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Friday Opinions, March 24, 2023, Court of Civil Appeals

R.H. and A.H. v. Madison County DHR, CL-2022-0799, CL-2022-0800, CL-2022-0813, CL-2022-0814, Consolidated Appeals from Madison County Juvenile Court. This opinion was authored by Judge Matt Fridy.

Holding(s):

> "[W]hen foster parents are amenable to continued contact between the child and the parent and when the evidence suggests that such contact is beneficial for the child, maintenance of the status quo or permanent placement with the foster parents can be a viable alternative to the termination of a parent's parental rights."

Procedural Posture and Parties:

R.H., the natural father, and A.H., the natural mother, individually appealed the Madison County Juvenile Court's Order terminating their parental rights to their two children, N.H. and A.G.H. The Court of Civil Appeals reversed the Juvenile Court's TPR Order, and remanded back to the Juvenile Court with instructions.

Concise Facts with S.J. McLure Commentary:

At the time of trial N.H. was four years old and A.G.H. was two years old. After an initial safety plan that fell through, the State placed the children in the home of a long-time family friend, who later became a licensed foster parent.

The State's involvement with the children began on February 10, 2021. The TPR trial began on May 31, 2022. That's approximately one year and three months from entry into State care to TPR. The Legislature has mandated that the Department petition the court for termination of parental rights after the child has been in care for 12 of the last 22 months; absent some extraordinary circumstance.

The Court of Civil Appeals marched through all the presenting factors which rightly led to State involvement. The home was so unclean that the parents were

evicted. The children had dismally bad hygiene. The natural mother had apparent mental health issues that prevented her from caring for the home or children.

This initial factors are important. In order to support a TPR, the Court wants to see that the State has provided, not immaculate services, but reasonable efforts and services to help the parents overcome those initial problems that led to the State's intervention. Here, the Court went into pretty good detail about the natural parents' current circumstances, which no doubt provided sufficient grounds for TPR.

So why did the Court of Civil Appeals overturn the trial court's order terminating parental rights?

It's the second prong, "no viable alternatives," that's the problem. We've written on this prong before, highlighting Justice Stuart's disdain for it [hyperlink to https://www.theadoptionfirm.com/2022/11/04/equipping-foster-parents-for-gracious-advocacy-series-part-ii%e2%80%a8the-golden-calf-of-no-viable-alternatives/]. In the famous 2008 Ex parte A.M.P., Justice Stuart's concurring opinion takes the "no viable alternative prong" to task:

> "I write to reemphasize the problem with the court-created "no viable alternative" second prong of the termination-of-parental-rights test. . . I have written at length concerning the origin of this judicial engraftment of a requirement outside the statutes and its subsequent modification, which made bad caselaw worse. See Ex parte F.P., 857 So.2d 125 (Ala.2003) (Stuart, J., dissenting). Although this judicially created test has become entrenched in our caselaw, it is nevertheless erroneous and perhaps will one day be overruled."[1]

In citing Ex parte F.P., Justice Stuart hints at how long she has been beating this drum. In F.P., Justice Stuart first noted that the the no-viable-alternative prong does not appear in any statutory provision of Alabama law.[2] The "viable alternatives" language originated in child-abuse and neglect cases involving the Department of Human Resources. Justice Stuart identified an unusual federal case that parties pursuing a "viable alternatives" argument cited to for authority: Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976).

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[1] Ex parte A.M.P., 997 So. 2d 1008, 1024 (Ala. 2008) (Stuart, J., concurring).

[2] Ex parte F.P., 857 So. 2d 125, 144 (Ala. 2003).

Roe v. Conn, in turn, cited, Lovell v. Department of Pensions & Sec. Hang with me … I promise this will be good.

Lovell held that trial courts, "in determining the best interest of children, should look to viable alternatives before terminating parental rights."[3]

Stuart explained that, over the years, the Lovell court's phrase was repeated while omitting the phrase "in determining the best interest of the children."[4] Instead of being considered one of several criteria, it was transformed into the second prong of a two-pronged test. It was, "without analysis," applied to termination of parental rights cases not involving the State or [DHR].[5]

Justice Stuart concluded:

> [I]t is simply not part of the statutory scheme adopted by the Legislature in the Child Protection Act; its continuation is by judicial engraftment only and is wrong.[6]

You can't have good fruit from a bad tree. The R.H. and A.H. decision is bad fruit.

This is now the fifth case in three years where the Court of Appeals has deprived a child of permanency because of the feelings of the foster parents. We've also written at length on this topic [https://www.theadoptionfirm.com/2022/11/04/equipping-foster-parents-for-gracious-advocacy-series-part-ii%e2%80%a8the-golden-calf-of-no-viable-alternatives/].

The first was P.M. v. Lee County Dep't of Human Res., 335 So. 3d 1163, 1172 (Ala. Civ. App. 2021) (because foster parents testified they were willing to continue caring for the child, status quo was a viable alternative to termination).

The second (by omission) was D.J. v. Etowah County DHR, 2200394 (Ala. Civ. App. October 8, 2021) (aunt's interest in caring for children was a viable alternative to TPR where "The children's foster parents did not testify").

The third was A.B. v. Montgomery Cty. Dep't of Human Res., No. 2210106 (Ala. Civ. App. August 19, 2022) (where foster mother was willing to continue caring for

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[3] Id. (citing Lovell v. Department of Pensions & Sec., 356 So.2d 188 (Ala.Civ.App.1978)).
[4] Id.
[5] Id.
[6] Id.

the child and allow continued contact with the mother, which was in the child's best interest, status quo was viable alternative to termination).

The fourth was C.C. v. C.T. and K.T., 2210356 (Ala. Civ. App. October 28, 2022) (uncle's willingness to continue caring for child and allow continued contact with mother so long as she remained sober was viable alternative to termination).

Today, I'm calling this new judicially created prong: the *Foster Parent Attitude Prong*.

In R.H. and A.H., the Court goes to lengths to explain that the Department did everything right, except that the foster parent didn't have the right attitude toward the natural parents to support an order terminating parental rights. The foster parent testified that she would continue to allow the child to have contact with the natural parents, whether or not there was TPR.

Unless and until the Alabama Supreme Court overturns this line of cases, we have a third prong which must be satisfied by clear and convincing evidence, the *Foster Parent Attitude Prong*.