ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

DAVID DAVIS	CA06-251
	April 4, 2007
APPELLANT	
V.	APPEAL FROM THE POLK COUNTY CIRCUIT COURT [NO. JV-2003-12]
ARKANSAS DEPARTMENT OF HUMAN SERVICES	HON. JOHN W. COLE, CIRCUIT JUDGE
APPELLEE	AFFIRMED

This termination-of-parental-rights case is once more before us. Originally, it was filed as a no-merit appeal pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Ark. Sup. Ct. R. 4-3(j)(1). After reviewing the brief and the transcript, we held that it was not appropriate to dispose of this case with a no-merit appeal, and we ordered that this case be briefed on the merits. We noted that in the four volume, 600-page transcript, which appellate counsel condensed into an eleven-page abstract and twenty-eight page addendum, there was virtually no evidence that Davis represented any potential harm to the minor children. We therefore ordered that this case be resubmitted as an appeal on the merits. ADHS did not file a brief for the no-merit

version of this appeal, but did, albeit untimely, tender a brief to this court the day *after* this case was submitted. We affirm.

On March 14, 2003, ADHS received a report that Rosie Blume was failing to protect her four children from potential sexual abusers. Davis is the father of two of Blume's four children. At the time of the report, Davis was incarcerated in Oklahoma, as he had been since December 1999, for a conviction for conspiracy to manufacture methamphetamine. On March 17, 2003, the trial court entered a probable-cause order placing the children in ADHS custody. The children were subsequently adjudicated dependent-neglected on April 7, 2003. Efforts were made first to reunite the children with Blume. After that goal proved untenable, ADHS explored placing the children with relatives. Ultimately, that experiment also did not produce satisfactory results. Meanwhile, Davis had no contact with his children. Although numerous hearings were conducted, Davis was not present for them and was rarely even mentioned. At all times, he was a non-offending, albeit totally absent, parent.

A permanency-planning hearing was held on March 29, 2005, at which ADHS sought to change the case goal to termination of parental rights. At that hearing, counsel for Davis informed the trial court that Davis had been released from prison and was "ready to step up and take custody of his children." At that hearing, ADHS case worker Carolyn Strickland testified that she had never had contact with Davis, never sent him a copy of the case plan, and Davis never visited or supported the children. Susan Miller, also an ADHS case worker, testified that she had "some contact" with Davis. She stated that Davis called her when he got out of prison. According to Miller, Davis also participated by telephone in the last

staffing, had inquired about getting a lawyer, and "indicated" to her that he wanted custody of his children. Miller stated that ADHS never offered Davis any services and, given Davis's Oklahoma residency, was unaware of any services that ADHS could "immediately provide."

Davis appeared for the first time in the case and testified that he had been released on probation the previous December. He stated that he was "in a position" to provide a home for his children. He was employed full-time, making between $8 and $18 an hour. The conditions of his probation required that he remain employed, pass random drug screening, report regularly to his probation officer, and attend counseling. Davis said that he was willing to cooperate with ADHS for "any services." He admitted that his parental rights had been terminated to two other children when he was nineteen years of age.

On April 28, 2005, ADHS filed a petition to terminate Blume's and Davis's parental rights. The petition alleged, among other things, that the parents had "abandoned" the children and that Davis had his parental rights terminated as two other children in Oklahoma. A termination hearing was held on July 21, 2005.

At the termination hearing, Susan Miller testified that ADHS had been "providing visits" for both parents, but that Davis had not attended every visit. Davis attended one visit in July, June, and April, and two visits in May. According to Miller, the children did not know who Davis was and did not "interact with him that much." Miller claimed that she prompted one of Davis's children to "interact with his father." She, however, did not see anything "inappropriate" in the visits. Davis also testified. He stated that he was working full time for a construction company, had recently moved into a three-bedroom apartment,

had beds and clothing for the children, had visited with the children, and had a "good relationship" with them. On cross-examination, he stated that the termination of his parental rights as to his other two children took place in Oklahoma in 1992 or 1993. The trial court terminated the parental rights of both Blume and Davis. Davis timely filed a notice of appeal.

Termination of parental rights cases are reviewed de novo. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). We review the factual basis for terminating parental rights under a clearly erroneous standard. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id*. In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Id*.

Despite being ordered by this court to rebrief this case on the merits, Davis's appellate counsel, who was also his trial counsel, inexplicably retained almost all of the verbiage from the no-merit brief. Because this brief is supposed to be an argument on the merits, we have to regard the inclusion of this material, however gratuitous, as concessions made on the part of his client. This retained verbiage states that: "ADHS has an appropriate placement plan for the children"; the trial court "did not err in finding that the children would be adoptable;" ADHS had "made a meaningful effort to correct the problems that caused the removal of the children from the home"; and he did not argue below that "ADHS failed in any way to

provide him with services or failed to make a meaningful effort to reunify him with his children." Significantly, the brief also states: "there was sufficient evidence presented to the trial court to make a decision by clear and convincing evidence that continuing contact with Appellant would be *harmful* to S.D. and D.D." (Emphasis supplied.)

Likewise, regarding the statutory grounds for termination, the brief recites that "it is undisputed that the child [sic] remained outside the home of Appellant for a period of twelve months," and notes that "the issue then becomes whether Appellant failed to provide significant material support or to maintain meaningful contact with the juvenile." The brief does assert that there was "not sufficient evidence to find by clear and convincing evidence that Appellant failed to maintain meaningful contact with his child." However, the brief notes that Davis was awarded weekly visitation but only visited a single time in July, June, and April, and twice in May. It also fails to address the willful failure to support grounds.

In a section that specifically addressed the best interest of the children, the brief states that Davis was in jail for "the majority of his young children's life" and that "the children did not know or interact with him." Further, he states that his criminal conduct did not provide a "positive role model" for his children and that he could not "rear his son from his prison cell." The "argument" does, however, cite *Malone v. Arkansas Department of Human Services*, 71 Ark. App. 441, 30 S.W.3d 758 (2000), for the proposition that the mere fact that he was incarcerated is not dispositive of the termination issue, and he asserts that upon his release from prison he "made the needed arrangements to have custody of his children." It notes that Davis works full time, moved into a three-bedroom apartment, has beds for the

children, has visited them, has a good relationship with the children, and has been compliant with his probation which includes passing all his drug tests. Accordingly, it concludes that Davis has rehabilitated himself and can "meet the intent of the law to provide permanency" in his children's life. In light of the concession previously noted, however, we find this argument unpersuasive.

We are disturbed at the paucity of evidence in this case justifying the termination of Davis's parental rights. It is apparent to us that at all times, Davis was little more than an afterthought to ADHS; first where the provision of services was concerned, second as to the case that it put on in support of its petition to terminate Davis's parental rights, and third on appeal, where ADHS did not even tender a brief until after this case was submitted. Nonetheless, Davis's counsel has not made an argument that can compel reversal in this case. In fact, it requires a careful reading of the brief before us to see the minor changes that convert the argument section to merit format, which is, at best, marginal compliance with our rebriefing order. This court takes very seriously the oft-echoed statement in these cases that termination of parental rights is an "extreme remedy." However, giving the state of the appellate argument presented to us, we must affirm.

Affirmed.

BIRD, J., agrees;

PITTMAN, C.J., concurs.