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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2014

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Limestone County Department of Human Resources

v.

Deborah Long, as guardian ad litem for  
D.R., a minor child

Appeal from Limestone Juvenile Court  
(JU-09-160.02)

MOORE, Judge.

The Limestone County Department of Human Resources ("DHR") appeals from a judgment of the Limestone Juvenile

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Court ("the juvenile court") awarding custody of D.R. ("the child") to DHR. We reverse.

Procedural History

On October 17, 2013, the child's paternal grandparents, J.R. and L.R. ("the grandparents"), filed a petition alleging that D.R. was dependent. The juvenile court appointed Deborah Long as the guardian ad litem for the child. After a hearing, the juvenile court entered an order on November 6, 2013, finding the child dependent, awarding temporary legal and physical custody of the child to the grandparents, setting a dispositional and permanency hearing for January 17, 2014, and ordering DHR to complete a home study of the grandparents' home. DHR submitted a report of the home study it conducted on January 14, 2014, recommending that, if they desired custody, the grandparents be awarded custody of the child. The January 2014 hearing was continued until February 7, 2014.

On January 17, 2014, the guardian ad litem filed a motion to transfer custody, alleging that the grandparents had told her on January 16, 2014, that they were no longer willing or able to maintain custody of the child, that the child had been "admitted to Mountain View[, a psychiatric hospital,] for an

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assessment and services," and that the child would be discharged in five days with no place to go. The guardian ad litem also alleged that DHR's employees had been contacted and had stated that a dependency petition must be filed. The guardian ad litem asserted that there was an ongoing dependency case pending in the juvenile court, i.e., the present action. The guardian ad litem requested that a hearing be held and that custody of the child be placed with DHR or some other viable placement. On January 21, 2014, the juvenile court entered a judgment placing custody of the child with DHR and noting that the matter had been set for a hearing on February 7, 2014. On January 22, 2014, an attorney for DHR filed an appearance in the dependency action. On January 24, 2014, DHR filed a motion to alter, amend, or vacate the juvenile court's January 21, 2014, judgment, alleging that its due-process rights had been violated because it had not been given notice or an opportunity to be heard on the motion to transfer custody that had been filed by the guardian ad litem. DHR requested a hearing on its motion. On January 28, 2014, the juvenile court entered an order denying DHR's motion to alter, amend, or vacate, citing Ala. Code 1975, § 12-15-314(a)(3).

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On February 6, 2014, the guardian ad litem filed a motion seeking review of the case; she alleged that the child had been discharged from Mountain View but that both the grandparents and DHR had refused to pick up the child upon his release. A hearing was held on February 7, 2014. On February 10, 2014, DHR filed a petition for a writ of mandamus or, in the alternative, a notice of appeal directed to the January 21, 2014, judgment and the January 28, 2014, order denying its motion to alter, amend, or vacate that judgment.<sup>1</sup> On February 18, 2014, the juvenile court entered two additional orders, both of which ordered DHR to take custody of the child.<sup>2</sup>

#### Discussion

On appeal, DHR argues that the juvenile court erred by denying its motion to alter, amend, or vacate without conducting a hearing and that the juvenile court violated its due-process rights by awarding custody of the child to DHR without giving it notice and an opportunity to be heard.

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<sup>1</sup>We elected to treat this matter as an appeal.

<sup>2</sup>Because DHR had already filed its notice of appeal, the juvenile court did not have jurisdiction to enter those orders. See, e.g., K.M.G. v. B.A., 73 So. 3d 708, 712 (Ala. Civ. App. 2011).

"Generally, when a party requests a hearing on a postjudgment motion, the court must grant that request.

"Rule 59(g), Ala. R. Civ. P., provides:

"Presentation of any post-trial motion to a judge is not required in order to perfect its making, nor is it required that an order continuing any such motions to a date certain be entered. All such motions remain pending until ruled upon by the court (subject to the provisions of Rule 59.1[, Ala. R. Civ. P.]), but shall not be ruled upon until the parties have had opportunity to be heard thereon."

"(Emphasis added.) Describing the effect of the emphasized part of that rule, our supreme court has held that when a party requests a hearing on its postjudgment motion, "the court must grant the request." Flagstar Enters., Inc. v. Foster, 779 So. 2d 1220, 1221 (Ala. 2000). However, although a trial court errs when it fails to hold a requested hearing on a Rule 59 postjudgment motion, the supreme court has explained that such error does not always require reversal:

"Harmless error occurs, within the context of a Rule 59(g) motion, where there is either no probable merit in the grounds asserted in the motion, or where the appellate court resolves the issues presented therein, as a matter of law, adversely to the

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movant, by application of the same objective standard of review as that applied in the trial court."

"'Greene v. Thompson, 554 So. 2d 376, 381 (Ala. 1989).'

"Isbell v. Rogers Auto Sales, 72 So. 3d 1258, 1260-61 (Ala. Civ. App. 2011) (second emphasis added).

"We must determine, therefore, whether the juvenile court's failure to hold a hearing on DHR's postjudgment motion constituted harmless error."

Mobile Cnty. Dep't of Human Res. v. C.S., 89 So. 3d 780, 784 (Ala. Civ. App. 2012).

With regard to whether DHR's postjudgment motion had probable merit, we note that, in Montgomery County Department of Human Resources v. McDermott, 74 So. 3d 455, 458 (Ala. Civ. App. 2011), this court stated: "[A] juvenile court would violate the due-process rights of DHR if it adjudicated a child dependent and transferred custody of the child to DHR without providing DHR such notice and an opportunity to be heard." Although Ala. Code 1975, § 12-15-141, permits a juvenile court to enter ex parte orders regarding custody in emergency situations, that Code section requires that a hearing be held within 72 hours after the entry of any ex

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parte order. The juvenile court did not hold a hearing within 72 hours after the entry of its January 21, 2014, judgment; thus, the juvenile court's actions in the present case were not in accordance with § 12-15-141.

In the present case, the record indicates that DHR was not a party to the dependency action and that DHR was not served with the guardian ad litem's motion to transfer custody. Furthermore, no hearing was held on the motion to transfer custody before the juvenile court entered its judgment awarding custody of the child to DHR. Finally, the record indicates that no hearing whatsoever was held by the juvenile court until approximately 20 days after the entry of the juvenile court's January 21, 2014, judgment awarding custody of the child to DHR.

Based on the foregoing, it appears that DHR's motion to alter, amend, or vacate, in which DHR argued that its due-process rights had been violated, had probable merit. Therefore, the juvenile court erred in failing to hold a hearing on that motion. Accordingly, we reverse the juvenile court's January 28, 2014, order denying DHR's motion to alter, amend, or vacate its January 21, 2014, judgment, and we remand

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this cause for the juvenile court to hold a hearing on DHR's postjudgment motion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, with writing, which Thomas, J., joins.



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THOMPSON, Presiding Judge, concurring in the result.

In her January 17, 2014, motion, Deborah Long, the guardian ad litem appointed to represent D.R. ("the child"), alleged that the child had no relatives willing or able to provide him a home, that he was to be released from a mental-health facility, and that he had no place to go. Given those circumstances, I conclude that the juvenile court, in ordering that the child be placed in the custody of the Limestone County Department of Human Resources ("DHR"), was acting pursuant to its emergency powers, as provided in § 12-15-141, Ala. Code 1975.<sup>3</sup> However, the juvenile court's failure to conduct a hearing within 72 hours of the entry of its emergency order was error. Also, the guardian ad litem and the juvenile court erred in failing to make DHR a party and in failing to serve it with process, and, because of those due-

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<sup>3</sup>That section provides, in part:

"The juvenile court may enter an ex parte order of protection or restraint on an emergency basis, without prior notice and a hearing, upon a showing of verified written or verbal evidence of abuse or neglect injurious to the health or safety of a child subject to a juvenile court proceeding and the likelihood that the abuse or neglect will continue unless the order is issued."

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process issues, there was probable merit to DHR's January 24, 2014, postjudgment motion.

I also agree with the concerns DHR raised in its January 24, 2014, postjudgment motion, in which it argued that, had it been made a party, different avenues might have been pursued and the child might not have been determined to be dependent. Although those arguments are valid, the safety and security of the minor child at issue were more important. It is clear from the allegations of the guardian ad litem in her motion to transfer custody and from the arguments made by DHR in its January 24, 2014, postjudgment motion that this emergency situation involving the child arose suddenly because the child's grandparents were no longer willing or able to properly handle or care for the child. It is the function of DHR, as the state agency charged with the protection of children, to step in at such times. Although DHR might have handled the situation differently had it been involved from the beginning of this action, it is often preferable that family members step in to assist when needed, as the grandparents in this case attempted to do.

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In her February 6, 2014, "motion for review," the guardian ad litem further alleged that, even after the entry of the juvenile court's January 21, 2014, judgment, DHR "failed or refused" to retrieve the dependent child from the mental-health center after the grandparents determined that they could no longer take care of the child. I recognize that the allegations of counsel in a motion are not evidence. However, the guardian ad litem is an officer of the court, and, therefore, it is to be assumed that there is truth in the representations she makes to the courts. Based on that assumption, I write to express my concern that DHR failed in its duty to protect this child by refusing to comply with the January 21, 2014, judgment. Regardless of DHR's disagreement over the procedures employed in the juvenile court, it should not have disregarded the juvenile court's judgment transferring custody of the child to it. It is the function and duty of DHR to protect dependent children in this state. See Rule 660-1-2-.01(2)(a), Ala. Admin. Code (DHR).

Thomas, J., concurs.