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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

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S.J.

v.

Limestone County Department of Human Resources

Appeal from Limestone Juvenile Court
(JU-08-185.02)

PITTMAN, Judge.

S.J. ("the mother") appeals from a judgment of the Limestone Juvenile Court terminating her parental rights as to a minor child, P.J. ("the child"), born to the mother in 1999.

In April 2009, the Limestone County Department of Human

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Resources ("DHR") filed a petition in the juvenile court seeking the termination of the parental rights of the mother as to the child. DHR averred, in pertinent part, that the child had been adjudicated dependent in May 2008 and had been in foster care since that time; that the mother had "a criminal history that include[d] multiple theft charges, multiple [possession-of-forged-instrument] charges, domestic violence, public intoxication, and criminal trespass"; that the mother was "in the Madison County jail on a bond revocation" proceeding; that the mother had "failed to comply with the steps set forth in [an individualized service] plan for the family"; that the mother had "willfully neglected the needs of [the] child"; that the mother had failed to provide support for, or provide for the material needs of, the child; that the mother had failed to "maintain consistent contact or communication" with the child and had failed to make efforts to adjust her circumstances to meet the needs of the child pursuant to agreements reached with DHR; that no relative resources existed for the child; and that the mother was not, and was likely to never be, able to "provide a fit and suitable home" for the child. The juvenile court directed

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both the mother and A.M., the child's father, to appear in the action, and it appointed a guardian ad litem for the child and counsel for the mother.

During the pendency of the action, the mother was incarcerated on criminal charges; despite that incarceration, she sought, and was granted, leave from the juvenile court to be transported to a preliminary hearing in the case on September 25, 2009. On November 3, 2009, the case was set for a final hearing on DHR's petition on January 14, 2010. Just before that scheduled hearing, the mother filed a written motion to continue the trial, averring that she was attending a residential drug-treatment facility for between six months and one year; that motion was denied on January 12, 2010. At the start of trial, the juvenile court noted that that motion had been filed and that it had been denied, whereupon counsel for the mother again moved for a continuance. The juvenile court denied the mother's renewed request. Immediately thereafter, counsel for the mother moved to withdraw from his representation, and the juvenile court granted that motion.

After hearing testimony from witnesses called by DHR, the juvenile court entered a judgment on January 19, 2010,

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terminating the parental rights of the mother and the father.¹ The mother thereafter sent several handwritten letters to court officials in early February 2010, after the 14-day period for appealing had run, prompting the appointment of new counsel; the mother, acting through that new counsel, then successfully moved for relief under Rule 77(d), Ala. R. Civ. P., permitting the taking of an appeal out of time because of excusable neglect, and the mother timely appealed after that relief had been granted.² The juvenile-court judge has certified the record as adequate for appellate review pursuant to Rule 28(A), Ala. R. Juv. P., and we thus have appellate jurisdiction.

The mother raises two issues, neither of which pertains to the substantive correctness of the juvenile court's conclusion, drawn from the evidence presented during the ore

¹The father has not appealed.

²Because no objection to the juvenile court's grant of leave has been asserted in the juvenile court or in this court so as to warrant examination of the validity of that ruling, and because the mother's notice of appeal was filed within 30 days after the original appeal deadline, we treat the appeal as timely. See generally F.G. v. State Dep't of Human Res., 988 So. 2d 555, 558-60 (Ala. Civ. App. 2007) (main opinion and special concurrence).

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tenus proceeding, that the termination petition was due to be granted. The mother's first contention is that she was denied due process because the juvenile court held its hearing on DHR's termination petition in her absence and after having allowed her appointed attorney to withdraw from his representation at the start of trial. She analogizes her situation to that of an incarcerated pro se civil litigant, in which context we have held that an opportunity to present evidence by deposition satisfies due-process minima if a party cannot attend a trial because of his or her incarceration. See, e.g., Eastman v. Eastman, 429 So. 2d 1058, 1058-59 (Ala. Civ. App. 1983).

However, the mother's first contention fails, both substantively and procedurally. First, although the mother strenuously argues that she was not given the opportunity to testify by deposition, DHR correctly notes that the mother was not "confined in prison" within the scope of Rules 30(a) and 31(a), Ala. R. Civ. P., dealing with the necessity of leave of court for deposing prisoners; thus, for all that appears in the record, we must agree with DHR's contention that the mother (and her attorney during pretrial representation) had

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at all times the unilateral right to notice her own deposition and to present a transcript of that testimony in lieu of her own attendance at trial. Second, the mother made no contention in the juvenile court, either at trial through her attorney before his withdrawal or at the postjudgment stage, that that court's proceeding to decide whether to grant the termination petition amounted to a due-process deprivation. "It has long been the law in this state that constitutional questions not raised in the court below will not be considered for the first time on appeal." Smith v. State Dep't of Pensions & Sec., 340 So. 2d 34, 37 (Ala. Civ. App. 1976); accord J.K. v. Lee County Dep't of Human Res., 668 So. 2d 813, 817 (Ala. Civ. App. 1995) (declining to reach ineffective-assistance-of-counsel issue because that issue had not been presented to the juvenile court).

The dissenting opinion, citing our decision in J.A.H. v. Calhoun County Department of Human Resources, 846 So. 2d 1093 (Ala. Civ. App. 2002), suggests that the mother's right to counsel was sufficiently "fundamental" that we should not, in this case, adhere to the principle that an issue must be properly preserved and presented for appellate review. The

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appealing parent in J.A.H. asserted a right to replacement appointed counsel after his initial appointed attorney had been permitted to withdraw; in that case, the juvenile court squarely denied such a request as being "untimely" when it was made on the day of trial. Here, all that has been presented to the juvenile court, and ruled upon adversely to the mother, is a continuance request -- one based upon the purported unavailability either of the mother's personal attendance (which was not required) or of alternative means of presenting evidence (which were clearly available to her but were not utilized).

Under similar circumstances involving a trial-day withdrawal of appointed counsel, we held three years ago in D.A. v. Calhoun County Department of Human Resources, 976 So. 2d 502 (Ala. Civ. App. 2007), that direct appellate review was foreclosed:

"The father ... attempts to assert substantive arguments that the juvenile court erred (1) in dismissing his appointed attorney before conducting the termination-of-parental-rights hearing and (2) in terminating his parental rights when, he claims, DHR failed to present clear and convincing evidence that termination of his parental rights as to the children was necessary. Because the father neither attended the parental-rights-termination hearing nor filed a postjudgment motion, neither of those

contentions were presented to the juvenile court; therefore, the record does not reflect any adverse ruling made by that court that is preserved for appellate review. The oft-quoted and long-standing rule is that an appellate court may not consider an issue raised for the first time on appeal. "[A juvenile] court should not be placed in error [by an appellate court] on matters which the record reveals it neither ruled upon nor was presented the opportunity to rule upon" at trial or in a postjudgment motion.

"Although we conclude that the father has not preserved any issue for appellate review beyond the issue of the juvenile court's denial of the father's continuance request, the father is not without legal remedy. The father's assertion regarding the juvenile court's removal of his appointed attorney from further representation would more properly be raised as an ineffective-assistance-of-counsel argument in a Rule 60(b), Ala. R. Civ. P., motion. Our Supreme Court has noted that in termination-of-parental-rights cases, 'a parent has a right to appointed counsel.' Inherent in that right to legal representation is the right to effective assistance of counsel.

"The only possible result of the father's direct appeals from the juvenile court's judgments based upon allegations of error not preserved for appellate review is summary affirmance. However, our Supreme Court has explicitly endorsed the use of a Rule 60(b) motion as a valid method of challenging a termination judgment based upon claimed ineffective assistance of counsel. We conclude that although the father has not brought a valid substantive challenge to the termination of his parental rights to this court at this time, he is not precluded from presenting a deprivation-of-counsel argument to the juvenile court so as to establish a record on which to base a possible future appeal."

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976 So. 2d at 504-05 (citations omitted). Although we in no way wish to condone the behavior of the mother's trial counsel in simply "throwing up his hands" and seeking immediate withdrawal in the face of an adverse ruling or to express agreement with the juvenile court's decision to grant that withdrawal request, we are constrained by principles of appellate review to affirm the judgment as to the mother's due-process argument.

The mother's second contention is that the juvenile court erred in denying the written and renewed oral motions seeking a continuance of the trial based upon her absence from trial. "'Whether to grant or to deny a motion to continue in a termination-of-parental-rights case is within the discretion of the court and its decision will not be reversed absent a showing that the court has abused its discretion.'" D.A., 976 So. 2d at 503 (quoting S.C.D. v. Etowah County Dep't of Human Res., 841 So. 2d 277, 278 (Ala. Civ. App. 2002)). We further noted in D.A. that, "[a]s a general rule, continuances are not favored under Alabama law."³ 976 So. 2d at 504.

³In D.A., we also cited Ala. Code 1975, § 12-15-68, as additional authority warranting affirmance. That statute, which provided that continuances in juvenile proceedings were

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Here, the juvenile court opined, upon its review of the mother's written motion to continue and a letter attached as an exhibit to that motion (which documents do not appear in the record), that the necessity of the mother's remaining on the premises of the provider of her inpatient-drug-treatment program was required so as to prevent her from attending trial, even in the custody of agents of the program's provider, had not been demonstrated. The juvenile court noted that there had been "nothing in the letter to indicate that she couldn't come," and it observed that the letter had "just said that [she had been] a client" without also stating that officials would "drop her from the program" if she attended trial. From that evidence, and based on the juvenile court's own previous experience involving agents of treatment centers that had "accompan[ied] people for important court hearings," that court concluded that the mother's absence was voluntary and that a continuance was not warranted. We note that, by

properly to be granted "only upon a showing of good cause," was repealed by the Alabama Juvenile Justice Act, Act No. 2008-277, Ala. Acts 2008, which became effective January 1, 2009. The repeal of § 12-15-68 does not, however, affect those portions of D.A. discussing other legal principles pertaining to continuances and appellate review of decisions on continuance requests.

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the time of trial in January 2010, the juvenile court had already allowed the mother, on her counsel's motion, to be transported from jail to attend an earlier hearing, yet the record contains no indication that the mother sought a similar transport order from the juvenile court in the days before trial.

In D.A., we upheld a juvenile court's determination that a parent's absence from a termination trial was an insufficient basis for granting a continuance when the record indicated a previous continuance and contained evidence tending to show that the parent's absence was a product of voluntariness. Similarly, in this case, we agree with DHR that the mother has failed to show that the juvenile court acted outside the limits of its discretion in proceeding with a scheduled trial notwithstanding the mother's claim that her absence from trial was excusable. We thus conclude that the juvenile court did not err to reversal in denying the written and oral motions to continue.

Based upon the foregoing facts and authorities, we conclude that the juvenile court's judgment is due to be affirmed.

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AFFIRMED.

Thomas, J., concurs.

Bryan, J., concurs in the result, without writing.

Moore, J., concurs in the part and concurs in the result,
with writing.

Thompson, P.J., dissents, with writing.

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MOORE, Judge, concurring in part and concurring in the result.

I concur in the main opinion insofar as it concludes that the mother failed to preserve for appellate review the issue of the mother's right to counsel and insofar as it concludes that the juvenile court did not exceed its discretion in denying the mother's request for a continuance.

The main opinion quotes D.A. v. Calhoun County Department of Human Resources, 976 So. 2d 502 (Ala. Civ. App. 2007), which indicates that the mother could file a Rule 60(b), Ala. R. Civ. P., motion based on ineffective assistance of counsel. Because I believe that the mother can file a Rule 60(b)(4), Ala. R. Civ. P., motion to set aside the judgment as void, I do not join the main opinion.

A parent in a termination-of-parental-rights proceeding has a due-process right to appointed counsel. See W.C. v. State Dep't of Human Res., 887 So. 2d 251, 256 (Ala. Civ. App. 2003). The mother in the present case had requested appointed counsel; she was not required by law to repeat that request. See J.A.H. v. Calhoun County Dep't of Human Res., 846 So. 2d 1093, 1095 (Ala. Civ. App. 2002). Because the mother was not represented by an attorney, her due-process rights were

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violated. See W.C., supra. A judgment is void if the court rendering that judgment acted in a manner inconsistent with due process. See Bowen v. Bowen, 28 So. 3d 9, 14 (Ala. Civ. App. 2009). Because a motion for relief from a void judgment filed pursuant to Rule 60(b)(4) may be filed at any time after the rendition of a judgment, see E.S.R. v. Madison County Dep't of Human Res., 11 So. 3d 227, 231-32 (Ala. Civ. App. 2008), I conclude that the mother has the same relief available to her. Thus, I concur in the result to affirm the trial court's judgment.

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THOMPSON, Presiding Judge, dissenting.

I respectfully dissent. The mother's attorney moved to continue the termination hearing based, in part, on the mother's failure to appear at the termination hearing because she was attending a drug-treatment program. The juvenile court denied that motion; it explained that ruling in its termination judgment as follows:

"[The mother's] attorney had previously filed a motion to continue the hearing as [the mother] is presently in a court-ordered rehabilitation program, which is New Life for Women in Gadsden, Alabama. The Court denied the Motion as this case has been pending since April 2008. The attorney for [the mother] then made an oral motion to continue, again due to [the mother's] being in New Life for Women, and not being able to be transported for today's hearing. The Court denied the motion."

After the juvenile court denied the mother's motions to continue, the mother's court-appointed attorney moved to withdraw from representing her at the beginning of the hearing on DHR's petition to terminate her parental rights. The juvenile court granted that motion to withdraw and did not appoint another attorney to represent the mother during the termination hearing. The juvenile court then entered a judgment terminating the mother's parental rights.

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An indigent parent defending an action seeking to terminate his or her parental rights is entitled to appointed legal counsel. Ex parte Shuttlesworth, 410 So. 2d 896, 899 (Ala. 1981); K.P.B. v. D.C.A., 685 So. 2d 750, 752 (Ala. Civ. App. 1996); see also § 12-15-305(b), Ala. Code 1975 ("In dependency and termination of parental rights cases, the respondent parent, legal guardian, or legal custodian shall be informed of his or her right to be represented by counsel and, if the juvenile court determines that he or she is indigent, counsel shall be appointed where the respondent parent, legal guardian, or legal custodian is unable for financial reasons to retain his or her own counsel.").

This court has held that a parent facing the termination of parental rights does not have to again request representation after his or her original appointed counsel is allowed to withdraw. J.A.H. v. Calhoun County Dep't of Human Res., 846 So. 2d 1093 (Ala. Civ. App. 2002). In J.A.H. v. Calhoun County Department of Human Resources, supra, an action seeking the termination of a father's parental rights, the juvenile court had earlier appointed counsel for the mother and the father but had allowed the attorney to withdraw from

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representing the father when the mother and the father separated and a potential conflict of interest arose. At some point before the termination hearing, the Calhoun County DHR moved to have new counsel appointed for the father, but the juvenile court denied that motion because the father had not requested the appointment of new counsel. At the termination hearing, the attorney for the mother, the father's original appointed attorney, brought to the juvenile court's attention a letter from the father indicating that the father claimed to have been informed at the time the original attorney withdrew that new counsel would be appointed to represent him and inquiring why he had not heard from that counsel. The juvenile court determined that the father's request for an attorney was not timely, and the termination hearing proceeded without the father's being present and without his having legal representation. This court held that the juvenile court's failure to appoint new counsel to represent the father at the termination hearing was error, and it reversed the termination judgment. In reaching that holding, this court explained:

"[W]e find it unduly burdensome and overly technical to require a parent to repeatedly request the

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appointment of counsel when he or she has previously requested counsel and has already proven his or her entitlement to such counsel. We do not conclude that the trial court in the present case erred by failing to inform the father of his right to counsel; instead, we conclude that the trial court erred by requiring the father to repeat his request for counsel."

J.A.H., 846 So. 2d at 1095.

In this case, as in J.A.H., supra, the mother's appointed counsel was allowed to withdraw, and the juvenile court failed to appoint new counsel to represent the mother at the hearing in which the termination of her parental rights was at issue. In this case, however, the mother did not know before the termination hearing that her attorney would withdraw; she did not have any advance knowledge that her interests would not be defended during the termination hearing. According to the allegation in the Rule 77(d), Ala. R. Civ. P., motion discussed in the main opinion, the mother "was unaware that she was proceeding without representation." The mother had requested appointed counsel. The mother had not elected, or anticipated being forced by the juvenile court, to proceed pro se. The juvenile court did not appoint new counsel for the mother until February 10, 2010, well after the 14-day period

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for appealing, or filing a postjudgment motion from, the January 19, 2010, termination judgment.

The main opinion addresses this issue by quoting an excerpt from D.A. v. Calhoun County Department of Human Resources, 976 So. 2d 502 (Ala. Civ. App. 2007), indicating that the mother could have filed a Rule 60(b), Ala. R. Civ. P., motion for relief from the termination judgment and by holding that the mother is improperly raising this argument for the first time on appeal. Unlike the father in D.A., supra, who had an attorney appointed in a timely manner, the mother in this case did not have new counsel appointed for her until after the issue might have been timely raised before the juvenile court.

Regardless, I do not agree that the mother is confined to review of the termination judgment by way of a Rule 60(b) motion; I believe the issue is properly before this court on appeal. The juvenile court created the error in this case by depriving the mother of her appointed counsel at the termination hearing. The record indicates that the mother was unaware for some time that she was no longer represented by counsel and that the juvenile court had not appointed counsel

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for the mother until after the time for properly raising that error had passed.

A parent's right to the custody of his or her child is a fundamental right. Troxel v. Granville, 520 U.S. 57, 65 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982). An indigent parent has a right to appointed representation when that fundamental right is at issue. § 12-15-305, Ala. Code 1975; Ex parte Shuttlesworth, supra; K.P.B. v. D.C.A., supra.

The mother argues on appeal that the juvenile court erred in terminating her parental rights after allowing her appointed attorney to withdraw at the termination hearing. That argument might have been more artfully drawn. However, given the fundamental nature of the issue involved, the mother's argument before this court, and the applicable statutory and caselaw precedent, I would reverse the termination judgment and remand the cause for the juvenile court to conduct a termination hearing at which the mother is represented by appointed counsel. Accordingly, I respectfully dissent.