REL: 1/21/11

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2090831

D.B. and J.R.B.

v.

K.B., L.B., Jr., C.T.H., and the Calhoun County Department of Human Resources

Appeal from Calhoun Juvenile Court
(JU-09-606.01 and JU-06-43.02)

BRYAN, Judge.

On November 17, 2009, the Calhoun County Department of Human Resources ("DHR") filed a petition in the Calhoun Juvenile Court ("the juvenile court") alleging that C.J.H. and

S.H. (collectively referred to hereinafter as "the children") were dependent because they did not have a parent or guardian able to provide for their support, training, or education. DHR further alleged that T.H., the father of the children ("the father"), had killed W.H., the mother of the children ("the mother"), and that the father had then committed suicide. DHR also filed a motion for ex parte temporary custody of the children; that motion was granted by the juvenile court the same day.

Shortly thereafter, C.T.H., the brother of the children ("the brother"); K.B., the children's maternal aunt ("the maternal aunt"), and L.B., Jr., the children's maternal uncle ("the maternal uncle"); and D.B., the children's paternal aunt ("the paternal aunt"), filed separate petitions to intervene in DHR's dependency action. The brother, the maternal aunt and the maternal uncle, and the paternal aunt all sought custody of the children. The paternal aunt alleged that DHR had placed the children in her custody shortly after the deaths of the mother and the father. The paternal aunt's petition for custody was later amended to add the paternal aunt's husband, J.R.B. ("the paternal uncle"), as a

petitioner. The juvenile court subsequently ordered DHR to perform a home study of the residences of the brother, the maternal aunt and the maternal uncle, and the paternal aunt and the paternal uncle.

On May 3, 2010, the juvenile court entered an order finding the children dependent. The juvenile court awarded custody of the children to the paternal aunt,[1] awarded the brother "liberal" visitation with the children, and awarded the maternal aunt and the maternal uncle specific visitation with the children, including: 4 days during Thanksgiving holidays in even-numbered years; 1 week during Christmas holidays; 3 consecutive weeks during the summer; every weekend that the children have the following Monday off of school; and any time the maternal aunt and the maternal uncle were in Anniston for two consecutive days, provided they give the paternal aunt 48 hours notice of the visit. The juvenile court also ordered DHR "to supervise for a period of ... 12 months from the date of entry of this [o]rder," and it held that "DHR shall provide counseling and all other services as

[1]The juvenile court's order awarded custody solely to the paternal aunt; the juvenile court did not mention the paternal uncle in its custody award.

may be necessary." The juvenile court, in its judgment, required the paternal aunt to

> "keep the child[ren] in the school of [her] choosing, but because th[e] child[ren are] accustomed to going to a public school and being involved in both classes with other non-related children and in public school related extracurricular activities, the [paternal aunt] shall not home school th[e] child[ren] for a minimum of one full school year in order to provide the child[ren] with as much normalcy as possible, due to the turmoil the child[ren] ha[ve] endured."

The paternal aunt subsequently filed a motion to alter, amend, or vacate the judgment pursuant to Rule 59, Ala. R. Civ. P.[2] In her motion, the paternal aunt argued that the juvenile court's judgment required her to keep the children in public school for one year, and she argued that such a provision was "unconstitutional as it takes away the custodial guardian's right to direct the upbringing and education for the ... children under her control." She also argued that the provision in the judgment that ordered DHR to supervise the custodial arrangement for one year was "invalid and unconstitutional as it places undue state interference into the life of a fit custodial guardian." Finally, the paternal

[2]The paternal uncle did not join in the postjudgment motion.

aunt argued that the visitation award to the maternal aunt and the maternal uncle was invalid because the maternal aunt and the maternal uncle had not requested an award of visitation with the children, because there is no law that allows for visitation by an aunt and an uncle, and because the maternal aunt and the maternal uncle lacked standing to assert visitation rights with the children. The juvenile court denied the paternal aunt's postjudgment motion. The paternal aunt and the paternal uncle timely appealed; because the juvenile court awarded custody solely to the paternal aunt, we will address the appellant's arguments as they relate to the paternal aunt.[3]

On appeal, the paternal aunt raises three issues for this court's review, which she frames as follows: (1) whether the provision in the judgment that, she alleges, requires her to keep the children in public school for one year is unconstitutional; (2) whether the provision in the judgment that ordered DHR to supervise the custodial arrangement for

[3]The paternal uncle is listed as an appellant. However, as noted earlier, the juvenile court did not award custody to the paternal uncle. See supra note 1. We do not address whether the paternal uncle has standing to appeal.

one year is unconstitutional; and (3) whether the provision in the judgment allowing the maternal aunt and the maternal uncle visitation with the children was error.

Regarding the paternal aunt's first argument -- that the juvenile court's judgment is unconstitutional because it requires her to keep the children in public school for one year -- we note that the juvenile court's judgment does not, in fact, require the paternal aunt to keep the children in public school for one year. The judgment specifically states that the paternal aunt may place the children in the school of her choosing but that, because of the emotional turmoil the children had experienced since the deaths of their parents, the paternal aunt could not homeschool the children for one year. At the trial in this matter, the paternal aunt stated that the children were excelling in public school and that she did not intend to homeschool the children. However, she did testify that she would like to enroll the children in a private school. Nothing in the juvenile court's judgment prohibits the paternal aunt from enrolling the children in private school. Accordingly, because there is no provision in the juvenile court's judgment that requires the paternal aunt

to keep the children in public school for one year, the paternal aunt's argument that such a provision is unconstitutional is not properly before this court.

Next, the paternal aunt argues that the requirement in the juvenile court's judgment that DHR supervise the custodial arrangement for one year is unconstitutional because it places undue state interference into the life of a fit custodial guardian. In support of her argument, the paternal aunt cites several general propositions of law from United States Supreme Court opinions such as Troxel v. Granville, 530 U.S. 57, 72-73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."), and Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). The paternal aunt argues that the evidence in the record reflected that she was a fit custodian and that, in the absence of evidence indicating that she was

unfit, the juvenile court violated her constitutional rights by requiring DHR to maintain a supervisory role in the case.

However, the paternal aunt has not clearly set forth the constitutional right that she allegedly possesses that would prohibit a juvenile court in a dependency action from requiring DHR to maintain a supervisory role for one year after the disposition of the custody of the children. Furthermore, the paternal aunt has failed to apply the general propositions of law cited in her brief in a manner that would demonstrate that the juvenile court violated her constitutional rights. See Beachcroft Props., LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004) ("Authority supporting only 'general propositions of law' does not constitute a sufficient argument for reversal."); and Elliott v. Bud's Truck & Auto Repair, 656 So. 2d 837, 838 (Ala. Civ. App. 1995) (citing Liberty Loan Corp. of Gadsden v. Williams, 406 So. 2d 988 (Ala. Civ. App. 1981)) ("This court does not presume error. In order for this court to consider an error asserted on appeal, that error must be affirmatively demonstrated by the record."). Accordingly, we affirm that part of the juvenile court's judgment that ordered DHR to

supervise the custodial arrangement for one year following the entry of the judgment.[4]

---

[4]We note that none of the cases relied on by Judge Moore in his dissent as to this issue, in which he asserts that the judgment of the juvenile court should be reversed as to this issue, are cited by the paternal aunt in her brief to this court. Our caselaw creates no exception for addressing constitutional arguments that are supported only by general propositions of law. See Limbaugh v. Limbaugh, 574 So. 2d 804, 805 (Ala. Civ. App. 1990) (affirming judgment of the trial court when the husband's general propositions of law cited regarding due process and civil rights were "not cited in such a way as to support the husband's contention of error on appeal"). Reversing the judgment of the juvenile court based on arguments that are not contained in the paternal aunt's brief on appeal unfairly penalizes the appellees by denying them an opportunity to respond to those arguments. Although none of the appellees filed an appellate brief with this court, we cannot assume that they would not have done so had the paternal aunt properly argued the constitutional issues raised in her brief.

Furthermore, we conclude that the juvenile court had the authority to order DHR to supervise the custodial arrangement for one year under the provisions of § 12-15-314(a)(4), Ala. Code 1975. Because of the contentious nature of these proceedings, which was a direct result of the manner of the mother's death, the juvenile court could have concluded that the best interests of the children would be served by allowing DHR to maintain a supervisory role of the custodial arrangement for a definite period. See S.P. v. E.T., 957 So. 2d 1127, 1133 (Ala. Civ. App. 2005) (discussing the applicable custody-modification standard in ongoing dependency cases and stating that "it is not uncommon for a juvenile court to require that DHR remain involved in a case for various reasons and at various levels after the entry of a 'final' dispositional order" in order to further the best interest of a dependent child).

Finally, the paternal aunt argues that the juvenile court's award of visitation to the maternal aunt and the maternal uncle is error for several reasons: (1) because the maternal aunt and the maternal uncle did not seek visitation with the children as a form of alternate relief; (2) because there is no statutory basis for an award of visitation to an aunt and uncle; (3) because the maternal aunt and the maternal uncle lacked standing to petition for visitation with the children; and (4) because the amount of visitation awarded to the maternal aunt and the maternal uncle is contrary to the best interests of the children.[5]

Regarding the paternal aunt's first assertion of error regarding the award of visitation to the maternal aunt and the maternal uncle, the paternal aunt's argument consists of two sentences that state that the maternal aunt and the maternal

---

[5]We reject any assertion made by Judge Moore in his dissent as to this issue that the paternal aunt set forth an argument in her brief that the visitation provisions violate her constitutional right to decide visitation matters for the children. No such assertion is made by the paternal aunt in her brief on appeal. We can only assume that he considers two quotations taken from Troxel v. Granville, 530 U.S. at 72-73 and 78, with no argument whatsoever regarding the constitutionality of the award of visitation, as an "argument" sufficient to merit our consideration.

uncle did not file a petition for visitation and that they did not ask for visitation during the final hearing. The paternal aunt wholly fails to cite any authority to support her argument that the award of visitation should be reversed on those grounds. Accordingly, we will not address that argument. See Rule 28(a)(10), Ala. R. App. P.; and Watson v. Whittington Real Estate, LLC, 16 So. 3d 802, 809 (Ala. Civ. App. 2009) (when the appellant failed to cite any legal authority to support a particular issue raised on appeal, this court held that the "issue present[ed] no ground upon which we may reverse the trial court's judgment").

We will consider the paternal aunt's argument that there is no law that allows the maternal aunt and the maternal uncle to seek visitation with the children with the paternal aunt's argument that the maternal aunt and the maternal uncle lacked standing to petition for visitation with the children. We agree that the Alabama Legislature has not provided aunts and uncles a statutory right to an award of visitation with a niece or nephew in a typical custody proceeding. However, this case stems from a dependency proceeding, not a custody

proceeding.[6] In J.S.M. v. P.J., 902 So. 2d 89 (Ala. Civ. App. 2004), this court upheld an award of visitation to a nonparent who had filed a dependency petition seeking custody of the child, without specifically seeking an award of visitation, based in part on the authority of former § 12-15-71(a)(4), Ala. Code 1975, which authorized a juvenile court, after adjudicating a child to be dependent, to "[m]ake any other order as the court in its discretion shall deem to be for the welfare and best interests of the child." Although § 12-15-71(a)(4) was repealed by the Alabama Juvenile Justice Act ("the AJJA"), § 12-15-101 et seq., Ala. Code 1975, and renumbered in the AJJA at § 12-15-314(a)(4), Ala. Code 1975, effective January 1, 2009, see Act No. 2008-277, Ala. Acts 2008, § 12-15-314(a)(4) is nearly identical to former § 12-15-71(a)(4). See § 12-15-314(a)(4) (allowing a juvenile court, after adjudicating a child dependent, to "[m]ake any other order as the juvenile court in its discretion shall deem to be

[6]Although a dispositional custody award was entered, the juvenile court had authority to enter the custody award only because it determined that the children were dependent. See § 12-15-310, Ala. Code 1975 (if a juvenile court finds that a dependency petition has not been proven by clear and convincing evidence, the juvenile court must dismiss the petition).

for the welfare and best interests of the child"). In J.S.M., this court held that an award of visitation to the nonparent was appropriate after the child was adjudicated dependent "if the [juvenile] court determined such an award to be in the child's best interests." 902 So. 2d at 95. Accordingly, we conclude that, pursuant to § 12-15-314(a)(4), the juvenile court could have awarded the maternal aunt and the maternal uncle visitation with the children if the juvenile court determined that such an award was in the best interests of the children.

Therefore, we will now consider the paternal aunt's final argument that the record did not support a determination that an award of visitation to the maternal aunt and the maternal uncle was in the best interests of the children.

The record on appeal reveals the following. The maternal aunt and the maternal uncle live in Florala, Alabama, which is approximately four hours from the children's home in Anniston. The maternal aunt admitted that her family was not "close-knit" and that all of her sisters, including a sister that lived near the children, had "serious problems." The evidence indicated that, at the time of the mother's and the father's

deaths, the maternal aunt had met the children, who were approximately 8 years old and 10 years old, only on 1 prior occasion, approximately 3 months before the mother and the father died. The maternal uncle admitted that he did not meet the children until after the mother and the father died. However, the record indicated that the maternal aunt and the maternal uncle had been able to develop a relationship with the children during three visits arranged by Donna Crow, the children's counselor, and DHR. In its judgment, the juvenile court found that the maternal aunt and the maternal uncle "clearly love" the children and desire a relationship with them. That finding is supported by the evidence. The record indicates that DHR approved the home of the maternal aunt and the maternal uncle and that DHR had no safety concerns regarding their home.

Crow testified that she had recommended that visitation between the children and the maternal aunt and the maternal uncle be suspended after their third visit based on unspecified allegations made by the children. The maternal aunt and the maternal uncle testified that they had learned that their visits with the children had been suspended the day

before trial, and the maternal uncle stated that he was flabbergasted that their visitation had been suspended because he thought the visits had gone exceptionally well. Both the maternal aunt and the maternal uncle denied making any negative remarks about the paternal aunt during their visits with the children.

However, Crow testified that the children could resume visitation with the maternal aunt and the maternal uncle once the children felt that they were not going to be taken from the paternal aunt's home. Crow recommended that visits begin at her office and move to the paternal aunt's home, where the children could see the paternal aunt and the maternal aunt and the maternal uncle being friendly to one another. Although the record indicated that there were communication issues between the paternal aunt and the maternal aunt and the maternal uncle, the paternal aunt testified that she had no problem with the maternal aunt or the maternal uncle and that, if she were awarded custody, she would "open her doors" to the maternal aunt and the maternal uncle. The maternal aunt stated that, if she was not awarded custody of the children, she would like as much visitation with the children as the

paternal aunt would allow. The paternal aunt testified that she supported the children's having a relationship with the maternal aunt and the maternal uncle. The guardian ad litem of the children also stated that she hoped that the maternal aunt and the maternal uncle could become part of the children's lives.

This court's standard of reviewing visitation awards in a dependency action is well settled.

> "In awarding visitation rights relating to the disposition of a 'dependent child' pursuant to [former] § 12-15-71(a)[repealed by the AJJA and replaced by § 12-15-314(a)], the trial court is guided by the 'best interests of the child' standard. See [former] § 12-15-71(a)(4) [repealed by the AJJA and replaced by § 12-15-314(a)(4)] ('If a child is found to be dependent, the court may make any of the following orders of disposition to protect the welfare of the child: ... (4) Make any ... order as the court in its discretion shall deem to be for the welfare and best interests of the child.').
>
> > "'"'The determination of proper visitation ... is within the sound discretion of the trial court, and that court's determination should not be reversed absent a showing of an abuse of discretion.' Ex parte Bland, 796 So. 2d 340 (Ala. 2000). '[C]ases in Alabama have consistently held that the primary consideration in setting visitation rights is the best interests and welfare of the child. Furthermore, each child visitation case must be decided on its own facts and

> circumstances.' Fanning v. Fanning, 504 So. 2d 737, 739 (Ala. Civ. App. 1987) (citations omitted). 'When the issue of visitation is determined after oral proceedings, the trial court's determination of the issue will not be disturbed absent an abuse of discretion or a showing that it is plainly in error. Andrews v. Andrews, 520 So. 2d 512 (Ala. Civ. App. 1987).' Dominick v. Dominick, 622 So. 2d 402, 403 (Ala. Civ. App. 1993)."
>
> "'K.L.U. v. M.C., 809 So. 2d 837, 840-41 (Ala. Civ. App. 2001).'
>
> "K.L.R. v. L.C.R., 854 So. 2d [124,] 132[(Ala. Civ. App. 2003)]."

K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 387-88 (Ala. Civ. App. 2004).

Based on our review of the record, we cannot conclude that the juvenile court exceeded its discretion by awarding the maternal aunt and the maternal uncle visitation with the children. Although it was undisputed that the children did not have a close relationship with the maternal aunt or the maternal uncle before the mother and the father died, the juvenile court could have concluded, especially in light of the maternal aunt's testimony that her sister that lived near the children had serious problems, that it was in the best interests of the children to maintain ties to their deceased

mother's family through visitation with the maternal aunt and the maternal uncle.[7]

The paternal aunt also argues that the amount of visitation awarded to the maternal aunt and the maternal uncle was error because it was contrary to Crow's recommendation that visitation begin in an environment where the children felt safe. Although the juvenile court awarded the maternal aunt and the maternal uncle considerable visitation with the children, the juvenile court included in its judgment certain provisions to protect the best interests of the children that indicate that Crow's recommendations were adequately considered. For example, the juvenile court ordered that Crow begin working with the children to prepare them for visitation with the maternal aunt and the maternal uncle and that visitation with the maternal aunt and the maternal uncle was not to begin until the children were adequately prepared by Crow. The juvenile court also held that the maternal aunt and

[7]It is not for this court to determine whether visitation with the maternal aunt and the maternal uncle is in the best interests of the children. The court is limited to reviewing whether a juvenile court exceeded its discretion by determining that an award of visitation was in the best interests of the children. See K.B. v. Cleburne County Dep't of Human Res., 897 So. 2d 379, 387-88 (Ala. Civ. App. 2004).

the maternal uncle shall participate in counseling if Crow recommended that they do so before visitation with the children began again. Therefore, we cannot conclude that the visitation awarded to the maternal aunt and the maternal uncle was contrary to the recommendation made by Crow.

Accordingly, we conclude that the judgment of the juvenile court is due to be affirmed.

AFFIRMED.

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

Bryan, J., concurs specially.

Moore, J., concurs in part and dissents in part, with writing.

BRYAN, Judge, concurring specially.

Although not necessary to the determination of the appeal filed by D.B. ("the paternal aunt") and J.R.B. ("the paternal uncle"), I write specially to address the first argument raised in their brief on appeal, that the juvenile court unconstitutionally limited the paternal aunt's right to direct the education of C.J.H. and S.H. (collectively referred to hereinafter as "the children").[3]

The paternal aunt, citing Meyer v. Nebraska, 262 U.S. 390 (1923), argues that parents are afforded a fundamental right to educate their children in the way they see fit. The paternal aunt further argues, citing Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925), that the "doctrine of parental rights" applies to guardians and custodians.

In Meyer, the United States Supreme Court held that parents, pursuant to their liberty interest under the Fourteenth Amendment to the United States Constitution, have a right to control and direct the education of their children. 262 U.S. at 400-01. In Pierce, relying on its holding in

[3]See note 1 and note 3 in the main opinion.

Meyer, the United States Supreme Court held that a state statute that required "every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school ....,'" 268 U.S. at 530, was unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35 (emphasis added). Based on the above-emphasized language, the paternal aunt argues that she, as the "custodial guardian" of the children, has the same fundamental substantive due-process right to control and direct the education of the children as the biological parents of the children. I disagree.

At the outset of this dependency action, the paternal aunt was a nonparent with no legal rights to the children. Pursuant to the juvenile court's statutory authority to make a dispositional order regarding custody of the children after they were adjudicated dependent, see § 12-15-314(a), Ala. Code 1975 (setting forth the dispositional orders a juvenile court may make after a child is adjudicated dependent), the juvenile court transferred legal custody of the children from the

Calhoun County Department of Human Resources to the paternal aunt. In Alabama, juvenile proceedings are conducted pursuant to the Alabama Juvenile Justice Act ("the AJJA"), codified at § 12-15-101 et seq., Ala. Code 1975. The AJJA defines "legal custody" as

> "[a] legal status created by order of the juvenile court which vests in a legal custodian[9] the right to have physical custody of a child under the jurisdiction of the juvenile court pursuant to this chapter and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, clothing, education, and medical care, all subject to the powers, rights, duties, and responsibilities of the legal guardian of the person of the child and subject to any residual parental rights and responsibilities. A parent, person, agency, or department granted legal custody shall exercise the rights and responsibilities personally, unless otherwise restricted by the juvenile court."

§ 12-15-102(16), Ala. Code 1975 (emphasis added).

Thus, the AJJA explicitly states that the rights and responsibilities of a legal custodian may be restricted by the juvenile court. Regarding the children, the only rights the

---

[9]The AJJA defines "legal custodian" in § 12-15-102(15), Ala. Code 1975, as

> "[a] parent, person, agency, or department to whom legal custody of a child under the jurisdiction of the juvenile court pursuant to this chapter has been awarded by order of the juvenile court or other court of competent jurisdiction."

paternal aunt obtained were given to her pursuant to the juvenile court's statutory authority to make a dispositional order after a finding of dependency; in doing so, the juvenile court limited the paternal aunt's right to provide education to the children by limiting the paternal aunt's choice of education for the children in a manner that would, as stated by the juvenile court in its judgment, "provide the child[ren] with as much normalcy as possible, due to the turmoil the child[ren] ha[ve] endured."

The paternal aunt, in her brief on appeal, has not addressed the fact that the juvenile court had authority to confer restricted rights to her as a legal custodian, and she has not otherwise challenged the constitutionality of any part of the AJJA. In short, the paternal aunt has presented this court with no authority that would support her argument that she, as a legal custodian with limited rights conferred by the juvenile court, has the same inherent, fundamental constitutional right as a biological parent to direct the education of the children. Therefore, based on the argument presented by the paternal aunt, I conclude that that part of the juvenile court's judgment that temporarily limited the

paternal aunt's choice of education for the children did not violate the paternal aunt's constitutional rights.

MOORE, Judge, concurring in part and dissenting in part.

D.B. and J.R.B. ("the custodians"), who are the paternal aunt and uncle of S.H. and C.J.H. ("the children"), appeal from the May 3, 2010, judgment entered by the Calhoun Juvenile Court ("the juvenile court") on three separate grounds. First, the custodians argue that the judgment unconstitutionally requires them to maintain the children in public school. Second, the custodians argue that the judgment unconstitutionally subjects them to monitoring by the Calhoun County Department of Human Resources ("DHR"). Third, the custodians argue that the juvenile court erred in awarding K.B. and L.B., Jr. ("the maternal aunt and uncle"), visitation with the children.

I agree with the main opinion that the custodians have misinterpreted the judgment in regard to the education of the children. The judgment specifies that the custodians may enroll the children in any school of their choosing but that they are precluded from homeschooling the children for one year. The judgment does not require the custodians to continue to enroll the children in public school. Hence, the issue whether a juvenile court can constitutionally include

such a limitation in a judgment awarding a relative custody of a dependent child is not before this court. Therefore, I fully concur with the decision not to address the constitutional issue raised by the custodians, and I do not express any opinion regarding the correctness of any of the legal principles espoused in Judge Bryan's special concurrence.

I disagree with the main opinion's treatment of the custodians' second issue. In their brief to this court, the custodians argue that American families have a constitutional right to be free of undue state interference; that, because they are fit parents, the state has no basis for interfering with their family; and that the provision in the judgment requiring DHR to supervise their family for one year violates that right by subjecting the custodians' child-rearing decisions to state oversight. In my opinion, that argument, which is supported by appropriate caselaw citations,[10]

[10]The main opinion criticizes this writing for relying on cases not cited by the custodians in their brief; however, an appellate court addresses legal arguments, not legal citations. The custodians argued that, as a matter of constitutional law, they are entitled to be free of DHR's supervision absent proof that the children would otherwise be subjected to harm. That this writer cited different cases

sufficiently advises this court of the nature of the error that the custodians allege the juvenile court committed so that we should address it.

Furthermore, I agree with every premise of the custodians' argument. The Supreme Court of the United States has recognized that a relative, who assumes an in loco parentis role due to the death or absence of a child's natural parent, has a fundamental right to be free from undue state interference with that familial relationship. See Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977). State interference with a family may be justified in order to protect a child from harm, see E.H.G. v. E.R.G., [Ms. 2071061, March 12, 2010] ___ So. 3d ___, ___ (Ala. Civ. App. 2010), but, in the absence of such a compelling justification, the state has no authority to oversee the child-rearing decisions of a fit custodian. Id. The juvenile court, by placing the

---

than those cited by the custodians does not in any way alter that argument. The appellees were fully apprised of the issue, both through the postjudgment motion filed by D.B. in the juvenile court as well as through the custodians' brief filed in this court. I cannot agree that, had the custodians cited Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977), and E.H.G. v. E.R.G., [Ms. 2071061, March 12, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010), the appellees would have responded any differently than they did.

children in the "permanent" custody of the custodians, impliedly found that the custodians were fit, willing, and able to receive and care for the children. See Ala. Code 1975, § 12-15-314(a)(3)c. The record contains no evidence indicating that the children have been, or probably will be, subjected to harm by the custodians. The children in this case were rendered dependent by the deaths of their parents,[11] but their dependency ended once the juvenile court awarded their "permanent" custody to the custodians. S.P. v. E.T., 957 So. 2d 1127, 1131 (Ala. Civ. App. 2005) (holding that dependency ends when "the child has a proper custodian 'and'

---

[11]Previously, I have argued that a child whose parent or parents die is not dependent when the child remains under the proper care and supervision of relatives. See T.T.T. v. R.H., 999 So. 2d 544, 560-61 (Ala. Civ. App. 2008) (Moore, J., dissenting). In this case, after the deaths of the parents, the children were immediately placed with the custodians and have remained in their proper care and supervision ever since. According to my reasoning in T.T.T., the children would not have been considered dependent. However, since T.T.T. was decided, our supreme court has issued Ex parte L.E.O., [Ms. 1090565, Sept. 17, 2010] ___ So. 3d ___ (Ala. 2010), which has redefined dependency so as to make dependent any child who is not receiving proper care and supervision from the persons legally obligated to provide it. So, at least as the state of the law currently stands, the children were rendered dependent by the deaths of their parents, and the juvenile court properly accepted the stipulation of the parties that the children were dependent.

is no longer 'in need of care or supervision' by persons other than the custodian"). The juvenile court cannot seize on the children's former dependent status as grounds for maintaining unnecessary state oversight.[12] In short, the juvenile court

---

[12]I do not agree with the main opinion that the evidence shows that DHR's services are needed in order to protect the children from any contentious relationship between the maternal and paternal sides of the family. ___ So. 3d at ___ n.4. First, the evidence does not reveal any ongoing tension between the two sides of the children's families that threatens the safety or welfare of the children. The evidence shows only that, immediately following the deaths of the mother and the father, some members of the maternal side of the family exhibited anger toward the father for killing the mother. Although, at that time, some members of the maternal family suggested that the children would be best served by being in their custody, the only maternal relatives who subsequently sought custody, the maternal aunt and uncle, did so through appropriate judicial means. The record contains no evidence indicating that anyone violated the pendente lite custody award entered by the juvenile court, which awarded custody of the children to the custodians, or that anyone would violate the final custody judgment. The record also contains no evidence of any dangerous interaction between the two sides of the family since the custodians had been keeping the children. Even if the custody dispute could be characterized as "contentious," which could probably describe practically any child-custody dispute, it has not elevated to the level that the safety of the children has been threatened. Second, should any threat to the children from family tensions arise, that threat can be ameliorated through appropriate protection-from-abuse or other orders addressed toward that specific threat without DHR's intervention. Third, I am unaware of any authority that empowers DHR to perform monitoring on a family absent evidence of past harm or the threat of imminent harm to the children that the guardian of the child lacks the protective capacity to prevent. The

had no rational basis, much less a compelling reason, for ordering DHR to supervise the family, and its judgment subjecting the family to such supervision violates the constitutional rights of the custodians.

As to the custodians' third argument, the record shows that, during the trial, the parties raised the issue of the visitation rights of the maternal aunt and uncle without objection, so I do not believe the juvenile court erred in addressing that issue in its judgment based on the ground that it was not properly pleaded. See Rule 15, Ala. R. Civ. P. I also agree that this court, in J.S.M. v. P.J., 902 So. 2d 89

---

record contains no evidence indicating that the custodians cannot act to adequately and lawfully protect the children.

The main opinion creates a dangerous precedent by recognizing that a juvenile court can order a family to be monitored by DHR solely because two sides of the family may not get along. Family tension is simply not a sufficient legal ground to justify state oversight over children. If this order is allowed, a juvenile court concerned for the safety of any child for any hypothetical or tenuous reason could, presumably, require constant monitoring of any family. Arguably, all children are jeopardized by some remote threat of harm that constant state monitoring could prevent. However, our constitution, which prizes the sanctity and independence of the family, does not allow such undue state interference. I fear the main opinion may be used as legal authority to allow even further unwarranted and unconstitutional judicial and executive intrusion into family affairs.

(Ala. Civ. App. 2004), construed former Ala. Code 1975, § 12-15-71(a)(4), as authorizing a juvenile court to award visitation to a nonparent when such visitation is in the best interests of a dependent child, and that the reasoning in J.S.M. applies equally to current Ala. Code 1975, § 12-15-314(a)(4), which is similarly worded. However, as set out above, I cannot agree that the children in this case remain dependent children, and, even if they were, I cannot agree that the juvenile court had sufficient evidence before it to find that visitation with the maternal aunt and uncle served the best interests of the children.

In J.S.M., the 14-year-old child at issue had lived with the nonrelative since he was 4 months old. The child referred to the nonrelative as his "mother," and it appears that she had fulfilled that role for the child throughout his childhood. After the father in J.S.M. removed the child from the nonrelative's home, the nonrelative filed a dependency petition. At the trial, the child testified that he wanted to continue to see the nonrelative as much as possible and that he did not believe the father would voluntarily allow him to interact with the nonrelative, so he had been sneaking out of

the father's home to contact the nonrelative. Under those circumstances, the juvenile court found that it would be in the best interests of the child to have court-ordered visitation with the person who had stood in loco parentis to the child for much of the life of the child.

In this case, on the other hand, before the deaths of the parents, the children, who were ages 10 and 8 at the time, had seen their maternal aunt only once or twice for a brief period, and they had never met the maternal uncle. The maternal aunt testified that she had not enjoyed a close-knit relationship with the maternal family for many years. The children's older brother testified that the maternal aunt and uncle sometimes visited the children's maternal grandmother, who lived nearby, but that they had never come by the home of the parents to see the children. After the death of the parents, the maternal aunt and uncle decided that they would offer themselves as potential custodians for the children, so they were allowed to visit with the children in order to forge a relationship with them. After the third visit, the children's counselor, responding to information provided by the children that the visit had distressed them, recommended

that the visitation cease. By the time of trial, the maternal aunt and uncle, who denied any wrongdoing, had not seen the children since that third visit.

It is clear from the record that the maternal aunt and uncle have no past relationship with the children similar to that of the nonrelative in J.S.M. Thus, the juvenile court could not have determined that it would be in the best interests of the children to preserve that relationship. Likewise, based on the evidence in the record, the juvenile court could not have determined that it would be in the best interests of the children to forge a new relationship with the maternal aunt and uncle through visitation. The record simply contains no evidence as to any benefit the children would gain from such visitation. The main opinion hypothesizes that the children would benefit by maintaining contact with the maternal side of their family through the court-ordered visitation.[13] I note that the record contains no evidence indicating that such contact would necessarily benefit the

[13]The juvenile court did not state its reasons for awarding the visitation.

children.[14] Some evidence, including the testimony of the maternal aunt herself, indicates that the children would be better off not having any contact with some maternal relatives. Nevertheless, even if it could be inferred that it would be beneficial to the children to have some contact with the maternal family,[15] the record shows that other maternal relatives who live closer to the children could serve that

---

[14]A juvenile court, like any other court, would exceed its discretion by awarding visitation that does not serve the best interests of the children. A decision that visitation serves the best interests of the children must be based on the evidence in the record. On appellate review, this court determines if the evidence is sufficient to sustain the judgment. It is not improper for this court to determine that the record lacks any evidence to support a finding that visitation would serve the best interests of the children. Thus, by concluding that the evidence does not support the visitation order entered by the juvenile court in this case, the court would not be usurping the role of that court, as the main opinion suggests. ___ So. 3d at ___ n.7.

[15]As our supreme court explained in Ex parte Devine, 398 So. 2d 686 (Ala. 1981), the determination of what is in the best interests of a child must be based on the specific facts of each case, and general social attitudes may not be used as surrogates for that thorough factual inquiry. Thus, the juvenile court would have had to infer from the evidence relating to this specific case that it would be in the best interests of the children to maintain contact with their maternal family. The juvenile court could not have based its decision on any general attitude that contact with both sides of the family always serves the best interests of a child.

purpose.[16] Not to disparage the maternal aunt and uncle, who appear to be very compassionate people acting with the best of intentions toward the victims of an unexpected and horrendous tragedy, but it appears that the visitation provisions are intended to benefit them, not the children.

In her testimony, the paternal aunt testified that she would allow the maternal aunt and uncle to visit with the children in her home at appropriate times and that she would not discourage any relationship between the maternal aunt and uncle and the children. Rather than awarding the maternal aunt and uncle 42 days of visitation out of every year, which is at least 21 times the amount of visitation they enjoyed with the children during the children's entire lives before the deaths of the parents, the juvenile court should have left visitation to the discretion of the custodians, who, presumably, will act in the best interests of the children in deciding visitation. See Troxel v. Granville, 530 U.S. 57 (2000). I would reverse the judgment of the juvenile court to

[16]The main opinion points out that the maternal aunt testified that her sisters that lived close to the children had "serious" problems. ___ So. 3d at ___. However, no adverse evidence was presented as to other maternal relatives, such as the maternal grandmother, who lived near the children.

the extent it awarded the maternal aunt and uncle visitation beyond those parameters.[17]

[17]For that reason, I would not address the custodians' argument, to the extent made, that the visitation provisions of the judgment violate their constitutional right to decide visitation matters for the children. Because I am not addressing that issue, I see no need to respond in detail to the main opinion's implication that the argument fails to comply with Rule 28, Ala. R. App. P. ___ So. 3d at ___ n.5. Suffice it to say that reasonable minds could differ on that point and that this court has in the past exercised its discretion to consider issues based on far less content.