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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-23-195

KYLE LEE DRAKE APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	Opinion Delivered October 4, 2023 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. 66FJV-21-159] HONORABLE ANNIE POWELL HENDRICKS, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Appellant Kyle Lee Drake appeals the Sebastian County Circuit Court order that terminated his parental rights to his children, MC1 (09/16/19) and MC2 (08/30/20). Kyle does not challenge the statutory grounds for termination or the potential-harm or adoptability prongs of the best-interest determination.[1] His sole argument on appeal is that termination was not in the children's best interest because a less restrictive alternative for their placement was available. We affirm.

I. *Relevant Facts*

[1]Because Kyle does not challenge the statutory grounds for termination of his parental rights, he abandons any challenge to those grounds on appeal. *Cole v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 481, 611 S.W.3d 218.

On April 26, 2021, the Arkansas Department of Human Services (Department) filed a petition for emergency custody and dependency-neglect alleging that MC1, MC2, and MC3 (05/24/18) were removed from the home of Danielle Burke and Kyle Drake due to parental drug use, inadequate supervision, and medical neglect.[2, 3] In the affidavit attached to the petition, the Department alleged that on the evening of April 21, 2021, Natasha Maddox, a family service worker with the Department, stopped by the Burke-Drake residence to administer a drug test as part of an open dependency-neglect case regarding another sibling, MC4, who is not a party to this case and was not living in the home at that time. Maddox found both Danielle and Kyle in an agitated state. Both parents reported noncompliance with the current case plan, and both produced urine samples that were not the correct temperature and that field tested negative for all substances. Danielle then admitted using fentanyl, methamphetamine, heroin, THC, and oxycodone. Danielle instructed Kyle to admit his drug use, and he stated that he had used fentanyl, "roxies," and heroin. The next day, the children were removed from the home. Two potential provisional homes were identified: Gayle and Harold Drake, Kyle's parents who already had provisional adoptive placement of one of Kyle's older children; and Savannah and Daniel Burke, Danielle's sister and brother-in-law. Savannah and Daniel Burke were unable to give the children a home at

[2]Cody Elkins is MC3's father.

[3]Danielle Burke is the mother of MC1, MC2, and MC3. On May 26, 2023, Danielle filed a motion to dismiss her appeal of the lower court decision to terminate her parental rights, which we granted on July 19.

that time. The affidavit noted the strong sibling bond between the children and that the children had been placed together in a foster home and were doing very well. The affidavit recounted the family's history with the Department.

The Department filed an amended petition for emergency custody on May 24, asserting that the children had been subjected to aggravated circumstances. Specifically, the Department contended that the children had been chronically abused and neglected, endangering their lives, and there was little likelihood that further services to the family would result in reunification. The Department set forth that at the outset of the case, the extent of the children's "massive amount" of exposure to drugs, including heroin, was not known. After removal, MC3 and MC1 tested positive for methamphetamine, amphetamine, morphine, codeine, and heroin. MC2 was nine months old, and her hair was not long enough for testing. For two years, the Department had offered services to address their substance abuse and related issues, and both Kyle and Danielle continued to abuse fentanyl, heroin, methamphetamine, oxycodone, THC, and other drugs. All the children had pneumonia when they were removed from the home, and Kyle and Danielle had been unwilling or unable to provide clothing, shoes, diapers, formula, or any necessities.

In the adjudication order, the circuit court found that the children were dependent-neglected on the basis of parental drug use, inadequate supervision, and medical neglect and determined that removal was necessary to protect their well-being. The Department was ordered to continue to provide services regarding the parents' drug use and unfitness.

In the March 8, 2022 review order, pursuant to DNA testing, the court found that Kyle is the father of MC1 and MC2. At the April permanency-planning hearing, the circuit court found Cody Elkins is MC3's father, which also was confirmed by DNA testing. The court found that both Kyle and Danielle were only partially compliant with the case plan, and they had continued their relationship despite domestic-violence issues. The court found that the appropriate goal of the case was reunification with the concurrent goal of adoption.

On July 26, 2022, the Department filed a petition for the termination of Danielle's and Kyle's parental rights based on three statutory grounds: (1) Ark. Code Ann. § 9-27-341 (b)(3)(B)(i)(*a)* (Supp. 2023) (twelve month failure to remedy); (2) Ark. Code Ann. § 9-27-341 (b)(3)(B)(vii)(*a)* (subsequent issues and factors); and (3) Ark. Code Ann. § 9-27-34l(b)(3)(B)(ix)(*a)* (aggravated circumstances). The Department alleged that it was in the children's best interest to terminate parental rights because they are adoptable and would be subject to potential psychological and physical harm if they were returned to their parents' custody. Specifically, the Department contended that the parents still used illegal drugs, had not completed drug treatment or acquired appropriate housing, and none of the parents had found valid employment. Kyle and Danielle had been arrested on drug charges in January and April, and the charges had not been resolved.

Katheryn Burke, Danielle's mother, filed a petition to intervene in the case, which was granted. On August 5, 2022, Katheryn filed a motion for placement or, in the alternative, guardianship of all three children. Katheryn asserted that she lives in a four-bedroom home, and the children had spent extended amounts of time in her care prior to their removal from

Danielle's custody. Katheryn reasoned that the children's best interest would be served by placing them with her, a family member, and the court should give her preference.

On September 5, Cody executed his consent to the termination of his parental rights to MC3. On October 5, the court certified the consent, and it was filed with the court. Also on October 5, the circuit court held the termination hearing. At the hearing, Bridget Cornett, the family service worker for the case, testified that the parents had completed the drug-and-alcohol assessment but had not followed through with drug treatment, though Danielle did maintain her sobriety while she was incarcerated, and she completed parenting classes. Cornett testified that the Department had reached out to several family members, including Danielle's mother, Kyle's mother, and the Reeds (Cody's mother and stepfather.) The Reeds' ICPC approval was pending at the time of the hearing. The Reeds had custody of Cody's older child, and they stated that they were willing to take MC1, MC2, and MC3, keeping the siblings together.[4] Regarding Danielle's mother, Katheryn, as a potential family placement, the ICPC report had not been completed by the time of the hearing, and because Katheryn had a felony conviction and prior involvement with the Department, waivers from the parole board and the Department waiver board were necessary before she could be approved. Cornett recommended termination rather than guardianship because it was possible the parents would be incarcerated for a significant portion of the children's lives, and the children are very young and need permanency. Kyle's parents had stated they could

[4]The Reeds were approved as potential placement for the children on October 27.

not take all three children, but they reported that Kyle had other family members who might be willing to take the children. Cornett explained that the grandparents told her they were going to speak with those family members, and the Department was "waiting for them to get us information." Cornett opined that the children should be kept together because they are tightly bonded and "feed off each other. They can't go anywhere without each other." She stated that further services would not help to reunite the family. The tribal representative of the Cherokee Nation of Oklahoma, Renee Gann, also recommended termination because MC3 needs "full permanency."[5] Kyle did not testify at the hearing due to the pending criminal charges against him.

On December 29, the circuit court entered the order terminating all three parents' parental rights. The court found that Cody consented to termination of his parental rights to MC3. Regarding Kyle and Danielle, the circuit court determined that the evidence supported the statutory grounds alleged in the Department's petition for termination beyond a reasonable doubt. The court also found that it was in the children's best interest to terminate Danielle's and Kyle's parental rights, finding that the children are adoptable and that

> Bridget Cornett testified that the Department has been in contact with a paternal relative who is interested in adopting all three juveniles. This placement would keep the siblings together and would be ICWA compliant. Even if this placement failed, Ms. Cornett testified that the juveniles would still be adoptable as they are young, healthy, and good natured.

[5]MC3 is the only child with tribal membership.

The circuit court also found that "termination of parental rights is the least restrictive permanency option for the juveniles." The court determined that there was potential for physical and psychological harm if the children were ever returned to their parents because each of the parents faced potentially significant jail time, and the parents had not seen the children for a substantial period of time or demonstrated sobriety outside of incarceration. Kyle and Danielle filed separate notices of appeal and separate briefs; however, Danielle, as noted above, voluntarily dismissed her appeal.

II. *Discussion*

A circuit court's order of termination must be based on findings proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3); *Martin v. Ark. Dep't of Hum. Servs.*, 2017 Ark. 115, 515 S.W.3d 599. Clear and convincing evidence is the degree of proof that will produce in the fact-finder a firm conviction of the allegation sought to be established. *Dinkins v. Ark. Dep't of Hum. Servs.*, 344 Ark. 207, 213, 40 S.W.3d 286, 291 (2001). On review, this court gives due deference to the opportunity of the circuit court to assess witness credibility and will not reverse termination unless the lower court's decision is clearly erroneous. *Posey v. Ark. Dep't Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Chastain v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 503, 588 S.W.3d 419. In determining whether a finding is clearly erroneous, an appellate court gives due deference to the opportunity of the circuit court to judge the credibility of witnesses. *Id.* The appellate court

is not to act as a "super factfinder," substituting its own judgment or second-guessing the credibility determinations of the circuit court; we reverse only in those cases in which a definite mistake has occurred. *Id.*at 7, 588 S.W.3d at 424.

In order to terminate parental rights, a circuit court must find by clear and convincing evidence that termination is in the best interest of the juvenile, taking into consideration (1) the likelihood that the juvenile will be adopted if the termination petition is granted and (2) the potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii). The order terminating parental rights must also be based on a showing by clear and convincing evidence of one or more of the grounds for termination listed in section 9-27-341(b)(3)(B).

On appeal, Kyle asserts that the circuit court erred in terminating his parental rights because the court failed to sufficiently consider that there was a less restrictive option available—placement with the multiple family members related to him, Danielle, and Cody. Kyle also asserts that the court failed to consider the impact of sibling separation on the children. His arguments are not well taken.

Arkansas Code Annotated section 9-27-329(d) (Supp. 2023) provides that in initially considering the disposition alternatives and at any subsequent hearing, the court shall give preference to the least restrictive disposition consistent with the best interest and welfare of the juvenile. A circuit court is permitted to set termination as a goal, even when a relative is available and requests custody. *King v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 126, 620

S.W.3d 529. This is because the Juvenile Code lists permanency goals in order of preference, prioritizing a plan for termination and adoption unless the juvenile is already being cared for by a relative, the relative has made a long-term commitment to the child, and termination of parental rights is not in the child's best interest. *Id.* Each termination-of-parental-rights case is decided on a case-by-case basis. *Dominguez v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 2, 592 S.W.3d 723.

The Department contends that Kyle's arguments are not preserved for appellate review because he did not raise the specific issues to the circuit court that he now asserts for the first time or he did not obtain a ruling on the points he did raise. It is well settled that to preserve arguments for appeal, the appellant must obtain a ruling below. *See Chacon v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 277, at 7, 600 S.W.3d 131, 135. The circuit court made no findings regarding Kyle's family, and he did not obtain a ruling regarding any of his family members as potential placement for the children. This court "will not review a matter on which the circuit court has not ruled, and the burden of obtaining a ruling is on the movant." *Dejarnette v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 410, at 16, 654 S.W.3d 83, 93.

Even if Kyle's arguments were preserved, they would fail because the potential family placements for the children are with a maternal relative or Cody's parents. *See Migues v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 439, at 11, 586 S.W.3d 221, 228 ("Here, the relatives in question were paternal relatives; therefore, any rights and relationship of the paternal relatives were not derivative of appellant's [mother's] relationship with [MC].") The same

holds true in the instant case because the potential family-placement options are not derivative of Kyle's relationship to MC1 and MC2. The Department contacted Kyle's parents, who declined to provide a home for all three children but stated that some other relative might be willing to do so. At the time of the termination hearing, Kyle's mother and stepfather had not contacted the Department with the names of potential relative placements, and no one from Kyle's family ever came forward.

Kyle's argument that the circuit court failed to consider the importance of keeping the siblings together also fails. The court heard testimony regarding the strong bond between the siblings and noted that a previous placement option for MC1 and MC2 was rejected because the potential placement would not accept MC3 as well. Moreover, in the termination order, the circuit court found that there was a potential paternal placement that would accept all three siblings; thus, the circuit court clearly considered sibling placement in making the decision to terminate parental rights. Most importantly, there is no requirement that siblings be adopted together. *See Nichols v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 420, 636 S.W.3d 114. This court has held that keeping siblings together is an important consideration but is not outcome determinative because the best interest of each child is the polestar consideration. *Price v. Ark. Dep't of Hum. Servs.*, 2023 Ark. App. 140, 13. We hold that the circuit court's best-interest determination is supported by the evidence and affirm.

Affirmed.

ABRAMSON and HIXSON, JJ., agree.

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