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A win for a father in jail

Appeals Court vacates couple's adoption of his daughter

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The South Carolina Court of Appeals has published a new opinion that vacates the adoption of an incarcerated father's child.

The unanimous decision replaces an earlier unpublished opinion and includes additional findings to support the court's reversal of a family court judge's order terminating Andrew Myers' parental rights to his 3-year-old daughter, Braelynn.

The appellate court's three-judge panel found that the foster parents, Edward and Tammy Dalsing, failed to show that Myers willfully abandoned Braelynn. The March 1 decision followed the Dalsings' petition for a rehearing in the wake of the original opinion that was filed in December.

"I think it's wonderful that we have a published opinion that we can rely on to support incarcerated parents' rights," said Myers' appellate attorney, Melinda Butler of Union. "It's a good opinion in favor of the constitutional rights that are already in place for parents."

Attempts to speak with the Dalsings' attorneys, James Fletcher Thompson of Spartanburg and Larry "Dale" Dove of Rock Hill, were unsuccessful.

The Dalsings, who have cared for Braelynn since she was born with drugs in her system and taken from her mother, wrote on a website they created, savebraelynn.com, that the court's latest decision was "not right" and ignored "Braelynn's rights and best interest."

"We of course are devastated and heartbroken for more than one reason," they added. "We are concerned about our daughter, but also for the adoption community in general. Adoption is supposed to be permanent. It is not supposed to be

a temporary opportunity for people to get out of jail and then appeal and use family members as a place holder."

The Court of Appeals held in the per curiam opinion that Union County Family Court Judge Rochelle Conits wrongly determined that the Dalsings failed to prove the three statutory grounds for termination of parental rights: abandonment, willful failure to visit and willful failure to support the child.

"Although we recognize the valuable contribution foster parents make to this state, it does not weaken Father's fundamental right to raise Child or allow us to lessen Foster Parents' burden of proving the existence of a statutory ground for TPR by clear and convincing evidence," the decision states. "Our judicial system will not extricate Father's fundamental right to custody, care, and companionship with Child simply because he has not been a model parent."

To support its finding, the appellate panel noted that Myers had voluntarily turned himself in on outstanding warrants when he discovered that he was going to be a father so he could begin serving his sentence as soon as possible.

"As a result, Father's lawless conduct in this case was not highly probative of willfulness," the decision stated. Myers was incarcerated in Maryland and Virginia on charges of contempt, fraud and a probation violation.

While behind bars, he expressed interest in visiting with Braelynn by sending a letter to a social services caseworker and asking for the Dalsings' phone number. And he tried to support her by asking his mother to send \$50 a month to support Braelynn instead of sending the

money to him, according to the Court of Appeals.

The court's decision shows for the first time that "a third party can provide support on behalf of the incarcerated parent or the parent who is not able to provide support for whatever reason," Butler said. "This was not a question that had been decided before in the state of South Carolina," she added. "But if it wasn't for the father taking steps himself, I don't think the grandparent's support could be sufficient enough to go against willful failure to support."

Myers was released from prison in November, but the Dalsings continue to deny his repeated requests to visit Braelynn, according to Butler. She argues that the South Carolina Department of Social Services should file a motion to force visitation, but said the agency asserts that the matter is out of its control because Braelynn was adopted.

"They're just leaving it in the foster parents' hands at this point," she added.

The Court of Appeals has remanded the case to the family court with an instruction that a permanency planning hearing be conducted "as expeditiously as possible." But Butler expected that the Dalsings would take the case to the state Supreme Court.

Gregory Forman, a family law attorney in Charleston who reviewed the decision at Lawyers Weekly's request, agreed with the court's conclusion that Myers had not willfully abandoned his daughter.

"I think it's accurate to the extent that lawlessness predates knowledge of the child's birth," he said. "Otherwise, every person that becomes incarcerated would be subject to termination of parental rights, possibly."

The 13-page decision is *South Carolina Department of Social Services v. Smith* (Lawyers Weekly No. 011-019-17). A digest of the opinion is available at sclawyersweekly.com.