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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

CL-2022-0694 and CL-2022-0695

T.W.

v.

Calhoun County Department of Human Resources

Appeals from Calhoun Juvenile Court
(JU-19-972.02 and JU-19-973.02)

On Applications for Rehearing

PER CURIAM.

This court's opinion released on February 10, 2023, is withdrawn, and the following is substituted therefor.

In appeal number CL-2022-0694, T.W. ("the mother") appeals from a judgment entered by the Calhoun Juvenile Court ("the juvenile court")

terminating her parental rights to S.H.W., who was born on September 4, 2012. In appeal number CL-2022-0695, the mother appeals from a separate judgment entered by the juvenile court terminating her parental rights to H.T., who was born on February 2, 2017. We reverse the juvenile court's judgments.

Procedural History

On August 24, 2021, the Calhoun County Department of Human Resources ("DHR") commenced an action by filing a petition to terminate the parental rights of the mother and of J.T. ("the father") to S.H.W. That same date, DHR commenced a separate action by filing a petition to terminate the parental rights of the mother and of the father to H.T. The juvenile court consolidated the actions for trial, which commenced on November 19, 2021, and was concluded on April 26, 2022. On April 26, 2022, the juvenile court entered a separate judgment in each action terminating the parental rights of the mother and of the father to S.H.W. and J.T. ("the children").¹ The mother filed a postjudgment motion in each action on May 4, 2022; the juvenile court entered orders denying

¹The father has not appealed the judgments terminating his parental rights.

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those motions on May 11, 2022. The mother filed a timely notice of appeal in each action on May 25, 2022. This court consolidated the mother's appeals ex mero motu. This court issued an opinion upon original submission on February 10, 2023. DHR and the guardian ad litem for the children filed applications for rehearing. The court conducted oral argument on the applications for rehearing on April 19, 2023.

Facts

The facts pertinent to the disposition of these appeals are as follows. The children were born on September 4, 2012, and February 2, 2017. The mother and the children resided together in a mobile home located in a mobile-home park in Calhoun County that was owned by relatives of the father. The father, who never married the mother, resided in a separate home close to the mother and the children but, at times, the father would stay in the mother's mobile home. In September 2019, DHR received a report that the children were being exposed to substance abuse in the mother's mobile home. At that time, the father tested positive for methamphetamine, but the mother did not test positive for any illegal substances. Based on its assessment that the mother could adequately protect the children, DHR entered into a safety plan with the mother,

pursuant to which the mother would retain custody of the children, provided that the father was not allowed to reside in the mother's mobile home; the mother was also required to supervise the father's visitations with the children.

In October 2019, the mother tested positive for methamphetamine. Based on that positive drug-test result, DHR terminated the safety plan, removed the children from the mother's home, and placed the children into foster care, where they have since remained. DHR subsequently completed a child-abuse-and-neglect investigation and determined that the children were at risk of harm from the mother as a result of her positive drug-test result. The mother denied that she had ever used illegal drugs and testified that she could not explain the positive drug-test result.

DHR immediately instituted a plan requiring the mother to submit to a substance-abuse assessment, drug testing, and substance-abuse counseling. The mother cooperated with that plan. The mother testified that she had learned a great deal about substance abuse during her counseling sessions, which she completed in the summer of 2020. Between November 2019 and August 2021, the mother submitted to

numerous drug tests and did not produce a single positive result for methamphetamine use after January 2020. At trial, the mother continued to maintain that she had never used illegal drugs and that she had never had a substance-abuse problem. A DHR social worker testified that she did not believe that the mother was using illegal drugs.

As the cases progressed, DHR shifted its focus from its concerns about the mother's suspected use of illegal drugs to concerns about the mother's home environment. The mother had agreed, as part of a family-reunification plan with DHR, that she would maintain stable, clean, and appropriate housing with working utilities for the children. The mobile home in which the mother was residing at the time the children were removed from her care was described by the children's Court Appointed Special Advocates ("CASA") worker as hazardous, unsanitary, and flea infested. DHR provided the mother with intensive in-home services through programs from ECA FOCUS designed to teach her better housekeeping skills. Although the mother testified that she had benefited from those services, the CASA worker testified that she had seen no improvement in the condition of the mobile home throughout 2021 and that any efforts that the mother had made to better her

housekeeping skills had proven unsuccessful. The CASA worker and a DHR social worker testified that the mother did not seem to understand the severity of the conditions of her residence and did not consistently apply what she had been taught to address those conditions.

In the fall of 2021, the mother moved into a newer and larger mobile home in the same mobile-home park, which home the mother described as being clean and in good repair with working utilities. However, a DHR witness who had inspected that mobile home described it as being in the same or even worse condition than the original mobile home, such that DHR could not approve of the children's visiting there. DHR introduced photographs of the condition of the exterior of the second mobile home into evidence. According to DHR's witnesses, it seemed that the mother was permanently incapable of maintaining a safe and sanitary home, and DHR cited that problem as the main factor supporting its petition to terminate the mother's parental rights. The mother disputed that testimony and testified that, by the time of the last day of trial, the second mobile home had been renovated, repaired, and cleaned so that it was safe and suitable for the children.

While working with DHR to improve her housekeeping skills, the mother maintained regular visits with the children. At first, she visited the children for two hours every two weeks under supervision of a social worker employed by Alabama Baptist Children's Home ("ABCH"). The mother also regularly communicated with the children over the telephone while they were at their shared foster home. The ABCH social worker testified that, during the initial supervised visits, the mother would often give the children excessive amounts of sugary foods and drinks that made them ill and kept them up late at night and that she would have to "redirect" the mother to take action to control the misbehavior of the children. The ABCH social worker testified that the mother seemed to benefit from parenting classes and, eventually, in December 2020, the mother began having unsupervised visits with the children at her residence and, at some point in early 2021, the mother began keeping the children overnight every two weeks without supervision.

The mother testified that the children were excited to visit with her and enjoyed their visits. During the visits, the mother would give the children food, clothes, and other presents, and, on at least one occasion, money. The mother would also play games with the children to entertain

them. The ABCH social worker testified that the mother had been consistent with her visitations with the children, that she was attentive and had generally acted appropriately toward the children during supervised visitations, and that the children "absolutely" love the mother and "[y]ou can definitely tell there is an attachment there." The children's CASA worker also testified that the mother had displayed a proper general protective capacity over the children when the CASA worker had observed the children visiting at the mother's residence on June 7, 2021, and that the children appeared to be happy and bonded with the mother.

However, according to the ABCH social worker, when the children returned from the unsupervised visits, they would smell of cigarettes "or just a foul odor" and they would appear unclean. At that time, the mother was caring for several dogs, and the children would complain of flea bites and of waste from the dogs being present in the residence. On one occasion, the mother had neglected to give S.H.W. her prescribed medication as required. The ABCH social worker testified that the mother also allowed other persons to be present in the home during the

visits, contrary to the visitation plan, and that the mother was still feeding the children improper food.

At trial, several DHR witnesses testified that, based on their visits to the mother's residence, they had developed concerns that the mother was maintaining a relationship with the father, who had consistently tested positive for illegal drugs, had refused to participate in any services offered by DHR, and had completely abandoned the children after June 2020. The mother testified that she had ended her relationship with the father in September 2019 and that, at the time of the first trial date, she had not seen him in over one year. However, the juvenile court heard evidence, some of which was disputed by the mother, indicating that the mother had kept men's clothes and shoes in her residence, that she had corresponded with the father through social-media platforms, that she and the father had together attended supervised visits with the children in 2019 and 2020, that the father had received service of legal process at the mother's residence, and that the father had been seen mowing the mother's lawn on one occasion, all of which could have indicated to the juvenile court that the mother and the father had remained together.

On June 10, 2021, the mother became involved in a domestic dispute involving a neighbor of the children's aunt. The mother testified that she was visiting the aunt when, she said, the neighbor became verbally abusive and began acting aggressively toward the aunt and the mother. The aunt called the police, which, the mother said, had ended with the neighbor, not the mother, being arrested. The mother testified that she considered herself to have been a victim in that domestic dispute.

On June 17, 2021, following the domestic dispute, DHR ceased allowing the mother to exercise unsupervised visits with the children or to communicate with them over the telephone. The ABCH social worker testified that the telephone calls had become "painful for [S.W.H.] in a sense of, like, emotional." The ABCH social worker testified that the mother was not able to honestly communicate with S.W.H. regarding "the way things are going" with "the situation." According to the ABCH social worker, after five minutes, S.W.H. did not want to talk anymore and the mother would run out of ways to engage S.W.H., while H.T. simply could not sit still for the length of the telephone calls. Also on June 17, 2021, DHR, over the objection of the mother, changed its goal from returning

the children to the custody of the mother to adoption. Additionally, all family-reunification services, except for drug testing and in-person supervised visitations, ended at that point. The mother testified that it was her understanding that the June 10, 2021, domestic dispute had caused DHR to take the abrupt change in its course of action.

The mother eventually resumed supervised visits with the children. According to the ABCH social worker, the mother had consistently brought the children food that was beyond its expiration date to those visits. The ABCH social worker testified that, although the mother had shown progress at some points, she was not able to "follow through ... towards the end." The CASA worker, the ABCH worker, and a DHR social worker all testified that the children needed a suitable permanent home apart from the mother. DHR's witnesses acknowledged that the mother had cooperated with the family-reunification process but stated that the mother had not shown sufficient and consistent improvement to the point that DHR could recommend that the children be returned to her custody. DHR had not located any relatives to care for the children, and DHR witnesses and the guardian ad item for the children uniformly

agreed that adoption would be the only option for the children to obtain a suitable, permanent home.

When S.W.H. was first removed from the custody of the mother, she had exhibited behavioral problems and had been diagnosed with dental problems, a speech impairment, a learning disability, and attention-deficit/hyperactivity disorder ("ADHD"), for which she was taking medication. The ABCH social worker also testified that S.W.H. displayed signs of social anxiety and was prone to lying. The mother had obtained dental care for S.W.H. and had enrolled S.W.H. in a local elementary school where she had tested with an intelligence quotient of 63, requiring specialized education in an isolated, controlled room, along with speech therapy. As a result of her intellectual disability, S.W.H. was receiving Supplemental Security Income ("SSI") benefits. By September 2021, S.W.H. had progressed to the point that she tested with an intelligence quotient of 93, no longer needed isolated education classes, and no longer qualified for SSI benefits. However, S.W.H. was still taking medication for ADHD and still required assistance with reading and math. The ABCH social worker described S.W.H. as a "sensitive, sweet" child. H.T. also suffered from dental problems and a speech impairment at the time

she was removed from the custody of the mother. At the time of trial, the dental problems had been resolved and H.T. was receiving speech therapy biweekly to address her speech issues. The ABCH social worker described her as "a smart and sassy" child who was "very happy."

The record indicates that, if the parental rights of the mother were terminated, the foster parent would continue to provide the same level of care in which the children had thrived but that the foster parent would not agree to adopt the children. DHR presented no evidence indicating whether it had made any efforts to identify any other individual or family member to adopt the children. DHR also did not present any evidence of its general methodology for recruiting adoptive resources for foster children, either before or after termination of parental rights, and did not offer any evidence of the feasibility or likelihood of the children's being adopted. By the last day of trial on April 26, 2022, DHR had not identified an adoptive resource for the children despite having established a goal on June 17, 2021, to have the children adopted.

Standard of Review

A judgment terminating parental rights must be supported by clear and convincing evidence, which 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."'" C.O. v. Jefferson Cnty. Dep't of Hum. Res., 206 So. 3d 621, 627 (Ala. Civ. App. 2016) (quoting L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn Ala. Code 1975, § 6-11-20(b)(4)).

"'[T]he evidence necessary for appellate affirmance of a judgment based on a factual finding in the context of a case in which the ultimate standard for a factual decision by the trial court is clear and convincing evidence is evidence that a fact-finder reasonably could find to clearly and convincingly ... establish the fact sought to be proved.'

"KGS Steel[, Inc. v. McInish], 47 So. 3d [749] at 761 [(Ala. Civ. App. 2006)].

"... [F]or trial courts ruling ... in civil cases to which a clear-and-convincing-evidence standard of proof applies, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden[,] [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)]; thus, the appellate court must also look through a prism to determine whether there was substantial evidence before the trial court to support a factual finding, based upon the trial court's weighing of the evidence, that would 'produce in the mind [of the trial court] a firm conviction as to each element of the claim and a high probability as to the correctness of the conclusion.'"

Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). 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).

Issue

The mother argues on appeal that the juvenile court's conclusions in its judgments that the mother was unwilling or unable to discharge her parental responsibilities to the children and that DHR had made reasonable efforts to rehabilitate her are not supported by clear and convincing evidence; that there was insufficient evidence of the mother's current conditions to warrant the termination of her parental rights; that DHR failed to establish that there were no viable relative resources; and that the juvenile court erred in terminating her parental rights because maintenance of the status quo was a viable alternative to termination. We find the mother's last argument dispositive.

Analysis

Section 12-15-319, Ala. Code 1975, a part of the Alabama Juvenile Justice Act ("the AJJA"), Ala. Code 1975, § 12-15-101 et seq., provides that a juvenile court may terminate the parental rights of a parent when clear and convincing evidence shows that the parent cannot or will not discharge his or her parental responsibilities to and for his or her children, which would include the duty of providing the children with a safe, clean, and suitable home, see generally H.B. v. Mobile Cnty. Dep't of Hum. Res., 236 So. 3d 875, 882 (Ala. Civ. App. 2017) (holding that a juvenile court may terminate parental rights when a parent, due to an uncorrectable, permanent inability or unwillingness, cannot or will not provide a home free from "chronic, recurring unsanitary conditions" that "endanger the health of the child"), and protecting the children from the threat of parental abuse or neglect, see L.M. v. Shelby Cnty. Dep't of Hum. Res., 86 So. 3d 377, 387 (Ala. Civ. App. 2011) (recognizing that the rights of a parent may be terminated when that parent fails or refuses to protect his or her children from threat of harm presented by the other unfit, abusive, or neglectful parent by allowing the other parent access to family home). However, because a parent has a fundamental right to the

custody of his or her natural children, Santosky v. Kramer, 455 U.S. 745, 758-59, 102 (1982), due process demands that a juvenile court terminate a parent's parental rights only when some other, less-drastic measure would be unavailing, Roe v. Conn., 417 F. Supp. 769, 779 (M.D. Ala. 1976), or, as Alabama appellate courts have stated more commonly, a juvenile court may terminate a parent's parental rights only when clear and convincing evidence shows that no other viable alternative to termination exists. Ex parte Ogle, 516 So. 2d 243, 243 (Ala. 1987).

Termination of parental rights is the most extreme measure the state can undertake to redress parental unfitness, abuse, or neglect. See Santosky, *supra*; M.H. v. Cleburne Cnty. Dep't of Hum. Res., 158 So. 3d 471, 482 (Ala. Civ. App. 2014). Termination of parental rights involves the complete, permanent, and irreversible extinguishment of a parent's right to custody, control, and even association with his or her children. Id. Through termination of parental rights, a juvenile court assures that a parent has no legal means of accessing the child to expose the child to the threat of harm arising from the unhealthy parent-child relationship. See S.M.M. v. R.S.M., 83 So. 3d 572, 573 (Ala. Civ. App. 2011) ("The purpose of the statute authorizing termination of parental rights is to

protect children from harm emanating from an adverse parental relationship.""). But the state has other means of adequately protecting a child from the threat of parental harm, including placing the child out of the family home and into the sheltered environment of foster care, in which contact between the parent and the child can be monitored and any personal visits can be supervised. See, e.g., Ex parte T.V., supra. If that alternative is available, it would serve as a less-drastic means of securing the safety and welfare of the child, militating against termination of parental rights. Id.

However, foster care is intended primarily to provide a child with a safe and nurturing home temporarily while the child's custodial parent works toward rehabilitation to the point that the family can be safely reunited. K.W. v. J.G., 856 So. 2d 859, 873 (Ala. Civ. App. 2003). The Adoption and Safe Families Act of 1997 ("the ASFA"), 42 U.S.C. §§ 671 and 675, was enacted to prevent a child from languishing in foster care after it has been determined that the goal of family reunification cannot be accomplished. See Robert M. Gordon, Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997, 83 Minn. L. Rev. 637, 642 (1999). The ASFA rests on the premise that

all children need "permanency" to thrive and to mature properly into responsible adults and citizens. Id. In this context, the term "permanency" refers to a safe, stable, and nurturing custodial arrangement lasting throughout the child's minority. See generally B.W.C. v. State Dep't of Hum. Res., 582 So. 2d 579, 580 (Ala. Civ. App. 1991); In re Interest of Sarah K., 258 Neb. 52, 57, 601 N.W.2d 780, 784 (1999) (applying federal guidelines for applying the ASFA). To obtain this goal, the ASFA requires states that receive federal funding for their foster-care programs, like Alabama, to use reasonable efforts to expeditiously move children who cannot be safely returned to their family home out of foster care and into permanent homes, preferably through adoption following termination of parental rights. Ramesh Kasarabada, Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out, 17 CUNY L. Rev. 145, 157 (2013). Because long-term foster care does not provide children with the kind of permanency contemplated by the ASFA, "generally speaking, maintaining a child in indefinite foster care is not a viable alternative to termination of parental rights." T.L.S. v.

Lauderdale Cnty. Dep't of Hum. Res., 119 So. 3d 431, 439 (Ala. Civ. App. 2013) (plurality opinion).

Consistent with that general principle, the juvenile court determined in these cases that it would not be in the best interests of the children to continue in long-term foster care and ordered that the parental rights of the mother be terminated in order that the children could be adopted. However, as the mother points out, DHR did not identify an adoptive resource for the children and argues that it is "by no means apparent that the children would obtain permanency if the mother's parental rights were terminated." The mother's brief, p. 59. Indeed, the record bears out that contention. It is undisputed that DHR had not identified an adoptive resource for the children by the last date of the trial on April 26, 2022, although it had determined that adoption would be the permanency goal for the children on June 17, 2021, see Ala. Code 1975, § 12-15-312(b) (requiring the Department of Human Resources to use reasonable efforts "to complete whatever steps are necessary" to finalize a permanency plan, which could include steps to finalize an adoption), and although it had filed a petition to terminate the parental rights of the mother on August 24, 2021. See Ala. Code 1975, §

12-15-317(1) (requiring the Department of Human Resources, upon the filing of a petition to terminate parental rights, "to identify, recruit, process, and approve a qualified family for adoption"). Moreover, by its own admission, DHR did not present any "certain testimony regarding the children's prospects for adoption." C.M. v. Tuscaloosa Cnty. Dep't of Hum. Res., 81 So. 3d 391, 398 (Ala. Civ. App. 2011). Most particularly, DHR did not offer any testimony or other evidence regarding the adoptability of the children or the likelihood that adoption would be achieved in the foreseeable future.

In their applications for rehearing, DHR and the guardian ad litem argue that the juvenile court could have inferred that the children were readily adoptable from the evidence indicating that the children had progressed significantly since they had entered foster care and from the manner in which they were described by the ABCH social worker. However, it is undisputed that, despite the progress the children had made, S.W.H. was still diagnosed with ADHD, still required regular medication for that disorder, and still required continuing educational assistance for reading and math, while H.T. still had a speech impediment requiring biweekly therapy sessions. Furthermore, under

the ASFA, the state is obligated to develop a plan to use reasonable efforts to place the children together in the same adoptive home. See 42 U.S.C. § 671(a)(31)(A). Based on regulations promulgated by the State Department of Human Resources, these children qualify as special-needs children, see Ala. Admin. Code (Dep't of Hum. Res.), r. 660-5-22-.06 (defining a special needs child, for the purposes of subsidized adoption, as, among other things, a child who is over five years of age; who is in a group of two or more siblings seeking joint adoption; who has a physical disability; or who is receiving ongoing medical treatment for an emotional or behavioral issue), which alone makes placement for adoption more challenging. This court has repeatedly emphasized that, before proceeding to terminate the parental rights of the parents of special-needs children, a juvenile court must consider whether the children will likely achieve permanency through adoption. See, e.g., C.M., supra; B.A.M. v. Cullman Cnty. Dep't of Hum. Res., 150 So. 3d 782, 786 (Ala. Civ. App. 2014); Talladega Cnty. Dep't of Hum. Res. v. J.J., 187 So. 3d 705, 713-714 (Ala. Civ. App. 2015); T.N. v. Covington Cnty. Dep't of Hum. Res., 297 So. 3d 1200 (Ala. Civ. App. 2019); D.S.R. v. Lee Cnty. Dep't of Hum. Res., 348 So. 3d 1104, 1112 (Ala. Civ. App. 2021). In order for the

juvenile court to consider that factor, it was incumbent upon DHR to present clear and convincing evidence of the viability of adoption so that the juvenile court could make an informed evaluation and decision, see C.M., 81 So. 3d at 398, especially given the length of time that had elapsed since DHR had established adoption as the permanency plan for the children. However, DHR did not even attempt to introduce any evidence on that point. DHR and the guardian ad litem for the children attempted to rectify that evidentiary omission at oral argument on their applications for rehearing, but this court cannot consider any statements of counsel regarding evidence outside of the record. See Quick v. Burton, 960 So. 2d 678, 680 (Ala. Civ. App. 2006). As the evidentiary record in these cases stands, the prospects of the children to be adopted remain totally uncertain and strictly speculative.

The mother maintains that, in light of the uncertainty as to whether the children will receive permanency upon termination of her parental rights, the juvenile court should have foregone that drastic measure and maintained the status quo with her continuing to have supervised visitation with the children while they resided in foster care. "[I]f some less drastic alternative to termination of parental rights can be

used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court must explore whether that alternative can be successfully employed instead of terminating parental rights." T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011). In these cases, it is undisputed that the children can continue to reside with the foster parent and that DHR has and can facilitate supervised visitation between the mother and the children. DHR presented no evidence indicating that the mother has acted in any disruptive, antagonistic, or any other manner that makes the continuation of that arrangement untenable. DHR and the guardian ad litem emphasize that the mother has made some bad decisions and parenting errors while visiting with the children in the past, but the presence of the ABCH social worker, acting as a supervisor, and her role in redirecting the mother, had generally ameliorated any harm to the children and nothing in the record indicates that continued supervised visitation would inadequately protect the children from parental harm.

In its brief in support of its application for rehearing, DHR argues that maintaining the status quo is not a viable alternative in these cases because "this record does not reflect a strong emotional bond with the

mother" worth preserving through continued visitation. DHR's brief in support of application for rehearing, pp. 12-13. However, in its initial brief to this court on original submission, DHR acknowledged that "[t]here is no dispute there was reciprocal affection between the mother and children." DHR's brief, p. 28. Two DHR witnesses testified that the mother and the children love one another and that they share an emotional bond and attachment. No one testified otherwise. The record is undisputed on this point, and we find DHR's attempt to argue otherwise on application for rehearing to be completely disingenuous. DHR and the guardian ad litem also note that telephone visitation between the mother and the children had been suspended because it was upsetting S.W.H., suggesting that that evidence supports the conclusion that continued visitation would not be in the best interests of the children. However, it is undisputed that, after the telephone visits were suspended, supervised in-person visitation continued and nothing in the record indicates that those visits, under monitoring by the ABCH social worker, had been painful or emotional for the children in the same way as the telephone communication had. DHR, with the input of the ABCH social worker and other members of the individualized-service plan team,

evidently determined that supervised visitation served the best interests of the children because that visitation continued up until the time of trial.

The salient facts of these cases closely align with those of other cases in which this court held that it would benefit the children at issue in those cases to remain in contact with a loving parent through supervised visitation when the prospects of adoption or achieving permanency through some other custodial arrangement remained unproven. See C.M., B.A.M., T.N., and D.S.R., supra. Based on the particular facts and circumstances of these cases, we agree with the mother that the juvenile court erred in terminating the parental rights of the mother. The evidence shows that the children share a beneficial, emotional bond with the mother; that their likelihood of achieving permanency through adoption or any other means is purely speculative, being unproven by any competent evidence in the record; and that the children can continue to reside in the same foster home while enjoying supervised visitation with the mother so that they are protected from any threat of parental harm. Given those facts, the juvenile court should have maintained the status quo as a viable alternative to termination of the mother's parental rights to the children.

Contrary to the assertions of the guardian ad litem in her brief in support of her application for rehearing, a reversal of the judgments terminating the mother's parental rights does not force the children to languish in foster care indefinitely under "another planned permanent living arrangement." See Ala. Code 1975, § 12-15-315(a)(6). The permanency plan for the children remains adoption unless and until modified by the juvenile court. If the mother adequately rehabilitates, with or without DHR's assistance, the juvenile court should change the permanency plan to require that their custody be returned to her. If she does not, once DHR recruits or otherwise identifies an adoptive resource for the children, DHR may file another petition to terminate the parental rights of the mother based on those changed circumstances. See L.M. v. Shelby Cnty. Dep't of Hum. Res., 86 So. 3d 377 (Ala. Civ. App. 2011). In any event, nothing in this opinion should be misinterpreted as requiring the juvenile court to maintain the children in long-term foster care until they reach the age of majority. We hold only that termination of the mother's parental rights was not an appropriate remedy based on the evidence of the current circumstances as contained in the record on appeal.

Conclusion

Because maintenance of the status quo is a viable alternative to termination of the mother's parental rights to the children in this case, we reverse the juvenile court's judgments and remand the cases to the juvenile court to take such further action as is consistent with this opinion.

CL-2022-0694 -- APPLICATIONS GRANTED; OPINION OF FEBRUARY 10, 2023, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

CL-2022-0695 -- APPLICATIONS GRANTED; OPINION OF FEBRUARY 10, 2023, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Edwards and Hanson, JJ., concur.

Moore, J., concurs specially, with opinion, which Fridy, J., joins.

Thompson, P.J., concurs in the result, without opinion.

MOORE, Judge, concurring specially.

I concur fully with the main opinion. I write specially to address my concern with the decision of the Calhoun Juvenile Court ("the juvenile court") to enter judgments terminating the parental rights of T.W. ("the mother") to S.W.H. and H.T. ("the children") although no adoptive resource had been identified.

The federal Adoption and Safe Families Act of 1997 ("the ASFA"), 42 U.S.C. §§ 671 and 675, provides, among other things, that states seeking federal funding to assist their child-welfare programs shall conduct a "permanency hearing" periodically to determine the permanency plan for a foster child. See 42 U.S.C. § 675(5)(C). Under the ASFA, the preferred permanency plan for a foster child is return to the parent, but the ASFA authorizes alternative permanency plans, foremost among those alternatives, placement of the child "for adoption," in which case "the State will file a petition for termination of parental rights." Id. The Alabama Legislature enacted Ala. Code 1975, § 12-15-315, to meet that requirement. Section 12-15-315 provides for a permanency hearing to be conducted periodically to determine the permanency plan for a foster child, which plan may include placement for adoption "with no

identified resource or with the current foster parent wherein the Department of Human Resources shall file a petition for termination of parental rights." §12-15-315(a)(2).

Although all 50 states have adopted statutes to comply with the ASFA, Alabama is the only state that expressly provides that a permanency plan may call for placement of a child for adoption with no identified resource. Nevertheless, the Alabama Legislature did not include any language in § 12-15-315 to guide a juvenile court when it is determining whether to approve a permanency plan calling for adoption with no identified resource. Consistent with the language of § 12-15-315(a)(2), this court has recognized that a juvenile court may terminate parental rights without first identifying an adoptive resource. R.B. v. State Dep't of Hum. Res., 669 So. 2d 187 (Ala. Civ. App. 1995). However, in R.B., this court did not expound on the circumstances that would justify terminating parental rights without an identified adoptive resource; instead, we only generally recognized that the lack of an identified adoptive resource is "a factor indicating that termination of parental rights would not be in the best interests of [the child]." 669 So. 2d at 191. The cases cited in the main opinion indicate that, in some

circumstances, it would be inappropriate to terminate parental rights without first identifying an adoptive resource or otherwise receiving evidence that adoption is likely for the child, but this court has not set forth any bright-line rules to guide a juvenile court in assessing that factor.

Similarly, our supreme court has not addressed in detail the effect of a lack of an identified adoptive resource on the analysis of a petition to terminate parental rights. In a special writing in Ex parte Bodie, [Ms. 1210248, Oct. 14, 2022] ___ So. 3d ___ (Ala. 2022), Chief Justice Parker advocated for a reexamination of the standards to be applied in termination-of-parental-rights cases. Among other things, Chief Justice Parker explained that, similar to the standard used in a constitutional strict-scrutiny analysis, before a juvenile court may terminate parental rights in cases involving foster children who are safely residing in a suitable foster home, "[the State] must prove by clear and convincing evidence that adoption is a viable option." ___ So. 3d ___ (Parker, C.J., concurring in part and concurring in the result). Otherwise, the state would unconstitutionally eradicate the fundamental right of the parent to a relationship with the child without achieving the intended

permanency for the child, which is the sole governmental interest at stake. Chief Justice Parker did not specifically discuss the issue of termination of parental rights without an identified adoptive resource, but his analysis suggests that, without further proof of the likelihood of adoption, it would be erroneous to terminate parental rights without identifying an adoptive resource in most cases. However, his special writing is not binding authority at this point.

I believe that, in an appropriate case, this court should explicitly set forth the circumstances in which it would be appropriate for a juvenile court to adopt a permanency plan calling for adoption with no identified resource and to terminate parental rights without an identified adoptive resource. I agree with the Oregon Supreme Court that a permanency plan calling for the placement of a foster child for adoption "implicitly requires that adoption appear to be a likely outcome." State v. L.C., 234 Or. App. 347, 355, 228 P.3d 594, 598 (2010). When the State submits a permanency plan calling for adoption with no identified resource, the State should be required to prove that adoption will nevertheless be a likely outcome for the foster child. I also agree with the Supreme Court of Pennsylvania that "termination of parental rights generally should not

be granted unless adoptive parents are waiting to take a child into a safe and loving home," In re T.S.M., 620 Pa. 602, 631, 71 A.3d 251, 269 (2013), and that that general rule should yield only in extremely limited circumstances, such as when the child would be subjected to real psychological harm by the mere existence of a continuing legal relationship with the parent, see T.L.S. v. Lauderdale Cnty. Dep't of Hum. Res., 119 So. 3d 431 (Ala. Civ. App. 2013) (plurality opinion), or "when termination may be necessary for the child's needs and welfare in cases where the child's [unhealthy] parental bond is impeding the search and placement with a permanent adoptive home." In re T.S.M., 620 Pa. at 631, 71 A.3d at 269.

In these cases, on June 17, 2021, the Calhoun County Department of Human Resources ("DHR") changed the permanency goal from return to the mother to adoption. The foster parent would not agree to adopt the children, and it is undisputed that DHR had not identified an adoptive resource for the children at the time of the last hearing date on April 26, 2022. DHR presented absolutely no evidence regarding the likelihood that the children would be adopted, except for its inability to locate an adoptive resource for over 10 months. Given the length of time

that had passed without the identification of an adoptive resource, that the children have special educational needs, and that the ASFA generally requires the State to develop a plan to use reasonable efforts to place the children together in the same adoptive home, see 42 U.S.C. § 671(a)(31)(A), it could not be assumed by the juvenile court that the children were likely to be imminently adopted upon termination of the parental rights of the mother. The concern, of course, is that they may never obtain permanency through adoption, in contravention of the very purpose of the ASFA and derivative Alabama laws.

In her brief to this court, the mother points out the failure of DHR to identify an adoptive resource, but she argues only that that factor militates in favor of maintaining the status quo as a viable alternative to termination of her parental rights. The mother does not specifically argue that the juvenile court erred in adopting a permanency plan of placement for adoption without an identified resource or in granting the petitions to terminate parental rights without clear and convincing evidence of the likelihood that the children would be adopted, a related, but separate point in the viable-alternative inquiry. Therefore, I believe that these are not the appropriate cases in which to establish the

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standards that a juvenile court should follow when terminating parental rights in a case in which no adoptive resource has been identified, although I agree with Chief Justice Parker that this state needs "a more coherent analytical framework for cases regarding termination of parental rights." Ex parte Bodie, ___ So. 3d at ___ (Parker, C.J., concurring in part and concurring in the result).

Fridy, J., concurs.