

Rel: January 7, 2022

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200740

K.C.B. and D.E.B.

v.

B.D.C.

**Appeal from Limestone Juvenile Court
(JU-21-16.01)**

THOMPSON, Presiding Judge.

On January 21, 2021, K.C.B. and D.E.B. ("the maternal grandparents"), the maternal grandparents of A.C.C. ("the child"), filed a

2200740

verified petition in the Limestone Juvenile Court ("the juvenile court") seeking to have the child declared dependent and an award of custody of the child. Allegations in the dependency petition and in motions filed by the maternal grandparents, as well as evidence in the record, indicate that the Limestone County Department of Human Resources had intervened in a 2017 divorce action in the Limestone Circuit Court ("the circuit court") involving the child's mother, B.D.C. ("the mother").¹ The maternal grandparents stated that, while the 2017 divorce action was pending, the child had suffered injuries, including "bruises on her face, back, arms, and buttocks," while in the mother's care and that the mother had refused or failed to explain how those injuries had occurred. In 2017, the circuit court entered a judgment in the divorce action that awarded the maternal grandparents custody of the child. The mother did not appeal that judgment.

The record indicates that, in January 2021, the circuit court entered a judgment determining that it had lacked jurisdiction to award custody

¹The child's father has not been identified in the record on appeal.

2200740

of the child to the maternal grandparents. That January 2021 judgment is not contained in the record on appeal, and the record does not indicate whether, in its January 2021 judgment, the circuit court vacated the 2017 divorce judgment insofar as it awarded custody of the child to the maternal grandparents.² After the entry of the January 2021 judgment, the maternal grandparents initiated this dependency action in the juvenile court, and the child remained in the custody of the maternal grandparents while the dependency action was pending.

At the May 20, 2021, hearing on the maternal grandparents' dependency petition, the juvenile court ruled that it would not allow the maternal grandparents to present evidence regarding the incident that had resulted in the child's being placed in their home and in the circuit court's award of custody of the child to them in 2017. The maternal grandparents attempted to make an offer of proof regarding the underlying facts of that incident and sought to offer photographs depicting

²It does not appear that the maternal grandparents appealed the January 2021 judgment. This court does not address whether the circuit court had jurisdiction to enter the 2017 judgment awarding custody award to the maternal grandparents.

2200740

the injuries the child had suffered as a result of the incident . The juvenile court refused to allow the maternal grandparents to make that offer of proof, as demonstrated in the following exchange between the juvenile-court judge and counsel for the maternal grandparents:

"THE COURT: Let me stop you. I don't want to hear -- I mean, I'm sustaining their objection that it's not admissible.

"[COUNSEL FOR MATERNAL GRANDPARENTS]: Yes, your Honor, I understand, but if I don't do this under an offer of proof, then it is not preserved in the record should my clients decide to appeal if it goes against them in the judgment.

"THE COURT: But you're about to tell me what your evidence would have shown.

"[COUNSEL FOR MATERNAL GRANDPARENTS]: That's what I'm supposed to do, your Honor. The caselaw tells me I have to do that. You can't consider it.

"THE COURT: But I just said it's not admissible.

"[COUNSEL FOR MATERNAL GRANDPARENTS]: Yes, sir, I understand that.

"THE COURT: And so, I can't hear it. And I don't want to hear it. So I'm going to stop you. I mean, I appreciate where you're headed, but I can't -- let's move on.

"[COUNSEL FOR MATERNAL GRANDPARENTS]: Well then. I'll just say that for the nine photographs that we would

2200740

have liked to have introduced, your Honor, we would say that those would be proof of dependency and proof of abuse. And that will be our offer of proof, Judge, without going into what the photographs show.

"THE COURT: All right. Fair enough.

"[COUNSEL FOR MATERNAL GRANDPARENTS]: Thank you. Judge.

"THE COURT: Your objection --

"[COUNSEL FOR MATERNAL GRANDPARENTS]: I'll put these aside.

"THE COURT: -- is well preserved."

The dependency hearing continued, and several witnesses testified. The juvenile court limited those witnesses to testifying about events occurring only within a few months of the initiation of the 2021 dependency action, i.e., a period when the mother had not had custody of the child.

On May 26, 2021, the juvenile court entered a judgment finding that the child was not dependent and that custody was to be returned to the mother. The maternal grandparents filed a postjudgment motion. The juvenile court denied the maternal grandparents' postjudgment motion,

2200740

stating that "the Court does not find the evidence of alleged unexplained injuries sustained by the minor child many years ago to be relevant in consideration of whether the child currently meets the definition of a dependent child." The maternal grandparents filed a timely notice of appeal to this court.

The maternal grandparents first argue that the juvenile court erred in refusing to allow them to make an offer of proof regarding evidence pertaining to the alleged injuries to the child while she was in the mother's care. The purposes of an offer of proof are to allow the trier of fact to determine the admissibility of the evidence and to allow the party seeking to introduce the evidence to preserve any error with regard to the ruling on that issue for appellate review.

"The primary reason for the offer of proof is that it better enables the trial judge to consider further the claim for admissibility of such evidence. The secondary reason is that the offer of the proposed [evidence] places the same in the official record for the benefit of the appellate court called upon to decide whether there has been error committed in the ruling.' "

Ex parte Harris, 461 So. 2d 1332, 1334 (Ala. 1984) (quoting Charles W. Gamble, McElroy's Alabama Evidence § 425.01(1) (3d ed. 1977)). "An offer

2200740

of proof generally consists of the attorney's stating to the judge what the witness would say if permitted to answer the question and what relevancy the expected answer would possess." 3 Charles W. Gamble et al., McElroy's Alabama Evidence § 425.01(1) (7th ed. 2020). See also Davis v. Davis, 474 So. 2d 654, 656 (Ala. 1985) (holding that an offer of proof is necessary to preserve the issue for appeal and stating that, "[w]hen the question does not show on its face the answer that will be given, and that such would be relevant, there must be an offer of proof made for appeal purposes." Charles W. Gamble, [McElroy's Alabama Evidence at § 425.01(4) [3d ed. 1977]."); and Fitch v. State, 851 So. 2d 103, 124 (Ala. Crim. App. 2001) (noting that "an offer of proof was necessary to discern the relevancy of the [evidence the defendant had] sought to admit" in the trial court).

Generally, an offer of proof is required to preserve for appellate review the issue of the correctness of a ruling that excludes evidence. Kilcrease v. John Deere Indus. Equip. Co., 663 So. 2d 900, 902 (Ala. 1995) (citing Walton v. Walton, 409 So. 2d 858, 861 (Ala. Civ. App. 1982)); Thompson v. Patton, 6 So. 3d 1129, 1138 (Ala. 2008); Harbert v. Harbert,

2200740

721 So. 2d 224, 225 (Ala. Civ. App. 1998); see also Ex parte Fields, 382 So. 2d 598, 599 (Ala. 1980) ("As a general proposition, the party asking a question to which an objection has been sustained must be given the opportunity to make an offer of proof stating the answer expected to be given."). However, if "the substance of the evidence ... was apparent from the context within which questions were asked," Rule 103(a)(2), Ala. R. Evid., an offer of proof is not required. Kilcrease v. John Deere Indus. Equip. Co., 663 So. 2d at 902. "'Where the relevancy of evidence is not self-evident, the proponent of it must make an offer of proof explaining its relevancy in order to preserve error.'" Hennis v. Hennis, 977 So. 2d 520, 526 (Ala. Civ. App. 2007) (quoting Systrends, Inc. v. Group 8760, LLC, 959 So. 2d 1052, 1064 (Ala. 2006)).

In this case, the juvenile court determined, without considering an offer of proof regarding the content of the evidence, that the evidence sought to be introduced by the maternal grandparents was too remote in time to be relevant to the issue of the child's dependency. In making that determination, the juvenile court noted that, under Alabama law, a child must be dependent at the time of the entry of a judgment finding the child

2200740

dependent and making a custody disposition. M.D. v. S.C., 150 So. 3d 210, 212 (Ala. Civ. App. 2014). In reaching that conclusion, the juvenile court apparently erroneously concluded that only a parent's current condition pertains to the issue of a child's dependency. However, in addition to considering a parent's current circumstances, in determining whether a child is dependent a juvenile court may consider the family's history. Ex parte H.A.S., 308 So. 3d 533, 542 (Ala. Civ. App. 2020). This court has stated that "[e]vidence of a parent's past conduct is admissible if it assists the juvenile court in assessing and weighing the evidence regarding current conditions, but evidence of past conditions cannot be the sole basis for finding a child to be dependent." J.P. v. D.P., 260 So. 3d 862, 872 (Ala. Civ. App. 2018).

The arguments of the attorneys before the juvenile court, and statements made by the juvenile-court judge, indicate that the maternal grandparents sought to prove that the mother had caused or allowed injuries to the child, that she then had failed or refused to explain those injuries, that she still posed a danger for failing to make that explanation, and that the mother's circumstances remain the same as when the alleged

2200740

abuse occurred. Such an offer of proof would enable the juvenile court to reconsider its evidentiary ruling, as well as assist this court in determining the correctness of a ruling excluding the evidence. A trier of fact must "hear the offer of proof in order to rule on its admissibility"; the offer of proof itself is not evidence. Sullivan v. State Pers. Bd., 679 So. 2d 1116, 1118 (Ala. Civ. App. 1996).³

The juvenile court erred in denying the maternal grandparents' request to make an offer of proof and for concluding, without considering the offer of proof, that the evidence the maternal grandparents sought to introduce was inadmissible. Sullivan v. State Pers. Bd., supra; Headley

³We further note that the fact that it is undisputed that the child suffered injuries that resulted in bruising on much of her body is not sufficient, under the facts of this dependency action, to warrant the application of the exception to the requirement of making an offer of proof because "the evidence ... was apparent from the context within which questions were asked." Rule 103(a)(2), Ala. R. Evid.; See also Kilcrease v. John Deere Indus. Equip. Co., 663 So. 3d 900, 902 (Ala. 1995). The nature and severity of those injuries are not clear from the context of the allegations, and the photographs and testimony of the parties would provide that evidence. Further, the juvenile court, in determining dependency, is in the best position to evaluate the reason, if any, provided by the mother for her failure or refusal to explain the injuries to the child that occurred while the child was in her care.

2200740

v. State, 55 Ala. App. 303, 305, 314 So. 2d 905, 907 (Crim. App. 1975).

Accordingly, we reverse the judgment and remand the cause for further proceedings. We pretermitt discussion of the other issues raised in the maternal grandparents' brief.

REVERSED AND REMANDED.

Hanson and Fridy, JJ., concur.

Moore and Edwards, JJ., concur in the result, without writings.