

REL: August 24, 2018

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

2170595

A.A.

v.

Jefferson County Department of Human Resources

Appeal from Jefferson Juvenile Court
(JU-16-119.02)

MOORE, Judge.

A.A. ("the mother") appeals from a judgment entered by the Jefferson Juvenile Court ("the juvenile court") terminating the mother's parental rights to D.A. ("the child"). We reverse the juvenile court's judgment.

Facts and Procedural History

On May 2, 2017, the Jefferson County Department of Human Resources ("DHR") filed a petition requesting that the juvenile court terminate the mother's parental rights to the child.¹ After a trial, the juvenile court entered a judgment on February 22, 2018, terminating the mother's parental rights to the child. On February 28, 2018, the mother filed a postjudgment motion; that motion was denied on March 1, 2018. On March 7, 2018, the mother filed her notice of appeal.

Facts

LaShonda Spencer, a former social-service case manager for DHR, testified that the child, whose date of birth is December 8, 2009, entered foster care in January 2016, after the mother tested positive for cocaine during her pregnancy with the child's younger half sibling, K.T.² Spencer testified that, at the shelter-care hearing, the mother had

¹The petition also requested that the juvenile court terminate the parental rights of any unknown father to the child. The child has no legal father.

²At the time of the trial, K.T. was in the custody of K.T.'s paternal grandparents. The child and K.T. have different fathers.

2170595

stipulated to the child's dependency because of the mother's drug use.

Spencer testified that, at the time the child entered foster care, there was a warrant for the mother's arrest based on a charge of possession of marijuana in the first degree. The mother testified that that charge had originated in 2009 and that, as a result of that charge, she had submitted to drug treatment, but she had not completed the treatment. An order entered into evidence indicates that, on July 21, 2016, the mother was "revoked from the 'CLEAN' program," [was] adjudged guilty of Possession of Marijuana First Degree," and was "sentenced to 24 months" but that her "sentence [was] suspended and she [was] placed on 2 years of supervised probation [conditioned on] payment of court costs, probation supervision fees and drug screens."

According to Spencer, the mother was to submit to color-code drug testing, to submit to a substance-abuse assessment, to obtain and maintain suitable employment and housing, and to complete a parenting program. Spencer testified that the mother had completed both a substance-abuse assessment and a parenting course but that she had not maintained consistent

2170595

employment and housing or consistently tested on color code. Spencer testified that the mother had complied with a referral for individual counseling. She also testified that the mother had completed drug treatment at Alethia House in March 2016. The mother testified that Alethia House is an outpatient drug-treatment program.

The mother testified that she had been evicted from her government housing in December 2016 after it was reported that her children were no longer living with her. She testified that she had lived with friends from December 2016 until July 2017 and that she had worked at a Burger King fast-food restaurant for some time leading up to July 2017.

According to Spencer, the mother had determined that she needed additional help after completing treatment at Alethia House, so the mother had enrolled in the Lovelady Center. The mother testified that she began the program at the Lovelady Center on July 8, 2017. Spencer testified that the mother had received both individual counseling and drug treatment through the Lovelady Center. According to the mother, she had worked in the Lovelady Center's thrift shop during her time there, but, she said, she had not been paid for working there. The

2170595

mother admitted that she had been "kicked out" of the Lovelady Center in late November 2017 because of allegations that she is "gay." Scarlett Holt, the foster-care supervisor at DHR who had supervised the social workers assigned to the mother's case, testified that, in December 2017, a representative from the Lovelady Center had informed her that the mother had been discharged from their program as a result of a rule violation.

The mother testified that she had enrolled in the Expect a Miracle Recovery Program on December 1, 2017. According to the mother, that program involves living at the program's rehabilitation facility and receiving counseling; she testified that the program is "[m]ore like a transition home." She testified that, in the almost one-month period leading up to the February 2018 trial, she had been employed at Adesa, an automobile-auction business. The mother testified that, at the time of the trial, she was enrolled in the "Dannon Project," and, she said, once she produces two months of clean drug screens, she will be entitled to a voucher from the Dannon Project to obtain an apartment or a house.

Spencer testified that the mother had attended every visit with the child. She testified that the mother had not

2170595

provided money for the child but that she had provided gifts, clothing, and food. Holt testified she was not aware of the mother's having provided any monetary support for the child from September 2017 (when Spencer was no longer assigned the case) through January 2018. The mother admitted that, at the time of the trial, there was a fraud case pending against her for having continued to receive food stamps for the children even though they were not in her custody.

Lucretia Dixon-Carter, the mother's social worker in the three weeks preceding the trial, testified that the records from the color-code program indicate that the mother had tested only two times in December 2017, had not tested at all in January 2018, and had tested only once so far in February 2018. The drug-screen results from the color-code program were admitted into evidence. A letter from the manager of the color-code program that was introduced into evidence indicates that the mother's color had been called four times in December 2017 and January 2018 and had been called once so far in February 2018. The drug screens to which the mother had submitted in December 2017 and February 2018 were negative for

2170595

drugs. In fact, the mother's last positive result had been on July 6, 2017.

The mother testified that she had been tested for drugs through her probation and that she had never tested positive. She also testified that she is required to test for drugs weekly as part of the Expect a Miracle program and that she had also been tested for drugs at the Lovelady Center. The mother testified that she had missed drug screens for the color-code program because of transportation issues, work, or sickness. The mother testified that she had not used cocaine regularly but that "pain killers" had been her drug of choice. When asked if she was still struggling with drugs, the mother responded: "No, sir, not so much." She further testified that she was "dealing" with her drug problem.

Standard of Review

A judgment terminating parental rights must be supported by clear and convincing evidence, which 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." C.O. v. Jefferson Cty.

2170595

Dep't of Human Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

"[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to clearly and convincingly ... establish the fact sought to be proved.'

"KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].

"To analogize the test set out ... by Judge Prettyman [in Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947),] for trial courts ruling on motions for a summary judgment in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden'; thus, the appellate court must also look through a prism to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would 'produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion.'"

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported

2170595

by evidence that the juvenile court could have found to be clear and convincing. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007). When those findings rest on ore tenus evidence, this court presumes their correctness. Id. We review the legal conclusions to be drawn from the evidence without a presumption of correctness. J.W. v. C.B., 68 So. 3d 878, 879 (Ala. Civ. App. 2011).

Discussion

On appeal, the mother argues that DHR did not present clear and convincing evidence to support the juvenile court's judgment terminating her parental rights to the child.

Section 12-15-319, Ala. Code 1979, 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:

"....

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for needs of the child.

"....

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parent[] have failed.

"....

"(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.

"(10) Failure by the parent[] to maintain regular visits with the child in accordance with a plan devised by the Department of Human Resources, or any public or licensed private child care agency, and agreed to by the parent.

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

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing

agencies, in an administrative review or a judicial review."

This court has stated:

"The parental 'responsibilities' referred to in § 12-15-319(a) include the duties to protect, to educate, to care for, to provide for, to maintain, and to support children. See Ex parte M.D.C., 39 So. 3d 1117, 1121 (Ala. 2009) (quoting M.D.C. v. K.D., 39 So. 3d 1105, 1110 (Ala. Civ. App. 2008) (Moore, J., dissenting)). Because the statute is phrased in present and future terms, a juvenile court may terminate a parent's parental rights only if clear and convincing evidence shows that the parent is currently unable to discharge his or her parental duties properly, see D.O. v. Calhoun Cnty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003), and that the conduct or condition that prevents the parent from assuming or exercising proper care will likely persist in the foreseeable future. See D.M. v. Walker Cnty. Dep't of Human Res., 919 So. 2d 1197, 1211 (Ala. Civ. App. 2005)."

S.U. v. Madison Cty. Dep't of Human Res., 91 So. 3d 716, 720 (Ala. Civ. App. 2012).

In the present case, the juvenile court found that the mother had failed to adjust her circumstances to meet the child's needs and that reasonable efforts to rehabilitate the mother had failed.³ The evidence presented by DHR indicated that the child was removed from the mother's custody as a

³We note that the evidence indicated that the mother had been consistent in visiting the child and had provided gifts, clothing, and food for the child. See 12-15-319(a) (9), (10), and (11).

2170595

result of the mother's drug use. Therefore, we must determine from the evidence in the record whether the juvenile court could have been clearly convinced that the mother had failed to cease her drug use at the time of the trial.

The evidence indicated that the mother completed outpatient drug treatment in March 2016. Because she felt she needed additional help, the mother enrolled in the drug-rehabilitation program at the Lovelady Center in July 2017, the same month the last positive drug-screen result appears on the mother's color-code drug-test results. After the mother was dismissed from the Lovelady Center, she shortly thereafter enrolled in the Expect a Miracle program. Although the evidence indicates that the mother had missed drug screens through the color-code program, she testified that she had been tested for drugs at both the Lovelady Center and through the Expect a Miracle program. There was no evidence presented indicating that the mother had tested positive for drugs while enrolled in those programs, and there was no evidence indicating that the mother's discharge from the Lovelady Center was related to drug use. Furthermore, the mother testified that she was required to test for drugs as a

2170595

condition of her probation and that she had not tested positive. There being no affirmative evidence indicating that the mother was using drugs at the time of the trial, we cannot conclude that, at the time of the trial, the mother had failed to adjust her circumstances from the drug use that had caused the child to be removed from her care.

DHR argues that the mother's history of drug use and failed treatment, the fact that she enrolled in the LoveLady Center after the termination-of-parental-rights petition was filed, and the fact that the mother has not yet completed the Expect a Miracle program weigh in favor of termination of the mother's parental rights. Although a court may consider a parent's history, "the existence of evidence of current conditions or conduct relating to a parent's inability or unwillingness to care for his or her children is implicit in the requirement that termination of parental rights be based on clear and convincing evidence." D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003).

In M.G. v. Etowah County Department of Human Resources, 26 So. 3d 436, 443 (Ala. Civ. App. 2009), this court, in reversing a judgment terminating a mother's parental rights,

2170595

reasoned that "DHR produced no evidence indicating that relapse was so likely or imminent that the mother should have been considered as having a current drug problem that interfered with her ability to properly care for the children." Similarly, in the present case, although the mother had a history of using drugs and had continued using drugs despite her outpatient drug treatment at Alethia House, she had subsequently pursued additional drug treatment in which she resided at the respective treatment facilities for the seven months leading up to the trial. Considering the mother's consistency in pursuing treatment in the months leading up to the trial and the lack of affirmative evidence indicating that the mother was using drugs at the time of the trial, the juvenile court could not have been clearly convinced "that relapse was so likely or imminent that the mother should have been considered as having a current drug problem that interfered with her ability to properly care for the child[]." M.G., 26 So. 3d at 443.

Finally, we note that, although we recognize that she was still in residency at the Expect a Miracle program at the time of the trial, the mother testified that she had enrolled in

2170595

the Dannon Project, which would enable her to obtain housing after she produces two months of clean drug screens. Therefore, we cannot conclude that the mother would not have suitable housing for the child "in the foreseeable future." 12-15-319(a).

"The termination of parental rights is an extreme matter and is not to be considered lightly. Ex parte Beasley, 564 So. 2d 950 (Ala. 1990). 'Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances.' Beasley, 564 So. 2d at 952."

S.M.W. v. J.M.C., 679 So. 2d 256, 258 (Ala. Civ. App. 1996).

In the present case, considering the high evidentiary burden applicable to termination-of-parental-rights cases, C.O., 206 So. 3d at 627, and the lack of evidentiary support for the judgment, we cannot conclude that this case presents the "'most egregious of circumstances'" so as to warrant a termination of the mother's parental rights. S.M.W., 679 So. 2d at 258. Therefore, we reverse the juvenile court's judgment terminating the mother's parental rights.

The mother also argues that there were viable alternatives to terminating her parental rights. Because we are reversing the judgment on the previously articulated

2170595

basis, we pretermitt discussion of the mother's argument regarding viable alternatives.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman and Thomas, JJ., concur.

Donaldson, J., recuses himself.