited jurisdiction, only have subject-matter jurisdiction as expressly conferred by statute. See Ex parte K.L.P., 868 So. 2d 454, 456 (Ala. Civ. App. 2003). 'A juvenile court has jurisdiction in proceedings involving a child who is alleged to be dependent, § 12-15-30(a), Ala. Code 1975, and in custody proceedings when the child is "otherwise before the court." § 12-15-30(b)(1), Ala. Code 1975.' K.S. v. H.S., 18 So. 3d 417, 418 (Ala. Civ. App. 2009).
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> "The paternal grandmother properly invoked the dependency jurisdiction of the juvenile court when she filed her petition in January 2008. See Ala. Code 1975, former 12-15-30(a) ('The juvenile court shall exercise exclusive original jurisdiction of proceedings in which a child is alleged to be ... dependent ....'); see also C.P. v. M.K., 667 So. 2d 1357, 1360 (Ala. Civ. App. 1994) ('When the petitioners alleged that the child was dependent, that terminology triggered the trial court to utilize the dependency statutes of the juvenile code.').
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> "Once the dependency jurisdiction of a juvenile court has been properly invoked, the juvenile court has an imperative statutory duty to conduct an evidentiary hearing to determine the dependency of the child. Ex parte Linnell, 484 So. 2d 455, 457 (Ala. Civ. App. 1986) ('[P]ursuant to § 12-15-65, [Ala. Code 1975,] a hearing on the merits of the petition itself is required to determine if the children are, in fact, dependent ....'); see also Ex parte W.H., 941 So. 2d 290, 299 (Ala. Civ. App. 2006). If a juvenile court determines that the child is not dependent, the court must dismiss the

dependency petition. Ala. Code 1975, former § 12-15-65(d). On the other hand, if, and only if, a juvenile court finds that the child is dependent, the court may then conduct proceedings to determine the custodial disposition of the child. Ala. Code 1975, former § 12-15-65. Ex parte K.S.G., 645 So. 2d 297 (Ala. Civ. App. 1992)(holding that juvenile court never assumed jurisdiction to determine issue of custody of child when evidence revealed that there was no emergency situation rendering the child dependent as alleged in mother's petition); Ex parte J.R.W., 630 So. 2d 447 (Ala. Civ. App. 1992) (holding that juvenile court that had never declared child dependent had no jurisdiction to enter order affecting visitation rights of father); J.W. v. W.D.J., 743 So. 2d 467, 469 (Ala. Civ. App. 1999) (holding that once juvenile court found children dependent, it had exclusive jurisdiction to determine their custody); Ex parte W.H., supra (holding that juvenile court erred in transferring custody of allegedly dependent child without holding evidentiary hearing to ascertain dependency of child); C.D.S. v. K.S.S., [963 So. 2d 125, 129 (Ala. Civ. App. 2007)] (holding that juvenile court that determined child was not dependent had no jurisdiction to thereafter determine custody of child); and E.H. v. N.L., 992 So. 2d 740 (Ala. Civ. App. 2008) (holding that, when evidence did not prove dependency of child as alleged in complaint, but revealed pure custody dispute, juvenile court was without jurisdiction to determine custody of child). As this court recently stated: '"[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in fact be dependent at the time of that disposition."' V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result)).

"In this case, the juvenile court announced to the parties that it did not intend to treat the case

as a dependency action but that it intended to determine only the custody of the child. The juvenile court then entered a judgment in which it did not declare the child dependent, but merely decided that the paternal grandmother should have custody of the child due to the mother's unfitness. This court addressed an almost identical scenario recently in T.B. v. T.H., 30 So. 3d 429 (Ala. Civ. App. 2009). In T.B., the Lee Juvenile Court took jurisdiction over a petition alleging the dependency of a child. At the adjudicatory hearing on the petition, the judge declared that, although dependency had been alleged, he considered the case to be more in the nature of a custody case, which statement was subsequently included in the final judgment. The Lee Juvenile Court awarded custody of the child to the child's maternal grandmother, based not on a finding of dependency and that such custody served the best interests of the child, but on a finding that the mother of the child had voluntarily relinquished custody of the child to the child's maternal grandparents and that the mother of the child was unfit to recover custody of the child. On appeal, this court, ex mero motu, determined that the Lee Juvenile Court had acted outside its jurisdiction. The court stated:

> "'Juvenile courts are purely creatures of statute and have extremely limited jurisdiction. See Ex parte K.L.P., 868 So. 2d 454, 456 (Ala. Civ. App. 2003). That limited jurisdiction allows a juvenile court to make a disposition of a child in a dependency proceeding only after finding the child dependent. V.W. v. G.W., 990 So. 2d 414, 417 (Ala. Civ. App. 2008) (quoting K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 389 (Ala. Civ. App. 2004) (Murdock, J., concurring in the result)) ("'[I]n order to make a disposition of a child in the context of a dependency proceeding, the child must in

fact be dependent at the time of that disposition.'").

"'In the case at bar, the maternal grandparents' allegation that the child was dependent was the only basis for the juvenile court's jurisdiction to make a final determination as to the custody issue. In the final judgment and in his earlier oral pronouncement, the juvenile-court judge declared that he had found that the maternal grandparents had proven the material allegations in their petition by clear and convincing evidence. That statement, standing alone, would indicate that the juvenile court had found the child dependent. The maternal grandparents did allege in their petition that the child was dependent, and allegations of dependency must be proven by clear and convincing evidence. See Ala. Code 1975, § 12-15-65(f). However, the judge plainly stated in the judgment, as he did at the end of the final hearing, that "the [juvenile court] is of the opinion that even though dependency is alleged, ... this, in fact, is a custody case." See A.L. v. S.J., 827 So. 2d 828, 833 (Ala. Civ. App. 2002) (when parties disputed whether underlying action was dependency action, facts that trial court, a juvenile court, stated that "'[t]here is nothing that does indicate that this is a dependency case'" and that trial court made no express finding of dependency supported conclusion that action was not a dependency action). Based on that premise, the court then proceeded to find that the mother had voluntarily relinquished custody of the child to the maternal grandparents and that the mother was unfit to have custody of the child. Those findings are essential to

overcome the presumption in favor of parental custody in a child-custody case between a parent and a nonparent, see Ex parte Terry, 494 So. 2d 628 (Ala. 1986) (also holding that those facts must be proven by clear and convincing evidence), but those findings are not required in a dependency case. See O.L.D. v. J.C., 769 So. 2d 299, 302 (Ala. Civ. App. 1999) ("This case is not simply a custody dispute between a parent and nonparent, but, rather, is a dependency case; therefore, Terry is not applicable."); J.P. v. S.S., 989 So. 2d 591 (Ala. Civ. App. 2008); and W.T.H. v. M.M.M., 915 So. 2d 64 (Ala. Civ. App. 2005); see also K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 387 (Ala. Civ. App. 2004) (holding that Terry "'parental unfitness'" standard is "more stringent" than the dependency "best interests" standard). Likewise, the finding that the maternal grandparents had met the [Ex parte] McLendon[, 455 So. 2d 863 (Ala. 1984),] standard is inconsistent with a disposition under the dependency statute, which is governed by the "best interests" standard. See L.L.M. v. S.F., 919 So. 2d 307, 311 (Ala. Civ. App. 2005) ("Because this is a dependency case, the juvenile court needed to determine only if transferring legal custody of the child to the father was in the best interest of the child. ... The juvenile court's determination of dependency obviated any necessity to apply the heightened custody-modification standard found in Ex parte McLendon."). We therefore conclude that the final judgment reflects the juvenile court's intention to treat the case as a custody case, not a dependency case. Once the juvenile court decided that the case would not be decided on dependency

> principles, the juvenile court had no jurisdictional basis for determining custody of the child. ...'
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> "30 So. 3d at 431-32 (footnote omitted; emphasis added); see also M.P. v. C.P., 8 So. 3d 316 (Ala. Civ. App. 2008)(Talladega Juvenile Court lacked subject-matter jurisdiction over father's petition alleging dependency of children, which juvenile court acknowledged three times during trial; action was actually a veiled custody dispute within the jurisdiction of the Talladega Circuit Court in a divorce action).
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> "The facts of this case essentially rest on all fours with the facts in T.B. Like in T.B., a relative petitioned for a declaration of dependency and custody of a child. Like in T.B., the juvenile court elected to treat the action as a custody dispute. Like in T.B., the juvenile court did not find the child dependent, but it awarded custody to the paternal grandmother solely on the basis of the unfitness of the mother. Like in T.B., the child was not 'otherwise before the court' such that the juvenile court would have had jurisdiction under former § 12-15-30(b) to decide a pure custody dispute. In accord with T.B., once the juvenile court recognized that the case did not involve a question of dependency, it lost jurisdiction over the remaining subject matter, i.e., the dispute over the custody of the child."

___ So. 3d at ___ (footnotes and some emphasis omitted; emphasis added).

Today, however, this Court rejects the rationale of K.C.G. and the long line of precedent it discusses, along with well settled precedent that predates our dependency law. We

now blur, indeed largely remove, the line between true dependency cases, which fall within the limited, exclusive jurisdiction of the juvenile court and which are governed by the statutory dependency scheme, see Ala. Code 1975, § 12-15-114 (formerly § 12-15-30), and mere third-party custody cases, which are governed by the standard announced in Ex parte Terry, 494 So. 2d 628 (Ala. 1986), and which fall within the jurisdiction of the juvenile court only if some other basis for juvenile-court jurisdiction exists.

Disputes between third parties and parents as to the custody of a child have long been treated as custody matters, see, e.g., Stoddard v. Bruner, 217 Ala. 207, 115 So. 252 (1928) (custody dispute between father and maternal uncle after mother had abandoned the child); Esco v. Davidson, 238 Ala. 653, 193 So. 308 (1940)(custody dispute between father and paternal aunt where father had allegedly relinquished custody to the paternal aunt), rather than as cases governed by the then existing dependency laws. See Ala. Code 1923, § 3528 et seq.; Ala. Code 1940, Tit. 13, § 350 et seq. Until today, Ex parte Terry, 494 So. 2d 628 (Ala. 1986), and its progeny have reflected the fact that that remains the case

except when the specific requirements defining "a dependent child" in the Juvenile Justice Act are satisfied.

Just as in the present case, the mother in Terry had "voluntarily relinquished the custody of her child to a nonparent," whose ability and willingness to care for and supervise the child were not in question. 494 So. 2d at 632. This Court stated the issue in Terry as follows:

> "[W]hether a father, who was not awarded custody by a prior divorce decree, but who has not been found to be unfit, has thereby lost his prima facie right of custody in a subsequent custody proceeding as against the rights of a nonparent (the maternal grandfather) with whom the mother, who was awarded custody by the divorce decree, has placed physical custody of the child."

494 So. 2d at 630 (some emphasis omitted; some emphasis added). We articulated the following standard to be applied by the circuit court to the ensuing custody dispute between a nonparent and the father:

> "'The prima facie right of a natural parent to the custody of his or her child, as against the right of custody in a nonparent, is grounded in the common law concept that the primary parental right of custody is in the best interest and welfare of the child as a matter of law. So strong is this presumption, absent a showing of voluntary forfeiture of that right, that it can be overcome only by a finding, supported by competent evidence, that the parent seeking custody is guilty of ... misconduct or neglect to a degree which renders that

> parent an unfit and improper person to be entrusted with the care and upbringing of the child in question.'"

494 So. 2d at 632 (quoting Ex parte Mathews, 428 So. 2d 58, 59 (Ala. 1983)). See, e.g., R.K. v. R.J., 843 So. 2d 774 (Ala. Civ. App. 2002) (Terry standard applied to a custody dispute between the maternal grandparents and the father in juvenile court; juvenile court had "retained jurisdiction" from an earlier paternity proceeding).

Under the new rule announced today in the main opinion, it now will be impossible to distinguish a Terry case from a dependency case. Thus, a grandparent who has been caring for a child for several years because a parent or the parents have placed the child with the grandparent to raise, will now have to file a dependency proceeding in the juvenile court, rather than a custody proceeding in the circuit court, in order to obtain a custody award to be able to enroll the child in school.[6] This is so because under the new approach adopted by this Court today, if the parents themselves are not providing the daily, hands-on care and supervision of the child, then

[6]There is no statutory basis on which to differentiate between third-party relatives and third-party nonrelatives so far as the definition of a dependent child is concerned.

the child is considered "dependent" (assuming that one of the first-element categories is met). It matters not that the child is being raised in a loving home by fully able and caring relatives or friends or neighbors with whom a parent has placed the child and perhaps with whom the child has lived, as in this case, for several years; that child will now be deemed "dependent" and will be subject to the mechanisms of the Juvenile Justice Act. Even more problematic, because dependency cases are in the exclusive jurisdiction of the juvenile court, countless custody awards that have been made to nonparents will now be considered void because the circuit court lacked jurisdiction to make the award.[7]

[7]In addition, the understanding expressed in the main opinion of what constitutes a "dependent child" creates an unnecessary jurisdictional conflict between the juvenile court and the probate court, which has jurisdiction in certain cases concerning the "protection of minors," Ala. Code 1975, § 26-2A-31; see also Ala. Const. 1901, § 144 ("general jurisdiction" of probate court includes "guardianships"). For example, under the main opinion's understanding of dependency, if both parents of a child are deceased or incapacitated and the parents have not nominated a guardian pursuant to Ala. Code 1975, § 26-2A-71, the child would be a dependent child because the child is "without a parent, legal guardian, or legal custodian willing and able to provide for the care, support, or education of the child." Ala. Code 1975, § 12-15-102(8)a.2. Yet, if the maternal grandparents, or some other "person interested in the welfare of the minor," Ala. Code 1975, § 26-2A-75(a), filed a petition for the appointment of a guardian, the probate court would be authorized to appoint

Second, I note that the approach taken by the main opinion violates the rules of statutory construction. See, e.g., Ex parte Children's Hosp. of Alabama, 721 So. 2d 184, 191 (Ala. 1998) (recognizing the basic principle of statutory construction that it will be presumed that every word, sentence, or provision of a statute has meaning and effect). Obviously, all children are in need of care and supervision by someone other than themselves; in the same sense, all children are dependent. If this axiomatic notion is all that is meant by § 12-15-1(10)n., then § 12-15-1(10)n. is surplusage, adding nothing of any import to the criteria for dependency prescribed in § 12-15-1(10)a. through m. Yet this, in essence, is the position staked out in the main opinion. By saying that a child automatically meets the in-need-of-care-

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a guardian, Ala. Code 1975, § 26-2A-73, who would have "the powers and responsibilities of a parent regarding the [child's] health, support, education, or maintenance," Ala. Code 1975, § 26-2A-78(a). How, in light of the exclusive original jurisdiction of the juvenile court in cases involving dependent children, could the probate court assume jurisdiction to appoint the child's guardian under the foregoing circumstances? Did the legislature craft a conflict into the statutes describing the jurisdiction of the juvenile court and the probate court or purportedly authorize the juvenile court to infringe on the jurisdiction of the probate court as described in § 144? As hereinafter explained, I do not believe such a conflict exists if the notion of "dependency" is properly understood.

and-supervision criterion merely if the child's parents are not the adults providing daily care and supervision, § 12-15-1(10)n. is given no meaning beyond what inherently flows from the application to a child of one of the criteria prescribed in § 12-15-1(10)a. through m.

The issue whether a child is "in need of care or supervision" begs the question, need of care and supervision by whom? The issue whether a child is a "dependent child" likewise begs the question, dependent on whom? The logical and obvious answer -- and the answer that has prevented the statute from being considered in conflict with all the above-discussed caselaw for many decades now -- is quite simply, the State.

If the child is receiving proper care and supervision from a nonparent who stands in loco parentis,[8] then, as

[8]In Smith v. Smith, 922 So. 2d 94, 99 (Ala. 2005), this court held that "a nonparent stands in loco parentis if he or she (1) assumes the obligations incident to parental status, without legally adopting the child, and (2) voluntarily performs the parental duties to generally provide for the child." We further noted that "[a] person taking the child into his or her custody and treating the child as a member of his or her own family constitutes the clearest evidence of an intent to stand in loco parentis." Id. L.E.O. and P.O. properly can be described as parties who stand "in loco parentis."

indicated by all the above-discussed cases, all that is needed is a custody award in favor of that third party or, if it is in the better interest of the child, in favor of another who is seeking custody. As in the above-discussed cases, such a circumstance has heretofore been properly directed to the circuit court as a "mere custody dispute" to be adjudicated pursuant to the standard announced in Ex parte Terry. It is not a circumstance necessitating or justifying the intervention of the Department of Human Resources.

If a child is in need of the actual care or supervision of the State (generally through the involvement of the Department of Human Resources), then the child may be dependent. But a child who is being adequately cared for and supervised, particularly a child who is being adequately cared for and supervised by a fit custodian in whose care the child was placed by the child's own mother when there is no evidence indicating that the mother was not fit to make the choice of a custodian, is not a "dependent" child. Thus it is that a single parent may place her child with her own mother, or her sister's family, or even her neighbor, before being deployed by the military to a foreign country for an extended period or

before checking herself into an alcohol-treatment center for an extended period, without making that child a "dependent child." Unless the custodian with whom such a mother places the child is shown to be unfit, there is no basis in our law for the Department of Human Resources or any other instrumentality of the State to take custody of the child or to take any position in a judicial proceeding that could interfere in any way with the custody choice made by that mother.

In the present case, the juvenile court concluded, based on ore tenus evidence, that, although dependency had been alleged, the child was in fact not a dependent child. The evidence supports this conclusion, though not for the reason apparently thought by the juvenile court. When L.E.O. and P.O filed their petition, the mother had placed the child in their care because she was admittedly unable or unwilling to care for him. L.E.O. and P.O. provided a loving and proper home for the child for several years before they filed their petition, including providing all financial support for the child. They desired to continue to provide for the care and supervision of the child and sought an award of custody to

facilitate their efforts, including a formal award of custody so the child could be enrolled in school and could be placed on L.E.O. and P.O.'s health-insurance policy.

The evidence supports the conclusion that this case is a custody dispute between a third party and a parent rather than a dependency case. Therefore, the dismissal of the case -- the result reached by the juvenile court -- was the correct result. As a mere custody dispute, this case fell within the general jurisdiction of the circuit court, Ala. Const. 1901, § 142(b), rather than within the limited jurisdiction of the juvenile court.