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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2017-2018

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Marshall County Department of Human Resources

v.

J.V.

Appeal from Marshall Juvenile Court  
(JU-09-300067.05)

PER CURIAM.

This is the ninth time that the Marshall County Department of Human Resources ("DHR") and J.V. ("the father") have appeared before this court seeking relief from one or another judgment or order of the Marshall Juvenile Court

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("juvenile court") respecting the custody of J.V.V. ("the child"). For the history of the litigation between these parties, see Marshall County Department of Human Resources v. J.V., 152 So. 3d 370 (Ala. Civ. App. 2014); Marshall County Department of Human Resources v. J.V., 203 So. 3d 1243 (Ala. Civ. App. 2016) ("J.V. I"); Ex parte Marshall County Department of Human Resources, [Ms. 2150709, July 1, 2016] \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2016) ("J.V. II");<sup>1</sup> Ex parte Marshall County Department of Human Resources (No. 2150795, July 1, 2016), 231 So. 3d 325 (Ala. Civ. App. 2016) (mandamus petition denied by order) (table); Ex parte Marshall County Department of Human Resources (No. 2160757, July 10, 2017), \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2017) (mandamus petition granted by order) (table); Marshall County Department of Human Resources v. J.V. (No. 2160761, July 14, 2017), \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2017) (appeal dismissed by order) (table); Ex parte Marshall County Department of Human Resources, [Ms. 2160947, October 6, 2017] \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2017) ("J.V. IV"); and Ex parte Marshall

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<sup>1</sup>For the sake of consistency, we use the J.V. I and J.V. II case designations that our supreme court use in Ex parte Marshall County Department of Human Resources, 233 So. 3d 345 (Ala. 2017), which also involved the same parties.

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County Department of Human Resources, [Ms. 2160948, October 6, 2017] \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2017).

The basic underlying facts and procedural history were set out in J.V. IV:

"This matter began in 2009, when DHR removed J.V.V. ('the child') from the custody of M.M.T. ('the mother') and placed the child in foster care. J.V. I, 203 So. 3d at 1244. J.V. ('the father') resided in Florida when the child was removed from the mother's custody. Id. The father was awarded supervised visitation with the child in 2010 and unsupervised visitation with the child in December 2010 and January 2011. Id. The foster parents with whom the child was living accused the father of sexually abusing the child. Id. The father was criminally charged; however, the charges were later dropped. Id. at 1245. While the criminal charges were pending, the father spent 17 months in jail between October 2011 and February 2013. After the criminal charges were dropped, the father was transferred to a detention facility in Louisiana on an immigration hold, where he remained until September 2014, when he was released; he then moved to Georgia. Id. Although DHR had sought the termination of the father's parental rights during that period, the juvenile court had denied DHR's petition. Id.

"In November 2014, the father filed a petition in the juvenile court seeking custody of the child. Id. The juvenile court, after a trial, entered an order in December 2014 requiring DHR to prepare a plan to transition custody of the child to the father and to have a home study performed on the father's home in Georgia. Id. However, that order was not a final custody judgment because it did not transfer custody of the child to the father but, rather, set the matter "for further review on

disposition.'" Id. at 1246. Further review hearings were held on March 23, 2015, and May 12, 2015, to develop the transition plan. A May 2015 order indicated that physical custody of the child would be placed with the father on July 27, 2015, if Georgia approved the father's home for placement after a home study. Id.

"On June 23, 2015, DHR moved for an evidentiary hearing. Id. at 1247. In its motion, DHR explained that Georgia had not approved the father's home for placement and that the child was not prepared to transition to the father's home. Id. After the requested hearing, the juvenile court entered a judgment on July 2, 2015, which ordered that legal and physical custody of the child be transferred to the father and that the transfer of physical custody occur no later than July 27, 2015, as required by the May 2015 order. Id. DHR appealed from that judgment. Id. We affirmed the judgment insofar as it awarded custody of the child to the father. Id. at 1253. However, we reversed the judgment insofar as it ordered the transition of custody to take place in July 2015, explaining that, based on the evidence before the juvenile court, 'the father and the child do not have a relationship strong enough to accomplish the transition of custody' and concluding that 'the child's best interest would [not] be served by immediately awarding custody to the father.' Id. at 1254.

"Upon remand, the juvenile court entered an order on April 3, 2016, in which it outlined a transition plan to which the parties had agreed. J.V. II, \_\_\_ So. 3d at \_\_\_\_\_. The plan provided that the father would have unsupervised visitation with the child on the weekend of May 27, 2016, to May 30, 2016. Id. at \_\_\_\_\_. On May 26, 2016, DHR filed a motion seeking to prevent that visitation from occurring based on allegations that the child had attempted to harm herself and that visitation with the father would not be safe for the child; the

juvenile court denied that motion. Id. at \_\_\_\_\_. DHR also filed a motion seeking to stay the visitation, which the juvenile court also denied. Id. at \_\_\_\_\_.

"DHR then filed an emergency petition for the writ of mandamus in this court, in which it sought an order 'compelling the juvenile court to terminate visitation between the child and the father.'" Id. at \_\_\_\_\_. We construed the request to terminate visitation as being a request to modify the award of custody to the father. Id. at \_\_\_\_\_. Based on that characterization, we determined that DHR was not entitled to the relief it sought in the petition. Id. at \_\_\_\_\_. In our opinion, we explained that the award of custody to the father had become the law of the case and that DHR's allegations were, in fact, new allegations supported by new evidence that had come into existence after the entry of the April 3, 2016, order and could be presented to the juvenile court only by way of a petition for modification. Id. at \_\_\_\_\_.

"After the issuance of our opinion in J.V. II, DHR filed a petition for the writ of mandamus in our supreme court. See Ex parte Marshall Cty. Dep't of Human Res., 233 So. 3d 345 (Ala. 2017) ('J.V. III'). That court issued an opinion on March 31, 2017, in which it determined that the April 3, 2016, custody order was not a final custody judgment incapable of alteration because, the court reasoned, in dependency cases there are typically a series of appealable dispositional custody orders and, the court noted, the April 3, 2016, order indicated that further review of the transition would occur on October 3, 2016. J.V. III, 233 So. 3d at 355. Our supreme court also explained that, because the April 3, 2016, order was not a final custody judgment, '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 that it might issue on October 3, 2016, in determining

whether a modification of the terms of transition was warranted.' Id. The supreme court observed that the juvenile court had not held a hearing on the allegations regarding the child's mental health and safety that DHR had made in its May 2016 filings in the juvenile court. Id. at 357. Specifically, our supreme court stated that 'the juvenile court should have scheduled a hearing so that it could properly evaluate any evidence DHR might present ... as to the alleged change in the child's circumstances after the entry of the April 2016 order.' Id.

"After the issuance of our supreme court's certificate of judgment in J.V. III, upon request of the father, the juvenile court set the hearing referenced in the supreme court's opinion for July 13, 2017. DHR objected to the July 13, 2017, hearing and also filed a motion for a summary judgment in which it argued that the supreme court's decision in J.V. III had resolved the issue regarding custody finally and conclusively in favor of DHR. The juvenile court, after a hearing, denied DHR's motion for a summary judgment on June 21, 2017, and DHR filed both a notice of appeal to our supreme court and a petition for the writ of mandamus in our supreme court. Both the appeal and the petition were transferred to this court because, as they both arose from a dependency and custody matter, they fell within our subject-matter jurisdiction, see Ala. Code 1975, § 12-3-10; the appeal was assigned case no. 2160761 and the petition was assigned case no. 2160757.

"We dismissed DHR's appeal of the denial of its motion for a summary judgment by order (case no. 2160761), citing Continental Casualty Co. v. SouthTrust Bank, N.A., 933 So. 2d 337, 340 (Ala. 2006), because the order denying DHR's motion for a summary judgment was not capable of supporting an appeal. We further noted in our order that DHR's alternative request that this court allow DHR to

pursue a Rule 5, Ala. R. App. P., permissive appeal was precluded by Rule 5. See Committee Comments, Rule 5 (stating that the rule does not 'apply to cases appealable to the Court of Civil Appeals'). We granted DHR's petition for the writ of mandamus (case no. 2160757), which sought the cancellation of the July 13, 2017, hearing, by order because the filing of the notice of appeal in case no. 2160761 had removed jurisdiction over the action from the juvenile court, and it therefore lacked the authority to conduct the July 13, 2017, hearing or to otherwise act on the matter until this court concluded its review and entered a certificate of judgment. See M.G. v. J.T., 105 So. 3d 1232, 1233 (Ala. Civ. App. 2012) (explaining that until this court issues its certificate of judgment on a matter, a lower court does not have jurisdiction to act on that matter).

"After the resolution of DHR's most recent petition and appeal, the father again filed in the juvenile court a motion to set the matter for an evidentiary hearing. DHR again objected to the father's request. Although the juvenile court at first declined to set a hearing because it was unaware that the appeal (case no. 2160761) had been dismissed, it later placed the father's request on an August 16, 2017, motion docket. On August 17, 2017, the juvenile court entered an order setting an evidentiary hearing for October 16, 2017."

J.V. IV, \_\_\_ So. 3d at \_\_\_-\_\_\_.

After the conclusion of the October 16, 2017, hearing, the juvenile court entered a judgment on October 19, 2017, in which it set out a new transition schedule with graduated visitation and ordered that the child be placed in the physical and legal custody of the father on January 1, 2018.

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Among other things not pertinent to the issues on appeal, the judgment ordered that the father and the child continue counseling with Dr. Elaine Eassa, the psychologist the parties had agreed that the father and the child would continue to see, which agreement the juvenile court had incorporated into the April 2016 order; that the child not be taken to another psychologist or counselor without leave of court; and that the father and the child continue language classes to assist in communicating with each other. The October 19, 2017, judgment further ordered that DHR "be responsible for all transportation, expenses, fees, or other costs associated with carrying out the terms of this [judgment] and the transition of custody to the father." In order to ensure the finality of the judgment, the juvenile court set no further review hearings and ordered that the case be closed.

DHR timely appealed from the judgment. DHR also requested a stay regarding implementation of the transition schedule, which this court granted. On appeal, DHR asserts four arguments: (1) whether the juvenile court erred by awarding the father legal and physical custody of the child despite "overwhelming evidence" that such an award is not in

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the best interest of the child; (2) whether the juvenile court erred by awarding the father visitation with the child when "overwhelming evidence" indicates that visitation is not in the best interest of the child; (3) whether the juvenile court exceeded its discretion by ordering that the father and the child see a particular psychologist or counselor, which, DHR asserts, is contrary to the child's best interest and usurps DHR's authority; and (4) whether the juvenile court exceeded its discretion by ordering DHR to be responsible for the costs relating to the transition of custody to the father.

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.<sup>2</sup> Neither the child's

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<sup>2</sup>The record does not reflect exactly how long or how often Dr. Eassa counseled the child and the father between the July 2015 trial in this case and May 2016; however, Smith testified that DHR had provided services to the father for "more than a year" at the time of the filing of the May 2016 petition for the writ of mandamus in J.V. II, indicating, perhaps, that

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foster parents nor the child were 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 ceased transporting the child to counseling sessions with Dr. Eassa after May 2016. Smith explained that DHR desired that all visitation between the

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reunification counseling had continued during that period.

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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 who 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.

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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,

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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,<sup>3</sup> 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

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<sup>3</sup>The child had inserted tweezers into an electrical cord in the summer of 2015 -- approximately one year before DHR's motion to cease visitation was filed.

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"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

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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

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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

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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

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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.

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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

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

Our standard of review of the custody decision of a juvenile court is well settled.

"In a child custody case [in which the evidence is presented to the trial court ore tenus], an appellate court presumes the trial court's findings to be correct and will not reverse without proof of a clear abuse of discretion or plain error. Reuter v. Neese, 586 So. 2d 232 (Ala. Civ. App. 1991); J.S. v. D.S., 586 So. 2d 944 (Ala. Civ. App. 1991). This presumption is especially applicable where the

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evidence is conflicting. Ex Parte P.G.B., 600 So. 2d 259, 261 (Ala. 1992)."

Ex parte Alabama Dep't of Human Res., 682 So. 2d 459, 460 (Ala. 1996). Furthermore, when the juvenile court has not made specific factual findings in support of its judgment, we must presume that the juvenile court made those findings necessary to support its judgment, provided that those findings are supported by the evidence. D.M. v. Walker Cty. Dep't of Human Res., 919 So. 2d 1197, 1210 (Ala. Civ. App. 2005).

DHR's first and second arguments are factually related. DHR argues that the juvenile court erred in concluding that the child should be placed in the custody of the father and that the juvenile court erred in ordering continued transitional visitation between the child and the father. This court affirmed the July 2, 2015, award of custody to the father in the opinion issued in J.V. I. DHR requested in its May 27, 2016, motion that the juvenile court set aside the custody award to the father because of a material change in circumstances. Although DHR's motion did not institute a new action seeking to modify the custody award or set out grounds for relief from the judgment under Rule 60(b), Ala. R. Civ.

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P., our supreme court indicated in J.V. III that, because this case is a dependency case and because the April 3, 2016, order was not a final judgment, DHR could present evidence regarding any alleged change in the child's circumstances without the need for filing a petition to modify or a Rule 60(b) motion. 233 So. 3d at 355. Our supreme court also held that the juvenile court should hold a hearing to consider DHR's evidence relating to the propriety of the transition plan. Id. at 355-56. The juvenile court was therefore required to consider the impact of DHR's evidence on both custody and the transition plan at the October 16, 2017, hearing. Because the evidence presented to the juvenile court pertained both to the decision regarding the child's custody and the transition plan, we will discuss both issues together.

DHR contends that the evidence presented to the juvenile court demonstrated that the child's best interest required termination of all visitation between the child and the father and a transfer of the child's custody back to DHR. Indeed, the testimony of Dr. Petrella indicated that the child would suffer negative consequences like regressive behaviors, anxiety, and even self-harm if she was forced to visit the

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father against her will or to live with him. According to Dr. Petrella, the child firmly believes that the father abused her, fears the father, and does not desire a relationship with him. Dr. Petrella does not believe that the child will ever develop a parent-child bond with the father; however, upon cross-examination, she admitted that certain methods for assisting the child to repair her relationship with the father exist. Even with such intervention, however, Dr. Petrella said, extensive counseling would be necessary and the child must be allowed to determine when, or if, a relationship with the father should be reintroduced. Dr. Petrella also admitted that visitation with the father could possibly resume in the future, once the child's condition had improved.

Although Dr. Petrella indicated that, in her opinion, it was unlikely that the child would develop a bond with the father and, thus, that visitation with the father should be terminated and that reunification should not be pursued, we note that the juvenile court was not required to ignore the evidence presented to it in support of its April 2016 order.<sup>4</sup>

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<sup>4</sup>We have taken judicial notice of the record in J.V. I. and have reviewed Dr. Eassa's testimony. See C.P. v. W.M., 837 So. 2d 860, 864 (Ala. Civ. App. 2002).

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That evidence included the July 2015 testimony of Dr. Eassa, who was, at that time, counseling the father and the child. Dr. Eassa indicated that progress was being made toward reunification. Although it was early in the process, Dr. Eassa testified, the father was incorporating her suggestions and the child had admitted that the father was not mean to her but that she was still scared of him because of her belief that he had abused her. Dr. Eassa indicated that reunification would be a long process and that the child would need to be able to control the process. She further advised that the child should not be further traumatized by forcing reunification before the child was ready. Dr. Eassa also testified that she would be willing to continue to counsel both the father and the child to facilitate reunification.

As we have explained, "[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." Seifert v. Houlditch, 583 So. 2d 274, 275 (Ala. Civ. App. 1991); see also Petrey v. Petrey, 989 So. 2d 1128, 1134 (Ala. Civ. App. 2008) ("It [i]s the duty of the trial court, as the trier of fact, to resolve any conflicts in the

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evidence." ). This is so because the juvenile court is "in the best position to evaluate [the witnesses'] demeanor and credibility; accordingly, we must defer to the [juvenile] court's factual findings and its rulings based on those findings." Dunn v. Dunn, 972 So. 2d 810, 815 (Ala. Civ. App. 2007). Furthermore, we note that the juvenile court was not bound by the opinions expressed by any witness regardless of title or curriculum vitae. Marshall Cty. Dep't of Human Res. v. J.V., 203 So. 3d at 1254 (Donaldson, J., concurring in part and dissenting in part) (citing McCurry v. Gold Kist, Inc., 647 So. 2d 732, 734 (Ala. Civ. App. 1993)).

"As with all witnesses, [expert] testimony must be carefully evaluated for bias, motive, and other matters that may affect factual findings. Experienced litigators and trial judges know that such testimony at times does not actually provide evidence grounded in scientific, technical, or other specialized knowledge as contemplated by Alabama Rule of Evidence 702 but is, instead, virtually indistinguishable from advocacy."

T.G.F. v. D.L.F., [Ms. 2150607, April 28, 2017] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Civ. App. 2017) (Donaldson, J., concurring specially).

In J.V. III, our supreme court suggested that the juvenile court consider "the failure of transitional efforts

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(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." 233 So. 3d at 355-56. The transcript of the October 16, 2017, hearing indicates that the juvenile court did as the supreme court suggested. Although DHR states in its brief on appeal that it has provided extensive services to reunite the father and the child, all to no avail, it is clear that the juvenile court disagrees with DHR's assessment of its efforts. The juvenile court indicated during the hearing on DHR's motions that it was not pleased with DHR's continued resistance to the transition plans to which it had agreed and its refusal to comply with the letter or the spirit of its orders. The record reflects that after each order containing a transition plan to which DHR had agreed, DHR acted to halt visitation within six weeks of the entry of order incorporating that agreement. Thus, the father has not had more than six consecutive visits, if that, with the child since 2014. He has not seen the child since May 2016. The record does not clearly reflect when counseling with Dr. Eassa was terminated or how many sessions the father and the child

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were provided before DHR terminated Dr. Eassa's services. Based on these facts, the juvenile court indicated during the hearing that it did not believe that the transitional efforts it had ordered had failed but, rather, that they had never been given an opportunity to succeed because DHR had not implemented them in good faith or allowed them to continue for more than a few weeks.

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

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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.

Following the October 16, 2017, hearing, the juvenile court, after considering the evidence presented, implemented a graduated transition plan. The juvenile court's action was taken in accordance with appellate mandates following the presentation of evidence in full and fair proceedings conducted without substantive or procedural deficiencies and was based on the juvenile-court judge's assignment of weight to, and assessment of the credibility of, the evidence presented at trial. Thus, we conclude that the evidence before the juvenile court supports its conclusion that a transition of custody to the father can be accomplished and

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that an award of custody to the father would serve the best interest of the child and meet the goal of the juvenile court "[t]o preserve and strengthen the family of the child whenever possible." Ala. Code 1975, 12-15-101(b)(1). Accordingly, we affirm that portion of the juvenile court's judgment awarding the father custody and setting out the transition plan to reunite the child with her father.<sup>5</sup>

DHR further complains that the juvenile court exceeded its discretion by ordering that the child and the father continue counseling with Dr. Eassa. Specifically, DHR complains that the juvenile court is usurping its power by forcing it to continue reunification efforts that have failed. We note that DHR relies on caselaw concerning the termination of parental rights. However, this case is a dependency case, and, in dependency cases, a juvenile court is imbued with the power to place the child with the parent, "subject to conditions and limitations as the juvenile court may prescribe," Ala. Code 1975, § 12-15-314(a)(1), and to "[m]ake

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<sup>5</sup>Of course, because of the stay instituted by this court, the juvenile court will, of necessity, have to fashion another transition plan for the child after the date that a certificate of judgment is issued by this court.

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any other order as the juvenile court in its discretion shall deem to be for the welfare and best interests of the child." Ala. Code 1975, § 12-15-314(a)(4). Therefore, we reject DHR's argument that the juvenile court lacks the authority to order that the father and the child continue counseling with Dr. Eassa as a means to preserve and continue the progress made toward reunification of the father and the child and to further the child's best interest.

DHR also argues that the juvenile court's ordering counseling with a particular psychologist or counselor violates the separation-of-powers doctrine. DHR quotes and cites several general authorities that state the separation-of-powers doctrine. DHR does not, however, explain how the juvenile court's ordering continued counseling with Dr. Eassa, as the juvenile court is authorized to do under § 12-15-314, invades DHR's province as an executive agency. We will therefore not discuss this argument further.

DHR's final argument is that the juvenile court erred by ordering that DHR be responsible for the costs associated with the transition plan. DHR relies on Ala. Code 1975, § 12-15-108, which reads, in its entirety, as follows:

"Except as otherwise provided in this chapter [i.e., the Alabama Juvenile Justice Act, Ala. Code 1975, § 12-15-101 et seq.] all expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children under the jurisdiction of the juvenile court pursuant to this chapter that may be incurred by order of the juvenile court in carrying out the provisions and intent of this chapter (except costs paid by parents, legal guardians, legal custodians, or trustees and court costs as provided by law) shall be valid charges and preferred claims against the county. These claims shall be paid by the county treasurer when itemized and sworn to by the creditor or other persons knowing the facts in the case and when approved by the juvenile court. Notwithstanding the foregoing, a municipality shall reimburse the county the actual costs of housing, maintenance, and medical expenses of those children held in a facility utilized by the county for housing children, or other facility licensed by the Department of Youth Services utilized by the county, as a result of a child being cited or detained for an alleged violation of an ordinance of the municipality that is not based on a state criminal statute adopted by the municipality as a municipal ordinance."

We have explained that former § 12-15-10, the precursor statute to § 12-15-108, prohibited a juvenile court from ordering DHR to pay costs associated with a dependent juvenile. Ex parte State Dep't of Human Res., 716 So. 2d 717, 718 (Ala. Civ. App. 1998). The language contained in former § 12-15-10 was that

"[a]ll expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, except costs paid by parents, guardians or trustees, court costs as provided by law and attorney fees shall be valid charges and preferred claims against the county ...."

Ex parte State Dep't of Human Res., 716 So. 2d at 718.

Section 12-15-108 contains nearly identical language. Thus, we conclude that the juvenile court erred in ordering DHR to be responsible for the costs relating to the transition plan, and its judgment, insofar as it did so, is reversed.

In conclusion, we affirm the juvenile court's judgment insofar as it maintained custody with the father, insofar as it set out a transition plan, and insofar as it ordered continued counseling with Dr. Eassa. We reverse the judgment insofar as it ordered that DHR be responsible for the costs relating to the transition of custody.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

Thomas, J., dissents, with writing.

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THOMAS, Judge, dissenting.

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."<sup>6</sup> Ex parte Marshall Cty. Dep't of Human Res., 233 So. 3d 345, 355-56 (Ala. 2017). The transitional efforts ordered by the juvenile court included graduated visitation

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<sup>6</sup>I note that the 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 Marshall Cty. Dep't of Human Res. v. J.V., 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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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

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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.<sup>7</sup>

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<sup>7</sup>Because I would reverse on the custody issue, I would not need to decide the other issues raised by the Marshall County Department of Human Resources, and I therefore express no opinion on those issues.