rel: April 20, 2018

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2017-2018

2170136

S.B.H.

v.

R.P. and D.P.

Appeal from Etowah Juvenile Court
(JU-17-6.01)

2170137

S.B.H.

v.

R.P. and D.P.

Appeal from Etowah Juvenile Court
(JU-17-7.01)

THOMPSON, Presiding Judge.

S.B.H. ("the father") appeals from a judgment of the Etowah Juvenile Court ("the juvenile court"), which was entered in both of the underlying actions, finding his two minor children ("the children") dependent and awarding custody of the children to R.P. and D.P ("the maternal grandparents").

On January 5, 2017, the maternal grandparents filed in the juvenile court a petition for "emergency custody" of the children.[1] In the petition, the maternal grandparents alleged that the father and J.P. ("the mother"), who are divorced, were both unfit and that the children were dependent. Specifically, they alleged that the mother and the father had "psychological conditions that have compromised their ability to care for the children." As to the father, the maternal grandparents stated that they believed he lived near

[1]The maternal grandparents filed a single petition, which apparently began a separate action for each child. The actions were tried together, and the juvenile court entered a single judgment encompassing both children. The father appealed from the judgment entered in each action, and this court has consolidated the appeals.

Nashville, Tennessee, but that "his exact whereabouts and address [were] unknown to" them at the time the petition was filed. Because the mother did not appeal from the judgment, in this opinion we will discuss the relevant information and evidence pertaining only to the father.

The same day the petition for emergency custody was filed, the juvenile court entered an ex parte order awarding the maternal grandparents "immediate temporary care, custody, and control" of the children. The father was awarded visitation at times to which the maternal grandparents and he could agree. A guardian ad litem was appointed to represent the children. A 72-hour hearing was never held or scheduled in these matters.

On January 20, 2017, the father filed an answer and a counterpetition for custody and visitation. He also sought an immediate hearing. The juvenile court did not hold an initial hearing in these cases until February 17, 2017. On February 24, 2017, the father filed a motion for visitation. In his motion, the father noted that, at the close of the February 17 hearing, the juvenile court had "indicated that it did not want to allow unsupervised weekend visitation without hearing

more evidence from the father" but had awarded the father visitation supervised by the children's paternal grandmother and coordinated by the children's guardian ad litem.

The trial of these matters was held on March 10, 2017, and May 22, 2017. On October 13, 2017, the juvenile court entered its judgment finding the father and the mother to be unfit and unsuitable to have custody of the children and determining that it was in the children's best interest to remain in the maternal grandparents' custody. The mother and the father were awarded supervised visitation. The father's visitation was to continue to be supervised by the paternal grandmother.

The father argues that the juvenile court's finding that he is unfit and its determination that, as to him, the children are dependent are not supported by the evidence.

> "'"In matters concerning child custody and dependency, the trial court's judgment is presumed correct on appeal and will not be reversed unless plainly and palpably wrong." Ex parte T.L.L., 597 So. 2d 1363, 1364 (Ala. Civ. App. 1992); see also Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004). Additionally, in Ex parte Anonymous, 803 So. 2d 542 (Ala. 2001), the Alabama Supreme Court stated:

> "'"The ore tenus rule provides that a trial court's findings of fact based on oral testimony 'have the effect of a jury's verdict,' and that '[a] judgment, grounded on such findings, is accorded, on appeal, a presumption of correctness which will not be disturbed unless plainly erroneous or manifestly unjust.' Noland Co. v. Southern Dev. Co., 445 So. 2d 266, 268 (Ala. 1984). 'The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses.' Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986)."
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> "'803 So. 2d at 546.'
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> "J.W. v. C.H., 963 So. 2d 114, 119 (Ala. Civ. App. 2007)."

L.M. v. Shelby Cty. Dep't of Human Res., 234 So. 3d 532, 534-35 (Ala. Civ. App. 2017).

> "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. 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)."

K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016).

The evidence in these cases shows the following. After an eight-year marriage, the mother and the father were divorced on June 25, 2013, by a judgment entered in the Etowah Circuit Court. The divorce judgment incorporated an agreement reached between the mother and the father pursuant to which they would have "joint legal care, control, and custody of the minor children, with the [mother] being designated as the primary custodial parent," subject to the father's visitation. The agreement also stipulated that the father would be allowed to make the medical decisions for the children.

The children, who were 11 and 8 years of age at the time the final judgment in these matters was entered, both have significant health issues. The older child has been diagnosed with attention-deficit/hyperactivity disorder ("ADHD"), epilepsy with seizures, a conduct disorder, and a learning disability. The younger child has been diagnosed with ADHD, schizophrenia, and encopresis, sometimes referred to as fecal incontinence, which occurs in children who have already learned to use a toilet.

After the mother and the father divorced, the father continued to live with the mother and the children in a mobile home next door to the home of the maternal grandparents. The mother testified that the father had stayed in the home "for the benefit of the kids." The mother said that the family had lived in that location since 2009. At trial, the mother explained that the family had moved next door to the maternal grandparents' home when the business where she worked closed and they could no longer afford the house where they had been living in Attalla.

The evidence indicates that both the mother and the father suffer from mental illness. The mother has been diagnosed with bipolar disorder and has displayed symptoms of that illness over a number of years. That illness prevents her from working, and she receives disability benefits. The father testified that he has suffered from anxiety issues "off and on" for much of his adult life; however, until April 2014, the anxiety was not debilitating. In April 2014, the father said, he began hallucinating--hearing people under the floors and believing people in the woods were trying to kill him. He acknowledged that he had fired a gun into the floor and into

the woods. He also had difficulty sleeping, began missing work, and was "zoning out," apparently during seizures. The father went to the hospital and was admitted. The father said that he stayed in the hospital for three or four days for observation, but he acknowledged that he left the hospital against medical advice in the first week of May.

On May 11, 2014, the father returned to the hospital. He could not remember details of what happened on that day, but evidence indicates that police were called to his house that day because the father believed someone was in the house. The mother drove the father to the hospital, and he was admitted again. On that occasion, the father was hospitalized in the psychiatric unit for 11 days.

While the father was hospitalized on the latter occasion, Renee Bellew, who appears to be an employee at Gadsden Regional Medical Center, filed in the Etowah County Probate Court a petition for the involuntary commitment of the father. In the petition, Bellew stated that the father had come to the hospital because he "'was depressed and hearing voices.'" She also stated that, while in the hospital, the father had pulled the fire alarm, had tried to take his sitter's cellular

telephone, and had tried to stab the sitter with a pen. At the time the petition was filed, the father had been diagnosed with "major depressive disorder, recurrent, severe, with psychotic features, R/O psychotic disorder."

The probate court held a hearing on the commitment petition on May 21, 2014. At that time, the evidence indicated that, since first being hospitalized, the father "showed signs of great improvement." The father's guardian ad litem stated that, after reviewing the father's chart, it was his opinion that the father could benefit from additional treatment but that it was "likely that outpatient treatment would suffice." On May 21, 2014, the probate court entered a judgment ordering that the father be committed to outpatient treatment for a period not to exceed 150 days at CED Mental Health Center ("CED") in Attalla.

On May 22, 2014, the father was released from the hospital and began living with his mother ("the paternal grandmother"), who had worked as a licensed practical nurse at a hospital for nine years. She said that she had been called on to work on the psychiatric floor and was familiar with the treatment of psychiatric patients. The father received

outpatient mental-health treatment as ordered, and, the paternal grandmother testified, the father gradually improved. In August 2014, the father returned to live with the mother and the children in the mobile home where they had lived before the father was hospitalized, and he resumed his employment with the Alabama Department of Transportation. The paternal grandmother testified that, by then, there "was a great deal of improvement" in the father. The father continued his treatment at CED through December 15, 2014--208 days after receiving the commitment order from the probate court. Dr. Fredric Feist, the father's physician at CED, evaluated the father on December 15, 2014. The evaluation sheet indicated that the father's progress was "good," and, under "chief complaint," it was noted that the father was "doing well." The evaluation sheet indicated that the father was no longer depressed or anxious and that his insight and judgment were good. It also indicated that the father's thought process was logical. Dr. Feist recommended that the father continue with counseling and return to CED in six months for a follow-up plan. The father was also prescribed a number of medications.

The father testified that he had had no further mental-health issues since recovering from the events of spring 2014. He acknowledged that he did not return to CED six months after his last evaluation, and that he had not had his prescriptions refilled, but he said that he had remained mentally stable. He explained that he thought he had completed his treatment as ordered by the probate court.

D.P. ("the maternal grandmother") testified that the father had told her that, even after he left the hospital, he had heard voices. On cross-examination, however, the maternal grandmother revealed that the father had made that statement to her "at least four weeks" after he was released from the hospital on May 22, 2014. We note that he was receiving outpatient treatment at that time and continued to do so for an additional six months from the time the maternal grandmother reported that the father was still "hearing voices."

In its judgment, the juvenile court stated that,

> "[w]hile the father claims he has been psychologically sound since his hospitalization, [the maternal grandparents] stated that while the father was in counseling at CED Mental Health and afterwards that he still heard voices telling him to do 'bad things.' The father never reported this

> information to his counselor at CED Mental Health or to anyone else after that time."

Our review of the record indicates that no evidence was presented tending to show that the father had suffered a recurrence of the problems for which he was hospitalized and treated in 2014. The only reference we discovered in the record to the voices allegedly telling the father to do "bad things" was in the maternal grandparents' brief to the juvenile court.

> "'[T]he unsworn statements, factual assertions, and arguments of counsel are not evidence.' Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005); see also Town of Westover v. Bynum, 68 So. 3d 840, 843 (Ala. Civ. App. 2011) ('The statement in Bynum and the Country Store's trial brief is an unsworn statement made by counsel, which is not considered evidence.'); and LVNV Funding, LLC v. Boyles, 70 So. 3d 1221, 1232 n. 2 (Ala. Civ. App. 2009) ('[A]n unsworn statement made by one of the parties' attorneys is not evidence.')."

Tucker v. Nixon, 215 So. 3d 1102, 1105 (Ala. Civ. App. 2016). We have found no evidentiary support for the juvenile court's finding that the father continued to hear voices after he completed treatment at CED.

A few weeks after the father returned to live with the mother and the children in August 2014, the mother and the father invited C.H. to live with them. The mother testified

that C.H. was a friend with whom the father had gone to high school. The father testified that C.H. was a former girlfriend. He acknowledged that, during the time C.H. lived with the mother and him in the mobile home, he had sexual relations with her. He said that he had also had sexual relations with the mother during that time. The father denied that the children saw him engaged in sexual relations with C.H. The mother testified that the older child saw the mother and the father having sexual relations on one occasion and that the older child also saw the mother and another man having sexual relations after the father had moved from the house.

In the dependency judgment, the juvenile court wrote: "During this time, while the children were exposed to their parents' sexual relationship with the other female, the minor daughter actually began exhibiting sexualized behaviors at school which the school reported to [the Department of Human Resources]." In reviewing the record, we found no evidence to support a determination that the mother and C.B. had ever had a sexual relationship. An allegation that such a relationship occurred appears in the maternal grandparents'

brief to the juvenile court. We also found no evidence to support the conclusion that the children had seen the father and C.H. engaging in sexual relations.

Lori Moss, the principal at the children's school, testified that, during the time that C.H. and the father still lived in the mobile home with the mother, the older child made reports to the school nurse that a grandparent or great-grandparent had stuck something silver inside her and that other people had touched her improperly. Moss also testified that she and the school nurse had documented that the older child also "had a lot of infection in her private areas" and had been "clawing" and pulling at her clothes around her private areas and had simulated or had actually masturbated at school. The most recent note Moss had regarding the older child was a nurses note dated December 12, 2016, indicating that the child was experiencing vaginal itching and burning. Moss said that she reported all of the information to the Department of Human Resources ("DHR").

The juvenile court's judgment includes the finding that the mother and the father's sexual relationship with C.H. ended after the mother and C.H. filed petitions seeking

protection-from-abuse ("PFA") orders against the father. We have already discussed that there is nothing in the record to indicate that the mother was involved in a sexual relationship with C.H. Additionally, there is no evidence in the record to support a finding that the father ended his relationship with C.H. after she filed a PFA petition against him. Evidence presented at the dependency hearing tended to show that, in about May or June 2015, the father moved from the mobile home where he had lived with the mother, the children, and C.H. and moved into the maternal grandmother's house. He was no longer living in the house with C.H. and the mother when the PFA petitions were filed. The mother testified that the father was traveling between the maternal grandmother's house and Tennessee, where his girlfriend at that time lived, until he moved permanently to Tennessee in October 2015. The cause of the end of the father's relationship with C.H. is not explained in the record.

The juvenile court also found that, in their PFA petitions, the mother and C.H. alleged that the father "had threatened to kill them." The evidence does not fully support that finding, but, again, the statement was made in the

maternal grandparents' brief to the juvenile court. On August 3, 2015, the mother and C.H. went to the Etowah County Courthouse together to file separate PFA petitions in the Etowah Circuit Court ("the circuit court"). At the dependency hearing, the mother testified that, at that time, C.H. no longer lived with her and that she had no knowledge regarding whether C.H. was living with the father, either. In her PFA petition, the mother described going to the maternal grandmother's house to pick up the children and seeing the father and the father's cousin fighting. In her statement in support of the petition, the mother alleged that the father

> "gets in my face and starts threat[en]ing me saying that he will take the kids away from me. Then, [the father's] brother gets in my face and threatens me saying he got a gun and a army that can kill me and my family."

At the dependency hearing, the mother testified that the father never threatened to kill her, and, in her PFA petition, the mother never alleged that the father had threatened to kill her. The father denied the allegations that the mother and C.H. had made in their PFA petitions. Additionally, the mother said that she had not read the statement C.H. made in her PFA petition before she took the ex parte PFA order

resulting from her petition to the children's school. The mother further testified that, after she and C.H. obtained ex parte PFA orders, the maternal grandparents threatened to evict her from the mobile home if she did not provide the ex parte PFA orders to the school the children attended.

In C.H.'s PFA petition, there are statements that are nearly verbatim to the statements the mother made in her petition. For example, both petitions state that the father had "threatened to do physical harm to me and" the mother or C.H., depending on whose petition one is reading. Both petitions also state that the father "is mentaly [sic] unstable and not on meds from CED that is court order."[2] In the statement C.H. wrote in support of her petition for a PFA order, she alleged that she was with the mother at what she called the father's house when the mother went to pick up the children. C.H. stated that she saw the father "abuse" his cousin. Contrary to the mother's statement, C.H. said that the father then told the mother and her that he was going to kill them. Finally, she said, the father, "when we were

[2]In the mother's petition, she writes that the father is "not on his meds ...." Otherwise, the quoted statement is identical in both petitions, down to the misspelled word.

leaving, told me we would (pay for this) and [he] would be (out for blood) and we left." C.H. ended her statement with: "Please speak with me for more." The parenthetical phrases are in C.H.'s original statement. C.H. was not present to testify at the dependency hearing, and her PFA petition does not appear to have been sworn.

The circuit court initially entered an ex parte PFA order for each petition, prohibiting the father from calling the mother, C.H., and the children and from threatening, annoying, harrassing, or otherwise engaging in conduct that would place them in reasonable fear of bodily injury. On September 8, 2015, the circuit court held an ore tenus hearing on the mother's and C.H.'s petitions. The same day, the circuit court entered separate judgments, one for each petition, ordering the dismissal of the PFA actions. The judgments did not state a reason for the dismissals.

In the dependency judgment, the juvenile court found that the mother and the father "have demonstrated a history of neglecting the children and making poor decisions which have no doubt had a detrimental impact on the emotional and physical health of the children." The juvenile court did not

elaborate on the finding. We note that the maternal grandparents' brief to the juvenile court states: "Both the mother and father have a history of neglecting the children and making poor decisions which have no doubt had a detrimental impact on the emotional and physical health of the children."

The evidence indicates that, after the children's school made its mandatory reports to DHR regarding the children, DHR never took custody of the children, and Moss testified that the only report she received from DHR as a result of an investigation contained a finding of "not indicated." Moreover, we note that the reports to DHR mentioned certain behavior of the mother, including that she had cursed and yelled at the older child while picking her up from school, that she had bitten the younger child, and that she had brought the younger child to school with feces in his pants. However, there was no mention of the father in the information Moss provided to DHR.

Furthermore, the maternal grandmother testified that if she had felt like the children were in danger, she would have gone to court to seek immediate custody. However, the only

time she filed any such actions was in January 2017, when the mother expressed her desire to move to Tennessee to be closer to the father. After reviewing the record in its entirety, we conclude that evidence does not support the juvenile court's finding that the father has a history of neglecting the children.

In the same vein, the juvenile court's judgment states that the father "admittedly cannot care for the children by himself as evidenced by his plan for the mother to move to Tennessee and live near him to help with the children." That finding is not reflective of the evidence. The record indicates that the father's mother--the paternal grandmother--planned to move to Tennessee to help the father with the children, as the father had requested. The paternal grandfather is deceased. The paternal grandmother testified that she has a recreational vehicle that accommodates eight people and is well equipped. She said that she intended to live in a motor home near the father's house.

The father testified that he had talked with the paternal grandmother and had told her he would need help with the children if he obtained custody. He explained that the

children had special needs and that the paternal grandmother's availability while he and his current wife, whom he married in March 2016, worked would provide the children with structure and routine with a person whom they already knew and who was familiar with how to address their needs.

As to the mother, the father's testimony was that it was important to him that she be a part of the children's lives and to share in the raising of the children. He stated that she should not be kept from the children and that he would like for her to eventually move to Tennessee. However, he said, "[t]here is so many things that [the mother] needs to get straight in her life right now." When asked what role he wanted the mother to play in the children's lives, the father responded:

> "If I'm getting custody, [the mother] should be allowed supervised visitation for as long as she is on drugs. Now, if she seeks rehab and goes through rehab and mental health and stuff like that to get off the drugs and she can prove to the court system and the court system would allow--eventually allow--allow unsupervised visitation back, she could have that and it be more liberal. For now, as long as she is testing positive, it is limited to supervised. But I don't think--I think that, you know, the best thing is to make sure the kids still see her even though it is going to be supervised. The kids need to be in her life."

There are other examples in the juvenile court's findings that are unsupported by the evidence. For example, the juvenile court stated in the judgment that the father met his current wife "on the internet." The record shows that, when asked where he met his wife, the father testified that he had gone to high school with her, that her mother was a friend of his mother, and that they "had been bridesmaids." He said that his wife's family used to come to his parents' house and that he used to babysit for his wife's little sister, adding: "I have known my wife for a very long time." We could locate a source of the juvenile court's finding only in the maternal grandparents' brief to that court, which reads: "After moving to Tennessee to live with the girlfriend he met over the Internet, the father has had very little contact with the children." Additionally, we note that, in the initial order granting the maternal grandparents custody of the children, the father was limited to visitation to which the maternal grandparents agreed. A subsequent order entered after the father requested specified visitation allowed the father to exercise visitation supervised by the maternal grandmother on

alternating weekends. The record demonstrates that the father has exercised that visitation as scheduled.

Furthermore, the evidence shows that, after the father moved to Tennessee and before the maternal grandparents filed their dependency petition, he spent at least one weekend a month with the children. He also spoke to the children on the telephone several times a week. In addition, the children and the mother had spent extended vacations with the father. The evidence demonstrates that, in March 2016, the father had taken them on an 11-day trip to Gatlinburg, Tennessee, during which he and his current wife married. He also took the children on a nearly weeklong trip to Kentucky to visit an amusement park, visited a beach in South Carolina with the children, and spent four to five days with the children during Thanksgiving 2016 and a week to ten days with the children during Christmas 2016.

In making its factual findings, the juvenile court overlooked much of the evidence favorable to the father. In addition to the evidence discussed above, the record indicates that, except for the period between his hospitalization in May 2014 and August 2014, when he returned to his previous

position with the Alabama Department of Transportation, the father has maintained continuous employment. He moved to Franklin, Tennessee, in October 2015, when he obtained a job with the Tennessee Department of Transportation. At the time of the trial, the father had a commercial driver's license and drove a freight truck for Ryder Logistics Company in Nashville. He testified that his route took him only around Nashville and that his work hours were from 3:00 a.m. to 11:00 a.m. The father said that he never had to spend the night on the road, so he would be available for the children. He said that he now earns approximately $40,000 a year with Ryder, which is approximately twice as much as he earned working for the states of Alabama and Tennessee. In its judgment, the juvenile court wrote that the maternal grandparents had "expressed a concern that because of stress due to the enormous amount of time and attention that the children require, the father would not be able to handle the same due to his psychological condition potentially resulting in another psychotic breakdown." However, as discussed, there is no evidence indicating that the father has displayed symptoms

of mental illness since leaving outpatient care in December 2014.

The maternal grandparents had the burden of demonstrating that the children were dependent by clear and convincing evidence. § 12-15-311(a), Ala. Code 1975. This court has stated that clear and convincing evidence is

> "'"[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."
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> "'§ 6-11-20[(b)](4), Ala. Code 1975.'
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> "L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002)."

L.A.C. v. T.S.C., 8 So. 3d 322, 327 (Ala. Civ. App. 2008).

Our job is not to reweigh the evidence. Instead, our duty is to determine 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. Ex parte

T.V., 971 So. 2d 1, 9 (Ala. 2007); K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016).

Based on our review of the record, we conclude that clear and convincing evidence does not support the findings the juvenile court relied upon in determining that the father is unfit and that the children are dependent, at least as to him, and that those findings are plainly and palpably wrong. Indeed, in considering the record as a whole, we conclude that the evidence is insufficient to justify the juvenile court's judgment as to the father. Accordingly, we have no choice but to reverse the judgment to the extent it finds the father is unfit to maintain custody of the children.

The judgment finding the children dependent as to the father and awarding custody to the maternal grandparents is reversed. We remand the causes to the juvenile court for it to enter a judgment consistent with this opinion.

2170136 -- REVERSED AND REMANDED.

2170137 -- REVERSED AND REMANDED.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.