Rel: March 1, 2024

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0867

Ex parte D.H.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: D.H.

v.

Tuscaloosa County Department of Human Resources)

(Tuscaloosa Juvenile Court: JU-19-513.02; Court of Civil Appeals: CL-2022-1095)

STEWART, Justice.

WRIT DENIED. NO OPINION.

Shaw, Mendheim, and Mitchell, JJ., concur.

Bryan, J., concurs specially, with opinion, which Wise, Sellers, and Cook, JJ., join.

Parker, C.J., dissents, with opinion.

BRYAN, Justice (concurring specially).

I concur in the Court's decision to deny D.H.'s petition for a writ of certiorari. In my opinion, there is no probability of merit in the petition. See Rule 39(f), Ala. R. App. P.

According to the facts that D.H. has provided to this Court, he was incarcerated when the child at issue in this case was born, and the child was placed in foster care when he was only three days old. It further appears from D.H.'s statement of facts that he has been incarcerated for the child's entire life, and the child was about three years old at the time of trial. D.H. also states that the Tuscaloosa County Department of Human Resources ("DHR") did not offer him any services because he was incarcerated.

In general, § 12-15-312, Ala. Code 1975, requires DHR to use "reasonable efforts" to reunite with their families dependent children who have been placed in foster care.

> "[R]easonable efforts refers to efforts made to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the home of the child, and to make it possible for a child to return safely to the home of the child."

§ 12-15-312(b).

However, § 12-15-312 also explicitly provides, in relevant part:

> "(c) Reasonable efforts shall not be required to be made with respect to a parent of the child if the juvenile court has determined that the parental rights of the parent to a sibling of the child have been involuntarily terminated or that a parent has done any of the following:
>
> > "(1) Subjected a child to an aggravated circumstance against the child or a sibling of the child and the risk of child abuse or neglect is too high for the child to remain at home safely or to be returned home. An aggravated circumstance includes, but is not limited to, rape, sodomy, incest, aggravated stalking, abandonment, torture or chronic abuse. An aggravated circumstance may also include any of the following:
> >
> > > "....
> > >
> > > "f. When a parent is incarcerated and the child is deprived of a safe, stable, and permanent parent-child relationship."

(Emphasis added.)

Based on the facts provided by D.H., it appears that DHR was relieved from making reasonable efforts to unite D.H. with the child based on D.H.'s incarceration. Under such circumstances, I fail to see any merit in D.H.'s argument that DHR was under a burden to place the child in the custody of a relative until a hypothetical time when D.H. may possibly safely assume custody of the child. See Petition, Exhibit C, at 7

("[D.H.] was incarcerated, though there was no admissible evidence o[r] testimony about the length of his sentence or expected release date. … The Mother was incarcerated [and] serving a [40]-year prison sentence.").

> "'We should not equate the filing of "court papers" and the taking of legal positions with the establishment of human relationships. … While those papers sit in a folder in a courthouse, children grow. They are read to and tucked in at night. They are nursed to health. They are taught. They are nurtured. They are loved. And they love back. And bonds are formed -- but not with a biological father who has allowed himself to remain absent from the child's life. See generally R.K. v. R.J., 843 So. 2d 774 [(Ala. Civ. App. 2002)]; Lehr v. Robertson, 463 U.S. 248 [(1982)].'
>
> "K.W.J. [v. J.W.B.], 933 So. 2d [1075, 1081] (Murdock, J., dissenting) …."

Ex parte J.W.B., 933 So. 2d 1081, 1092 (Ala. 2005). In my opinion, the Court has correctly denied D.H.'s petition based on the facts and arguments presented to us.

Wise, Sellers, and Cook, JJ., concur.

PARKER, Chief Justice (dissenting).

I respectfully dissent from the Court's denial of certiorari review in this termination-of-parental-rights case. In my opinion, neither the juvenile court nor the Court of Civil Appeals adequately considered the possibility that a relative placement for the child with a maternal great-uncle was a viable alternative to terminating the father's parental rights. Therefore, the Court of Civil Appeals' decision to affirm the Tuscaloosa Juvenile Court's judgment terminating the father's parental rights likely conflicts with M.P. v. DeKalb County Department of Human Resources, [Ms. CL-2023-0179, Oct. 27, 2023] ____ So. 3d _____ (Ala. Civ. App. 2023). I write specially to express my concern that, in affirming the termination, the Court of Civil Appeals did not follow the precedents of this Court but, instead, followed two decisions of its own that run contrary to the precedents set by this Court for termination-of-parental-rights proceedings. In denying certiorari review, this Court muddies the waters unnecessarily and weakens the strict-scrutiny review we have repeatedly

required for State interferences with fundamental rights, including parental rights.[1]

According to the facts before us, D.H. ("the father") is incarcerated, serving an unknown term for an unknown offense. He had two children. Their mother pleaded guilty to the murder of the older child and is now serving a 40-year prison sentence. At some point after the first child's death, but before her trial and sentencing to prison, the mother gave birth to a second child. The Tuscaloosa County Department of Human Resources ("DHR") immediately removed the second child from the mother's custody, placing him in foster care when he was three days' old. Being incarcerated, the father was not available to care for the child. The

[1]I acknowledge, as the special concurrence points out, that a department of human resources is not required to seek family reunification in all circumstances and that this case may be one in which such efforts are not required. But that does not excuse the Court of Civil Appeals from applying strict scrutiny, including the "viable alternatives" prong of this Court's test, originally set forth in Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990) to the juvenile court's decision to terminate a father's parental rights, which is a separate issue from family reunification. See Ex parte T.V., 971 So. 2d 1, 4, 7-8 (Ala. 2007) (holding that, even in a situation in which a department of human resources had no duty to seek family reunification, both prongs of the Beasley test were still required to be met in order to terminate parental rights); see also Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011) (imposing the strict-scrutiny standard in cases involving parental rights).

mother and the father both gave DHR information regarding possible relative resources for the child. Upon investigation, DHR discovered that the only possible relative resource who had adequate housing and income to care for the child was T.W., a maternal great-uncle of the child. DHR began, but did not complete, an investigation with a view to placing the child with T.W. A background check revealed that T.W. had a prior conviction, but the facts before this Court do not indicate whether that conviction would have rendered him unfit to take custody of the child. T.W. indicated that he wished to take custody of the child, including by cooperating with DHR, by filing a petition for custody in the juvenile court, and by repeatedly contacting court and DHR personnel when nothing was done. Despite T.W.'s efforts, DHR did not complete its investigation or return T.W.'s phone calls.

At trial, neither parent was present or available. T.W. testified that he wanted custody of the child and would be glad to take him. He testified about his willingness to make necessary adjustments to his life to fit the needs of the child, and to follow any court orders, including orders restricting visitation with the mother. The juvenile court ultimately terminated the parental rights of both parents. The father appealed. The

Court of Civil Appeals affirmed the juvenile court's judgment in a no-opinion order. D.H. v. Tuscaloosa Cnty. Dep't of Hum. Res. (No. CL-2022-1095, Sept. 8, 2023), ___ So. 3d ___ (Ala. Civ. App. 2023) (table).

To satisfy this Court's test for termination of parental rights, DHR must prove, by clear and convincing evidence, (1) that adequate legal grounds exist for the termination of parental rights and (2) that no viable alternative to the termination of parental rights exists. Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990); Ex parte T.V., 971 So. 2d 1, 4-5 (Ala. 2007). This test is based on the constitutional requirement that strict scrutiny be applied to decisions to terminate fundamental parental rights. Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011); Ex parte Bodie, [Ms. 1210248, Oct. 14, 2022] ____ So. 3d ____, (Ala. 2022) (Parker, C.J., concurring in part and concurring in the result). Based on the facts before us, DHR utterly failed to meet the second element of this test. There is no argument before this Court that a permanent placement with T.W. was not a viable alternative to the termination of the father's parental rights. Instead, in its no-opinion order, the Court of Civil Appeals cited A.E.T. v. Limestone County Department of Human Resources, 49 So. 3d 1212 (Ala. Civ. App. 2010), and S.J. v. Jackson County Department of

Human Resources, 294 So. 3d 804 (Ala. Civ. App. 2019), in support of its decision to affirm the juvenile court's judgment terminating the father's parental rights despite the existence of a viable alternative.

On the page cited by the Court of Civil Appeals, A.E.T. contains the following language:

> "'In short, so long as reunification with the parents is a foreseeable likelihood, the State has no choice but to consider and pursue all viable alternatives to such termination. Once "grounds for termination" exist, however, reunification by definition is no longer a "foreseeable" alternative, the constitutional and state-law presumption in favor of the natural parents is lost, the "interests of the child and the natural parents ... diverge," and the only remaining consideration is the direct question, unencumbered by a parental presumption, of what is in the child's "best interest."'"

49 So. 3d at 1219 (quoting D.M.P. v. State Dep't of Hum. Res., 871 So. 2d 77, 94 (Ala. Civ. App. 2003) (plurality opinion)). The emphasized portion of the above quote essentially abandons this Court's test from Beasley and T.V. Instead, it proposes an alternate test, substituting the "best interest of the child" for the "viable alternatives to termination" element of the Beasley test. See S.J., 294 So. 3d at 810 (quoting H.B. v. J.N., 226 So. 2d 205, 209-10 (Ala. Civ. App. 2016), (citing in turn A.E.T., 49 So. 3d at 1219) (pointing out that, "'[u]nder A.E.T., a juvenile court may

terminate parental rights if the juvenile court determines that viable options to termination do not serve the best interests of the child'" (emphasis added)).

In my special writing in Ex parte Bodie, I explained that the two elements of the Beasley test are tailored to the constitutional requirement that strict scrutiny be applied to any governmental interference with fundamental rights. Those two elements "are ultimately expressions of strict constitutional limitation, not merely nice suggestions for the betterment or well-being of families, or even merely legislative or common-law impositions that can be fundamentally modified by popular will or judicial sentiment." Bodie, ____ So. 3d at ____ (Parker, C.J., concurring in part and concurring in the result).

Thereafter, in M.P., the Court of Civil Appeals went into great detail on the constitutional requirement that strict scrutiny be applied to decisions to terminate parental rights. It cited Beasley, T.V., and my special writing in Bodie repeatedly. It held that the second element of the Beasley test, the one abandoned by A.E.T. and S.J., was a constitutional requirement. See id. at ___ (citing my special writing in Bodie, which was

based on Beasley). It is hard to see how the Court of Civil Appeals' decision in this case does not conflict with that conclusion in M.P.

A.E.T. and S.J. appear to try to create an exception to this Court's precedents for situations where family reunification "'is not reasonably foreseeable.'" S.J., 294 So. 3d at 810 (quoting H.B., 226 So. 3d at 209). Although this exception may seem reasonable on the surface, I have previously explained that such considerations are irrelevant to the strict scrutiny courts are required to apply in such cases. See Bodie, ____ So. 3d at ____ (Parker, C.J., concurring in part and concurring in the result) (explaining that, "ordinarily, the viability of alternatives to termination should be analyzed based on the circumstances that are before the juvenile court at the time of the termination judgment, not based on potential future circumstances"). A.E.T. and S.J. do not comply with the "strict constitutional limitation" binding on the State in terminating parental rights. Bodie, ___ So. 3d at ___ (Parker, C.J., concurring in part and concurring in the result). Rather than applying strict scrutiny, as this Court has repeatedly required, they sneak the less-stringent "best

interest of the child" standard through the back door and, at least to this extent, should be overruled.[2]

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[2]The Court of Civil Appeals, in its order of affirmance, also cited § 12-15-319(c), Ala. Code 1975, which provides, in relevant part:

> "The juvenile court is not required to consider a relative to be a candidate for legal guardian of the child in a proceeding for termination of parental rights if both of the following circumstances exist:
>
> > "(1) The relative did not attempt to care for the child or obtain custody of the child within four months of the child being removed from the custody of the parents or placed in foster care, if the removal was known to the relative.
> >
> > "(2) The goal of the current permanency plan formulated by the Department of Human Resources is adoption by the current foster parents."

If T.W. met both of those criteria, the juvenile court was not required to consider him as a relative resource, and a placement with him would not have been a "viable alternative" to termination. But this Court has no facts properly before it to justify a reasonable inference that T.W. met both of those criteria. The second criterion is undoubtedly met; the permanency plan is adoption by the foster family. But the facts before this Court seem to indicate that T.W. was very diligent in seeking custody of the child. There is no indication in the facts currently before the Court that T.W. did not seek to care for the child or to get custody of the child within four months of the child's removal from the mother's custody. Without more information in the record, we cannot be sure that § 12-15-319(c) applies.

For these reasons, I believe the father has established a likelihood of merit in his contention that the Court of Civil Appeals' decision in this case conflicts with its decision in M.P., which faithfully followed the binding precedents of this Court requiring strict scrutiny in termination-of-parental-rights cases. I would therefore grant certiorari review.