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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2011

2100466

D.E.F.

v.

L.M.D.

Appeal from Baldwin Juvenile Court
(JU-08-707.03)

THOMPSON, Presiding Judge.

D.E.F. ("the father") is the father of L.L.F. ("the child"). Following his birth in June 2008, the child resided

for a time in the home the father shared with his wife, R.F., and her three children from a previous relationship.[1]

On October 31, 2008, the child and R.F.'s three children were taken into protective custody following allegations that the father and R.F. had physically abused some or all of the children in the home. The Baldwin County Department of Human Resources ("DHR") then filed in the juvenile court a petition alleging, in pertinent part, that the child was dependent. On December 8, 2008, the juvenile court entered an order in which it found the child dependent and awarded temporary legal and physical custody of the child to DHR.

Following a hearing, the juvenile court, on December 17, 2008, entered a judgment in which it found the child dependent, placed the child "in the legal and physical custody of [J.E.D.] and [L.M.D.]," and specified that "[t]his case is hereby closed and DHR is relieved of supervision on this case." The father did not appeal that judgment.

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[1]R.F. is not the mother of the child. The record and briefs before this court do not indicate that the child's mother, although served with process, has been involved in any of the litigation concerning the child.

On February 5, 2009, the father filed in the juvenile court a Rule 60(b), Ala. R. Civ. P., motion seeking relief from the December 17, 2008, judgment. The juvenile court granted the motion on March 16, 2009. J.E.D. and L.M.D. filed a petition for a writ of mandamus in this court challenging the March 16, 2009, order setting aside the December 17, 2008, judgment. The father did not respond to the petition for a writ of mandamus filed in this court. On May 7, 2009, this court entered an order granting the petition for a writ of mandamus. Ex parte J.D., 51 So. 3d 1134 (Ala. Civ. App. 2009) (table).

Thereafter, on July 8, 2009, the father filed in the juvenile court a petition seeking to modify the December 17, 2008, judgment. The father alleged that the child was "currently in the legal and physical custody" of J.E.D. and L.M.D. and that a material change of circumstances had occurred warranting an award of custody of the child to him. J.E.D. and L.M.D. answered and opposed the father's custody-modification action.

The juvenile court received ore tenus evidence over the course of four days between July 2010 and December 2010. At

the conclusion of the father's presentation of evidence, J.E.D. and L.M.D. orally moved for a judgment as a matter of law, arguing that the father had not met his evidentiary burden. The child's guardian ad litem joined the motion for a judgment as a matter of law. The juvenile court orally granted the motion during the hearing. Later, on January 12, 2011, the juvenile court entered a judgment denying the father's modification petition on the basis that the father had not met his burden of proof in support of his petition to modify custody. The father timely appealed that portion of the judgment entered in favor of L.M.D.; the father did not appeal the judgment as it pertained to J.E.D.[2]

A recitation of the evidence presented at the ore tenus hearing is not necessary to resolve the issues raised on appeal. The two arguments asserted by the father in his brief submitted to this court each involve only legal issues. "When

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[2]The father filed his notice of appeal after the juvenile court's oral ruling but before the entry of the January 12, 2011, final judgment. The father's notice of appeal is deemed timely filed. See Hood v. Hood, 23 So. 3d 1160, 1162 (Ala. Civ. App. 2009) ("The ... notice of appeal is deemed to have been held in abeyance until the entry of that final judgment, see Rule 4(a)(4), Ala. R. App. P., and the appeal is timely.").

this court is presented with a question of law in a child-custody case, we review the judgment of the trial court de novo, without affording it any presumption of correctness." C.B. v. B.B., 998 So. 2d 489, 491 (Ala. Civ. App. 2008) (citing Patrick v. Williams, 952 So. 2d 1131, 1138 (Ala. Civ. App. 2006), and Barber v. Moore, 897 So. 2d 1150, 1153 (Ala. Civ. App. 2004)).

The father first argues that the juvenile court applied an incorrect legal standard. Specifically, the father contends that the juvenile court erred in requiring him to meet the evidentiary burden established in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984). This court has explained:

> "In Ex parte McLendon, ... our supreme court held that the proper standard to be applied in child-custody cases wherein a parent has either voluntarily forfeited custody or has lost custody due to a prior judgment is whether there has been a material change in circumstances since the prior judgment; whether a change in custody will materially promote the best interests of the child; and whether the benefits of the change in custody will more than offset the inherently disruptive effect caused by uprooting the child. 455 So. 2d [863,] 865 [(Ala. 1984)]."

Barber v. Moore, 897 So. 2d at 1153. The father argues that, rather than the McLendon standard, the juvenile court should have applied the best-interests-of-the-child standard

applicable in dependency actions. See B.S.L. v. S.E., 826 So. 2d 890, 892-93 (Ala. Civ. App. 2002) (the best-interests-of-the-child standard applies in a dependency action); and O.L.D. v. J.C., 769 So. 2d 299, 302 (Ala. Civ. App. 1999) (same).

This court has held, however, that when a juvenile court has entered a judgment awarding custody of a dependent child to a relative, a parent seeking to modify that custody order must meet the McLendon standard in order to regain custody of the child. J.W. v. C.B., 56 So. 3d 693, 699 (Ala. Civ. App. 2010); M.B. v. S.B., 12 So. 3d 1217, 1219-20 (Ala. Civ. App. 2009). L.M.D. argues that the father "either voluntarily forfeited custody or has lost custody due to a prior judgment," i.e., the December 17, 2008, judgment. See Barber v. Moore, 897 So. 2d at 1153. Therefore, she contends, the father was required to meet the McLendon standard.

The father does not dispute the existence of the December 17, 2008, judgment or that it awarded J.E.D. and L.M.D. legal and physical custody of the child. Rather, on appeal, he disputes the validity of that prior judgment. However, as already indicated, the father did not appeal the December 17, 2008, judgment, and, in his February 2009 Rule 60(b) motion,

the father asserted the same arguments concerning that judgment that he currently asserts before this court. Although the juvenile court granted the father's Rule 60(b) motion, J.E.D. and L.M.D. successfully petitioned this court for a writ of mandamus with regard to that ruling. Accordingly, this court's May 7, 2009, order granting the petition for a writ of mandamus and directing the juvenile court to vacate its March 16, 2009, order became the law of the case. Ex parte King, 821 So. 2d 205, 209 (Ala. 2001). Even assuming that the father had, in the current action, again challenged the validity of the December 17, 2008, judgment, the juvenile court would have been without authority to ignore the effect of that judgment.[3] Ex parte King, supra.

The juvenile court properly concluded that the father was required to meet the McLendon standard in order to modify the December 17, 2008, judgment awarding custody of the child to J.E.D. and L.M.D. Accordingly, we cannot say that the father

[3]In the current modification action, the father did not file a claim seeking to vacate the December 17, 2008, judgment. Although the father arguably attempted to try that issue by the implied consent of the parties pursuant to Rule 15(b), Ala. R. Civ. P., given our conclusion that the claim was barred by the doctrine of law of the case, this court need not determine whether he properly did so.

has demonstrated error with regard to this issue. We note that the father has not argued on appeal that the juvenile court erred in determining that he had not met his evidentiary burden under Ex parte McLendon, supra. Accordingly, that argument is waived. Pardue v. Potter, 632 So. 2d 470, 473 (Ala. 1994) ("Issues not argued in the appellant's brief are waived.").

The father also argues on appeal that he should not be required to meet the McLendon standard because, he says, the stringency of that standard violates public policy by creating a barrier to the reunification of a parent and a child. The father asks this court to "revisit current laws and standards relating to custody as they violate public policy." The precedent the father would have this court overrule is not confined to the holdings of this court, but also encompasses opinions from the Alabama Supreme Court. See, e.g., Ex parte McLendon, 455 So. 2d at 865 (stating that "[a] natural parent has a prima facie right to the custody of his or her child. However, this presumption does not apply after ... a prior [judgment] removing custody from the natural parent and awarding it to a non-parent."). This court is bound by the

precedent established by our supreme court. § 12-3-16, Ala. Code 1975 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals ...."); Farmers Ins. Exch. v. Raine, 905 So. 2d 832, 835 (Ala. Civ. App. 2004) ("Although the supreme court might choose to revisit this issue, this court is bound by precedent ...."). Thus, even if we agreed with the father that the Ex parte McLendon standard somehow interferes with his reunification with the child, we may not overrule precedent established by our supreme court.

AFFIRMED.

Pittman, Bryan, and Thomas, JJ., concur.

Moore, J., concurs in the result, with writing.

MOORE, Judge, concurring in the result.

I concur in the result. I write specially to explain why, in this case, the custody-modification standard established in Ex parte McLendon, 455 So. 2d 863 (Ala. 1984), does not conflict with the public policy favoring reunification of a dependent child with his or her natural parents. See § 12-15-312, Ala. Code 1975.

Section 12-15-101(b)(3), Ala. Code 1975, a part of the Alabama Juvenile Justice Act ("the AJJA"), § 12-15-101 et seq., Ala. Code 1975, establishes a goal for juvenile courts to

> "reunite a child with his or her parent or parents as quickly and as safely as possible when the child has been removed from the custody of his or her parent or parents unless reunification is judicially determined not to be in the best interests of the child."

In pursuit of that goal, once a child is removed from the family home for protective purposes, juvenile courts commonly order state child-welfare agencies to use reasonable efforts to assist the family in correcting the conduct, conditions, or circumstances that endangered the child so as to allow for family reunification. See generally R.T.B. v. Calhoun Cnty.

Dep't of Human Res., 19 So. 3d 198, 204 (Ala. Civ. App. 2009).

To safeguard the child during that rehabilitation and reunification process, the juvenile courts must provide for some alternative custodial arrangement involving temporary placement of the child with a nonparent. See generally J.B. v. Cleburne Cnty. Dep't of Human Res., 992 So. 2d 34 (Ala. Civ. App. 2008). However, a judgment awarding a nonparent such "temporary protective custody" during the parental-rehabilitation and family-reunification process does not constitute a final disposition of the custody of the dependent child. See S.P. v. E.T., 957 So. 2d 1127, 1131-32 (Ala. Civ. App. 2005) (explaining that dependency proceedings often involve a series of appealable temporary custody orders before a final "permanent" dispositional judgment is entered).

> "[W]hen a juvenile court places a child in the custody of a nonparent during the rehabilitation period, the transfer of custody is not intended to be so long-lasting that the child is expected to lay down roots and stabilize in the custody of the nonparent; rather, it is designed to be a temporary protective measure to safeguard the child until either the parent can safely resume custody or, reunification efforts having failed, some other permanent disposition of the [custody of the] child may be made."

J.B., 992 So. 2d at 48 (Moore, J., dissenting).

Viewing this process properly, i.e., as an aid to family reunification, it naturally follows that a judgment awarding a nonparent temporary protective custody of a dependent child should be modifiable when the need for family separation no longer exists. Hence, as I explained at length in my dissent in J.B., 992 So. 2d at 47-50, a parent should be able to reclaim a child from temporary protective custody in a dependency proceeding upon proof that the best interests of the child would be thereby served unless the party resisting the resumption of parental custody proves by clear and convincing evidence that the child remains dependent and that reasonable efforts to rehabilitate the parent and reunite the family have not succeeded.[4] J.B., 992 So. 2d at 50 (Moore, J., dissenting). Once a parent has established his or her fitness to resume custody, that parent should not have to bear

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[4]In J.B., the Cleburne County Department of Human Resources held legal custody of the child at the time the parents petitioned to regain custody of the child. Hence, I wrote that "the state" bears the burden of proving continuing dependency and the failure of reasonable efforts to reunite the family. 992 So. 2d at 50 (Moore, J., dissenting). I believe the same standard should apply when an individual nonparent holds temporary protective custody of a child in the same context.

the burden of further proving that a return to parental custody would materially promote the best interests and welfare of the child so that "'[t]he positive good brought about by the modification ... more than offset[s] the inherently disruptive effect caused by uprooting the child.'" McLendon, 455 So. 2d at 865 (quoting Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976)).

On the other hand, when a juvenile court enters a final dispositional judgment ending the dependency of the child, see S.P., 992 So. 2d at 1131 (noting that dependency ends when a juvenile court awards custody to a proper custodian in a "final" dispositional judgment and the child is no longer in need of the care or supervision of the State), that judgment implies a judicial determination that family reunification no longer serves the best interests of the dependent child, effectively ending the parental-rehabilitation and family-reunification process. Y.N. v. Jefferson Cnty. Dep't of Human Res., [Ms. 2090832, Jan. 14, 2011] ___ So. 3d ___, ___ (Ala. Civ. App. 2011) (Moore, J., concurring in the result). At that point, any presumption in favor of parental custody dissolves, see generally M.A.J. v. S.B., [Ms. 2100084, June

24, 2011] ___ So. 3d ___, ___ (Ala. Civ. App. 2011), and the law shifts its focus from preserving family integrity to securing the safety and stability of the child in the new custodial arrangement. A final dispositional judgment necessarily intends that the child will stabilize in his or her new home environment and develop "'those roots necessary for the child's healthy growth into adolescence and adulthood.'" McLendon, 455 So. 2d at 863 (quoting Wood v. Wood, 333 So. 2d at 828). Accordingly, after the entry of a final dispositional judgment in a dependency proceeding, a parent can no longer rely on the general public policy in favor of family reunification. However, as a long line of cases have held, correctly so, a parent may then reclaim custody of the child only by meeting the McLendon standard, i.e., by proving a material change of circumstances since the entry of that judgment that demonstrate that the best interests and welfare of the child would be materially promoted by returning the child to the custody of the parent. See, e.g., S.B.L. v. E.S., 865 So. 2d 1214 (Ala. Civ. App. 2003); A.H. v. R.M., 793 So. 2d 799 (Ala. Civ. App. 2001; and In re F.W., 681 So. 2d 208, 211 (Ala. Civ. App. 1996).

Having carefully considered the terms of the December 17, 2008, judgment entered by the Baldwin Juvenile Court ("the juvenile court"), and the circumstances surrounding its rendition, I conclude that that judgment constitutes a final disposition of the custody of a dependent child that may be modified only by satisfying the McLendon standard.

D.E.F. ("the father") contends that the judgment arose from an agreement between himself and L.M.D. and J.E.D. at a time when the Baldwin County Department of Human Resources ("DHR") had established a permanency plan to reunite L.L.F. ("the child") with the father. According to the father, he did not want the child to be in a foster home with strangers during the reunification process, so he agreed with L.M.D. and J.E.D. that they would assume custody of the child only temporarily and that they would cooperate with the father in his efforts to rehabilitate himself and reunite with the child.[5] However, the record reflects that the December 17, 2008, judgment resulted from an agreement recited by the parties in open court on December 15, 2008. Pursuant to that agreement, the father stipulated to the dependency of the

[5]L.M.D. and J.E.D. dispute that contention.

child, which DHR had alleged resulted from physical abuse by the father and R.F., the child's stepmother, and consented to L.M.D. and J.E.D.'s assuming custody of the child. Despite specific questioning by the juvenile court as to any undisclosed terms, the father did not reveal that the parties intended that custody to be temporary while the father rehabilitated himself. On the other hand, the father explicitly agreed that DHR would maintain custody of the child's three stepsiblings, that DHR would use reasonable efforts to reunite those children with the father and R.F., and that their dependency cases would remain open and subject to review in three months.

The December 17, 2008, judgment, which was expressly intended to incorporate the agreement of the parties, clearly does not indicate in any manner that the award of custody to L.M.D. and J.E.D. was intended only for temporary protective purposes while the father underwent rehabilitation or DHR used reasonable efforts to reunite the child with the father. On its face, the judgment terminates the dependency action by awarding unconditional legal and physical custody of the child to L.M.D. and J.E.D., closing the case, and relieving DHR of

any further supervision over the matter. See G.M. v. T.W., [Ms. 2100273, July 8, 2011] ___ So. 3d ___, ___ (Ala. Civ. App. 2011) (holding that judgment that indicated "[f]ile closed" and that relieved county department of human resources of supervision terminated dependency proceeding). If the father believed that the December 17, 2008, judgment erroneously failed to incorporate the entirety of the oral agreement reached by the parties in open court, the father should have moved to set aside the judgment within 14 days, see Rule 1(B), Ala. R. Juv. P., which he did not.[6] As a

[6]In February 2009, the father did file a Rule 60(b), Ala. R. Civ. P., motion seeking to have the judgment vacated, but that motion was not based on any error committed by the juvenile court in drafting the judgment. In his Rule 60(b) motion, the father maintained that L.M.D. had defrauded him into agreeing to the entry of the December 17, 2008, judgment by falsely stating that she would cooperate with him in his efforts to reunite with the child when she had no intention of doing so. At the hearing on the motion, the father presented no evidence to prove his fraud allegations; nevertheless, the juvenile court granted the motion based on its conclusion that its decision to treat the child differently from his three stepsiblings had violated the due-process rights of the child, a theory not advanced by the father in his Rule 60(b) motion and not proven by any evidence in the record. This court issued a writ of mandamus to the juvenile court to vacate its order granting the Rule 60(b) motion, Ex parte J.D., 51 So. 3d 1134 (Ala. Civ. App. 2009) (table), thus reinstating the December 17, 2008, judgment. Our issuance of the writ of mandamus does not in any way preclude the father from arguing the nature of the restored judgment and its effect on his

result, the unambiguous terms of that judgment bind the father and the court system as to the nature of the custody awarded to L.M.D. and J.E.D.

Because of the ramifications it has on the family unit, a final dispositional judgment awarding custody of a dependent child to a nonparent cannot be entered lightly. All manner of procedures are instituted in dependency proceedings to assure that parents are not deprived of the custody of their children without notice and a meaningful and fair opportunity to contest the action. See, e.g., § 12-15-305, Ala. Code 1975 (requiring appointment of counsel for indigent parents in dependency proceedings). Substantively, the law requires clear and convincing evidence of the continuing dependency of the child. See generally D.M.P. v. State Dep't of Human Res., 871 So. 2d 77 (Ala. Civ. App. 2003) (authored by Murdock, J., with Crawley, J., concurring, and Yates, P.J., and Thompson and Pittman, JJ., concurring in the result). During a dependency proceeding, out of respect for the fundamental right to family integrity, a parent is entitled to strict observance of those procedural and substantive safeguards.

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burden of proof in his subsequent custody-modification action.

See Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents ...."). Accordingly, such a judgment ordinarily reflects a careful and considered determination that the family relationship must be disintegrated in order to protect the child from harm.

In this case, the father, by stipulating to the dependency of the child, basically agreed that the child was in danger of physical abuse if returned to the family home. By consenting to the unconditional award of custody of the child to L.M.D. and J.E.D., the father essentially agreed that it was not in the child's best interests to reunite with the family. In other words, the father waived his rights under the AJJA and consented to a judgment adverse to his right to pursue family reunification. That judgment carries the same weight as any other final dispositional judgment entered without the consent of a parent. See generally Sanders v. First Bank of Grove Hill, 564 So. 2d 869, 872 (Ala. 1990) ("[A] consent judgment is generally entitled to the same conclusive effect as a judgment on the merits."). Because it

was judicially established in the dependency proceedings that the goal of family reunification could not be achieved, the father cannot rely on any principles favoring family reunification in his custody-modification action. Thus, the juvenile court did not violate public policy by applying the McLendon standard in this case, and its judgment is therefore due to be affirmed.