Cite as 2023 Ark. App. 536

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-23-359

JENNIFER ALEXANDER APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	Opinion Delivered November 15, 2023 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT [NO. 10JV-21-95] HONORABLE RALPH WILSON, JR., JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Jennifer Alexander appeals the March 17, 2023 order of the Clark County Circuit Court terminating her parental rights to her daughter, Minor Child (MC).[1] She contends that the circuit court erred by finding that termination was in MC's best interest. We affirm.

Appellant does not challenge the circuit court's finding of statutory grounds for termination; thus, any such challenge is waived.[2] She also fails to challenge the circuit court's findings regarding adoptability or potential harm within its best-interest analysis. Therefore,

[1]The circuit court also terminated the parental rights of MC's father, but he is not a party to this appeal.

[2]Hile v. Ark. Dep't of Hum. Servs., 2023 Ark. App. 173.

we need not address those findings either.[3] Appellant's argument focuses solely on relative placement as part of the best-interest analysis. Accordingly, only a brief recitation of the facts is warranted.

MC was removed from appellant's custody and placed in the custody of the Arkansas Department of Human Services (DHS) on September 4, 2021, when appellant was arrested for several drug offenses while driving under the influence of drugs. MC, who was one year old, was in the vehicle with appellant, unrestrained. Appellant also was charged with endangering the welfare of a minor and having no child restraint. MC was adjudicated dependent-neglected by an agreed order, due to neglect and parental unfitness. During the pendency of the case, appellant only partially complied, tested positive for drugs after completing inpatient treatment, and had at least four other arrests. Appellant was also intimately involved with an individual who had been found to be a detrimental influence on her.

The termination hearing took place on February 6, 2023.[4] Laura Mergele, the supervisor for the Clark County Department of Children and Family Services, testified that there was mention of an Interstate Compact on the Placement of Children (ICPC) study being conducted on Elizabeth Smith, MC's grandmother who lives in Tennessee, in a hearing that took place in the summer of 2022. She acknowledged that the ICPC package

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[3] *Id.*

[4] At the time of the termination hearing, appellant was serving six years' probation, which began on October 11, 2022.

was not sent to the coordinator until January 26, 2023. She was shown what was purported to be an email from appellant's caseworker, LaRoyce Browning, in July 2022 indicating that Smith's information had been provided to the ICPC coordinator. A contact from the Children's Reporting and Information System (CHRIS), an electronic documentation system used throughout the state, showed that Browning had noted in an August hearing that DHS "testified that an ICPC packet will be completed to consider placement with the grandmother." Mergele stated that she believed Smith was present at the August hearing. Another contact from CHRIS on September 27 indicated that the ICPC had been submitted. Mergele testified that she submitted the ICPC packet to the coordinator at the end of January once Smith personally contacted her about it. There was also an entry in CHRIS on January 17, 2023, stating that Smith had contacted Julie Rankin concerning Smith's grandchildren and that Smith had talked to someone about six months ago and had even been to Arkansas for a hearing but had not been able to contact anyone and would like to be considered for placement. Mergele stated that she had no idea how long it would take Tennessee to process an ICPC.

On cross-examination by appellant's attorney, Mergele testified that MC and her brother, Minor Boy (MB), are in the same foster placement and are bound to each other.[5] She opined that it would be detrimental for them to be separated. She stated that a CHRIS

[5]MC's and MB's cases were at different stages because they had been taken into DHS custody at different times.

entry on December 12, 2022, indicated that the foster parents wanted to adopt only one child, not both, and that permanency of the children needed to be addressed.

On cross-examination by the ad litem, Mergele testified that the foster parents have maintained MB in their home despite his significant behavioral issues. She said that they had even sought training for themselves and MB and sought intensive counseling services for MB. Mergele was asked to read a portion of appellant's psychological evaluation, and she read the following:

> Jennifer stated that she was forced to forgive him, her father. Her mother is notably angry with Jennifer for having her father convicted for three years. Jennifer notes that her relationship with her mother has always been poor. Jennifer desperately wants her mother's attention and affection, blaming her mother for shoving me to where I'm at now, basically giving Jennifer away to her husband whom she married at 18. Jennifer claims that her mother sold her on two different occasions, at seven and nine, for drugs and alcohol.

Mergele agreed that the evaluation contained many concerning statements about appellant's childhood. She also stated that if any of the statements in the evaluation were true, she had health and safety concerns as well as concerns about the appropriateness of the proposed placement with Smith.

Sandra Marfoglio-Hinton, the adoption specialist, testified that the foster parents had not decided one way or the other about adopting MB.

Appellant testified that she and her mom, Smith, got "really close, finally." She said that it had been hard her whole life due to Smith's having six children and appellant being the only girl. She stated that "over this period of time that I got in contact with my mom, she has been in my life, she has been here supporting me, and been here, and we've gotten

really close. First time ever we're very close, and I'm very happy for that." Appellant said that despite all the things she said about her mom in the psychological report, she believes that Smith is a good placement for her children. She said that the things she said about Smith were not true and that she now respects Smith and sees Smith in a whole different way.

On cross-examination, appellant stated that she had not seen Smith until appellant had MB and reached out to Smith. She said that she had worked out the feelings she had toward Smith, and they were able to talk about things. She stated that having Smith in her life is a blessing. She denied ever saying that she did not want her children placed with Smith. Appellant admitted that she reported that Smith was verbally and psychologically abusive, and that was what she believed growing up based on how she was treated. However, she stated that she no longer believes that. She said that as a mother, she is now able to see things from Smith's point of view and understand what Smith was going through. She stated that it seemed like everything was against her, but she is now able to "go through and process things way better."

On cross-examination by the ad litem, appellant denied that Smith had sold her on two separate occasions. She stated that she got it mixed up and that it was actually her husband, not her mother, who had sold her.

Smith testified that she resides in Hollow Rock, Tennessee. She stated that she talked to Browning when she first found out about MC. She said that she talked to Browning again about a home study when MB was placed in DHS custody because she wanted to have the

children placed with her. She said that she never heard anything from Browning about the home study. She testified that she had given Browning all the information needed. She said that she had spoken with Mergele off and on since June and that she gave Mergele the information for the home study about a month before the hearing. She stated that she did not contact anyone to ask why she had not heard anything about the home study. She said that she left Browning messages and she even tried to visit with MC, but she could not get anything done. She stated that she contacted Julie Rankin, and Rankin told her that that she could not do anything about Browning, but Rankin "could only work from now on." Smith stated that she wanted both MC and MB placed with her. She said that she lives in a four-bedroom, two-bathroom home with her husband. She testified that she has a good relationship with appellant but admitted that there was a time when they did not get along too well. She stated that she and appellant have talked about their problems and have resolved them in the past six months or so. She said that she contacted Tennessee's office two days prior and was told that Tennessee had not gotten the paperwork for the home study yet.

On cross-examination, Smith testified that she learned that MC was in DHS custody before MB was also placed in DHS custody. She admitted that MC had been in foster care for a while before appellant told her about it. Smith denied that she failed to protect appellant from sexual assault by appellant's father, Smith's then husband. She stated that she immediately removed appellant from the home when she found out. She denied that she made appellant forgive her father or that she was angry with appellant for having her

father convicted. Smith also denied having relationships with various men when appellant was young. She admitted that she had drunk a lot after the situation with appellant and her father but denied currently having a problem with alcohol or drugs.

On cross-examination by the ad litem, Smith testified that she had last seen MB in person in July 2022 when appellant came to her home with him and stayed overnight. She said that she now visits him via FaceTime or some other video chat. She initially stated that it had been three years since she had last seen MC, but she changed it to two and a half years when she was informed that MC had just turned three that day. She testified that she also sees MC on FaceTime. Smith said that this was her second time in Arkansas. She stated that she and appellant had been estranged for "a while."

In closing, appellant's attorney argued that if the ICPC had been submitted earlier, "it's very possible that we could have had the results back and have a placement for the children with a relative and keep them together." Appellant's attorney asked the circuit court to hold termination "in abeyance," which would, in turn, give "more time for [appellant] to maintain stability, finish her counseling or increase her amount of counseling that she has already done." The attorney argued that this would be in the children's best interest and that separating MC and MB from each other would not be in their best interest. The circuit court orally granted DHS's petition and found that it was in MC's best interest that appellant's parental rights be terminated. The oral ruling did not address relative placement.

The circuit court entered an order terminating appellant's parental rights to MC and finding the following grounds by clear and convincing evidence: (1) twelve months failure to remedy,[6] (2) other subsequent factors,[7] and (3) aggravated circumstances.[8] The circuit court also found by clear and convincing evidence that termination of appellant's parental rights was in MC's best interest based on MC's adoptability and the potential harm she would face if returned to appellant's custody. The termination order makes no reference to relative placement. Appellant filed a timely notice of appeal.

Termination of parental rights is an extreme remedy and in derogation of a parent's natural rights; however, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child.[9] To terminate parental rights, DHS must prove, by clear and convincing evidence, that a minimum of one statutory ground exists and that it is in the child's best interest to do so.[10] Clear and convincing evidence is that degree of proof that will produce in the finder of fact a firm conviction of the allegation sought to be established.[11]

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[6]Ark. Code Ann. § 9-27-341(b)(3)(B)(i)*(a)* (Supp. 2023).

[7]Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)*.

[8]Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)*.

[9]*Bentley v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 374, 554 S.W.3d 285.

[10]Ark. Code Ann. § 9-27-341.

[11]*Bentley*, *supra*.

In finding that termination is in the best interest of the child, the circuit court is required to consider the likelihood that the child will be adopted if the petition is granted and the potential harm to the health and safety of the child that might result from returning the child to the parent's custody.[12] This court has held that other factors to be considered in making a best-interest finding may include preserving a child's relationship with a grandparent; the cessation of child support from a parent; if less drastic measures, such as a no-contact order or supervised visitation, may be used; if continued parental contact would be beneficial to the child if or when the child is living with a relative and not in an indeterminate state that is working against the child; and whether the child is living in continued uncertainty.[13]

We review termination-of-parental-rights cases de novo.[14] The appellate inquiry is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous.[15] In resolving the clearly erroneous question, we give due regard to the opportunity of the circuit court to judge the credibility of witnesses.[16]

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[12]Ark. Code Ann. § 9-27-341(b)(3)(A).

[13]*Cole v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 481, 611 S.W.3d 218.

[14]*Dinkins v. Ark. Dep't of Hum. Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

[15]*Shawkey v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 2, 510 S.W.3d 803.

[16]*Bentley*, *supra*.

Appellant argues that termination of her parental rights was not in MC's best interest because her mother, Elizabeth Smith, was a less restrictive alternative to termination. She contends that termination was "unnecessary where the issue of a less restrictive alternative to termination, placement with the maternal grandmother, was still outstanding." She cites this court's decision in *Clark v. Arkansas Department of Human Services*,[17] in which we held that the circuit court's decision to forgo a relative-placement option in favor of termination was clearly erroneous where the grandparents had a longstanding relationship with the children. Alexander further contends that *Borah v. Arkansas Department of Human Services*[18] is applicable to the instant case. In *Borah*, we held that the circuit court clearly erred by failing to consider placing the child with the paternal grandmother as a less restrictive alternative to termination of parental rights where the child's permanency was in question because the foster parents had not expressed an interest in adopting her.

DHS contends that we should not address appellant's argument because it is not properly before us. DHS states that the argument on appeal is not the same one made by appellant to the circuit court and that appellant failed to get a ruling. DHS is correct. Appellant never argued to the circuit court that termination was not in MC's best interest because there was a less restrictive alternative available. She only sought to have the termination held in abeyance. The failure to raise a challenge or obtain a ruling below is

[17]2019 Ark. App. 223, 575 S.W.3d 578.

[18]2020 Ark. App. 491, 612 S.W.3d 749.

fatal to the appellate court's consideration of an issue on appeal.[19] Even in termination cases, this court will not address issues raised for the first time on appeal.[20]

Even had appellant preserved the issue for appeal, it would still fail to provide a path to reversal of the termination of her parental rights. Specifically, to make a least-restrictive-placement argument on appeal, at a minimum, there must be an appropriate and approved relative in the picture.[21] Here, at the time of the termination hearing, no home study had been conducted, and Smith had not been approved for placement of MC. Additionally, there was no evidence of a bond between MC and Smith, and there were allegations made by appellant in her psychological evaluation that would call into question Smith's appropriateness as a relative placement.

Appellant also argues that termination was not in MC's best interest because of the strong bond MC has with MB. The circuit court stated in response to this argument that it was its understanding that the foster parents had not communicated a desire to not adopt MB and that it was under consideration. That was the extent of the circuit court's discussion of appellant's sibling-separation argument. There was no actual ruling, and it is not properly before us.

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[19]*Anderson v. Ark. Dep't of Hum. Servs.*, 2011 Ark. App. 522, 385 S.W.3d 367.

[20]*Tuck v. Ark. Dep't of Hum. Servs.*, 2014 Ark. App. 468, 442 S.W.3d 20.

[21]*See, e.g.*, *Thomas v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 457, 610 S.W.3d 688 (noting where relatives have not been approved for placement and the children remain in foster care, the existence of potential relatives was not a basis to reverse a termination-of-parental-rights decision).

Even if the argument was preserved for our review, it would fail. The evidence shows that MC and MB are both in the same home. Even though the foster parents are still considering whether to adopt MB, that is not an issue before this court because MB's case had not even progressed to the termination-of-parental-rights stage at the time appellant's rights were terminated as to MC. Furthermore, this court has recently held that when it is expected that the relationship between siblings will continue after termination, then the circuit court's best-interest finding is not clearly erroneous based on severance of the sibling relationship.[22]

Affirmed.

VIRDEN and GRUBER, JJ., agree.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for appellant.

Kaylee Wedgeworth, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

Dana McClain, attorney ad litem for minor child.

[22]*See Blankenship v. Ark. Dep't of Hum. Servs.*, 2023 Ark. App. 63, 661 S.W.3d 227.