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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-18-709

CLINT KLOSS APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	**Opinion Delivered:** February 20, 2019 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, EIGHTH DIVISION [NO. 60JV-17-620] HONORABLE WILEY A. BRANTON, JR., JUDGE MOTION TO WITHDRAW DENIED; REBRIEFING ORDERED

PHILLIP T. WHITEAKER, Judge

Appellant, Clint Kloss, appeals a Pulaski County Circuit Court order terminating his parental rights to daughters, K.K.1 and K.K.2. Pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(i) (2018), Kloss's counsel has filed a motion to be relieved as counsel and a no-merit brief asserting that there are no issues of arguable merit to support an appeal. The clerk of our court sent copies of the brief and the motion to withdraw to Kloss, informing him of his right to file pro se points for reversal pursuant to Rule 6-9(i)(3); however, he has filed no points.

Counsel's brief contains an abstract and addendum of the proceedings below, states that the only ruling adverse to Kloss was the termination itself and asserts that there was sufficient evidence to support the termination. *See Linker-Flores*, *supra*; Ark. Sup. Ct. R. 6-9(i).

Because counsel's brief does not adequately address all of the adverse rulings, we deny the motion to withdraw at this time and order rebriefing.

Sherrie Sinkey and Clint Kloss are the unmarried biological parents of K.K.1 and K.K.2. In May 2017, Kloss and Sinkey were living together with the children when the Pulaski County Sheriff's Office executed a search warrant on their home. During the execution of the warrant, the officers found marijuana, hydrocodone, and methamphetamine within reach of four-year-old K.K.1 and two-year-old K.K.2. The home was infested with roaches, and the children were dirty and covered in bug bites. Kloss and Sinkey were arrested on two counts of endangering the welfare of a minor, maintaining a drug premises (enhanced), possession of paraphernalia, possession of a Schedule II substance, and felony theft by receiving. Following his arrest, Kloss overdosed in the back of the police vehicle and had to be rushed to the emergency room. Based on the arrests of Kloss and Sinkey, as well as the condition of the home and the children, the Arkansas Department of Human Services (DHS) exercised a seventy-two-hour hold on the children.

The children were adjudicated dependent-neglected in July 2017. The trial court found that the juveniles were dependent-neglected due to parental unfitness. The court specifically found that the children were living in a drug premises, that the home was the subject of a drug raid, that the children were exposed to toxic illegal drugs, and that the evidence constituted environmental neglect. Based on the extreme and multiple risks of harm, the court made a finding by clear and convincing evidence that Sinkey and Kloss had subjected the children to

aggravated circumstances.[1] Kloss did not appeal the adjudication order or the court's finding of aggravated circumstances. It is important to note that at the time of the adjudication hearing, Kloss had not yet been declared the father of the children; Kloss's status as a parent was not established until the permanency-planning hearing on March 27, 2018. Thus, as of the date of adjudication and the court's aggravated-circumstances finding, Kloss had attained the status of only a putative father.

In May 2018, DHS filed a petition to terminate the parental rights of Sinkey and Kloss. As to Kloss, DHS alleged the following three grounds for termination: (1) the failure-to-remedy ground as it applies to a noncustodial parent, Ark. Code Ann. § 9-27-341(b)(3)(B)(i)*(b)* (Supp. 2017); (2) the subsequent-other-factors-or-issues ground, Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)*; and (3) the aggravated-circumstances ground, Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)*.

The trial court terminated Kloss's parental rights based on all three grounds alleged in the petition. Regarding the failure-to-remedy ground, the trial court found that the children had been out of the Kloss's home (the noncustodial parent) for over a year and that he had failed to remedy the conditions preventing reunification.[2] As to the subsequent-other-factors ground, the court found that it had made an aggravated-circumstances finding at adjudication and could have fast tracked the case and proceeded immediately to termination; it did not do

[1]Despite its finding of aggravated circumstances, the court declined fast tracking the case.

[2]The court noted that the twelve-month-failure-to-remedy ground as to a custodial parent did not apply as there had not been any DNA evidence at the time of removal indicating Kloss was the father of the children.

so, giving the parents an opportunity to achieve reunification by receiving and benefiting from services. Despite this opportunity, a year later, the parents had still not corrected or fixed the problems which caused removal. As for the aggravated-circumstances ground, the court found that there was little likelihood that services to the family would result in successful reunification within a reasonable period of time as measured from the children's perspectives and consistent with their developmental needs. The court then found that termination was in the best interest of the children, considering potential harm and adoptability.

Counsel states in her no-merit brief that any argument challenging either the statutory grounds for termination or the circuit court's "best interest" findings would be wholly frivolous. More specifically, she claims that challenging the grounds for termination would be wholly frivolous because the trial court had made an aggravated-circumstances finding at adjudication; Kloss had not appealed that finding; and as a result, he was precluded from challenging the aggravated-circumstances finding at termination. *See Hannah v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 502; *see also Dowdy v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 180, 314 S.W.3d 722. Counsel argues that because only one ground of section 9-27-341(b)(3)(B) need be proved to support termination and Kloss is precluded from challenging the aggravated-circumstances ground, there can be no meritorious argument for challenging the statutory-grounds findings of the court. *See Draper v. Ark. Dep't of Human Servs.*, 2012 Ark. App, 112, 389 S.W.3d 58. As a result, counsel does not present any additional argument addressing the sufficiency of the remaining statutory grounds pertaining to failure to remedy or subsequent other factors.

Pursuant to *Linker-Flores*, our rules were created to ensure that someone who is advocating on behalf of the appellant has reviewed the record and considered all the arguments that could be made in the client's favor before a no-merit brief is submitted. Counsel has a duty to address all adverse rulings and to explain why each ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 6-9(i)(1)(A).

Here, counsel's no-merit argument, as it applies to the court's finding of statutory grounds, is problematic. First, it does not appear that the trial court based its aggravated-circumstances finding at termination on its previous ruling at adjudication. Instead, it appears that the trial court made an entirely new finding predicated on its determination that there was little likelihood of successful reunification. Counsel has not addressed why challenging the aggravated-circumstances finding based on little likelihood of successful reunification is without merit. Second, counsel's argument that there is no merit to challenging the aggravated-circumstances ground because Kloss failed to appeal this finding from adjudication is based on a conclusion that the aggravated-circumstance finding at adjudication applied to Kloss. As noted earlier, Kloss was only a putative father at adjudication. He was not found to be a "parent" at the time the aggravated-circumstances finding was made during adjudication. By definition, a finding of aggravated circumstances applies only to a "parent." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)*. Counsel has not addressed why challenging the aggravated-circumstances finding based on Kloss's putative-father status at adjudication is without merit. Counsel's failure to address these deficiencies is further compounded by a failure to address the alternative statutory grounds found by the court, thereby leaving us with a brief that has not adequately addressed all of the adverse rulings.

Finally, there is one additional adverse ruling that has not been addressed by counsel. At the close of the testimony, counsel asked the trial court to allow Kloss more time—three additional months—to obtain reunification; the trial court denied the request. Counsel has not addressed this adverse ruling in her brief.

We recognize that a counsel's failure to address adverse rulings does not always automatically require rebriefing. *See Sartin v. State*, 2010 Ark. 16, at 1, 362 S.W.3d 877, 878 (holding that the failure to list and discuss all adverse rulings in a no-merit termination-of-parental-rights case does not automatically require rebriefing if the ruling would clearly not present a meritorious ground for reversal); *see also Houseman v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 227, 491 S.W.3d 153 (affirming termination of parental rights by addressing a statutory ground that was omitted from counsel's brief). While we have the authority to affirm without rebriefing, we are not required to do so in every case. *See Bentley v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 125, at 3 (requiring rebriefing where counsel failed to address numerous adverse rulings). We decline to exercise that authority in this case.[3] Counsel's motion to withdraw is therefore denied at this time.

Motion to withdraw denied; rebriefing ordered.

GRUBER, C.J., and VAUGHT, J., agree.

Leah Lanford, Arkansas Public Defender Commission, for appellant.

One brief only.

[3]The duty to review the record and provide this court with an argument as to why there is no merit to the appeal falls first and foremost squarely on parent counsel's shoulders, not this court. It is not incumbent upon, or proper for, this court to perform the work parent counsel should have performed in the first instance.