

UTAH COURT OF APPEALS

**JOINDER IN
GUARDIAN AD LITEM MOTION
FOR RULE 23C EMERGENCY
RELIEF**

Order from Which Relief Is Sought

Pursuant to Rule 23C of the Utah Rules of Appellate Procedure, Appellant
, by counsel, hereby joins in full, approves, and adopts the Motion for 23C
Emergency Relief filed by the Guardian Ad Litem on _____ (“GAL’s
Motion”), which seeks relief in the form of a stay until the case of *In re B.T.B.*, 2018 UT
App 157, is resolved or withdrawn.

Specific and Clear Statement of Relief Sought

Mother seeks a stay of this action until *In re B.T.B.*, 2018 UT App 157, is fully and finally decided or withdrawn.¹

Factual and Legal Grounds Entitling the Party to Relief

Mother moves for an emergency stay based on this Court’s recent disavowal of 30 years of Utah appellate court precedent regarding the best interests analysis that is required to be conducted in every termination of parental rights proceeding. Specifically, this Court, in *In re B.T.B.*, overturned longstanding precedent that in a termination of parental rights action, when grounds for termination have been found (and in particular when such grounds include abandonment), best interests follows “almost automatically.” 2018 UT App 157, ¶ 44. The application of this precedent to the facts of this case is one of several issues argued by the parties and decided by the juvenile court below, as well raised by the parties on appeal. This intervening change in controlling law warrants a remand for further proceedings, including additional discovery and a new trial.² *See id.* ¶ 60. However, a remand now is premature; *In re B.T.B.* is not yet final because the GAL timely petitioned the court for rehearing. Accordingly, there should be no further action in this matter until *In re B.T.B.*—and its purported new best interests analysis—is fully and finally decided (or withdrawn). Failure to do so would necessarily mean making a

¹ This appeal, in turn, seeks relief from the juvenile court’s Amended Findings of Fact, Conclusions of Law and Order of Dismissal dated

² The juvenile court’s analysis of best interests is only one of several claimed errors on appeal. Prior to any remand, Mother respectfully requests the court “pass upon and determine all questions of law involved in the case presented upon appeal” prior to any remand because they are likely to become material in further proceedings before the juvenile court. Utah. R. App. P. 30(a).

determination of the Children’s best interests based on unsettled appellate case law and would be a waste of judicial resources. As such, Mother seeks a stay in this action pending full and final resolution (or withdrawal) of *In re B.T.B.*

a. Mother Argued and Relied upon the Line of Cases Disavowed by *In re B.T.B.* Both at the Juvenile Court and on Appeal.

On August 23, 2018, this Court expressly disavowed the line of cases that held best interests follows “almost automatically” from a finding of grounds for termination—a line of cases going back almost 30 years—as well as any burden-shifting or presumptions created by a finding of grounds for termination (including abandonment).³ *Id.* ¶ 44. The disavowal of the “almost automatically” line of cases represents a substantial departure from precedent as it relates to the best interests analysis required in every termination proceeding, in particular as it relates to proceedings where abandonment is found. *Id.* at ¶ 20 (“This court stated as far back as 1988 that satisfaction of the second prong of the objective abandonment test . . . satisfies the need separately to consider the best interest of the child.” (brackets and citation omitted)). Indeed, in this Court’s own words, *In re B.T.B.* both “clarified *and reformulated*” the best interests analysis. *Id.* ¶ 59 (emphasis added).

At the juvenile court trial, Mother and the GAL relied on well-established and controlling precedent regarding the “almost automatically” line of cases, and argued that

³ Also relevant to this appeal, *In re B.T.B.* interpreted—as a matter of first impression—the strictly necessary language of Utah Code section 78A-6-503., and the Court’s interpretation was contrary to the juvenile court’s analysis. *In re B.T.B.*, 2018 UT App 157, ¶¶ 46-55 (holding strictly necessary is not a separate element, but rather encompassed in the best interests determination and determining that the strictly necessary standard should be viewed from the perspective of the child’s best interests and not “to further an objective of one of the parents”).

Father's abandonment of the Children and resulting destruction of the parent-child relationship shifted the burden to Father to rebut a presumption that termination was in the Children's best interests. Indeed, the juvenile court expressly held the same at the outset of trial, in response to argument from the GAL:⁴ "it is the Court's opinion that petitioner has the burden of proof in this case, unless there is a rebuttal [sic] issue, and then certainly in the case that [the GAL] indicated, abandonment, that's where there would be a potential burden shifting." Mother was entitled to—and did in fact—rely on the juvenile court's statements regarding the presumption provided upon a finding of abandonment. Specifically, Mother argued in her opposition to the motion to dismiss that a finding of abandonment creates a presumption in favor of termination, thereby shifting the burden to Respondent to rebut that presumption

, and that "it is an unusual case where grounds for termination of parental rights are found, but termination is held not to be in the child's best interest". In short, the "almost automatically" line of cases and the presumption created by a finding of abandonment were argued at and ruled on by the juvenile court, and Mother reasonably relied upon controlling precedent in preparing and presenting her case to the lower court.

Yet, despite the juvenile court's prior ruling and finding of abandonment, the juvenile court denied and dismissed Mother's petition, holding Mother failed to meet her burden on best interests. Mother and the GAL appealed. On appeal, Mother argued (among other things) that the juvenile court: (1) failed to follow then-controlling

⁴ Specifically, the GAL argued "if the ground of abandonment is proved, that there is a presumption that it is in the best interest of the child to have those rights terminated, but that is a rebuttal [sic] presumption."

Utah law regarding the best interests analysis; and (2) failed to explain if, much less why, this case is the rare exception to the general rule that if abandonment is found, best interests will almost automatically compel termination. Brief of Appellant at pp.

. Simply stated, Mother again relied upon then-controlling precedent in presenting her case to this Court.

And finally, it is indisputable that an overlap exists between the issues decided in *In re B.T.B.* and the issues presented on appeal in this case. Interestingly, Father argues in his Opposition to the GAL's Motion that the "Utah Court of Appeals in under no obligation to base its decision in this case on *In re BTB.*" Opp. at 2. While this statement may be true, Father's argument misses the point. While this Court may not be bound by a prior Court of Appeals decision, the juvenile court will be bound by any subsequent appellate court decision. So once an opinion is issued in this appeal, and the appropriate deadlines pass, this Court loses jurisdiction over the case. Thereafter, the juvenile court would be bound to follow any subsequent decision related to *In re B.T.B.*, even though this Court was not similarly constrained, and even though following *In re B.T.B.* may contradict this Court's opinion because of the intervening change of controlling law exception to the law of the case doctrine. *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 34, 196 P.3d 588. Under those or similar circumstances, Mother would likely again appeal, and the parties and courts would be no further along in the case than if a stay were granted, but would be significantly impacted by the financial, emotional, and time intensive toll of protracted litigation. Likewise, significant court resources

would be expended, just to circle back to the same issues. In sum, Mother indisputably relied on caselaw at the juvenile court and on appeal that was expressly disavowed in *In re B.T.B.*

b. *In re B.T.B. Is Not Yet Final Because the GAL Filed a Petition for Rehearing.*

It is clear that *In re B.T.B.*, if made final in its current form, represents a significant change in the best interests analysis applicable to all termination of parental rights action and constitutes an intervening change in controlling law. However, *In re B.T.B.* is not yet final (and no remittitur has issued) because the GAL timely sought rehearing on August 23, 2018. *See* Utah. R. App. P. 30, 36. The GAL seeks rehearing on the following three grounds: (1) the opinion violates vertical *stare decisis*, (2) it violates horizontal *stare decisis* (beyond what is recognized in the opinion), and (3) it violates principles of preservation in that the Court of Appeals reversed on an issue not preserved at the trial court level and not argued in the opening brief. Notably, each of these three claimed errors fall within the character of reasons the Utah Supreme Court considers in deciding whether to grant certiorari, and the current circumstances likely warrant such review. *See* Utah. R. App. P. 46(a)(1)-(3). Moreover, the disavowal of three decades of horizontal *stare decisis* is truly extraordinary, as is the fact that the office charged with representing the best interests of children in termination proceedings is claiming error with the Court's holding regarding the best interests analysis. Simply put, it is likely the Utah Supreme Court would grant certiorari if the GAL so petitions. *See* Utah. R. App. P. 49.

In short, because *In re B.T.B.* is not yet a final decision of the Court of Appeals, and remains subject to further review and possible modification by both the Court of Appeals and the Utah Supreme Court, this Court should not take any further action in reliance on or that would contradict *In re B.T.B.* unless and until it becomes a final decision of this Court.

- c. Mother Is Entitled to Remand Based on Intervening Change of Controlling Law by *In re B.T.B.*, but Remand Now Is Premature; This Appeal Should Be Stayed Until *In re B.T.B.* Is Fully and Finally Decided.

As *In re B.T.B.* currently stands, Mother, having relied upon the “almost automatically” line of cases below and on appeal, is entitled to remand and reconsideration on the basis of intervening change of controlling authority. *Thurston v. Box Elder County*, 892 P.2d 1034, 1039 (Utah 1995); *In re B.T.B.*, 2018 UT App 157, ¶ 59 & n.13. Such remand almost certainly requires additional discovery and a new trial, as Mother reasonably relied upon 30 years of caselaw (as well as the juvenile court’s ruling based on said precedent) in conducting discovery and presenting her case to the juvenile court. Indeed, “[l]itigants in Utah are entitled to rely on our explication of the law as definitive.” *In re Adoption of J.S.*, 2014 UT 51, ¶ 49, 358 P.3d 1009. In fact, the Utah Supreme Court has declined to extend a holding to pending matters where a litigant reasonably relied on the law at the time. *Carter v. Lehi City*, 2012 UT 2, ¶ 15, 269 P.3d 141.

Any action in reliance on *In re B.T.B.* now or at any time prior to its final resolution would be imprudent and potentially detrimental to the Children’s best interests,

as well as a waste of judicial and the parties' resources. To be clear, a decision regarding the best interests of the two minor Children should not be made based on non-final and unsettled caselaw. If the request for a stay is denied, and a decision issues from this Court on the merits of the case, protracted litigation until *In re B.T.B.* is fully and finally decided is inevitable.

In contrast, a stay maintains the status quo—one that has been constant for the past eight years. Indeed, the juvenile court determined the Children have “security and” stability in their current environment. Father has not challenged this finding. In short, a stay of this appeal serves the best interests of the Children by maintaining the secure and stable status quo.

Statement of Facts Justifying Emergency Action

In addition to the facts set forth *supra*, Mother notes the following: The Children have not seen or spoken with Father in over eight years, since they were three years old and one year old—around the time he was incarcerated for a violent attack against Mother where he threatened her life, beat her, choked her, and held her at gunpoint for several hours.⁵ Indeed, the juvenile court found, by clear and convincing evidence, that Father's actions, including his conscious disregard of the Children, caused the destruction of the parent-child relationship and that *no relationship* currently exists between Father and the Children. In Father's own words, his relationship with the Children is “zero.” Father did not challenge any of those determinations

⁵ The juvenile court characterized Father's actions as “extremely violent,” acknowledging they caused Mother “unthinkable physical and emotional injuries.”

on appeal, including the finding of abandonment by clear and convincing evidence. What issue is on appeal (among other issues) is whether it is in the Children's best interests to be forced to be introduced to and create a brand new relationship with Father, or to convert their physical reality into a legal reality by terminating Father's parental rights and eliminating his associated residual rights.

Additionally, Father has a history of attempting to make contact with the Children prior to final adjudication in this action. During the pendency of the post-trial motions in the juvenile court, Father moved the district court to appoint a new therapist to begin reintroduction. Both Mother and the GAL requested a Rule 100 conference to prevent reintroduction and any contact between Father and the Children pending resolution of the present case. Father opposed. The district court determined it would be inappropriate to hold any further proceedings in the district court until the juvenile court case was resolved.

As this appeal has been fully briefed and argued since of this year, emergency action is necessary. Mother is mindful that, without a stay, a decision from the Court could be issued at any time. For the reasons set forth above, this Court should exercise its discretion and stay any decision in this case pending a full and final resolution in *In re B.T.B.* Granting a stay avoids the risk of determining the Children's best interests based on unsettled or uncertain case law and avoids a profound waste of judicial and personal resources.

Conclusion

In summary, Mother requests this Court stay the pending appeal until *In re B.T.B.* is fully and finally decided. The cases disavowed in *In re B.T.B.* were relied up by Mother in preparing for and presenting her case at the juvenile court and argued on appeal before this Court. Such circumstances warrant remand for additional discovery and a new trial. But issues remain to be decided by this Court prior to remand, which is premature until *In re B.T.B.* is fully and finally decided. Accordingly, this Court should stay any further proceedings in this action pending further appellate review of *In re B.T.B.*, to avoid protracted litigation in light of the intervening change in law. Failure to stay this action risks that a determination of the Children's best interests will be made based on uncertain or unsettled case law and will avoid wasting judicial and personal resources, instead preserving them to address the issues that will necessarily remain.