Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Court of Appeals Case Number: 19CA1406 ORDER REVERSED AND REMANDED Opinion by: Judge Tow, Webb, J. concurring; Terry, J., dissenting. Larimer County District Court Case Number: 17JV249 The Honorable Gregory M. Lammons, Judge	▲ **COURT USE ONLY** ▲ Case Number: 2020SC187
Petitioner: The People of the State of Colorado, In the Interest of AM, a Child v. Respondent: TM	
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GUARDIAN AD LITEM'S PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner Guardian ad Litem's Petition for Writ of Certiorari complies with all the requirements of C.A.R. 3.4(k)(2) and C.A.R. 53(c) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this opposition brief complies with the 3800-word limit set forth in C.A.R. 53(f)(1). It contains 3091 words.

Josi McCauley, Reg. No. 37813
Appellate Guardian ad Litem

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ADVISORY LISTING OF THE ISSUE

1) Whether a divided division of the Court of Appeals, in departing from the usual course of review for a trial court's finding that no less drastic alternative to termination existed, was correct in equating adequacy with a child's best interests.
2) Whether the Court of Appeals acted discordantly with applicable decisions of this Court when it failed to properly apply the clearly erroneous standard of review, substituting the trial court's factual findings with its own judgment, and reversed the trial court's termination decree.
3) Whether the Court of Appeals' election not to follow the law of the case doctrine, where a previous division directed the court to determine whether permanent custody or whether termination was in the best interests of the child, is such a departure from the principle of stare decisis that this Court must exercise its power of supervision.

OPINION BELOW

On February 13, 2020, a divided division of the Court of Appeals issued its published opinion in case 19CA1406, *People in Interest of A.M.,* 2020 COA 30. The appellate court reversed the judgment of the trial court and remanded the case with instructions. This was the second appeal in this case. The first decision reversed the trial court's decree and remanded the case to the trial court. *People in*

Interest of A.M., 18CA1091, ¶17 (issued May 2, 2019) (not published pursuant to C.A.R. 35(e)).

JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction under C.A.R. 3.4(l), 49(b)-(d), and 52(b). By order of the Court of Appeals, the time within which to file a petition for rehearing was limited to seven days. No petition for rehearing was filed. This petition is timely filed.

RELATED MATTERS PENDING BEFORE THIS COURT

The Guardian ad Litem is unaware of any cases pending before this Court for review on the same legal issues.

STATEMENT OF THE CASE

This is a dependency and neglect case. The *Petition in Dependency and Neglect* was filed on June 27, 2017. The Child, AM, was three weeks old at the time the case was filed. The Child was adjudicated dependent and neglected on or about July 24, 2017, as to Father, and July 31, 2017, as to Mother based upon the willful admission of each parent. Appropriate treatment plans, with respect to each parent, were adopted as part of the dispositional orders the same days. The People filed a motion to terminate the rights of the parents on December 7, 2017, and a two-day termination hearing was held on April 16 and June 1, 2018. The People's Motion for Termination was denied by the trial court. Importantly, the trial court

held "the best interest of the child would be served by termination; however, permanent custody is a less drastic alternative." *CF, p 220.*

The First Appeal

The trial court's judgment denying the request for termination of parental rights was appealed, and a division of the Court of Appeals reversed the trial court's judgment and remanded the case with directions to resolve whether APR or termination was in the best interests of the child. *A.M.,* 18CA1091, ¶17. On remand, without presentation of any additional evidence, but after a status conference with the parties, the trial court issued its *Order Upon Remand*, terminating the parent-child legal relationships. *CF, pp 297-300.* In finding that termination was in the Child's best interests, the court held "permanent custody was an appropriate and viable option and less drastic than termination; however, termination is better for the child because it provides a slightly higher probability of permanence." *CF, pp 299-300.*

The Second Appeal

Father appealed the court's termination of his parental rights. Another division of the Court of Appeals, with one judge dissenting, reversed the trial court's *Order Upon Remand,* and again remanded the case with instructions. *A.M.*, 2020 COA 30. The majority, in an apparent departure from other decisions of the Court of Appeals, and acknowledging that it likely was in conflict with the first

division handling the initial appeal, determined that the less drastic alternative inquiry required the juvenile court to determine "whether there is an alternative short of termination that adequately meets the child's physical, emotional, and mental health needs," rather than whether such option best served the child's needs. *A.M.*, 2020 COA 30, ¶¶24, 26.

ARGUMENT FOR GRANTING THE WRIT

I. There are special and important reasons this Court should grant the Petition.

The Court of Appeals, in holding that an adequacy standard, rather than a best interests standard, is the requisite standard for identifying whether less drastic alternatives to termination exist, determined a question of substance probably not in accord with other decisions of this Court. Additionally, not only was there division amongst the judges assigned to the panel, but the opinion conflicted with another division of the intermediate appellate court. And, the newly adopted standard for determining the viability of less drastic alternatives is a significant departure from the standards applied by other Court of Appeals' divisions.

A. The Court of Appeals has decided a question of substance not yet determined by this Court.

This Court reviews questions of law de novo. *People ex rel. A.J.L.*, 243 P.3d 244, 249 (Colo. 2010). Though the statutory criteria for termination of parental rights has changed multiple times, the requisite that the court consider less drastic

alternatives has never been explicitly incorporated into the statutes. *See* §19-3-111 et. seq., C.R.S. (1973), §19-11-105, C.R.S. (1978 Repl.Vol. 8), §19-3-604, C.R.S. (supp. 1987). The need to consider and eliminate less drastic alternatives prior to terminating parental rights, however, has been established by this Court. *See People in Interest of M.M.*, 726 P.2d 1108, 1122-1123 (Colo. 1986), *C.S. v. People*, 83 P.3d 627, 640 (Colo. 2004); *see also In re People in Interest of M.M.*, 184 Colo. 298, 305 (Colo. 1974). This requirement has been determined to be implicit within the statutory criteria for termination. *People in Interest of M.M.*, 726 P.2d at 1123. Consideration of these alternatives needn't be explicit, and courts may presume less drastic alternatives were considered, absent indication to the contrary, where the findings necessary for termination are supported by the record. *C.S.*, *pp* 640-641.

While this Court has recognized the need to consider and eliminate less drastic alternatives prior to termination of parental rights, what constitutes a viable less drastic alternative remains undefined and largely determined on a case-by-case basis. Indeed, this Court has yet to determine whether a less drastic alternative need only adequately meets a child's needs, or whether the permanency option must best serve the child's needs, to be considered a viable less drastic alternative to termination.

B. The Court of Appeals, failing to properly apply the clearly erroneous standard of review, has rendered a decision probably not in accord with other decisions of this Court.

"Whether the court of appeals applied the correct legal standard to a case under review is a matter of law," to be reviewed de novo. *A.J.L., p* 249. In holding that what best serves a child is irrelevant where a less drastic permanency option adequately meets the child's needs, the Court of Appeals arrived at a legal conclusion in conflict with both the legislative intent of the Code and with prior opinions of the same court. This Court has recognized, "[c]ourts conducting dependency and neglect proceedings must be guided by the purposes underlying Colorado's Children's Code." *K.D. v. People,* 139 P.3d 695, 698 (Colo. 2006). To that end, one purpose of the Code is to "secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society." §19-1-102(1)(a), C.R.S (2019).

This Court favors statutory interpretation that produces "a harmonious reading of the statutory scheme," rather than one that results in inconsistency among the various statutory components. *A.M. v. A.C.,* 2013 CO 16, ¶8. Related statutes, concerning the same subject matter, are to be construed consistently with one another, and interpretations rendering words or provisions meaningless are to be avoided. *People in Interest of L.M.*, 2018 CO 34, ¶13. Contrary to the Court of

Appeals' opinion, "best interests" must be used as a superlative if it is to be read consistently with other provisions of the Code. *See A.M.,* 2020 COA 30, ¶24.

In declining to find that a less drastic alternative must best serve the child's welfare to be viable, the lower court implied that such interpretation would contradict this Court's previous finding that "the parental relationship should not be terminated simply because the child's condition thereby might be improved." *See People in Interest of A.M.,* 2020 COA 30, ¶23 (quoting *People in Interest of E.A.*, 638 P.2d 278, 285 (Colo. 1981)). However, the holding in that case concerned a trial court's judgment terminating parental rights where there were insufficient facts and findings to support the termination decree, unlike the case-at-hand. *People in Interest of E.A.*, 638 P.2d 278 (Colo. 1981).

The Court of Appeals misapplied the clearly erroneous standard of review when it reversed the termination of parental rights. *See A.J.L.*, p 246 (finding the Court of Appeals did not properly apply the clearly erroneous standard of review where ample evidence supported the trial court's findings and conclusions). Where the court's findings conform to the requisite criteria for termination of parental rights, and where those findings are supported by the record, the trial court's finding that no less drastic alternative existed should not be disturbed. *C.S.*, pp 640-641.

In this case, as acknowledged by the lower court, there was no contest as to whether the statutory criteria had been satisfied. *See A.M.,* 2020 COA 30, ¶19. Additionally, evidence supported the trial court's finding that, "termination is better for the child because it provides a slightly higher probability of permanence." *CF, pp 299-300.* It is unquestionable that adoption is a more permanent solution, legally, than is allocation of parental responsibilities. The custodial relative testified that adoption was best for the Child and provided needed stability. *TR 4/16/ 18, pp 61:15, 63:25-64:1.* The caseworker also testified that permanent custody was an inappropriate permanency option, identifying the "fear and anxiety" that the parent's ability to request major modifications of custody would cause. *TR 4/16/18, pp 109:20-110:3.*

As identified by the dissent, "where, as here, the court considered the availability of such an APR, but still determined that termination of parental rights would be in the child's best interest, and that finding is supported by the record," the decision must be affirmed. *A.M.*, 2020 COA 30, ¶32. The lower court's failure to adhere to the clearly erroneous standard of review rendered as legal error its reversal of the termination decree. And, the Court of Appeals' determination that permanent custody was in the best interests of the child, contrary to the findings of the trial court, was an improper substitution of its findings for those of the trial court. *See A.J.L., p 250* (citing *M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380,

1383-1383 (Colo 1994) (finding the court of appeals erroneously substituted its findings for those of the trial court)).

C. The lower court's decision conflicts with decisions of other divisions of the court of appeals.

This division of the Court of Appeals acknowledged that its opinion may conflict with the decision of the division that decided the earlier appeal. *A.M.*, 2020 COA 30, ¶26. Prior to the ruling in question, neither this Court, nor the Court of Appeals, has determined that adequacy is sufficient to satisfy best interests inquiries. To terminate parental rights, a trial court must find that 1) the child has been adjudicated dependent or neglected; 2) an appropriate treatment plan has not been complied with or was unsuccessful; 3) that the parent is unfit; and 4) that the conduct or conditions of the parent is unlikely to change in a reasonable time. §19-3-604(1)(c), C.R.S (2018). Additionally, consideration of this criteria requires primary consideration be given to the child's "physical, mental, and emotional conditions and needs." §19-3-604(3), C.R.S. (2018). And, as identified above, the court must also consider whether any less drastic alternative to termination exists. *See C.S., supra.*

Many divisions, if not all, have recognized that consideration of less drastic alternatives requires primary consideration be given to the physical, mental, and emotional conditions and needs of the child. *See People ex rel. D.B-J.*, 89 P.3d 530, 531 (Colo. App. 2004), *People in Interest of Z.M.*, 2020 COA 3M, ¶29,

People in Interest of A.N-B., 2019 COA 46, ¶50, *People in Interest of S.K.,* 2019 COA 36, ¶85, *People in Interest of J.L.M.*, 143 P.3d 1125, 1126 (Colo. App. 2006); *see alsoPeople ex rel. D.P.*, 160 P.3d 351, 356 (Colo App. 2007), Similarly, it is recognized that a child's best interests govern the termination decision. *See People ex rel. J.M.B.*, 60 P.3d 790, 793 (Colo. App. 2002) (citing *People in Interest of M.M.* 726 P.2d 1108 (Colo. 1986), *People in Interest of S.T.*, 678 P.2d 1054 (Colo. App. 1983)). Many divisions have identified criteria that the trial court **may** rely on in eliminating a less drastic permanency option, including the following:

- Whether the child needs permanency that can only be assured by adoption. *Z.M.*, ¶30, *A.N-B.*, ¶50, *People ex rel. J.C.R.*, 259 P.3d 1279, 1285 (Colo. App. 2011), *People ex rel. Z.P.*, 167 P.3d 211, 214 (Colo. App. 2007), *People ex rel. M.B.*, 70 P.3d 618, 627 (Colo. App. 2003),. *J.M.B.*, p 793.
- The lack of adequate permanence of another permanency option. *People ex rel. A.R.*, 2012 COA 195M, ¶41, *People in Interest of T.E.M.*, 124 P.3d 905, 910 (Colo. App. 2005)..
- Whether an ongoing relationship with the parent would be beneficial or detrimental to the child. *See People ex rel. J.C.R.*, p 1285*; see also A.N-B.*, ¶50, *People ex rel. A.R.*, 2012 COA 195M, ¶38, *J.L.M.*, p 1127.

- The relative's lack of appreciation of the parent's problems or the child's conditions or needs. *S.K.*, ¶85, *D.B-J.*, pp 531-532 (Colo. App. 2004).

While some divisions have explicitly elected to consider the lack of adequacy a certain permanency option provides, *see T.E.M., supra*, this is not the same as requiring a court to identify a certain option as a viable less drastic alternative if it is merely adequate. Here the lower court, imputing its own criteria for less drastic alternatives, found "the inquiry **must** be whether there is an alternative short of termination that *adequately* meets the child's physical, emotional, and mental health needs." *A.M.*, 2020 COA 30, ¶24 (emphasis added). No division before has gone so far as to **require** a court to consider specific criteria not explicitly identified as statutory criteria for termination, in eliminating less drastic alternatives. Not only was this ruling novel, but it likely conflicts with the generally accepted premise that the child's best interests should determine the availability of a less drastic alternative.

D. The Court of Appeals' departure from the rule of stare decisis and/or the law of the case doctrine demands the exercise of this Court's power of supervision.

On appeal from the trial court's judgment, the Guardian ad Litem argued that the Court of Appeals should apply the law of the case doctrine, and the People argued that the Court of Appeals should apply the doctrine of claim preclusion. The Court of Appeals abused its discretion in declining to apply either doctrine.

Stare decisis requires an appellate court to follow to rule of law it has established in earlier cases, with limited exception. *See Bedor v. Johnson*, 2013 CO 4, ¶23. The purpose of stare decisis is to ensure "uniformity, certainty, and stability of the law and the rights acquired thereunder." *Creacy v. Industrial Com'n*, 148 Colo. 429, 433, 366 P.2d 384, 386 (1961). Similarly, the law of the case doctrine provides that "the law of the case established by an appellate court must be followed on remand in subsequent proceedings before a trial court." *Kuhn v. State, Dept. of Revenue*, 897 P.2d 792, 795 (Colo. 1995). In other words, "[an] appellate holding and its necessary rationale become law of the case controlling future proceedings." *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009).

When the first division of the court of appeals reversed and remanded the trial court's first decree, it did so with the instruction that the trial court determine "whether the less drastic alternative of APR to the child's aunt is in the best interests of the child or whether, as the court's findings indicate, termination is in the child's best interests." *A.M.*, 18CA1091, ¶17. The court identified that the trial court failed to resolve whether the less drastic alternative served the best interests of the child, impliedly holding that such finding was a requisite to terminating, or refusing to terminate, parental rights. *Id.* Effectively, the first division concluded that only one permanency option could serve the child's best interests and no other option would constitute a less drastic alternative. After determining, on remand,

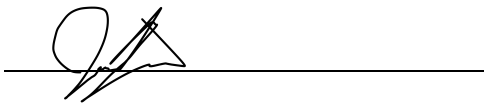
that termination was in the child's best interests, the matter should have been final. Instead, the second division, disagreeing with the earlier division, *A.M.*, 2020 COA 30, ¶26, again reversed the trial court and remanded the case.

Although the second division was correct that divisions of the Court of Appeals have determined the application of the law of the case doctrine is discretionary in some circumstances, it should not have declined to apply the doctrine here. *See People v. Thomas,* 2015 COA 17, n.2. In declining to adhere to the law of the case doctrine, the court rendered this case potentially unresolvable. Once again, the case was remanded to the trial court with instructions. *A.M.*, 2020 COA 30, ¶29. Yet again, the final outcome will be subject to possible appeal. And, without application of the law of the case doctrine, yet another division of the Court of Appeals may decided to render an opinion in conflict with the second division with the possibility of even further repetition. Such disregard of the law of the case doctrine in this circumstance erodes fundamental judicial principles including the need for finality, consistency and efficient disposition within the legal system.

CONCLUSION

The Court of Appeal's decision that the trial court must deny termination if faced with any permanency alternative that adequately meets a child's needs is a degrades the overall intent of the Children's Code and may lend to varying interpretations of "best interest" language as it applies to provisions throughout the Code. As such, the Guardian ad Litem respectfully requests this Court grant her Petition for Writ of Certiorari to review the lower court's decision.

Respectfully submitted this 5th day of March, 2020.



Josi McCauley, Reg. No. 37813

CERTIFICATE OF SERVICE

I certify that I did on this 5th day of March 2020, via ICCES or by U.S. Mail, postage prepaid, serve a true and correct copy of the foregoing Respondent Guardian ad Litem's Petition for Writ of Certiorari the following:

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Josi McCauley