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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

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J.C.

v.

Madison County Department of Human Resources

**Appeal from Madison Juvenile Court
(JU-15-1016.02)**

EDWARDS, Judge.

In May 2017, the Madison County Department of Human Resources ("DHR") filed a petition seeking the termination of the parental rights of J.C. ("the mother") to R.W.N. ("the child"). After a trial held on December 21, 2018, the Madison

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Juvenile Court ("the juvenile court") entered a judgment terminating the mother's parental rights. The mother timely filed a postjudgment motion, which the juvenile court denied, and the mother timely appealed to this court.

Neither the testimony at the trial nor the documentary evidence affirmatively establishes the basis for the child's removal from the mother's custody, which occurred in late 2015 or at least by February 2016.¹ However, information contained in the mother's November 2016 substance-abuse assessment at WellStone² indicates that the mother was sent by DHR for a drug screening and that, at that screening, the mother had reported using opiates and methamphetamine in the previous 2 weeks; the same assessment reveals that the mother reported having used opiates regularly for the previous 11 years, with periods of abstinence as long as 3 months, and methamphetamine

¹The record is not entirely clear on the date the child was removed from the mother's custody. Some testimony indicates that the child was first placed with relatives, and other information indicates that the initial placement was pursuant to a safety plan. Other testimony indicates that the child was placed into the legal custody of DHR in February 2016.

²The records from Wellstone indicate that Wellstone might also be known as, or do business as, New Horizons Recovery Center.

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for the previous 10 years, with periods of abstinence lasting approximately 2 weeks. That assessment further indicates that the mother had received mental-health treatment for bipolar disorder between 2003 and 2013; no other information regarding the mother's mental-health diagnoses or treatment appears in the record.

Grannessi Bates, the DHR caseworker assigned to the family's case in May 2016, testified that, when she was assigned to the case, the mother was already being provided services, including parenting classes, substance-abuse assessment and treatment, random drug screens, and supervised visitation. Bates said that the mother completed parenting classes, and the record contains a certificate memorializing that completion. According to Bates, the mother visited the child regularly and, although she had not been required to pay child support, the mother had furnished the child clothing, shoes, age-appropriate toys, and electronics. However, Bates testified that the mother had not completed substance-abuse treatment and that she had not appeared for the vast majority of her random drug screens, having last submitted to a drug screen on August 24, 2018.

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According to Bates, the mother had entered substance-abuse treatment at WellStone in November 2016, but, she said, the mother did not complete that treatment because, although she had reached step 11 of the 12-step program, the mother had stopped attending classes and was discharged from the program. The Wellstone records introduced into evidence support that testimony.

Similarly, Tyouna Baker, a substance-abuse therapist at Aletheia House, testified that the mother had begun substance-abuse treatment at Aletheia House in June 2018 but that she had attended only four sessions before she was discharged from the program in August 2018 after failing to attend or to contact the facility. Baker testified that the mother's 2018 substance-abuse assessment at Aletheia House, which included a notation that the mother had admitted to multiple relapses, had indicated that the mother should attend intensive outpatient treatment but that the mother had reported that her work schedule at that time would not permit her to attend that program, which was offered only during the daytime hours.

Bates was questioned about her observations of the mother. Bates admitted that she had never seen the mother

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appear to be under the influence of any substance. She answered in the affirmative when asked if the mother had been clear-eyed and had made eye contact when she met with Bates, whether the mother appeared to be healthy during the entire time Bates had been the caseworker, and whether the mother appeared to have maintained a steady weight during DHR's involvement. Bates further indicated that the mother had not appeared drowsy or unstable during their interactions. Bates also testified that DHR was pursuing the termination of the mother's parental rights because DHR's policy required it.

The mother testified that she is an addict. She explained that, at the time of the termination trial, she was being treated for her opiate addiction at a methadone-treatment facility, where she went at least four days a week to receive a dose of methadone. However, the mother admitted that she also uses Adderall, which, she said, she had taken only two weeks before the trial. The mother testified that she had used Adderall as frequently as once a day during the previous six months but then stated that "it's probably four of five times a week." The mother excused her failure to complete substance-abuse treatment at WellStone by explaining

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that her brother had died, which, she said, had caused her to fall into a depression and to relapse. The mother said that her longest period of sobriety had been "a couple of months." When asked by the juvenile court why she had not pursued inpatient treatment for her substance-abuse issues, the mother explained that she had to work to pay her rent and utilities and that she had no one to help her do those things, implying that she would lose her employment and possibly her apartment if she went into inpatient treatment.

The mother testified that she had been employed at a gasoline station and convenience store when the child was first removed from her custody. She reported that, at that time, her hours of employment were from 6:00 a.m. to 4:00 p.m. According to the mother, she had had difficulty making it to the drug-screening facility, which operates from 8:00 a.m. to 4:30 p.m. However, the mother testified that she had changed employment six months before the termination trial and that, at the time of trial, she was working at a discount store during the third shift or from 10:00 p.m. to 7:00 a.m.³ The

³We note the inconsistency between Baker's testimony indicating that the mother's daytime work hours precluded her attendance at an intensive-outpatient-treatment program and

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mother candidly admitted that her failure to attend any drug screens for the previous six months was due more to the fact that she knew that she would test positive rather than conflicts with her work schedule. The mother testified that she had undergone a drug assessment in the days before the termination trial and that she had enrolled in a substance-abuse-treatment program at Aletheia House, which, she said, was scheduled to begin on January 3, 2019.

The mother testified that she had lived in the same apartment for almost 5 years at the time of the trial, and she presented as evidence a lease-extension addendum indicating that the mother had extended her existing lease for an additional 12-month period in December 2018. The mother introduced photographs depicting the apartment, which appeared clean and appropriate. The mother also testified that she owns an automobile and provided documentary evidence indicating that the automobile was insured. The mother said that her employer had indicated that she could move to the first shift if she received custody of the child.

the mother's testimony that she began working the third shift at a discount store six months before the termination trial, which would have been in June 2018.

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Bates testified that the child, who was 13 years old at the time of the trial, makes very good grades at school. She said that the child had initially been placed with a relative but that that placement had lasted for approximately two months. According to Bates, the child's second placement had lasted about the same length of time but had ended because DHR learned that the foster parent, a single man, had been sexually abusing the child and another child in his care. Bates said that the child was then placed with a single female foster parent, with whom the child remained for almost a year; however, Bates explained that the child had disrupted that placement by acting out and using coarse language. Bates testified that the child was then placed in a two-parent foster home, where he remained for a year. Bates said that that family had considered adopting the child, but, she said, the child had disrupted that placement when the foster parents disciplined him by taking away a cellular telephone that he was not allowed to have and the child threatened to kill himself. At the time of the trial, Bates testified, the child was in a new therapeutic foster-care placement with another

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single male, who, Bates said, the child appeared to be comfortable with.

Bates testified that the child had been described as polite and respectful. She said that, at the time he was removed from the mother's custody, the child had been making good grades and, as far as she knew, had not had attendance problems at school. According to Bates, the child had continued to excel at school, making all A's. Bates further admitted that the child's behavior should be credited to his mother.

Regarding the child's bond with his mother, Bates testified that the child "loves her with everything that is in him." She commented that she believed that the child's attachment to the mother prevents him from bonding with his foster parents because, she opined, he feels that forming attachments with them would be a betrayal of his mother. In answer to the question whether permanency would help the child, Bates answered "yes and no" and further explained that "he does need a permanent ... living situation, but, ... if it [is] not with his mom, its not going to work anyways."

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Bates testified that the child's behavior -- specifically, the "meltdown" over the cellular telephone and his threat of suicide -- had resulted in his placement in a therapeutic foster home. However, she commented that the child's behaviors were not so drastic that he would not be able to return to a normal foster home. She noted that the child would often act out more and use inappropriate language when he knew a court date was approaching but that he was not otherwise a difficult child.

According to Bates, the permanency plan for the child was adoption with no known resource. Bates admitted that, as a teenaged child, the child's chances at being adopted are low; she commented that, once he is placed on the "heart gallery," the child might be adopted out of the state, which she felt might be more difficult for him. Bates further noted that, if the child's behavior worsened, or if he made more threats of suicide, the child's placement opportunities would be limited to therapeutic foster care, which, she said, was even more difficult to locate for older children. Bates also said that, because of his age, the child might have to be placed in a group home.

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Melissa Leibrecht, the child's guardian ad litem, testified that the child had been difficult to get to know and commented that he seems to have "walls." She described the child as being bright and "generally a good kid." According to Leibrecht, the child needs a more permanent living situation. When the juvenile court questioned whether the longevity of the case and the continued hope of reunification had prevented the child from bonding with his foster parents, Leibrecht answered in the affirmative. She said that she had recognized that the child is very bonded to the mother, and, she said, in her opinion, that bond had prevented him from forming strong relationships with his most recent foster family, which had seriously considered adopting him, before his placement in the therapeutic foster home. Leibrecht testified that the child would not allow himself to fully entertain the idea of adoption. Leibrecht characterized the child's relationship with the mother as a constant but said that she did not truly consider it "a positive" because it held the child back. She opined that the termination of the child's relationship with the mother would possibly cause a "downward spiral," but, she said, she hoped that ending that

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relationship would allow him to move forward and form new bonds and relationships as he grows into adulthood.

The test a juvenile court must apply in an termination-of-parental-rights action is well settled.

"A juvenile court is required to apply a two-pronged test in determining whether to terminate parental rights: (1) clear and convincing evidence must support a finding that the child is dependent; and (2) the court must properly consider and reject all viable alternatives to a termination of parental rights. Ex parte Beasley, 564 So. 2d 950, 954 (Ala. 1990)."

B.M. v. State, 895 So. 2d 319, 331 (Ala. Civ. App. 2004). A juvenile court's judgment terminating parental rights must be supported by clear and convincing evidence. P.S. v. Jefferson Cty. Dep't of Human Res., 143 So. 3d 792, 795 (Ala. Civ. App. 2013). "Clear and convincing evidence" is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.'" L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002) (quoting Ala. Code 1975, § 6-11-20(b)(4)). Although a juvenile court's factual findings in a judgment terminating parental rights based on evidence presented ore tenus are presumed correct, K.P. v. Etowah Cty.

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Dep't of Human Res., 43 So. 3d 602, 605 (Ala. Civ. App. 2010), "[t]his 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." K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016). That is, this court "'must ... look through [\"the prism of the substantive evidentiary burden,\" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986),] 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.\"'" K.S.B., 219 So. 3d at 653 (quoting Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008), quoting in turn Ala. Code 1975, § 25-5-81(c)).

The termination of parental rights is governed by Ala. Code 1975, § 12-15-319. That statute reads, in part:

"(a) If the juvenile court finds from clear and convincing evidence, competent, material, and relevant in nature, that the parent[] of a child [is] unable or unwilling to discharge [his or her]

responsibilities to and for the child, or that the conduct or condition of the parent[] renders [him or her] unable to properly care for the child and that the conduct or condition is unlikely to change in the foreseeable future, it may terminate the parental rights of the parent[]. In determining whether or not the parent[] [is] unable or unwilling to discharge [his or her] responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following:

"....

"(2) Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of a duration or nature as to render the parent unable to care for needs of the child.

"....

"(7) That reasonable efforts by the Department of Human Resources or licensed public or private child care agencies leading toward the rehabilitation of the parent[] have failed.

"....

"(12) Lack of effort by the parent to adjust his or her circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of human resources or licensed child-placing agencies, in an administrative review or a judicial review."

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On appeal, the mother first argues that DHR did not present clear and convincing evidence establishing grounds for the termination of her parental rights. She specifically contends that DHR did not present evidence indicating that the mother was in need of rehabilitation services or how and why DHR initially became involved with the family and why DHR removed the child from the mother's custody. Thus, she says, the evidence does not establish that she is "unable or unwilling to discharge her responsibilities to and for the child." § 12-15-319(a).

We agree. DHR alleged, and the juvenile court determined that DHR had proven, that the mother had "excessively used alcohol or controlled substances, the duration or nature of which render the [mother] unable to care for the needs of said child," see § 12-15-319(a)(2), that "reasonable efforts by [DHR] leading toward the rehabilitation of the [mother] ... have failed," see Ala. Code 1975, § 12-15-319(a)(7), and that the mother had "failed to adjust [her] circumstances to meet the needs of the child in accordance with agreements reached with [DHR]." See Ala. Code 1975, § 12-15-319(a)(12).

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However, our review of the evidence presented by DHR does not support the juvenile court's findings.

We will first examine the juvenile court's first ground for termination of the mother's parental rights -- that the mother had "excessively used alcohol or controlled substances, the duration or nature of which render the [mother] unable to care for the needs of said child." The record contains no evidence indicating the basis for DHR's initial involvement with the mother and the child. Although DHR established that the mother had a history of drug use, it did not present evidence indicating that the child suffered neglect or abuse at the hands of the mother as a result of her drug use.⁴ In fact, the evidence DHR presented was to the effect that the child was generally polite and respectful and that he excelled in school, both at the time of his removal from the mother's custody and at the time of the trial.

We considered a similar issue in S.K. v. Madison County Department of Human Resources, 990 So. 2d 887, 899 (Ala. Civ. App. 2008). The father in S.K. had failed to comply with a

⁴The only abuse that DHR proved the child had suffered was at the hands of a former foster parent.

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recommendation that he undergo counseling, a fact the Madison Juvenile Court found to support the termination of the father's parental rights. S.K., 990 So. 2d at 899. We disagreed, noting that the evidence before the Madison Juvenile Court did not support that conclusion. We explained that

"because [the Madison County Department of Human Resources] did not offer the results of the father's psychological evaluation into evidence, it is difficult to assess whether the father's noncompliance constitutes a ground for termination of his rights. In other words, without evidence as to the reason for the recommendation that the father have counseling, we are unable to determine whether the grounds for termination listed [in the statute] applied."

Id.

Likewise, in the present case, DHR presented no evidence that the mother's drug use, although long-standing and certainly not a desirable trait, has ever impacted her ability to rear the child. See S.K., 990 So. 2d at 899. Furthermore, as we have explained, "the test [for the termination of parental rights] is whether DHR has presented clear and convincing evidence demonstrating that the parental conduct or condition currently persists to such a degree as to continue to prevent the parent from properly caring for the child."

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M.G. v. Etowah Cty. Dep't of Human Res., 26 So. 3d 436, 442 (Ala. Civ. App. 2009) (emphasis added). Nothing in the evidence presented at trial indicated that the mother, who was gainfully employed, had adequate transportation, and had a stable, suitable residence, was currently unable to properly care for the child. In addition, DHR failed to present evidence indicating that the mother's drug use had resulted in her inability or unwillingness to properly parent the child, and, thus, the record contains no proof that, in fact, her drug use renders her incapable of caring for the child and therefore that her condition should serve as a ground for termination of her parental rights. See § 12-15-319(a)(2). Accordingly, we conclude that the juvenile court's first finding -- that the mother had "excessively used alcohol or controlled substances, the duration or nature of which render the [mother] unable to care for the needs of said child" -- is not supported by clear and convincing evidence.

We now examine the juvenile court's second finding -- that "reasonable efforts by [DHR] leading toward the rehabilitation of the [mother] ... have failed."

"That DHR is generally required to make reasonable efforts to rehabilitate parents of dependent

children cannot be questioned. See T.B. v. Cullman Cty. Dep't of Human Res., 6 So. 3d 1195, 1198 (Ala. Civ. App. 2008). That is, DHR must make an effort to tailor services to best address the shortcomings of and the issues facing the parents. See H.H. v. Baldwin Cty. Dep't of Human Res., 989 So. 2d 1094, 1105 (Ala. Civ. App. 2007) (opinion on return to remand) (per Moore, J., with two Judges concurring in the result)."

Montgomery Cty. Dep't of Human Res. v. A.S.N., 206 So. 3d 661, 672 (Ala. Civ. App. 2016) (emphasis added). In the present case, DHR required the mother to complete a drug assessment, to complete drug treatment, and to participate in regular drug screenings as conditions to the reunification of the mother and the child. However, because DHR failed to present evidence of the shortcomings of the mother insofar as they relate to her ability to parent the child, the juvenile court could not have determined what services the mother was in need of receiving, whether the services DHR offered the mother were aimed at addressing those shortcomings, or whether DHR's efforts to rehabilitate the mother had truly failed.⁵ See

⁵We note that the WellStone records indicate that the mother had been previously diagnosed with and treated for bipolar disorder. DHR did not present evidence indicating that it had evaluated the mother's mental health, much less evidence indicating that it had considered offering the mother services aimed at addressing any mental-health disorder from which the mother might suffer.

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S.K., 990 So. 2d at 899; see also H.H. v. Baldwin Cty. Dep't of Human Res., 989 So. 2d 1094, 1105 (Ala. Civ. App. 2007) (opinion on return to remand) (per Moore, J., with two Judges concurring in the result) ("The natural starting point in any fair and serious attempt to rehabilitate the parent and to reunite the parent with the child is identification of that characteristic, conduct, or circumstance that renders the parent unfit or unable to discharge his or her parental responsibilities to the child. Once DHR identifies the source of parental unfitness, the overarching goal of family reunification requires DHR to communicate its concerns to the parent and to develop a reasonable plan with the parent that is tailored toward the particular problem(s) preventing the parent from assuming a proper parental role.").

Finally, we examine the third and final ground for the termination of the mother's parental rights stated in the juvenile court's judgment -- that the mother had "failed to adjust [her] circumstances to meet the needs of the child in accordance with agreements reached with [DHR]." As we have just explained, because of DHR's failure to present appropriate evidence, it was impossible for the juvenile court

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to determine whether DHR's requirements that the mother complete drug treatment and participate in drug screenings were aimed at ameliorating the conduct or condition of the mother leading to her inability to parent the child. Thus, the juvenile court lacked the factual basis to determine that the mother's failure to complete drug treatment to DHR's satisfaction is a "failure to adjust her circumstances to meet the needs of the child." Without proof of the condition or conduct of the mother that resulted in DHR's involvement, the juvenile court had no way of assessing the need for the mother's completion of drug treatment.

As our supreme court pronounced in Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990): "Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances." This court has also recognized that "the termination of parental rights is a drastic measure, and we know of no means by which those rights, once terminated, can be reinstated." V.M. v. State Dep't of Human Res., 710 So. 2d 915, 921 (Ala. Civ. App. 1998). Based on the record in the present case, the evidence does not reflect

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egregious circumstances requiring the drastic measure of termination of the mother's parental rights.

As noted above, the record fails to establish the reason that the child was removed from the care of the mother. Although the evidence suggests that the mother has had long-standing substance-abuse issues, and, thus, that the mother's drug use was of significant duration, the evidence does not indicate that the child suffered neglect or abuse as a result of the mother's drug use; that is, the evidence fails to establish that the mother's long-standing drug use was of a nature "as to render the parent unable to care for needs of the child." § 12-15-319(a)(2). The child was described as intelligent, respectful, and polite, qualities which, Bates admitted, had been instilled and fostered by the mother. In addition, Bates testified that, at the time of removal, the child was making good grades in school and had no attendance problems of which she was aware. The mother has had the same residence for five years, she has a reliable automobile, which is insured, and she has held two different jobs during the three-year period of DHR's involvement with the family.

Without evidence indicating that the mother's conduct or condition prevents her from adequately caring for the child,

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we cannot conclude that the juvenile court correctly determined that termination of the parental rights of the mother is warranted. That is, we cannot conclude that DHR presented clear and convincing evidence to support the juvenile court's judgment. Accordingly, we reverse the judgment of the juvenile court terminating the parental rights of the mother, and we remand the cause for proceedings consistent with this opinion. Because we have reversed the juvenile court's judgment based upon the mother's first argument on appeal, we pretermitt discussion of her other arguments. See P.S., 143 So. 3d at 798 (pretermittng discussion of further issues in light of the dispositive nature of another issue).

REVERSED AND REMANDED.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, with writing.

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THOMPSON, Presiding Judge, concurring in the result.

I disagree with the main opinion's analysis and conclusions with regard to the issues it addresses.

I concur in the result, however, because I conclude that there exists a viable alternative to the termination of the mother's parental rights of J.C. ("the mother"). In a case involving a claim seeking to terminate a parent's parental rights, the paramount consideration is the best interests of the child. C.T. v. Calhoun Cty. Dep't of Human Res., 8 So. 3d 984, 987 (Ala. Civ. App. 2008); State Dep't of Human Res. v. A.K., 851 So. 2d 1, 8 (Ala. Civ. App. 2002); A.R.E. v. E.S.W., 702 So. 2d 138, 140 (Ala. Civ. App. 1997). "The determination of whether a viable alternative to termination exists in a given case is a question of fact." J.A. v. Etowah Cty. Dep't of Human Res., 12 So. 3d 1245, 1254 (Ala. Civ. App. 2009).

The witnesses all acknowledged concerns about the effect a termination of the mother's parental rights could have on R.W.N. "(the child)". "[M]aintaining the status quo is a viable option to terminating parental rights when the parent and the child enjoy a relationship with some beneficial aspects that should be preserved such that it would be in the child's best interests to continue that relationship.'" J.D.

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v. E.R., 266 So. 3d 1088, 1099 (Ala. Civ. App. 2018) (quoting S.N.W. v. M.D.F.H., 127 So. 3d 1225, 1230 (Ala. Civ. App. 2013)). The evidence concerning the bond between the mother and the child, the child's behavioral issues, and the concerns that a termination of parental rights would have a detrimental effect on the child indicate that the termination of the mother's parental rights would not be in the child's best interests. Given the unique facts of this case, I would hold that this is one of the few, extraordinary cases in which a longer-term placement in foster care would best serve the child. See, e.g., L.M.W. v. D.J., 116 So. 3d 220, 226 (Ala. Civ. App. 2012) (reversing a termination-of-parental-rights judgment and holding that maintaining the status quo was, in that case, a viable alternative to the termination of parental rights). Accordingly, I concur in the result reached by the main opinion, i.e., that the juvenile court's judgment should be reversed.