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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170704 and 2170705

Amy L. Herring, as guardian ad litem for A.B.
and I.C.B.

v.

Madison County Department of Human Resources,
T.B., and C.B.

2170796 and 2170797

T.B.

v.

Madison County Department of Human Resources

Appeals from Madison Juvenile Court
(JU-15-1004.03 and JU-17-813.02)

2170704, 2170705, 2170796, and 2170797

DONALDSON, Judge.

These consolidated appeals are from judgments entered by the Madison Juvenile Court ("the juvenile court") terminating the parental rights of T.B. ("the mother"), but not terminating the parental rights of C.B. ("the father"), to A.B. and I.C.B. ("the children"). The mother appealed from the judgments, challenging the decision to terminate her parental rights, and Amy L. Herring, the children's guardian ad litem, appealed from the judgments, challenging the decision not to terminate the father's parental rights. Based on the applicable standards of review, and for the reasons expressed below, we affirm the judgments insofar as the father's parental rights were not terminated, but we reverse the judgments insofar as the mother's parental rights were terminated.

Facts and Procedural History

The mother and the father were married in October 2011. The mother and the father each had a child from a previous relationship, neither of whom are involved in these appeals.¹

¹The father's oldest child was an adult at the time of the termination-of-parental-rights proceedings, and the mother's oldest child was in the custody of a maternal uncle.

2170704, 2170705, 2170796, and 2170797

A.B. ("the child") was born October 8, 2012. In May 2013, the Madison County Department of Human Resources ("DHR") placed the child on a safety plan based on the mother's cocaine use. Pursuant to that safety plan, the mother moved out of the family's residence, and the father continued to care for the child and her halfsiblings and supervised the mother's visitation. At some point in 2013, DHR permitted the mother to return to the family's residence and ended its involvement with the family. In September 2014, the mother left the family's residence with the child and ended her relationship with the father. The mother began living with an ex-husband and his father, where she lived until the summer of 2017.

In December 2015, K.H. ("the maternal grandmother"), filed a dependency petition in the juvenile court seeking custody of the child and asserting that the mother had been abusing drugs. In early 2016, DHR filed a dependency petition in the juvenile court seeking custody of the child. It appears that the maternal grandmother withdrew her petition after DHR filed its petition. The child was removed from the mother's custody in March 2016 and placed in foster care.

2170704, 2170705, 2170796, and 2170797

In February 2017, after an evidentiary hearing, the juvenile court changed the child's permanency plan to "adoption by current foster parent."

On May 13, 2017, the mother gave birth to I.C.B. ("the baby") at her home. The mother did not take the baby to a hospital. The record indicates that, a few weeks after the baby's birth, DHR took custody of the baby and placed the baby in the same foster home as the child.

On June 13, 2017, DHR filed a petition in the juvenile court seeking to terminate the mother's and the father's parental rights to the child. On December 19, 2017, DHR filed a petition in the juvenile court seeking to terminate the mother's and the father's parental rights to the baby.

The juvenile court held a trial on the termination petitions filed by DHR on March 16, 2018. At the time of the trial, the child was 5 years old and had been in foster care since March 2016 and the baby was 10 months old and had been in foster care since shortly after her birth.

Rochelle Jones was the DHR caseworker involved with the family from July 2016 until August 2017. Jones testified that the baby was taken into DHR custody because the mother had

2170704, 2170705, 2170796, and 2170797

another child in foster care and was noncompliant with services being offered by DHR. Jones testified that she could not recall what goals she had identified for the father to complete in order to be reunited with the children. After reviewing notes from an Individualized Service Plan meeting, Jones testified that the father was required to obtain safe and stable housing and to submit to a psychological assessment, a substance-abuse assessment, and random drug testing. Jones testified that she did not know whether the father had completed a psychological assessment or had complied with the other reunification goals, but, she testified, the father had maintained stable housing since November 2017.

Jones also testified that she could not remember what goals had been established for the mother to complete in order to be reunited with the children, but, she testified, she was "assuming" that the needs and goals were the same as those established for the father. Jones recalled that she had also referred the mother to anger-management classes.

According to Jones, she had removed both parents from the random drug-testing program at some unspecified point based on

2170704, 2170705, 2170796, and 2170797

their noncompliance. From the drug-testing facility's records, which were admitted into evidence, it appears that the father began submitting to drug testing in May 2016. The results of one test conducted in May 2016 were positive for cocaine. Other than one additional test in September 2016 that was negative, the father did not submit to any other drug tests between June 2016 and March 2017. It appears that the father returned to the drug-testing program in June 2017 and that he submitted to all drug tests from that point until the date of the trial. The results of all of the father's tests after June 2017 were negative for the presence of illicit substances; two tests, however, had positive results for alcohol.

Records from the drug-testing facility indicate that the mother was scheduled to begin submitting to drug tests in April 2016 but that she had not submitted to any of the scheduled tests until June 2016, when she submitted to four drug tests. The results of two of those tests were negative, one was "abnormal," and one was positive for two different illicit substances. In July 2016, the mother again tested positive for an illicit substance. From July 2016 until March 2017, the mother did not submit to any scheduled drug tests.

2170704, 2170705, 2170796, and 2170797

In July 2017, it appears that the mother reenrolled in the drug-testing program, but she did not submit to any tests until September 2017. The results of that test were negative. In October and November 2017, however, the mother's drug-test results were positive for two illicit substances and alcohol. The mother did not submit to any drug tests after November 2017.

Jones testified that she became concerned in July 2017 that the foster parents and the children's guardian ad litem were attempting to stop the visits between the children and the parents, and, she said, she relayed her concerns to her manager.

Jones testified that the father did not identify any potential relative resources for DHR to consider for placement of the children. The mother had identified the maternal grandmother as a potential relative resource and DHR had evaluated and approved the maternal grandmother's home for the child before the baby's birth. Jones testified that DHR never placed the child with the maternal grandmother because the permanency plan for the child was changed at the February 2017 hearing to "adoption by current foster parents."

2170704, 2170705, 2170796, and 2170797

Sharanna Bridges, an employee of DHR, had been the children's caseworker since August 2017. Bridges testified that she had not visited the mother's home because the permanency plan was not to return custody of the children to the mother. When asked whether part of her responsibilities included determining whether a parent had met identified goals, Bridges testified: "[N]ot if the permanency plan is adoption by current foster parent."

Bridges echoed Jones's testimony regarding concerns related to the foster parents. Bridges testified that she believed that the foster parents and the children's guardian ad litem were trying to circumvent the efforts of the DHR caseworkers toward assisting the parents. According to Bridges, at the foster parents' request, the parents were required to wear gloves when visiting with the children and were not allowed any skin-to-skin contact with the children, which she opined is important for bonding. The foster parents had also allegedly told the child not to eat any food provided by the parents at visitations because, the foster parents allegedly said, the parents were "gross." Bridges testified that, in her view, there had been multiple occasions in which

2170704, 2170705, 2170796, and 2170797

it appeared as though the foster parents and the guardian ad litem were attempting to sabotage the parents' reunification efforts and that the foster parents were pushing to move quickly to terminate the parents' rights to the children.

Bridges acknowledged that, in September 2017, the father had requested additional reunification services and an in-home service provider to assist in his reunification efforts, but, because of scheduling difficulties with various providers, those services were not offered to the father until approximately two weeks before the trial.

Bridges's testimony indicated that, based on the progress the father had made, DHR would have normally expanded his visitation with the children and in-home reunification services would have been "standard," but, she said, those services were not normally offered when the permanency plan is to terminate parental rights.

When asked whether DHR could have made further progress with the father if there had not been a permanency plan of adoption, Bridges testified: "In general, yes, we would have." Bridges also testified that the father had done everything DHR

2170704, 2170705, 2170796, and 2170797

had asked him to do, "but at the same time, it's a little late."

Bridges testified that the parents and the children appeared to share a bond and love for one another and that she believed that the children could suffer if that bond were broken. Bridges testified, however, that she did not think that the children should be returned to the mother because she

"has been noncompliant with services for some time. The children have been out of the home for a very long time as well. I have current concerns with whether or not she's using drugs based on her lack of drug screens and drug screens that she's completed that have been positive. And, again, she's just completely stopped participating in services."

Regarding the father, Bridges testified: "I definitely can say that [the father] has made some progress over the last six months, but I do have continued concerns with whether or not he will be able to care for the children." Bridges elaborated that she had concerns regarding the father's parenting ability and his history of domestic violence. Bridges acknowledged, however, that "parenting" had not been identified as a deficiency for the father. Bridges testified that she did not think it would be a viable alternative to

2170704, 2170705, 2170796, and 2170797

allow the father to attend parenting classes and to have additional time for reunification.

According to Bridges, when she inherited the case from Jones in September 2017, she spoke with Jones to determine whether any relative resources had been identified. Based on Jones's answer, the substance of which is unclear in the record, Bridges did not conduct an independent investigation regarding potential relative resources.

Amanda Snipes testified that she is a DHR case aide and that she had supervised the visitation between the parents and the children. Snipes testified that the parents were able to visit with the children for 2 hours every other week and that they were offered 16 visits between July 2017 and the time of the trial in March 2018. According to Snipes, the mother had missed four visits due to incarceration and illness and had been late or left early for the other visits. Snipes testified that the father had missed one visit because he had the flu, but he did not miss any other visits.

Snipes testified that the parents always brought toys, activities, and snacks for the children. According to Snipes, the parents' interactions with the children were appropriate.

2170704, 2170705, 2170796, and 2170797

She testified that she had to remind the father on a few occasions to check the baby's diaper or to feed her but that he had responded positively to her directions. Snipes testified that she had been concerned that the foster parents wanted to set limits as to what the parents could do during the visitations, and she had concerns that the guardian ad litem and the foster parents had attempted to interfere with the parents' visitation with the children.

According to Snipes, both parents shared an appropriate bond with the children, and she believed that the children could suffer if that bond was broken. Snipes also testified that, if these had not been termination-of-parental-rights cases, it would have been appropriate to increase contact between the parents and the children.

Victoria Henry, an employee of an in-home reunification service provider furnished by DHR, testified that she had been contacted by DHR approximately two weeks before the trial date to work with the father on his parenting skills. According to Henry, they had been able to complete only 2 sessions by the time of the trial and the father would need approximately 10 sessions in order to complete the program. Henry testified

2170704, 2170705, 2170796, and 2170797

that the father had been "very prompt and eager," that he was making progress, and that she believes that the father would benefit from additional time in the program. Henry testified that the father's one-bedroom apartment is "very, very clean" and child-proofed and that he has a nice room furnished for the children. According to Henry, the father intended to obtain a two-bedroom apartment if he regained custody of the children.

Dr. Lois Petrella completed a psychological evaluation of the mother in July 2016. According to Dr. Petrella, the mother reported that she was a recovering addict. Dr. Petrella conducted various tests on the mother, which revealed, in Dr. Petrella's opinion, that the mother was of below average intelligence, that the mother had an adjustment disorder with anxiety and depression, and that the mother had an unspecified personality disorder. Dr. Petrella testified that the mother's substance-abuse evaluation did not reveal any recent or current chemical-dependency problems. Based on the results of that testing, Dr. Petrella recommended to DHR that the mother participate in counseling and anger-management classes, obtain

2170704, 2170705, 2170796, and 2170797

medication to treat her psychiatric issues if necessary, and submit to random drug testing.

The mother, who was 44 years old at the time of the trial, testified that she and the father were still married although they had been separated and living apart for approximately 4 years. The mother testified that, as of the trial date, she only communicates with the father when she and the father are visiting the children. During the marriage, the father worked outside the home and the mother stayed home to care for the child. The mother also testified that she and the father had had physical altercations with each other in the past. The mother later clarified her testimony to state that the father had never struck her, that he had just pushed her away, and that the only occasion in which he had become physical was when he was defending himself. The mother testified that the father is a good man and father.

The mother and the father had attempted to reconcile on a few occasions; one such occasion resulted in the pregnancy with the baby. After the baby was born, the mother informed the father and he supplied many necessities for the baby. The

2170704, 2170705, 2170796, and 2170797

mother stated that the father did not know that the baby had been born outside a hospital.

The mother acknowledged that she had been involved with DHR in the past and that she had a criminal history. The mother testified that she had been to jail "more than a couple times" for, primarily, unpaid traffic tickets and misdemeanor theft charges. The mother testified that she had pleaded guilty to interfering with child custody, a felony, because she had taken the child from a visitation location and had not returned her to DHR until the following day. As a result of that guilty plea, the mother was sentenced to serve seven years in prison, but that sentence was suspended on the condition that she serve three years on probation.

The mother testified that DHR had asked her to submit to a psychological evaluation, a substance-abuse assessment, and drug testing. The mother testified that she underwent a psychological evaluation but that she never received the results of that evaluation. The mother acknowledged that she had not submitted to many of the scheduled drug tests. The mother testified that she had seen a therapist and underwent a substance-abuse assessment, which recommended substance-

2170704, 2170705, 2170796, and 2170797

abuse treatment one day each week. The mother testified that she completed all but two classes of the substance-abuse program while in jail from September to December 2017. The mother testified that she had attempted to finish the classes after she was released from jail. She testified that DHR did not transmit the purchase order required to finish the classes in a timely manner and that, as a result, the mother would have been required to complete the entire program again.

The mother testified that she had been living in a one-bedroom apartment since December 2017 but that she intended to obtain a two-bedroom apartment in June 2018. The mother testified that she had been employed with a cleaning service since the first week of February 2018 earning approximately \$350 per week. The mother also testified that she had bought and sold items on the Internet to earn income.

The mother testified that she provided DHR with four potential relative resources to consider -- specifically, the maternal grandmother, A.G. and D.H., her maternal aunts, and L.M., her goddaughter. According to the mother, all the potential relative resources had stable homes and jobs. The mother testified that the maternal grandmother and A.G. had

2170704, 2170705, 2170796, and 2170797

expressed their desire that the mother regain custody of the children, rather than personally accepting custody. The mother acknowledged that the maternal grandmother had previously had custody of the child but that she had voluntarily relinquished custody and that she had never had physical contact with the baby. The mother testified that she could not recall the last occasion on which she spoke with or saw D.H., and she acknowledged that L.M. was not a blood relative.

The mother testified that, when the child was initially removed from her custody, she missed visitation with the child because she was told that her visitation had been suspended. The mother testified that, "in general, I -- I saw [the children] every opportunity I got unless I was unable to." The mother acknowledged that she would always be a drug addict, but she testified that she was no longer using drugs.

The father, who was 42 years old at the time of the trial, testified that the last occasion on which he abused drugs was when he used cocaine approximately one year before the trial.

The father testified that he was not aware when the child was placed into DHR's custody but that he became involved with

2170704, 2170705, 2170796, and 2170797

the child when he learned of DHR's involvement. The father acknowledged, however, that there was period of approximately 10 months after DHR became involved with the child during which he did not participate in services or visit with the child. The father attributed this behavior to being in "defense mode" and trying to disassociate himself with the mother. The father testified that he understood his actions were damaging for the child and that both he and the child had "paid the price." After the baby was born, the father renewed his efforts to comply with DHR's requirements and services, and, since that time, he had visited consistently with both children. The father testified that he learned that the baby had been born two days after her birth and that he went to the mother's house and stayed with her and the baby until DHR removed the baby from the home. The father testified that the mother had told him that the baby was born in a hospital.

The father testified that he had brain surgery in 2007 to have a cyst removed that was crushing his spinal cord. The father testified that, after the surgery, he had to learn how to walk again but that he had fully recovered. The father testified that the only remaining side effect from his brain

2170704, 2170705, 2170796, and 2170797

surgery is that he gets minor headaches from sharp sounds. The father also acknowledged that he had experienced childhood trauma, but he testified that the experience no longer "troubles" him.

The father testified that he had a previous conviction for domestic violence for which he had served 10 days in jail. The father also testified that he believed that there was a warrant for his arrest in Maine stemming from an incident in which he hit his former girlfriend after she stole his pain medication while he was recovering from brain surgery. Both of those incidents occurred before he met the mother and before the children were born.

The father testified that he had been employed as a master mechanic earning \$2,800 per month and that he had obtained a one-bedroom apartment. The father explained, however, that he would move into a two-bedroom apartment in the same complex if the children were returned to him.

Ta.B., the father's sister-in-law, testified that she had seen an improvement in the father over the past 10 months. She stated that the father now had a positive attitude, that he had obtained a place to live, and that he had been attending

2170704, 2170705, 2170796, and 2170797

church. Ta.B. testified that she and her husband were willing to support the father and assist him in caring for the children if necessary.

R.R. testified that he had known the father since 2010. R.R. testified that he is employed with the United States Department of Defense and that he is regularly in Washington, D.C., as a result of his employment. R.R. testified that the father had often helped his family when R.R. was out of town and that they had become friends. R.R. testified that the father had shared his past problems with him and that he had given fatherly advice. R.R. testified that he was not aware of the father's criminal history, but, he testified, a criminal history would not change his perception of the father. According to R.R., the father had been doing very well.

On April 10, 2018, the juvenile court entered a judgment in each child's case in which it terminated the mother's, but not the father's, parental rights to each child. Regarding the mother, the juvenile court found:

"That reasonable efforts by [DHR] leading toward the rehabilitation of the mother have failed;

"That the mother has failed to provide for the material needs of the child[ren] or to pay a

2170704, 2170705, 2170796, and 2170797

reasonable portion of child support and is not able to do so;

"That the mother has failed to adjust her circumstances to meet the needs of the child[ren] in accordance with the agreements reached with [DHR] or the Juvenile Court of Madison County, Alabama.

". . . .

"That the best interest of the minor child[ren] is for the parental rights of the child[ren's] mother, [T.B.], ... to be terminated;

"That there exists no viable alternative to termination of the mother's parental or custodial rights;

"That ... reasonable efforts have been made to reunite the child[ren] with the mother and that it would be contrary to the welfare of the child[ren] and not in the child[ren's] best interest to return [them] to the mother."

Regarding the father, the juvenile court made the following findings:

"That the Termination of Parental Rights Petition is DENIED in that the father has not abandoned the child[ren] and that all reasonable efforts have not failed;

"That the father, throughout the child[ren's] lives], has attempted to provide for the material needs of the child[ren] in light of the present circumstances;

"That the father has had consistent contact and communication with the child[ren] and appears to have bonded with the child[ren];

2170704, 2170705, 2170796, and 2170797

"That the father has made attempts to adjust his circumstances to meet the needs of his child[ren].

". . . .

"That the best interest of the child[ren] is for the parental rights of the mother [to] be terminated but the parental rights of father not [to] be terminated;

"That a permanency plan of Return to Parent be adopted by [DHR];

"That all reasonable efforts should be made to try to effectuate this new permanency plan."

The guardian ad litem filed notices of appeal from the judgments, challenging the decision not to terminate the parental rights of the father, on April 20, 2018. On April 24, 2018, the mother filed motions to alter, amend, or vacate the judgments terminating her parental rights.² The juvenile court denied the mother's motions on May 8, 2018, and the mother timely filed her notices of appeal on May 22, 2018.

²"[A] notice of appeal filed within [the period prescribed by rule following the entry] of judgment does not divest the trial court of jurisdiction to receive post-judgment motions to alter, amend, or vacate that are timely filed . . ." Ex parte Andrews, 520 So. 2d 507, 510 (Ala. 1987); and Rule 28(C), Ala. R. Juv. P. (requiring a notice of appeal in juvenile actions to be filed within 14 days of the judgment). See also Parker v. Parker, 946 So. 2d 480, 485 (Ala. Civ. App. 2006) (explaining that a notice of appeal that is filed before a timely postjudgment motion is held in abeyance until the resolution of all postjudgment motions).

2170704, 2170705, 2170796, and 2170797

Standard of Review

In reviewing a juvenile court's decision regarding whether to terminate parental rights, we have explained that

"appellate courts must apply a presumption of correctness in favor of the juvenile court's findings in a termination-of-parental-rights action. J.C. v. State Dep't of Human Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007). 'Additionally, we will reverse a juvenile court's judgment terminating parental rights only if the record shows that the judgment is not supported by clear and convincing evidence.' Id. See Ex parte McInish, 47 So. 3d 767, 774 (Ala. 2008) (explaining standard of review of judgment resting upon factual determinations required to be based on clear and convincing evidence)."

S.S. v. Calhoun Cty. Dep't of Human Res., 212 So. 3d 940, 949 (Ala. Civ. App. 2016). See also K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016) ("A juvenile court's judgment terminating a parent's parental rights must be supported by clear and convincing evidence"). "This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing." Id. (citing Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007)). "When [the juvenile court's] findings rest on ore

2170704, 2170705, 2170796, and 2170797

tenus evidence, this court presumes their correctness." Id.
(citing Ex parte T.V., 971 So. 2d at 9).

Discussion

In determining whether to terminate a parent's parental rights in an action filed by a nonparent, "[the] juvenile court is required to apply a two-pronged test ...: (1) clear and convincing evidence must support a finding that the child is dependent; and (2) the court must properly consider and reject all viable alternatives to a termination of parental rights." B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004) (citing Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990)).

Section 12-15-319, Ala. Code 1975, governs the termination of parental rights and provides, in part:

"(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them 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 parents. ..."

In making that determination, the juvenile court is required to consider certain factors, including the following:

2170704, 2170705, 2170796, and 2170797

"(1) That the parents have 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 parents.

"(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.

". . . .

"(4) Conviction of and imprisonment for a felony.

". . . .

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

". . . .

"(9) Failure by the parents 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 parents 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 parents 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

2170704, 2170705, 2170796, and 2170797

agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review."

§ 12-15-319(a).

Appeal Nos. 2170704 and 2170705 -- The Father's

Parental Rights

The guardian ad litem argues, among other things, that the evidence established that the father had abandoned the children. See § 12-15-319(a)(1). "Abandonment" is defined as

"[a] voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, without good cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or failure to perform the duties of a parent."

§ 12-15-301(1), Ala. Code 1975.

Initially, we note that DHR did not allege abandonment in its petitions to terminate the parents' parental rights. The guardian ad litem argues on appeal that the issue of abandonment was tried by the implied consent of the parties pursuant to Rule 15(b), Ala. R. Civ. P., which provides, in part, that, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the

2170704, 2170705, 2170796, and 2170797

pleadings." In response, the father argues that the evidence relied upon by the guardian ad litem to show abandonment was pertinent to other issues that were properly pleaded and that he had no notice that he was expected to defend against a claim of abandonment. We note that the juvenile court made a specific finding in the judgments that "the father has not abandoned the child[ren]." The father did not address or object to that finding in the juvenile court or claim that abandonment had not been properly pleaded. Accordingly, although abandonment was not a specific ground alleged in the pleadings, it is apparent that the issue of abandonment was tried by implied consent. See McDuffie v. Hooper, 294 Ala. 293, 296, 315 So. 2d 573, 576 (1975) (explaining that the failure to object during the trial or to file a postjudgment motion objecting to the consideration of an issue indicated that the issue was tried by the implied consent of the parties pursuant to Rule 15(b)).

The guardian ad litem asserts that the father abandoned the children by failing to perform the duties of a parent. She argues that the evidence established that, before the child was placed in DHR's custody, the father had left child-care

2170704, 2170705, 2170796, and 2170797

tasks to the mother and that, after both children were placed in DHR's custody, the father had not paid child support.

The juvenile court could have found from the evidence that the mother stayed home to care for the child while the father was employed outside the home earning income to support the family. Although the father acknowledged that he did not pay child support to DHR or to the foster parents after the children were removed from the parents' custody, the evidence indicated that the father always brought snacks and presents to visitations with the children and that his offerings were often rebuffed by the foster parents. The juvenile court was not required to find that the father had abandoned the children from the facts presented at trial.

The guardian ad litem also asserts that the father's 10-month absence from participating in services offered by DHR and from visitation constitutes abandonment. The evidence indicated that the father ceased visitation and participating in the services offered for a 10-month period before the birth of the baby. The father acknowledged this absence and explained that he was attempting to compose himself and distance himself from the mother. After the baby was born in

2170704, 2170705, 2170796, and 2170797

May 2017, the father began participating in services and missed only one visitation, which was due to illness. The juvenile court heard the father's testimony and was in the best position to evaluate the credibility of the testimony and the weight to be given to it. "A trial court's factual findings premised on an ore tenus hearing are presumed correct." Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008) (citing Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994)). ""This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility."" Ex parte J.E., 1 So. 3d at 1008 (quoting Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007), quoting in turn Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001)). The juvenile court, having received ore tenus testimony, could have determined that there was not clear and convincing evidence to support a claim that the father had abandoned the children.

The guardian ad litem also asserts that the father suffered from an emotional illness, a mental illness, a mental deficiency, or excessive use of alcohol or controlled substances that renders him unable to care for the children.

2170704, 2170705, 2170796, and 2170797

See § 12-15-319(a)(2). Specifically, the guardian ad litem argues that the father's prior brain surgery and unresolved childhood trauma renders him unfit to parent the children. The juvenile court could have found from the evidence that the father had had brain surgery more than 10 years before the trial, that he had recovered, and that the only lingering effect from that surgery was that he experiences minor headaches when subjected to sharp sounds. With regard to the childhood trauma, the father's testimony indicated that it does not affect him. Although the juvenile court could consider the father's history in evaluating his current ability or willingness to care for the children, there must be clear and convincing evidence of the father's current conditions that make him unable or unwilling to care for the children. See A.M.F. v. Tuscaloosa Cty. Dep't of Human Res., 75 So. 3d 1206, 1213 (Ala. Civ. App. 2011); and D.O. v. Calhoun Cty. Dep't of Human Res., 859 So. 2d 439, 444 (Ala. Civ. App. 2003) (explaining that "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

2170704, 2170705, 2170796, and 2170797

in the requirement that termination of parental rights be based on clear and convincing evidence").

The guardian ad litem also argues that DHR had made reasonable efforts toward reunification and that DHR was not required to exert additional efforts to rehabilitate the father. She argues that the father had almost two years to rehabilitate himself with respect to the child and nine months to learn basic parenting skills regarding the baby. The guardian ad litem cites M.A.J. v. S.F., 994 So. 2d 280, 291 (Ala. Civ. App. 2008), in support of her assertion. We find M.A.J. distinguishable because the mother in that case was offered a multitude of services but remained incapable of caring for her children's needs at the time of the trial. Id. at 290. In these cases, the evidence indicated that DHR had not identified "parenting" as a deficiency for the father and DHR did not provide any parenting services to the father until two weeks before the trial, despite his request for such services that had been made six months earlier.

Accordingly, the juvenile court could have found from the evidence that the father had substantially rehabilitated himself; that the father had complied with every goal

2170704, 2170705, 2170796, and 2170797

identified by DHR; that the father had consistently attended visitation with the children; that the father had abstained from substance abuse; and that the father had maintained stable employment and housing.

The guardian ad litem also challenges the juvenile court's finding that it is in the best interest of the children that the father's parental rights not be terminated. We note again that our review on appeal is not de novo. "Under the ore tenus standard of review, we defer to the juvenile court's resolution of the disputed facts and to the juvenile court's determination of the children's best interests." R.T.B. v. Calhoun Cty. Dep't of Human Res., 19 So. 3d 198, 207 (Ala. Civ. App. 2009). Under the applicable standard of review, we cannot reverse the judgment on this basis.

Moreover, we note that the juvenile court was not required to terminate the father's parental rights, even if it had found that some of the factors set forth in § 12-15-319(a) had been satisfied.

"Section 12-15-319 provides that if the required findings are made, the juvenile court 'may' terminate parental rights. The term 'may' leaves the decision to the discretion of the juvenile court. See Ex parte Mobile Cnty. Bd. of Sch. Comm'rs, 61 So. 3d 292, 294 (Ala. Civ. App. 2010) ('Ordinarily,

2170704, 2170705, 2170796, and 2170797

the use of the word "may" indicates a discretionary or permissive act, rather than a mandatory act.'). Furthermore, '[w]hen evidence is presented ore tenus, it is the duty of the trial court, which had the opportunity to observe the witnesses and their demeanors, and not the appellate court, to make credibility determinations and to weigh the evidence presented.' Ex parte Hayes, 70 So. 3d 1211, 1215 (Ala. 2011) (citing Blackman v. Gray Rider Truck Lines, Inc., 716 So. 2d 698, 700 (Ala. Civ. App. 1998))."

Montgomery Cty. Dep't of Human Res. v. N.B., 196 So. 3d 1205, 1211-12 (Ala. Civ. App. 2015).

It is well settled that, "[i]nasmuch 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." Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990). The juvenile court did not find that those circumstances regarding the father were proven by clear and convincing evidence. Because the juvenile court's findings are supported by the evidence in the record, we affirm the judgments insofar as they decline to terminate the father's parental rights to the children.

Appeal Nos. 2170796 and 2170797 -- The Mother's

Parental Rights

2170704, 2170705, 2170796, and 2170797

We now turn to the portions of the judgments terminating the mother's parental rights. The mother argues that the record does not contain evidence of any services offered to her by DHR or of her current inability to care for the children. The mother also argues that there was not clear and convincing evidence that all viable alternatives to the termination of her parental rights were considered and rejected. In particular, the mother argues that the father, whose parental rights were not terminated, could maintain custody of the children and afford the mother appropriate contact with the children. We observe again that, before terminating parental rights, "the court must properly consider and reject all viable alternatives to a termination of parental rights." B.M., 895 So. 2d at 331.

The guardian ad litem argues that there is a conflict between P.H. v. Madison County Department of Human Resources, 937 So. 2d 525 (Ala. Civ. App. 2006), and W.A. v. Calhoun County Department of Human Resources, 211 So. 3d 849 (Ala. Civ. App. 2016), "in determining whether the parental rights of only one parent should be terminated vis-á-vis the parental rights of the other parent." In P.H., this court reversed a

2170704, 2170705, 2170796, and 2170797

judgment terminating a mother's parental rights because there was not clear and convincing evidence that the mother was currently unwilling or unable to care for the child. This court also upheld the termination of the father's parental rights. Whether the mother's involvement could serve as a viable alternative to the termination of the father's parental rights was not an issue presented in that appeal. We also note that the father in P.H. had been accused of abusing the child's halfsiblings, which had resulted in the child being removed from his custody.

In W.A., the juvenile court terminated both the mother's and the father's parental rights. A majority of this court reversed the portion of the judgment terminating the father's parental rights because the Calhoun County Department of Human Resources had failed to make reasonable efforts to reunite the father and the child. With regard to the mother's parental rights, a majority of this court held that, because this court had reversed the judgment terminating the father's parental rights, "the father may prove to be a suitable custodian who could supervise visitation of the mother and the child, which

2170704, 2170705, 2170796, and 2170797

would be a viable alternative to terminating the mother's parental rights." Id. at 853.

We also observe that in J.C.D. v. Lauderdale County Department of Human Resources, 180 So. 3d 900, 902 (Ala. Civ. App. 2015), a case not addressed by the parties, the juvenile court denied a petition seeking to terminate the mother's parental rights but entered a judgment terminating the father's parental rights. The evidence in J.C.D. indicated, among other things, that the father and the children shared a bond, that the children enjoyed visitation with the father, that the father acted appropriately during visitation, and that the father had not endangered the children during visitations. Id. at 902. This court noted that no evidence was presented to indicate that continuing the father's supervised visitation "would necessarily expose the children to the threat of physical or emotional harm from the father. Furthermore, the record contain[ed] no evidence indicating how the children would benefit from the termination of the father's parental rights." Id. at 902. We explained:

"If the safety and stability of the child can be secured by placing the child in the long-term care of a suitable relative, such that the continuance of the relationship with the parent poses no undue

2170704, 2170705, 2170796, and 2170797

threat of harm to the child, the juvenile court should not terminate parental rights. See generally Ex parte T.V., 971 So. 2d 1 (Ala. 2007)."

Id. at 901. This court reversed the judgment terminating the father's parental rights, holding that "the juvenile court should have concluded that placement of the children with the mother constituted a viable alternative to termination of the father's parental rights." Id. at 902.

Likewise, in these cases, the juvenile court declined to terminate the father's parental rights and ordered DHR to engage in efforts to reunite the children and the father. The undisputed evidence indicated that the mother had attended the majority of her visitations with the children, that she always brought activities, crafts, and snacks for the children, that she and the children shared a bond, and that she had acted appropriately during visitations. There was no evidence presented indicating that continuing supervised visitation with the mother would be detrimental to the children. Based on the foregoing authorities, the juvenile court should have declined to terminate the mother's parental rights because the children's impending placement with the father could serve as a viable alternative to the termination of her parental

2170704, 2170705, 2170796, and 2170797

rights. Because we are reversing the judgments on that ground, we pretermit discussion of the mother's other arguments.

Conclusion

As explained above, the evidence supports the juvenile court's decision not to terminate the father's parental rights. In view of that holding, we further hold that the juvenile court should have considered whether placement of the children with the father was a viable alternative to the termination of the mother's parental rights. See W.A., 211 So. 3d at 853-54. Accordingly, in appeal nos. 2170704 and 2170705, the judgments are affirmed insofar as they decline to terminate the father's parental rights to the children, and, in appeal nos. 2170796 and 2170797, the judgments are reversed insofar as they terminate the mother's parental rights to the children and the causes are remanded for proceedings consistent with this opinion.

2170704 and 2170705 -- AFFIRMED.

2170796 and 2170797 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

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