

Rel: March 8, 2019

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte Marshall County Department of Human Resources

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: Marshall County Department of Human Resources

v.

J.V.)

**(Marshall Juvenile Court, JU-09-300067.05;
Court of Civil Appeals, 2170082)**

PER CURIAM.

We granted the petition for a writ of certiorari filed by the Marshall County Department of Human Resources ("DHR") to review the Court of Civil Appeals' decision in Marshall County

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Department of Human Resources v. J.V., [Ms. 2170082, March 9, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018), affirming the juvenile court's order immediately removing J.J.V. ("the child") from her foster parents and ultimately transferring legal and physical custody of the child to her biological father, J.V. ("the father"). For the reasons set forth below, we reverse the judgment of the Court of Civil Appeals.

Facts and Procedural History

In Marshall County Department of Human Resources v. J.V., 203 So. 3d 1243 (Ala. Civ. App. 2016) ("J.V. I"),¹ the Court of Civil Appeals explained some of the factual and procedural history of this case as follows:

"In 2009, the Marshall County Department of Human Resources ('DHR') removed J.J.V. ('the child') from the custody of M.M.T. ('the mother'). At that time, the child's father, J.V. ('the father'), was living in Florida, where the child and the mother had resided until the mother left the father. The father came to Alabama to locate the mother and the child only to learn that DHR had removed the child from the mother's home.

¹As the Court of Civil Appeals noted in the opinion currently before this Court on certiorari review, this matter has been before this Court and the Court of Civil Appeals multiple times. Portions of the opinions in those cases are quoted to present a full picture of the factual and procedural history of this matter.

"The father, without the aid of counsel, attempted to work with DHR, and he briefly reunited with the mother. However, when a DHR caseworker informed him that the child would not be returned to the parents if they resided together, the father left the mother's residence. The father retained an attorney and secured supervised visitation with the child in the fall of 2010. In December 2010 and January 2011, the father was granted unsupervised visitation with the child; he had a total of five unsupervised visits with the child.

"On January 8, 2011, a few hours after the child had returned from an unsupervised visit with the father, the child's foster parents contacted the child's DHR caseworker, who was, at that time, Tracy Burrage. B.B. ('the foster father') told Burrage that the child had reported that the father had 'hurt her butt.' At Burrage's instruction, the foster parents took the child to the emergency room, which then referred the child to Crisis Services of North Alabama for an examination by a forensic nurse examiner.

"After the accusation, the father's visitation was changed to supervised visitation. The child cried and said that she did not want to attend visits with the father. When at the visits, the child barely interacted with the father.

"In October 2011, the father was charged with sexual abuse. He was arrested and placed in the Marshall County jail, where he remained for approximately 18 months. DHR filed a petition to terminate the father's parental rights; however, the juvenile court denied that petition. DHR appealed, and this court reversed the juvenile court's judgment declining to terminate the father's parental rights and remanded the cause for the juvenile court to reconsider DHR's termination-of-parental-rights petition based on the evidence already adduced at trial, indicating in our

opinion that the juvenile court had perhaps mistakenly believed that late perfection of service of process on the father had prevented the juvenile court from considering the termination-of-parental-rights petition at the time of the termination-of-parental-rights trial. See Marshall Cty. Dep't of Human Res. v. J.V., 152 So. 3d 370 (Ala. Civ. App. 2014). On remand, the juvenile court entered another judgment declining to terminate the father's parental rights; no appeal was taken from that judgment.

"Meanwhile, the sexual-abuse charge against the father was dismissed on February 11, 2013. The father was then transferred to a detention facility in Louisiana on an immigration hold based on his status as an illegal immigrant. The father was released from the Louisiana facility in September 2014, after a 17-month detention. The father then moved to Canton, Georgia.

"The father filed a petition in the juvenile court on November 6, 2014, seeking an award of custody of the child. After a three-day hearing in December 2014, the juvenile court entered an order on December 29, 2014, stating the following:

"'1. This matter is set for further review on disposition on January 20, 2015, at 9:00 a.m.

"'2. At that time, DHR shall:

"'a. Present a plan to transition physical custody of the child to her father by the time the child completes her spring semester of school. This plan shall include the name of a licensed psychologist near the father's residence in Georgia who can counsel the child and the father.

This plan shall also include a proposal of gradually increased visitation, which visitation schedule shall take into account the father's work schedule.

"'b. Present a home study of the father's residence in Georgia.

"'3. Between now and January 20, 2015, DHR shall ensure that the father is able to visit with his child as frequently as once per week for a period of no less than two hours. These visitations may be supervised by DHR. The visitations shall be at times when the father is not working. The foster parents shall not attend the visitations or provide transportation to the visits.

"'4. DHR shall pay the costs of any home study, and until further Orders, any and all counseling fees.

"'5. On January 20, 2015, the father shall present photos of his house -- both inside and out. At that time the father shall identify the school the child would attend, should the child live in the house. Also, the father should describe the provisions he will make for child care when he is at work and the child is not in school.'

"... [A] transition plan was created by the parties; the juvenile court entered an order incorporating the agreed-upon transition plan on March 27, 2015. In addition to setting out the transition plan, the order contained, among other things, the following provisions:

"'1. This matter is set for further review on disposition on May 12, 2015 at 9:00 a.m.

''[2]. At this time, the father's visitation plan to transition physical custody of his child from the Marshall County Department of Human Resources shall be as [set out in the following omitted subparagraphs]:

''....

''[3]. It is the intention of the parties and Court upon the receipt of an approved Home Study from Georgia that the father's visits with his child shall transition to supervised visitation in his home. The Marshall County Department of Human Resources has agreed to provide a Spanish interpreter in addition to an in home service provider. The father's visitation shall be as [set out in the following omitted subparagraphs]:

''....

''[4]. On June 12, 2015, physical custody of the minor child shall be placed with her father pending further Order of the court.

''[5]. The Marshall County Department of Human Resources has agreed to provide transportation to and from the visitation; however, the father has agreed to provide the names of in home relatives for approval by the Marshall County Department of Human Resources to assist in transportation during this transition.

''[6]. The child and father shall continue to participate and cooperate with counseling with Dr. Eassa, a licensed psychologist.

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''[7]. A hearing will be scheduled upon the motion of any party and notice being given.'

"After the review hearing was held on May 12, 2015, an amended order regarding the transition plan was entered on May 18, 2015. The May 2015 order, like the March 2015 order, set out the specific transition plan and stated that the child would be permanently transitioned to the father's physical and legal custody no later than July 27, 2015. The May 2015 order also contained the following provisions referencing a home study:

''3. It is the intention of the parties and Court upon the receipt of an approved Home Study from Georgia through the Interstate Compact [on the Placement of Children ("ICPC"), codified at Ala. Code 1975, § 44-2-20 et seq.], that the father's visits with his child shall transition to supervised visitation in his home.

''....

''4. On July 27, 2015, physical custody of the minor child shall be placed with her father pending further Order of the Court upon the receipt of an approved Home Study from Georgia through the ... ICPC.''

203 So. 3d at 1244-47 (emphasis added).

On June 23, 2015, DHR requested an evidentiary hearing, arguing that the home study in Georgia had not been approved and asserting that the child was not prepared to transition to the father's home on July 27, 2015. After conducting a

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hearing on the motion, on July 2, 2015, the juvenile court entered an order that provided, in part:

"1. The physical transition of the child to the child's father shall occur absolutely no later than the previously agreed upon date of July 27, 2015. The occurrence of this final transition is no longer conditioned upon anything.

". . . .

"4. In an effort to be perfectly clear, all physical custody, all legal custody and all authority over the child shall be returned to the father no later than July 27, 2015."

DHR appealed the juvenile court's order to the Court of Civil Appeals.

In J.V. I, the Court of Civil Appeals reversed the juvenile court's judgment "insofar as it ordered an immediate transfer of the child's custody to the father." 203 So. 2d at 1254. The Court of Civil Appeals relied in large part on the testimony of Dr. Elaine Eassa, the licensed psychologist who had been counseling the child and the father to assist with reunification. That court summarized Dr. Eassa's July 2, 2015, testimony as follows:

"She had been counseling the child and the father since March or April 2015 to assist them with reunification. Dr. Eassa said that the child had indicated, even at her first sessions, that she did not feel safe with the father, that she did not want

to be alone with the father, and that she did not want to live with the father. Dr. Eassa opined that the child was not ready to transition into the father's home. Dr. Eassa explained that, if the child were placed with the father before she was ready for the transition, the child would become oppositional and defiant, act out, be depressed, and exhibit troublesome behaviors and that the father would need to be prepared to address those behaviors. However, Dr. Eassa lacked confidence the father could handle the child's expected behavior.

"Dr. Eassa had observed the father and the child together only once, on June 27, 2015, the Saturday before the July 2, 2015, hearing. She said that the child would not communicate with the father. According to Dr. Eassa, the child had told the father at the visit before the June 27, 2015, visit that she did not want to live with him.

"Dr. Eassa explained that she understood that the child would often yell at the father and throw things, including rocks, at him during visitations. Dr. Eassa said that the child had said that she 'had a bag packed,' indicating perhaps that she planned to run away. Furthermore, Dr. Eassa testified that the child had made statements indicating that she might harm herself if she was forced to stay with the father.

"When asked if the child was 'driving the show,' Dr. Eassa explained that, in her opinion, the child should be in control of the reunification plan. She said that an immediate transition to the father's custody would retraumatize the child. When asked to clarify whether the initial trauma to the child was actual sexual abuse or being convinced by the foster parents that such abuse had occurred, Dr. Eassa stated that it did not matter because, to the child, the abuse had occurred.

"Dr. Eassa testified that the father had been making progress toward reunification. She explained that some of the issues with the father's ability to parent the child were culturally based; she explained that parents from the Guatemalan culture were more lenient about a child's misbehavior. As an example, Dr. Eassa related that the father gave into the child's demand for an ice cream even after she had thrown rocks at him. Dr. Eassa said that she had encouraged the father to be more assertive with the child and to set limits with her; she said that if the father did not learn to set those limits, the child, who Dr. Eassa indicated had a tendency to be 'bossy,' would 'run all over him.' According to Dr. Eassa, the father was cooperative in counseling sessions and tried to incorporate her advice; she said that he had done very well in counseling and had become more assertive with the child with Dr. Eassa's encouragement. However, Dr. Eassa opined that the father was not yet ready to parent the child on his own. She also testified that she had discussed the progress of reunification with the father, stating:

"We talked about [whether he] is he ready for her to be reunified because I have concerns about his ability to handle her because I think that she is really going to have difficulty making that transition. And we talked about [the fact] that [reunification] may not [occur] as quick[ly] as [he] thought it [would] and he is aware of that and he is agreeable to whatever needs to be done. He is willing to do whatever we need to do for [the child]."

J.V. I, 203 So. 3d at 1251-52 (emphasis added).

The Court of Civil Appeals also noted that the home study that was performed in Georgia pursuant to the Interstate

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Compact on the Placement of Children, codified at § 44-2-20 et seq., Ala. Code 1975 ("ICPC"), was admitted into evidence.

With regard to that home study, the court noted:

"The home study indicated that the father's home was safe for the child. The ICPC home study questioned the father's financial ability to support himself and the child and raised questions regarding the father's criminal history, which consisted of the dismissed indictment for sexual abuse of the child. Furthermore, the ICPC home study indicated that Dr. Eassa had opined that reunification was not appropriate at the time because of the child's persistent fear of the father.

"Stacy Duncan, the child's DHR caseworker after February 2013, testified that, without an approved ICPC home study from Georgia, DHR was unable to place the child with the father in Georgia. Specifically, she explained that Alabama could not monitor a child placed in another state and that, without an approved ICPC home study, another state (like Georgia) would also fail to monitor the child. Duncan confirmed that the Georgia ICPC home study indicated concerns about the father's financial ability to care for the child, his criminal history, and the lack of an established relationship between him and the child."

J.V. I, 203 So. 3d at 1252-53.

The Court of Civil Appeals reversed the juvenile court's judgment to the extent it ordered an immediate transfer of custody of the child to the father, explaining its reasoning as follows:

"DHR ... argues that the juvenile court's order that the child be returned to the custody of the father no later than July 27, 2015, is not in the child's best interest. To support the July 2, 2015, judgment ordering the transition of custody to occur no later than July 27, 2015, the juvenile court must have determined that reuniting the child with the father immediately would serve the child's best interest. We agree with DHR that the record lacks evidence that would support the finding that the child's best interest would be served by placing her in the custody of the father without further transitioning.

"The record is replete with evidence indicating that the child believes that the father abused her, that she fears the father, and that she does not want to be alone with the father, much less be placed in his custody. According to Dr. Eassa, the child has indicated that she might run away or possibly harm herself if forced to spend time alone with the father. The evidence presented at both the December 2014 hearing and July 2015 hearing further indicates that the child treats the father with disrespect, including going so far as to throw rocks at him, or indifference and establishes that she feels no familial affection for him. Similarly, the evidence indicates that the father is not fully prepared to handle the behavior the child is expected to display if she is placed in his custody; Dr. Eassa testified that the father would often ignore the child's misbehavior and give in to the child. Placing a child who is expected to display oppositional and defiant behaviors with a father who is ill-prepared to handle those behaviors would not serve the child's best interest. At this time, the father and the child do not have a relationship strong enough to accomplish the transition of custody.

"The record does not support a conclusion that the child's best interest would be served by

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immediately awarding custody to the father. Both the child and the father would be ill-served by a transition of custody at this time and under these circumstances. Accordingly, we reverse the judgment of the juvenile court insofar as it ordered an immediate transfer of the child's custody to the father, and we remand the cause for proceedings consistent with this opinion."

J.V. I, 203 So. 3d at 1253-54 (emphasis added).

The Court of Civil Appeals released its opinion in J.V. I on February 26, 2016. Less than two months later, on April 3, 2016, the juvenile court

"entered an order ... setting out the transition plan to which the parties had agreed, which included increasingly longer periods of visitation with a custody-transition date of July 1, 2016. That order provided that the father was to have unsupervised visitation with the child from May 27, 2016, to May 30, 2016."

Ex parte Marshall Cty. Dep't of Human Res., 234 So. 3d 519, 520 (Ala. Civ. App. 2016) ("J.V. II"). On May 24, 2016, DHR filed a "Motion for Emergency Order to Cease Visitation" in the juvenile court; the juvenile court denied the motion, and DHR filed an emergency motion to stay and a petition for a writ of mandamus in the Court of Civil Appeals.

The Court of Civil Appeals denied DHR's petition for a writ of mandamus. J.V. II, 234 So. 3d at 520-21. Presiding Judge Thompson dissented from the Court of Civil Appeals'

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decision to deny DHR's petition for a writ of mandamus, reasoning:

"In our February 26, 2016, decision [J.V. I], this court reversed that part of the judgment of the Marshall Juvenile Court ('the juvenile court') transferring immediate custody of J.J.V. ('the child') to J.V. ('the father') because of our concern for the welfare and safety of the child and to allow a more appropriate relationship between the father and the child to develop. [J.V. I], 203 So. 3d 1243 (Ala. Civ. App. 2016). This court held that the father and the child did not 'have a relationship strong enough to accomplish the transition of custody' and that '[b]oth the child and the father would be ill-served by a transition of custody at this time and under these circumstances.' [J.V. I], 203 So. 3d at 1245.

"Following this court's decision in [J.V. I], supra, the parties arrived at and the juvenile court sanctioned a 'visitation plan to transition ... legal and physical custody' of the child to the father, which began with supervised visitation and gradually increased to unsupervised, overnight visitation. The ultimate goal of the transition was to have the father assume legal and physical custody of the child on July 1, 2016. The transition plan also provided that '[t]he child and [the] father shall continue to participate and cooperate with counseling with Dr. [Elaine] Eassa, a licensed psychologist.'

"In its petition for a writ of mandamus filed in this court, the Marshall County Department of Human Resources ('DHR') alleges that certain events have occurred during the transition period, and it requests that this court order the juvenile court to 'cease visitation in order to preserve the health and safety of the child.' In support of its petition, DHR presented evidence indicating that Dr.

Lois W. Petrella, a licensed psychologist, evaluated the nine-year-old child in mid-May 2016. Dr. Petrella diagnosed the child as having post-traumatic stress disorder, among other things. The child cut herself with a can while visiting her father and attempted to shock or electrocute herself in order to avoid being forced to visit the father. This child has also stated that -- at nine years of age -- she has had thoughts of suicide when faced with having to visit the father. The evidence presented in [J.V. I], supra, indicated that, because the Georgia home study regarding the father's home had not been approved, the Georgia child-protection agency would not monitor the family in connection with this case when the child visits the father or after the child is placed in the father's custody in Georgia.

"I do not agree with the main opinion when it states that 'DHR's request that we order the juvenile court to "terminate" the father's visitation is in essence a request that we order the juvenile court to modify the award of custody to the father.' 234 So. 3d at 521. I view DHR's petition as requesting that this court order the juvenile court to exercise its power to protect the health and safety of the child. See § 12-15-138, Ala. Code 1975 ('The juvenile court, at any time after a dependency petition has been filed, or on an emergency basis, may enter an order of protection or restraint to protect the health or safety of a child subject to the proceeding.').

"Regardless of whether this court affirmed the initial award of custody to the father, the juvenile court possesses the power to halt visitation based upon the best interests and welfare of the child and to consider any properly filed modification action. Although I understand that the juvenile court is attempting to meet one of the goals of the Alabama Juvenile Justice Act ('the AJJA'), § 12-15-101 et seq., Ala. Code 1975, by seeking to reunite the

father and the child, I note that the AJJA requires that reunification be achieved in a manner that ensures the child's safety. See § 12-15-101(b)(3), Ala. Code 1975 (A goal of the AJJA is '[t]o reunite a child with his or her parent or parents as quickly and as safely as possible when the child has been removed from the custody of his or her parent or parents unless reunification is judicially determined not to be in the best interests of the child.').

"The evidence from the most recent psychological evaluation of the child is consistent with previous evidence indicating that the child has engaged in self-destructive behavior, and it appears to me that the situation has deteriorated rather than improved since the issuance of our last opinion. I can see no reason to alter my position that an immediate transfer of custody to the father is not presently in the best interests of the child. It is the function of the courts of this state to protect the children before them. J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1211 (Ala. Civ. App. 2007); C.S. v. Mobile Cty. Dep't of Human Res., 166 So. 3d 680, 684 (Ala. Civ. App. 2014). The juvenile court appears to have rejected the allegations that the father sexually abused the child. In any regard, whether the child needs protection from the father or not, it is clear that the child needs protection from her own potential conduct if she is forced to visit the father or transition to his home. Accordingly, I would grant DHR's petition for a writ of mandamus and direct the juvenile court to end the visitation or at least temporarily suspend the transition until a more acceptable solution can be reached."

J.V. II, 234 So. 3d at 521-23 (Thompson, P.J., dissenting) (some emphasis added).

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After the Court of Civil Appeals denied its petition, DHR filed a petition for a writ of mandamus with this Court, challenging the juvenile court's April 3, 2016, order setting a transition date of July 1, 2016. This Court summarized DHR's "Motion for Emergency Order to Cease Visitation" and the evidence submitted in support of it as follows:

"The motion alleged that,

''[i]n early May, 2016, for the second time, [the child] attempted to harm herself by cutting herself to avoid having to be with the father (the first incident was her attempt to electrocute herself). She has also threatened to run away from his home. Her behaviors indicate that her safety is at risk at the father's home. Despite regular counseling sessions with Dr. Eassa, the child's conduct or condition is not improving, but rather, is worsening. According to the foster parent, [the child] has exhibited disturbing behaviors, to wit: she cut herself intentionally because she said she would rather live in a hospital than with her father; she refused to bathe, brush her teeth, brush her hair, or have a bowel movement at her father's home; she refused to eat food prepared at her father's home; and she has become more withdrawn at school and at the foster home. The effect of forced visitation has been harmful to the child.'

"The 'Motion for Emergency Order to Cease Visitation Before May 27, 2016' further referenced a report prepared by Lois W. Petrella, a clinical psychologist who had evaluated the child on May 13,

2016. A copy of the report was attached to the motion. According to the report, the child

"'has consistently been resistant to visits with her biological father, whom she refers to as "J--." She continues to assert that he sexually molested her, that she is afraid that he will hurt her again, and that she wants nothing to do with him. Regarding her biological father, [the child] stated, "I don't usually talk to him." She explained that she does not like him because, "He hurt me a long time ago when I was little -- he hurt me in my privates." She was adamant that she does not want to see her biological father again. She stated she does not like to talk about her father or the abuse, and kept herself distracted during this line of questioning, e.g., exploring the office, playing with puzzles, trying to change the topic, etc. She stated, "I don't like going there," indicating that she feels as though "people" make her go there against her will. She stated, "I want to live with [the foster parents]." She said she feels "sad" and "mad" about being forced to visit and ultimately live with her biological father. She explained, "I don't play with kids right when I get there, but after a little while I start playing with them." The children [the child] was referring to are her cousins She explained that she eventually starts to play with them because, "it's either that or be bored."'

"The report notes that the child 'reportedly has never been hospitalized for psychiatric purposes and has no history of taking routine psychiatric medications.' The report further notes that the child

"stated that she cries "sometimes, when I have to leave my mommy," referring to [the foster mother], and that she is always sad "whenever I have to leave my mommy and daddy." She has concentration problems and distracted herself in various ways when reporting her history, particularly when the subject was her biological father. Her affect was different when discussing her father, and at times she appeared to be dissociative. [The child] showed the examiner a cut on her finger and explained, "It happened when I was at [the father's] house -- I picked up a can and just cut myself." She said she did this intentionally because, "It would be better living in a hospital instead of having to live with him -- that's my opinion." She reported that on another occasion, "I got tweezers and I stuck it in a cord and it made a shock, which was not smart to do." She explained, "That was when I was with [the foster parents] 'cause I wanted to go to the hospital." She said she would intentionally harm herself if she is forced to go back to [the father's] house. She has also threatened to run away if she is forced to go to live with him.'

"Petrella concluded in her report that the child was 'experiencing some paranoia about her father, as well as passive suicidal ideation.' The report concludes:

"The transition from foster care to her biological father's custody would be detrimental to [the child's] health and safety. This child firmly believes that [the father] sexually molested her when she was younger, and clearly she still seems to fear him. Additionally, since she apparently has not yet bonded with her

biological father after all of his encouragement, it appears unlikely that she will do so in the future.

"Regressive behaviors, i.e., regression to a previous stage of development, would be expected if [the child] is forced into a relationship with her biological father. Such behaviors might include reverting to baby talk, a decline in grades at school, lack of self care, and possibly more serious problems such as enuresis or encopresis. This becomes increasingly important since [the child] soon will be entering another developmental stage, adolescence, which can be difficult for parents and children alike under the best of circumstances.

"Since [the child] has already made two small but significant attempts at self-harm and has thought of plans to run away from her biological father's home, it certainly is possible that continuing extended visits and/or placing her in her biological father's care would pose a threat of harm to herself or others. For the child's health and safety, and continued emotional development, it would be in [the child's] best interest if the visits were terminated.'

"The 'Motion for Emergency Order to Cease Visitation Before May 27, 2016' requested that the juvenile court enter an emergency order 'ceasing visitation between the child and the father' and that the juvenile court 'enter an Order continuing the minor child in the custody of [DHR].'"

Ex parte Marshall Cty. Dep't of Human Res., 233 So. 3d 345, 351-53 (Ala. 2017) ("J.V. III").

In J.V. III, this Court held that the Court of Civil Appeals

"erred as to its conclusion in J.V. II that 'the juvenile court is not free to alter the custody award merely upon motion of the parties,' 234 So. 3d at 521, and that DHR must file a new action in order to present evidence to the juvenile court as to facts that arose after the entry of the April 2016 order. The underlying proceeding is a dependency case and, as discussed in note 3, supra, '[u]nlike many other types of cases, dependency proceedings often involve a series of appealable dispositional custody orders.' S.P. v. E.T., 957 So. 2d 1127, 1131 (Ala. Civ. App. 2005). Although the April 2016 order at issue purported to award legal custody and physical custody of the child to the father as of July 1, 2016, that order further provided:

"'3. The child and father shall continue to participate and cooperate with counseling with Dr. Eassa, a licensed psychologist.

"'4. The child and father shall participate in language classes to assist with communication.

"'5. The Marshall County Department of Human Resources shall supervise the custody and placement of the minor child and father after July 1, 2016 for three (3) months.

"'6. This matter is set for further review on disposition on October 3, 2016 at 9:00 a.m.'

"In light of foregoing 'restrictions' as to the custody award to the father, it is clear that the juvenile court did not intend the April 2016 order 'to be its "final" dispositional order as to the pending case,' 'free from any intervention or

supervision by the state under the dependency statutes' and regardless of what might transpire -- or fail to transpire -- during the transition of custody. 957 So. 2d at 1131. See also Ala. Code 1975, § 12-15-102(8)a.8 (providing that a 'dependent child' includes a child '[w]ho ... is in need of the care and protection of the state'); Ala. Code 1975, § 12-15-314(a) ('If a child is found to be dependent, the juvenile court may make any of the following orders of disposition to protect the welfare of the child: (1) Permit the child to remain with the parent, legal guardian, or other legal custodian of the child, subject to conditions and limitations as the juvenile court may prescribe. ... (4) Make any other order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child.'). Thus, the juvenile court was free to take into account evidence regarding matters occurring after the entry of its April 2016 order and before any order it might issue on October 3, 2016, in determining whether a modification of the terms of transition was warranted. For example, the juvenile court was free to take into account the failure of transitional efforts (which it had previously ordered) to achieve the results that were contemplated by it and that would be necessary for an eventual transfer of custody that would serve the child's best interest."

J.V. III, 233 So. 3d at 355-56 (emphasis added).

After examining the allegations in DHR's motion and Presiding Judge Thompson's dissent in J.V. II, this Court granted the petition and vacated the juvenile court's April 3, 2016, order transferring legal and physical custody of the child to the father, reasoning:

"The materials before us support the above-stated concerns of Presiding Judge Thompson and raise a substantial question as to whether the father can communicate with and control the child in a manner sufficient to ensure her safety upon the transfer of custody to him. We note, however, that no evidentiary hearing was conducted by the juvenile court as to the matters raised by DHR in its May 2016 filings. Given the allegations made by DHR and the contents of the report prepared by Petrella, the clinical psychologist, the juvenile court could not conclude that the concerns raised by DHR and Petrella could be ignored as a matter of law. Instead, the juvenile court should have scheduled a hearing so that it could properly evaluate any evidence DHR might present (including any testimony from Petrella) as to the alleged change in the child's circumstances after the entry of the April 2016 order. Ex parte Fann, 810 So. 2d 631, 638 (Ala. 2001) ('It is the court's duty to scrupulously guard and protect the interests of children.').

"Based on the foregoing, the petition is granted; the juvenile court's order of April 3, 2016, transferring legal and physical custody of the child to the father is vacated."

J.V. III, 233 So. 3d at 357 (emphasis added).

This Court released the opinion in J.V. III on March 31, 2017. Ultimately, the juvenile court conducted a hearing on October 16-17, 2017. In Marshall County Department of Human Resources v. J.V., [Ms. 2170082, March 9, 2018] ___ So. 3d ___

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(Ala. Civ. App. 2018) ("J.V. V"),² the Court of Civil Appeals summarized the testimony from that hearing as follows:

"The record in the present appeal contains the testimony of the DHR caseworker, Kristy Smith, the father, and Dr. Lois Petrella, a psychologist who evaluated the child in May 2016 and in April 2017. Neither the father nor DHR offered into evidence Dr. Petrella's written reports or the records of Dr. Eassa, who counseled the father and the child beginning in March or April 2015 until at least June 2015 and, again, at the least, three times in May 2016. Neither the child's foster parents nor the child was present at the October 2017 hearing, so the juvenile court did not hear testimony from the child regarding the allegations that gave rise to DHR's May 2016 motions in the juvenile court.

"Smith testified regarding the concerns that led to DHR's filing of the May 2016 motion to cease visitation. She explained that the child's 'behavior had deteriorated to the point that she was engaging in self-harm.' Smith recounted that the child had cut her finger and that the child had said that she would rather live in a hospital than to return to the father's home. In addition, Smith said, the child was refusing to use the bathroom or to perform basic hygiene while at the father's home and refusing to ride in an automobile with the father.

"Smith testified that the father and the child had not visited with each other since the entry of this court's stay of the April 2016 order in May 2016. In addition, Smith stated that DHR had also

²The Court of Civil Appeals issued an opinion on October 6, 2017, Ex parte Marshall County Department of Human Resources, 252 So. 3d 1098 (Ala. Civ. App. 2017), that it designated as "J.V. IV" in J.V. V.

ceased transporting the child to counseling sessions with Dr. Eassa after May 2016. Smith explained that DHR desired that all visitation between the child and the father be terminated and that custody of the child be awarded to DHR so that it could pursue its permanency plan of adoption by the foster parents. Although Smith admitted that the father had done everything that was asked of him, she still opined that the child's best interest would be served by allowing her to 'stay' with DHR and the foster parents.

"Smith admitted that DHR had changed its permanency plan for the child on May 1, 2017, to adoption by the child's current foster parents. She further admitted that, in the spring of 2016, DHR had informed Scott McGee, the licensed professional counselor whom the child had begun seeing to address post-traumatic stress disorder ('PTSD') and anxiety issues, that DHR intended to terminate the father's parental rights, despite the fact that, at that time, the permanency plan, in accordance with the juvenile court's orders, was to return custody of the child to the father. Smith testified that DHR had disagreed with both the juvenile court's decision to award custody of the child to the father and its decision requiring the child to visit with the father.

"When questioned regarding why DHR had had the child evaluated by Dr. Petrella in May 2016 despite the fact that the child had been in counseling with Dr. Eassa at that time, Smith testified that DHR had desired an 'independent counselor' to evaluate the child. Specifically, Smith testified that DHR had not desired Dr. Eassa to evaluate the child because she 'was involved in the reunification efforts.' Smith admitted that Dr. Petrella did not contact the father or Dr. Eassa when conducting her evaluations of the child in May 2016 and April 2017.

"Dr. Petrella testified that in May 2016 DHR asked her to evaluate the child 'to learn about her

psychological condition' and because DHR had 'concerns about behavioral regression.' According to Dr. Petrella, she evaluated the child on May 13, 2016. Dr. Petrella said that DHR had asked her to answer specific questions, including: 'Would transitioning [the child] to her father's care be detrimental to her health and safety, would forcing [the child] into a relationship with her biological father affect her regression, is [the child] a threat to harm herself or others if continuing [sic] to force this relationship with her father, does the transition need to stop, and is it contrary to her health and safety?' Dr. Petrella testified that she had been informed that the child had cut herself on a can, had stated that she would rather go to the hospital than to the father's home, that she had put tweezers in an electrical cord, and that she had threatened to run away if she was required to visit the father. When asked why DHR had chosen to have the child reevaluated by her instead of relying on Dr. Eassa, Dr. Petrella said that she understood that DHR had wanted an independent counselor who had not been involved with the father or the reunification efforts.

"Dr. Petrella testified that the transition of the child to the father's custody, and, in fact, any visitation with him, would be harmful to the child's health and safety. She explained that the child firmly believed that the father had molested her when she was younger and that the child had not bonded with the father. According to Dr. Petrella, the child would demonstrate regressive behaviors if she was placed with her father; specifically, Dr. Petrella referenced the child's 'going back to a previous level of development, engaging in baby talk, lower grades in school, self-care deficits, and ... possibly things more serious such as bed wetting.' Dr. Petrella testified that, at the time of the evaluation, the child was exhibiting some concerning behaviors, like stress eating,

concentration problems, being dissociative, and using poor judgment.

"Dr. Petrella had diagnosed the child with PTSD and parent/child relational problem in May 2016. She said that, when she reevaluated the child in April 2017, those diagnoses had not changed. However, she opined that the child's PTSD had shown improvement, which, Dr. Petrella said, was likely because the child had been in a stable living situation and because visitation with the father had ceased. Dr. Petrella explained that the child's prognosis was dependent on her living situation. She said that, if the child remained stable in the place in which she had grown up, the child would show improvement. However, if the child were removed from the foster parents' custody, Dr. Petrella opined, the child would revert to regressive behaviors and, possibly, self-harming behaviors. On cross-examination, Dr. Petrella admitted that the child had indicated to her that she would not carry out her suicidal thoughts or self-harm ideations.

"Dr. Petrella testified that, based on her review of Dr. Eassa's records, other documents provided by DHR, and her sessions with the child, she had concluded that the child had not bonded with the father despite their having had extended visits, and, she said, the child would not likely ever do so. She explained that regardless of whether the father had, in fact, harmed the child, the child believed that he had done so and that, as a result, the child would always fear the father. However, when questioned by the juvenile court, Dr. Petrella stated that, although visitation with the father at the present time would not be good for the child, she might be able to visit with the father in the future 'when she is more stable and she is getting better.' Dr. Petrella noted that family counseling

with the father and the child had been attempted and that some success had been achieved in counseling, but, she said, the child 'has made up her mind that she doesn't [want to] live [with the father].'

"Dr. Petrella also testified that there are methods available to assist a child who has an incorrect perception that a parent had harmed him or her. According to Dr. Petrella, such methods could be used in family counseling; she said, however, that she did not know if those methods had been utilized in counseling with Dr. Eassa. Although Dr. Petrella testified that if a child were to have been traumatized and had mistakenly ascribed that trauma to a parent when, in fact, the parent had not caused the trauma, a counselor would need to address that issue with the child to assist the child to understand that the parent was not the cause of the trauma, she stated that it should be left up to the child to determine whether he or she wanted to be reintroduced to a relationship with that parent.

"Dr. Petrella admitted that Dr. Eassa's notes had indicated that the father and the child were making progress in their relationship. In addition, Dr. Petrella agreed that Dr. Eassa's notes had stated that, although the child had indicated that she did not want to be with the father or that she would hurt herself if forced to be with the father, the interaction Dr. Eassa observed between the father and the child was different than what the child was saying about the father. Furthermore, Dr. Petrella agreed that Dr. Eassa's notes had indicated that the child 'compartmentalizes' her two families.

"On cross-examination, the father's attorney asked Dr. Petrella whether the foster parents' behaviors, which included crying whenever court orders requiring reunification were issued and admonishing the child to keep her shoes on while at the father's home so that she would not get hurt, might have impacted the child's willingness to transition to her father's custody. Dr. Petrella indicated that such behaviors by the foster parents

would negatively impact the child's willingness to transition. Dr. Petrella also admitted that the child was bonded with the foster parents and would identify with the foster parents such that she would behave in such a way as to prevent her foster parents from being sad or upset. Dr. Petrella indicated that the child would want to please those to whom she felt close.

"The father testified about his relationship with the child and the previous visitations at his home. The father lives with his sister and her children ('the cousins') at a home in Georgia. Regarding allegations that the child would not eat while at his home, the father explained that the child did not want to try the traditional Guatemalan food that his sister made and would refuse to eat it. He said that the cousins also sometimes refused such food. When that occurred, he said, he would get take-out meals, including fast food or Chinese food, for the child and the cousins. The father also said that he had purchased snack food that the child liked so that she would have snack foods that she preferred when she visited him. He mentioned that the child liked popcorn and hot chocolate, both of which she would prepare for herself; he said that she would also share the food she prepared with the cousins.

"Although the father admitted that the child was quiet and withdrawn during the early visits with him, he said that she had 'warmed up' and played with the cousins. He said that she had usually showered and brushed her teeth and, as far as he was aware, had used the bathroom to have a bowel movement when she visited him. He admitted that the child seemed to feel unwell at the last visit in late May 2016; he said that she had not wanted to shower, to brush her hair, or to eat at that visit.

"According to the father, he had not initially liked Dr. Eassa, but he explained that he had come

to realize that she was trying to help him improve his relationship with the child and that he had then tried to follow Dr. Eassa's recommendations regarding his interactions with the child. According to the father, he had thought that his relationship with the child was improving and that they had made progress in counseling. However, the father admitted that the child had refused to ride in an automobile with him 'last time.' In addition, the father said that the child would not wear clothing that he had purchased for her. The father explained that he thought that they needed more counseling and that he had lost any progress that he had made with the child because he had not seen her since May 2016.

"The father also testified about the incident involving the cut on the child's finger. He said that the child and his oldest nephew were playing with a can of soda in the backyard and that the child had accidentally cut herself on the can when it exploded after being thrown on the ground. He said that his nephew had called his attention to the injury, that he had seen a small cut on the child's finger, that he had gotten the child a bandage, that he had asked the child if she needed additional attention for her injury, and that the child had told him that she was fine. He said that the child had resumed playing with the other children immediately after the incident.

"The father testified that, at the time of the October 2017 hearing, he worked seven days a week as a subcontractor. He explained, however, that he could reduce his work schedule if the child were allowed to come live with him. He also said that he did not have to work on weekends but chose to do so because he earned more income when he did so. He said that his hours were flexible and that he had a crew of men who could perform work even if he was not at a job site. He said that his sister would be

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available to assist with the child when he had to work and the child was not in school."

___ So. 3d at ___-___ (footnotes omitted).

On October 19, 2017, the juvenile court had entered an order that provided, in pertinent part:

"2. Between now and January 1, 2018, the undersigned orders, in essence, a 'reattempt' of the transition all parties agreed upon and placed in this Court's April 3, 2016 Order. The re-attempt (with 2017 dates and a few other NECESSARY modifications) is as follows:

"a. The Department of Human Resources is directed to IMMEDIATELY remove the child from the current foster parents and IMMEDIATELY place the child in another foster home. Said placement shall ensure that the child remains in her current school until custody is transferred to father. ...

"b. The father's visitation plan to transition [the] legal and physical custody of his child from the Marshall County Department of Human Resources shall be as follows:

"On October 21, 2017, the father shall have three hours of supervised visitation with his child a[t] his home.

"....

"3. On January 1, 2018, legal and physical custody of the minor child ... shall be transferred to her father...."

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(Capitalization in original.)

DHR appealed the juvenile court's order to the Court of Civil Appeals, and the Court of Civil Appeals affirmed the juvenile court's judgment except for the portion of the judgment that required that DHR pay for the counseling. J.V.

V. Judge Thomas dissented, explaining:

"I respectfully dissent from the main opinion insofar as it affirms the award of custody to J.V. ('the father') in the October 19, 2017, judgment of the Marshall Juvenile Court ('the juvenile court'). As the main opinion notes, our supreme court has indicated that the juvenile court should consider 'the failure of transitional efforts (which it had previously ordered) to achieve the results that were contemplated by it and that would be necessary for an eventual transfer of custody that would serve the child's best interest.'⁶ [J.V. III], 233 So. 3d 345, 355-56 (Ala. 2017). The transitional efforts ordered by the juvenile court included graduated visitation between the father and the child, language classes to assist in communication, and counseling with Dr. Elaine Eassa.

"Dr. Eassa testified in 2015 that she thought progress toward reunification was possible with continued counseling. However, the most current information before the juvenile court includes caseworker Kristy Smith's testimony that only minimal progress toward reunification was achieved after a year of counseling with Dr. Eassa. When that testimony is coupled with Dr. Lois Petrella's testimony that the child continues to fear the father and to strongly oppose resuming a relationship with him, I find the evidence supportive of the conclusion that the attempts to reunite the father and the child have not resulted

in any improvement in the child's attitude toward her father and have not been successful.

"The record reveals that the child's opposition to having a relationship with the father has not only not lessened but, in fact, appears to have intensified. Thus, I find no support for a conclusion that a transition to the father's custody will likely be achieved. In fact, based on the failure of the transitional efforts ordered throughout the pendency of this case, I conclude that the child cannot be safely returned to the custody of the father. See Ala. Code 1975, § 12-15-101(b)(3) (indicating that reunification should be accomplished as quickly and as safely as possible). Therefore, because I conclude that a transfer of custody to the father would not serve the child's best interest at this time or at any time in the near future, I would reverse the October 19, 2017, judgment.

"

"⁶... [T]he juvenile court orally stated in the transcript that it was attempting to balance the father's constitutional rights with the best interest of the child. However, because the child was removed from the custody of her parents and, for two years or more, the father was incarcerated and unable to parent the child, she was necessarily a dependent child. See [J.V. I], 203 So. 3d 1243, 1249 (Ala. Civ. App. 2016). Once that occurred, the father lost his fundamental parental presumption. See J.P. v. S.S., 989 So. 2d 591, 600 (Ala. Civ. App. 2008) (explaining that the parental 'presumption does not apply in the dispositional phase of a dependency proceeding'). The juvenile court was to be concerned with only one question: What is in the best interest of the child?"

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J.V. V, ___ So. 3d at ___ (Thomas, J., dissenting) (emphasis added).

DHR filed a petition for the writ of certiorari with this Court, and we granted the petition to determine whether the juvenile court's October 19, 2017, order immediately removing the child from her foster parents and ultimately transferring legal and physical custody of the child to the father is in the best interest of the child.

Discussion

In J.V. I, the Court of Civil Appeals specifically stated that "the record lacks evidence that would support the finding that the child's best interest would be served by placing her in the custody of the father without further transitioning" and that, "[a]t this time, the father and the child do not have a relationship strong enough to accomplish the transition of custody." 203 So. 3d at 1253-54. Nevertheless, less than two months after the Court of Civil Appeals released its opinion in J.V. I, and without any additional testimony or evidence to establish that the father and the child had a relationship strong enough to accomplish a transition of custody to the father at that time, the

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juvenile court entered an order on April 3, 2016, that included a transition plan with increasingly longer periods of visitation and a custody-transition date of July 1, 2016. The juvenile court's April 3, 2016, order completely ignored the concerns expressed by the Court of Civil Appeals in J.V. I that reunification was not in the best interest of the child at that time and completely ignored Dr. Eassa's testimony that "the child should be in control of the reunification plan"; "that an immediate transition to the father's custody would retraumatize the child"; and "that the father was not yet ready to parent the child on his own." 203 So. 3d at 1252.

After this Court in J.V. III instructed the juvenile court to consider the concerns DHR raised in its May 2016 "Motion for Emergency Order to Cease Visitation," it conducted a hearing on October 16-17, 2017. Despite additional evidence from Kristy Smith, a DHR caseworker, and Dr. Lois W. Petrella, a psychologist, that reunification was still not in the best interest of the child, the juvenile court ordered that the child be "IMMEDIATELY" removed from the foster parents with whom she had lived for more than eight years; ordered that DHR "IMMEDIATELY" place her with a new foster family; and, instead

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of accepting Dr. Eassa's opinion that the father and the child were not yet ready to be reunified and heeding her recommendation that the child be allowed to be in control of the reunification plan, arbitrarily set an even shorter period -- between October 21, 2017, and January 1, 2018 -- for the child to be transitioned to the father's custody. It also appears to have completely ignored testimony from Smith and Dr. Petrella that subsequent efforts to transition the child to the father had actually caused the situation to deteriorate rather than to improve.

The juvenile court stated at one point that it was "in the best interest for that child to be in the life of the father and vice versa."

"[P]arents typically have the benefit of the presumption stated in Ex parte Terry[, 494 So. 2d 628 (Ala. 1986),] in custody disputes with nonparents. However, that presumption does not apply in the dispositional phase of a dependency proceeding. W.T.H. v. M.M.M., 915 So. 2d 64, 70-71 (Ala. Civ. App. 2005). Once the trial court has made a finding of dependency, § 12-15-71(a), Ala. Code 1975, empowers the trial court to make various dispositions of the child, including 'any ... order as the court in its discretion shall deem to be for the welfare and best interests of the child.' § 12-15-71(a)(4). Alabama courts have interpreted that provision to mean that, in the dispositional phase of a dependency proceeding, the presumption discussed in Ex parte Terry does not apply and that

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a subsequent transfer of custody is determined by the 'best interest of the child' standard. W.T.H. v. M.M.M., 915 So. 2d at 70-71; F.G.W. v. S.W., 911 So. 2d 1, 3 (Ala. Civ. App. 2004)."

J.P. v. S.S., 989 So. 2d 591, 600 (Ala. Civ. App. 2008).

Also,

"[c]onsistent with § 12-15-71(a), we have long stated in both child-custody and dependency cases that the primary concern is the best interests and welfare of the child. E.g., McKinney v. Alabama Dep't of Pensions & Sec., 475 So. 2d 568 (Ala. Civ. App. 1985); Melton v. State Dep't of Pensions & Sec., 448 So. 2d 392 (Ala. Civ. App. 1984); Price v. Price, 440 So. 2d 1110 (Ala. Civ. App. 1983). At the time of the trial court's order at issue, A.M.A. was approximately six and one-half years old and had lived with S.P. and the foster siblings for almost six years. In providing for the counseling and the visitation challenged in this appeal by W.T.M., the juvenile court clearly took into consideration the bonds between the child and her foster mother and foster siblings forged from having lived with S.P. and the other children virtually her entire life. We likewise conclude that it was appropriate for the trial court, in determining A.M.A.'s best interest and welfare, 'to consider ties of affection resulting from years of association between the child and its custodian.' Dale v. Dale, 54 Ala. App. 505, 507, 310 So. 2d 225, 227 (1975) (custody determination in a divorce case).

"The bonds of love between parent and child are not dependent upon blood relation and instinct, but may be forged as strongly in the crucible of day to day living. Out of the actual relationship of parent and child love grows. It is not merely a product of the biological function of conception and giving birth. To give

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paramount consideration to the principle of parental priority or ownership in custody decisions would often be an anathema to the best interest of the child.'

"Borsdorf v. Mills, 49 Ala. App. 658, 661-62, 275 So. 2d 338, 341 (1973). See generally Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983)."

W.T.M. v. S.P., 889 So. 2d 572, 580-81 (Ala. Civ. App. 2003).

Thus, the focus of this case must remain solely on the best interest of the child. There has been extensive testimony about the child's mental well being, and there are concerns, based on statements by the child, that she might either hurt herself or run away if she were forced to live with the father.

The juvenile court's order removing the child from her foster parents and ultimately transferring legal and physical custody of the child to the father is not in the child's best interest. At no time since the decision was issued in J.V. I has there been any testimony or evidence that a transfer of custody at any time in the near future would be in the child's best interest. In fact, even the father admitted during the October 2017 hearing that he and child needed more counseling and that any progress he had made had been lost because he had

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not seen the child since May 2016. Also, during that hearing, when the juvenile court asked the child's guardian ad litem what his recommendation was, the guardian ad litem stated:

"I recommend that custody be awarded to the Department of Human Resources, subject to whatever award of visitation to [the father] that the Court deems appropriate. I am very concerned about the uprooting [e]ffects that a change of custody would have on the child or on the uprooting [e]ffect that an award of custody to [the father] would have on the child and that's the vast substance of my recommendation."

Finally, although it had originally indicated that it would talk to the child before making a decision, the juvenile court ultimately entered its order without doing so.

Contrary to the conclusions of the Court of Civil Appeals in J.V. V, there was not actually conflicting evidence in this case as to whether a transition of custody to the father at the present time and over such a short period, after the child and the father have not seen each other since approximately mid 2016, is in the child's best interest. Rather, all the evidence, including the testimony from Dr. Eassa, Dr. Petrella, and Smith, as well as the admission of the father and the recommendation of the child's guardian ad litem, indicates that the parties are not yet ready for a transition

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of custody and that such a transition is actually not in the best interest of the child. Although the father may have been prepared to provide for the child's physical needs, there was no evidence indicating that he is currently capable of parenting the child and satisfying her emotional and mental-health needs that were highlighted during this most recent hearing. In addition, there is still no indication that the Georgia home study has been approved. Thus, as indicated in J.V. I, the Georgia child-protection agency would not monitor the family in connection with this case if the child visited the father or if the child was placed in the father's custody in Georgia.

Conclusion

In light of the fact that all the testimony indicated that the parties are not yet ready for a change of legal and physical custody of the child and that such a change is actually not in the best interest of the child, and because there has not been any evidence indicating that those circumstances have changed since the Court of Civil Appeals' decision in J.V. I, the concerns for the child's health, safety, and continued emotional development previously set

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forth by the Court of Civil Appeals in J.V. I and by this Court in J.V. III remain and are still valid. Therefore, the juvenile court's October 19, 2017, order immediately removing the child from her foster parents and ultimately transferring legal and physical custody of the child to the father is not in the child's best interest and is, instead, plainly and palpably wrong. See D.W. v. M.M., [Ms. 2170223, September 21, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018) ("We could find no evidence in the record that would support a finding that placement with the father will somehow advance the child's best interests. We therefore hold that the juvenile court's finding that an award of custody to the father is in the best interests of the child is "'so poorly supported by the evidence as to be plainly and palpably wrong.'" M.M. [v. Colbert Cty. Dep't of Human Res.,] 117 So. 3d [376,] 383 [(Ala. Civ. App. 2013)]."). Accordingly, we reverse the judgment of the Court of Civil Appeals and remand this case for that court to order the juvenile court to vacate its judgment.

REVERSED AND REMANDED.

Bolin, Shaw, and Wise, JJ., concur.

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Bryan and Mitchell, JJ., concur in the result.

Mendheim, J., concurs in the result in part and dissents
in part.

Parker, C.J., and Sellers and Stewart, JJ., dissent.

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MENDHEIM, Justice (concurring in the result in part and dissenting in part).

I concur in the result of the main opinion insofar as it orders the vacation of the portion of the juvenile court's October 19, 2017, order requiring the Marshall County Department of Human Resources to surrender legal and physical custody of the child to the father on January 1, 2018; I dissent as to the remainder of the main opinion. Under the facts, I agree with the main opinion's conclusion that the juvenile court's October 19, 2017, order insofar as it requires that legal and physical custody of the child be returned to the father by a date certain -- January 1, 2018 -- is palpably erroneous or manifestly unjust; the evidence does not indicate that the best interest of the child would be best served by such a rigid deadline. However, I dissent as to the remainder of the conclusions in the main opinion because the juvenile court, which heard the evidence ore tenus, is in the best position to consider the conflicting evidence presented in this case and has the discretion to conclude, as it did, that the best interest of the child will be served by awarding legal and physical custody to the father. On remand, the

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juvenile court can exercise its discretion and, after considering all the evidence presented, determine what schedule of reunification would serve the best interest of the child.

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SELLERS, Justice (dissenting).

I respectfully dissent.

Once a juvenile court determines that a child is dependent, the court may enter "any ... order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child." § 12-15-314(a)(4), Ala. Code 1975. "'In matters concerning child custody and dependency, the trial court's judgment is presumed correct ... and will not be reversed unless plainly and palpably wrong.' Ex parte T.L.L., 597 So. 2d 1363, 1364 (Ala. Civ. App. 1992)." Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004). Similarly, "'[t]he 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.'" Id. (quoting River Conservancy Co. v. Gulf States Paper Corp., 837 So. 2d 801, 806 (Ala. 2002)).

As the Court of Civil Appeals acknowledged, there was evidence presented to the juvenile court indicating that the child falsely believed the father had abused her, that the child was afraid of the father, that the child refused to eat or to tend to her hygiene while visiting the father, and that

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the child had threatened to harm herself if the father was awarded custody. However, Dr. Lois W. Petrella, an expert psychologist who evaluated the child, admitted on cross-examination that the child had indicated that she would not carry out her threats of self-harm. Other testimony supports a conclusion that DHR grossly exaggerated prior instances of alleged self-harm. Written notes created by Dr. Elaine Eassa, a psychologist who had counseled the child and the father before Dr. Petrella evaluated the child, indicated that "the interaction ... between the father and the child was different than what the child was saying about the father." Marshall Cty. Dep't of Human Res. v. J.V., [Ms. 2170082, March 9, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018). The father's testimony tended to refute the allegation that the child had consistently refused to eat or tend to her hygiene while visiting the father. There was also testimony indicating that the child's foster parents had behaved in a way that "might have impacted the child's willingness to transition to her father's custody." ___ So. 3d at ___. Finally, as the Court of Civil Appeals noted, "Dr. Petrella also testified that there are methods available to assist a child who has an

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incorrect perception that a parent had harmed him or her."

___ So. 3d at ___.

In summarizing the evidence before the juvenile court, the Court of Civil Appeals stated:

"The evidence presented regarding whether the transition of custody can be achieved is conflicting. Although Dr. Petrella testified that the child would likely never form a bond or relationship with the father, she admitted on cross-examination that methods of assisting a child with rebuilding a relationship with a parent damaged by an incorrect belief that the parent had harmed the child exist and can be implemented by a counselor during treatment, which Dr. Petrella admitted she, as an evaluator, did not perform. Dr. Eassa, who had engaged in counseling with the child and the father, indicated that a transition would take a significant amount of time and that the child would need to have the ability to control the transition; however, she testified (albeit in July 2015, before the protracted appellate proceedings that resulted in a suspension of visitation and the termination of Dr. Eassa's services) that the father and the child were making progress in counseling and offered to continue counseling the father and the child to aid in the transition process. In addition, the father testified that he and the child had made progress in counseling before visitation was terminated in May 2016, and other testimony indicated that the foster parents had engaged in behavior related to the proceedings that could have negatively affected the child's willingness to transition to the father's custody."

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___ So. 3d at ___. The father indicated a willingness and a desire to continue joint counseling with the child, and the juvenile court's order directs that such counseling continue.

The Court of Civil Appeals correctly noted that, "'[i]n cases where the evidence conflicts, the trial court is free to choose which evidence it believes and it is up to the [trial] court to resolve the conflicts.'" ___ So. 3d at ___ (quoting Seifert v. Houlditch, 583 So. 2d 274, 275 (Ala. Civ. App. 1991)). The juvenile court was "'in the best position to evaluate [the witnesses'] demeanor and credibility; accordingly, [the Court of Civil Appeals] defer[ed] to the [juvenile] court's factual findings and its rulings based on those findings.'" ___ So. 3d at ___ (quoting Dunn v. Dunn, 972 So. 2d 810, 815 (Ala. Civ. App. 2007)). In light of the evidence and legal presumptions afforded the juvenile court, I believe the Court of Civil Appeals was correct in affirming that court's judgment on the custody issue.

Stewart, J., concurs.