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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

2120534

C.C.

v.

L.J.

**Appeal from Limestone Juvenile Court
(JU-12-154.01)**

On Remand from the Alabama Supreme Court

PER CURIAM.

C.C. ("the father") appeals from a judgment of the Limestone Juvenile Court ("the juvenile court") to the extent

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that it terminated his parental rights to J.C. ("the child") upon the petition of L.J. ("the mother"). We reverse.

Procedural History

"The record reflects that the mother initiated a civil action against the father in the juvenile court in July 2012, requesting that the juvenile court establish the father's paternity of the child and that that court also terminate the father's parental rights on the basis that the father had purportedly abandoned the child and had failed to visit with or provide for the material needs of the child. The father, initially acting pro se, filed an answer generally denying the allegations of the mother's complaint pertinent to her termination request, but he did not deny paternity, and the juvenile court entered an order in September 2012 determining that the father was indeed the biological father of the child. The father, acting through counsel, then amended his answer and asserted a counterclaim seeking joint legal custody, visitation rights, and a child-support award for the benefit of the mother.

"After an ore tenus hearing, at which the mother, the father, and the mother's mother testified, the juvenile court entered a judgment in March 2013 terminating the father's parental rights, thereby implicitly denying the relief requested by the father in his counterclaim. The father timely appealed from the judgment of the juvenile court, and the judge of that court certified the record as adequate for review by this court pursuant to Rule 28(A)(1)(a), Ala. R. Juv. P."

C.C. v. L.J., [Ms. 2120534, Sept. 6, 2013] ___ So. 3d ___, ___ (Ala. Civ. App. 2013).

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On appeal, the father first argued that the juvenile court lacked jurisdiction over the termination-of-parental-rights case because there was no finding of dependency as to the child. This court, on original submission, agreed and dismissed the appeal with instructions to the juvenile court to vacate its void judgment. ___ So. 3d at ___. On the mother's petition for a writ of certiorari, however, the supreme court reversed this court's decision, holding that the juvenile court did have jurisdiction over the case. Ex parte L.J., [Ms. 1121462, Sept. 30, 2014] ___ So. 3d ___, ___ (Ala. 2014). The supreme court remanded the cause to this court for us to consider the father's remaining arguments, which had been pretermitted by this court on original submission because of our dismissal of the appeal. ___ So. 3d at ___.

Discussion

The father argues that the juvenile court erred in terminating his parental rights because, he says, there was not clear and convincing evidence indicating that he was unable or unwilling to care for the child and because there were viable alternatives to termination of his parental rights.

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"The two-prong test that a court must apply in a parental rights termination case brought by a custodial parent consists of the following: First, the court must find that there are grounds for the termination of parental rights, including, but not limited to, those specifically set forth in [Ala. Code 1975,] § 26-18-7 [amended and renumbered as Ala. Code 1975, § 12-15-319]. Second, after the court has found that there exist grounds to order the termination of parental rights, the court must inquire as to whether all viable alternatives to a termination of parental rights have been considered."

Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990).

"A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. Bowman v. State Dep't of Human Res., 534 So. 2d 304, 305 (Ala. Civ. App. 1988). 'Clear and convincing evidence' is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting Ala. Code 1975, § 6-11-20(b)(4)); see also Ex parte McInish, 47 So. 3d 767 (Ala. 2008) (explaining standard of review of factual determinations required to be based on clear and convincing evidence). A juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct. R.B. v. State Dep't of Human Res., 669 So. 2d 187 (Ala. Civ. App. 1995)."

B.C. v. A.A., 143 So. 3d 198, 203 (Ala. Civ. App. 2013).

Grounds for Termination

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

"(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her] responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parent[]. In determining whether or not the parent[] [is] unable or unwilling to discharge [his or her] responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

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

". . . .

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

". . . .

"(11) Failure by the parent[] to maintain consistent contact or communication with the child."

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In the present case, the child was born on November 13, 2008. The mother testified that the father had physically abused her while she was pregnant with the child. The mother testified that the father was at the hospital for the birth of the child, was listed on the child's birth certificate, and had lived with her and the child for about four weeks. She testified that, during that time, the father's interaction with the child had been limited and he had refused to change the child's diaper. She testified that, thereafter, the father had visited the child sporadically and that he had not seen the child during the 2009 Christmas holidays because he had had other plans. She also testified that she had taken the child to the father's parents' house when the father was there but that, on those occasions, the father's interaction with the child had been limited.

The mother testified that the father had stolen tools from her and had forged checks in her name. She testified that the father had threatened to take her to court over the child if she had him prosecuted for those crimes. She also testified that she thought the father had a problem with alcohol. She testified that, in April 2010, she had filed a

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protection-from-abuse action against the father and that, two days after that, he had filed a petition to establish the paternity of the child. The mother testified that the father had agreed to dismiss his paternity case if she dismissed the protection-from-abuse case and that both cases had subsequently been dismissed in October 2011.

The mother testified that the last time the father had seen the child was Christmas 2010 at the father's parents' house, but, she said, there had been little interaction between the father and the child on that occasion. She testified that the last time she had heard from the father was in June 2011 and that the father had not attempted to visit the child on that occasion. The mother testified that she had never refused to allow the father to visit with the child. She testified that the father had never given the child any gifts or provided him with any financial support other than \$80 that he had given to the mother a few weeks before the trial. The mother testified that the father had never been alone with the child and that the child did not know the father. She testified that the child is happy and stable and that she had filed the petition to terminate the father's

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parental rights in order to protect the child's safety and to make sure the child was not confused or hurt in any way.

The father admitted that he had not seen the child in almost two years at the time of the trial and that he had not talked to the mother since October 2011. He also admitted that he had not paid child support, although he had been working. He excused his actions by stating that the mother had denied him visits with the child, that the mother had refused to accept child support from him, and that the mother had threatened to have him arrested.

Based on the foregoing, we conclude that there was clear and convincing evidence indicating that the father had abandoned the child for the two years preceding the trial, had failed to provide for the material needs of the child despite his ability to do so, and had failed to maintain consistent contact with the child. Ala. Code 1975, § 12-15-319(a)(1), (9) and (11). There was also sufficient evidence indicating that the father was "unwilling to discharge [his] responsibilities to and for the child." § 12-15-319(a).

Viabile Alternatives

Even when the evidence is undisputed that a parent has abandoned a child, under Ex parte Brooks, 513 So. 2d 614 (Ala. 1987), the parental rights of that parent may be terminated only if no other viable alternative exists that would protect the child from parental harm. See S.D.P. v. U.R.S., 18 So. 3d 936, 944 (Ala. Civ. App. 2009) (Moore, J., concurring specially). With regard to whether the juvenile court exhausted all viable alternatives before terminating the father's parental rights, we note:

"The determination of whether a viable alternative to termination of parental rights exists is a question of fact to be decided by the juvenile court. See Ex parte J.R., 896 So. 2d 416 (Ala. 2004). On appeal from ore tenus proceedings in a termination-of-parental-rights case, this court presumes that the juvenile court's factual findings regarding viable alternatives are correct. See J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007). However, because of the serious nature of a judgment severing a familial relationship, see L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), this court conducts a "careful search of the record" to determine whether such findings are supported by clear and convincing evidence. In re Moore, 470 So. 2d 1269, 1270 (Ala. Civ. App. 1985). See also Columbus v. State Dep't of Human Res., 523 So. 2d 419, 421 (Ala. Civ. App. 1987);

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and Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).'

"J.B. v. Cleburne Cnty. Dep't of Human Res., 991 So. 2d 273, 282 (Ala. Civ. App. 2008)."

T.S. v. M.O., 76 So. 3d 269, 274-75 (Ala. Civ. App. 2011).

The father argues that the juvenile court could have maintained the status quo or could have allowed for graduated visitation as a viable alternative to termination of his parental rights. At the trial, the father testified that he would be willing to visit under whatever conditions the juvenile court imposed, even supervised visitation, and he acknowledged that he had a duty to support the child. The mother testified generally that she had sought to terminate the father's parental rights because she was afraid for the child's safety and emotional well-being. She did not, however, testify that the father had ever threatened or attempted to harm the child. She did not present any specific evidence indicating how the child would be harmed emotionally or physically if the father's rights were not terminated.

"In Ex parte Brooks, [513 So. 2d 614 (Ala. 1987), overruled on other grounds by Ex parte Beasley, 564 So. 2d 950 (Ala. 1990),] our supreme court declared that the 1984 Child Protection Act is designed to afford a legal means of terminating parental rights when continuation of those rights

threatens the welfare of the child. Since this declaration, this court has consistently held that termination of parental rights is not appropriate in cases like this one in which the children are safely residing with the custodial parent and the continuation of the noncustodial parent's parental rights does not present any harm to the children. See In re Beasley, 564 So. 2d 959 (Ala. Civ. App. 1990); Miller v. Knight, 562 So. 2d 274 (Ala. Civ. App. 1990); Talley v. Oliver, 628 So. 2d 690 (Ala. Civ. App. 1993)]; and S.M.W. v. J.M.C., 679 So. 2d 256 (Ala. Civ. App. 1996)]. Rather, in cases involving petitions filed by a divorced custodial parent, this court has affirmed the termination of a noncustodial parent's parental rights only in rare cases in which the custodial parent proved that the child would be harmed, either physically or emotionally, if the noncustodial parent's parental rights were not terminated. See Thornton v. Thornton, 519 So. 2d 960 (Ala. Civ. App. 1987) (threat that mentally ill mother would act violently toward child, like she did when she shot and killed child's four-year-old brother, warranted termination of parental rights); Sutton v. Elrod, 724 So. 2d 551 (Ala. Civ. App. 1998) (evidence that renewal of relationship with father who had been absent from eight-year-old child's life for seven years would be detrimental to child justified termination of parental rights). This distinction flows from the principle that termination of parental rights is reserved for the most egregious circumstances, Ex parte Beasley, supra, like those represented in this latter group of cases. When the court has been confronted by cases falling into the former category, it has recognized that a less drastic alternative, usually maintaining the status quo, is viable and should be utilized. See, e.g., Miller v. Knight, supra."

A.J.H.T. v. K.O.H., 983 So. 2d 394, 406-07 (Ala. Civ. App. 2007) (Moore, J., concurring in part and dissenting in part).

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We conclude that the present case falls into the category of cases in which the custodial parent has failed to present clear and convincing evidence indicating that the child would be exposed to any specific physical or emotional harm by a less drastic alternative to termination, specifically, the maintenance of the status quo. Given further that the mother in this case presented no evidence indicating how the custodial stability of the child would be enhanced by terminating the father's parental rights, we conclude that the juvenile court did not have sufficient evidence before it to exclude maintenance of the status quo as a viable alternative. Compare T.M. v. M.D., [Ms. 2121005, April 11, 2014] ___ So. 3d ___ (Ala. Civ. App. 2014), cert. denied, Ex parte T.M., [Ms. 1130811, July 3, 2014] ___ So. 3d ___ (Ala. 2014) (case in which counselor, mother, and maternal grandmother all testified that reintroduction of child to father, who had abandoned child, would cause emotional conflict and harm to child, who had forged parental relationship with stepfather who wanted to adopt child). Accordingly, we conclude that a viable alternative to termination of the father's parental

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rights existed and, therefore, that the juvenile court erred in terminating the father's parental rights to the child.¹

Conclusion

Based on the foregoing, we reverse the juvenile court's judgment terminating the father's parental rights, and we remand the cause for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ., concur.

Thomas, J., dissents, without writing.

¹In so ruling, we do not mean to hold that the father can continue to withhold financial support from the child, or that an appropriate court cannot award the father visitation with the child if determined to be in the best interests of the child. Rather, we do not address the issues of child support and visitation, which are not presented in this appeal.