

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-23-9

MELISSA PASSARELLI

APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN
SERVICES AND MINOR CHILD

APPELLEES

Opinion Delivered October 25, 2023

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. 26JV-21-77]

HONORABLE LYNN WILLIAMS,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

BRANDON J. HARRISON, Chief Judge

Melissa Passarelli¹ appeals a Garland County Circuit Court order terminating her parental rights to her daughter (MC). Passarelli’s counsel has filed a no-merit brief and motion to withdraw as counsel pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Ark. Sup. Ct. R. 6-9(j) (2023). The clerk of this court delivered a copy of counsel’s brief and motion to withdraw to Passarelli, advising her of her right to file pro se points for reversal pursuant to Ark. Sup. Ct. R. 6-9(j)(3), but she has not done so. We affirm and grant counsel’s motion to withdraw.

Passarelli gave birth to MC on 20 November 2020. Passarelli tested positive for methamphetamine at the time of delivery, and MC’s cord blood tested positive for Demerol,

¹We note that appellant’s last name is also spelled “Passerelli” throughout the record. For consistency, we use the spelling contained in the initial petition for dependency-neglect.

amphetamine, methamphetamine, and Ambien. After receiving a referral from the child-abuse hot line, the Arkansas Department of Human Services (DHS) opened an investigation.

DHS discovered that Passarelli had been staying with Don Bergan, the grandfather of an individual she had previously dated, during her pregnancy and had used methamphetamine frequently. At a meeting on November 24, Bergan was identified as a potential sober caretaker in the event of relapse, and Passarelli agreed that if she were to ever have the desire to leave the home to seek or use illegal substances, she would leave MC in Bergan's care and contact her caseworker. Passarelli also agreed to begin counseling services, participate in NA/AA meetings beginning that week, participate in in-home parenting assistance, complete a drug-and-alcohol assessment and follow the recommendations of that assessment, submit to random drug screens and home visits, and maintain contact with DHS. With that plan in place, DHS allowed MC to remain in Passarelli's custody.

Passarelli did not participate in services as she had agreed and avoided contact with DHS. On 3 March 2021, DHS conducted a home visit and spoke to Bergan, who said that Passarelli had been gone for two days and had left MC in his care. Bergan also stated that Passarelli had his vehicle and that he had no other form of transportation. Bergan had the necessary supplies to take care of MC, but he was not comfortable caring for her by himself for multiple days at a time. Passarelli eventually returned the night of March 3.

On April 2, DHS conducted another home visit and again found Bergan caring for MC on his own. Passarelli had not been home in two days, and Bergan, who was seventy-eight years old, stated that he was "too old" to continue caring for MC by himself. Bergan said that if Passarelli did not return by April 5, DHS would have to take MC. On April 5, Bergan informed DHS that Passarelli had been home briefly the night before but had left again. Due

to Bergan's age, failing health, and inexperience in caring for an infant, DHS decided to place a seventy-two-hour hold on MC.

DHS filed a dependency-neglect petition on April 8, and the circuit court granted DHS emergency custody of MC. The court later adjudicated MC dependent-neglected due to neglect and parental unfitness. The court cited Passarelli's failure or inability to provide for the essential physical, mental, or emotional needs of MC, including failure to provide a shelter that does not pose a risk to MC's health or safety. Specifically, due to Passarelli's methamphetamine use, she left MC in the care of an elderly gentleman for days at a time without providing necessary clothing, diapers, food, or formula. The court ordered Passarelli to submit to hair follicle screening; to complete a drug-and-alcohol assessment and follow any recommendation; to submit to random drug screens immediately upon request; to participate in individual therapy; to submit to a psychological evaluation and follow any recommendation; to participate and attend all visitation scheduled with MC; to complete parenting education; to obtain and maintain a safe, suitable, and appropriate home for herself and MC; to obtain and maintain adequate income to support herself and MC; to cooperate with and maintain consistent contact with DHS; and to keep DHS informed of a current address.

The circuit court reviewed the case in September 2021 and found that Passarelli had not complied with the case plan and the orders of the court. The court's review order recited that Passarelli began inpatient drug treatment but left after one week, that she had not visited MC or had contact with DHS since 28 April 2021, and that her whereabouts had been unknown for much of the review period. The order continued,

She appeared at the Department on September 1, 2021 visibly intoxicated and refused a drug screen; she agreed to go to inpatient drug treatment, which the Department arranged for her; she did not attend. The Department arranged

two (2) more intake days for her to go to treatment, but she refused those, as well. The Department has a fourth spot arranged for her tomorrow.

The court again ordered Passarelli to follow the case plan and previous court orders. The court also specifically ordered her to begin an inpatient drug treatment program or to submit to hair-follicle screening by the end of the week. A second review order entered in January 2022 reflected substantially similar noncompliance with the case plan and court orders.

In April 2022, the circuit court entered a permanency-planning order and found that Passarelli had made “negligible” progress: she had visited MC twice since the last hearing; she had turned herself in and cleared her outstanding warrants; and while she had not participated in drug treatment since the last hearing, she had tested negative on two drug screens. However, the court entered a second permanency-planning order on 1 July 2022 and changed the goal of the case to authorizing a plan for adoption with DHS filing a petition for termination of parental rights. The court remarked that it could not authorize a plan to place custody of MC with Passarelli “as the Court cannot find that the mother is complying with the established case plan or orders of the Court, making significant or measurable progress toward achieving the goals established in the case plan, or diligently working toward reunification or placement in her home.”

DHS petitioned to terminate parental rights on 1 July 2022 and alleged several statutory grounds, including failure to remedy, failure to provide significant material support or to maintain meaningful contact, and aggravated circumstances. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), (ii)(a), & (ix)(a)(3) (Supp. 2023). The circuit court convened a termination hearing in September 2022.

Shawna Wright, the DHS caseworker, testified that Passarelli had completed parenting classes and a three-day detox, but she had not completed any other requirements of the case plan. She had not completed inpatient drug treatment because “she doesn’t feel like she has a problem any longer since completing her three-day detox.” Passarelli had not been available for random drug screens, but the drug screens taken at visitation had been negative. Her attendance at visitation had been sporadic.

Susan Miller, an adoption specialist for DHS, testified that there were no factors that would prohibit MC’s adoption and that she had identified 249 potential matches.

Passarelli testified that in January 2022 she attended a four-day detox in Little Rock and that after she was released, Shawna Wright told her that she did not have to attend inpatient drug treatment. She said she had not used methamphetamine since her detox. She is currently unemployed and staying with Bergen. He provides her only source of transportation, and he gives her money. To help maintain her sobriety, she “just stay[s] home” and “appl[ies] for jobs on the phone.”

From the bench, the circuit court remarked that it seems “incredible” that Passarelli had been able to stop using methamphetamine just by detoxing, but DHS had offered no evidence to show that she was still using methamphetamine. Other problems remained, however, including the fact that she was living with and depended on, Bergen:

Mr. Bergan brought the child to the Department because he didn’t believe it was a safe place for her to be. You’re back in Mr. Bergan’s house. You have no means of support. You have no other housing. Mr. Bergan at the time was 78. . . . If something happens to Mr. Bergan, you have no means of support as far as I can obtain from the testimony.

The court was also concerned with Passarelli's lack of counseling, sporadic visitation, and lack of employment. Due to a lack of substantial progress in addressing these matters, the court granted the petition to terminate parental rights.

In its written order, the circuit court terminated Passarelli's parental rights on the failure-to-remedy ground.² Specifically, the court found that she had not completed counseling; that her visitation with MC had been sporadic; and that her living situation was the same as when the case opened. Passarelli was unemployed and had no transportation, no housing, and no source of support apart from Bergen. The court also found that termination was in MC's best interest, noting that Passarelli's behavior during the case "indicates she would not appropriately care for the juvenile if placed in her care." Passarelli filed a timely notice of appeal from the circuit court's order.

In order to terminate parental rights, a circuit court must find clear and convincing evidence as to one or more of the grounds for termination listed in Ark. Code Ann. § 9-27-341(b)(3)(B). *Trogstad v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 443, 609 S.W.3d 661. Clear and convincing evidence is defined as that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established. *Posey v. Ark. Dep't of Health & Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). The circuit court must also 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

²The court's order also includes language that describes aggravated circumstances, but it is unclear if the court based its decision on that ground as well.

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 appellate court reviews termination-of-parental-rights cases de novo but will not reverse the circuit court's ruling unless its findings are clearly erroneous. *Trogstad, supra*. 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. *Id.* In determining whether a finding is clearly erroneous, an appellate court gives due deference to the opportunity of the circuit court to assess the witnesses' credibility. *Lee v. Ark. Dep't of Hum. Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008). Only one ground is necessary to terminate parental rights. *Id.*

Arkansas Supreme Court Rule 6-9(j)(1) allows counsel for an appellant in a termination case to file a no-merit petition and motion to withdraw if, after studying the record and researching the law, counsel determines that the appellant has no meritorious basis for appeal. The petition must include an argument section that includes all circuit court rulings that are adverse to the appellant on all objections, motions, and requests made by the party at the hearing from which the appeal arose and an explanation why each adverse ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 6-9(j)(1)(A). In evaluating a no-merit brief, the issue for the court is whether the appeal is wholly frivolous or whether there are any issues of arguable merit for appeal. *Linker-Flores, supra*.

In her no-merit brief, counsel explains that any challenge to the statutory grounds for termination of Passarelli's parental rights would have no arguable merit. Counsel notes that only one statutory ground for termination is required to be proved and argues that, in this case, there was clear and convincing evidence to support the aggravated-circumstances ground. As

indicated above, the circuit court's order was more clearly based on the failure-to-remedy ground than the aggravated-circumstances ground. However, counsel's argument to support the aggravated-circumstances ground can also support the failure-to-remedy ground. Counsel explains that Passarelli did not comply with the majority of the case plan, despite having ample time to do so. At the time of termination, she had no income, no transportation, no intent to pursue further treatment for her drug addiction or to enter a sobriety-maintenance program, and she had sporadically visited with her daughter. In addition, Passarelli's living situation had not changed, and she admitted to having no means of support other than the money provided by Bergan. In sum, her circumstances had not changed from the time MC was taken into custody, other than her apparent recovery from methamphetamine use.

With regard to best interest, counsel asserts that DHS provided uncontroverted testimony that MC is adoptable. Counsel also argues that DHS produced sufficient evidence of potential harm to MC because Passarelli had not achieved any long-term stability. Instead, she still relied on an elderly man who was not capable of being a secondary caretaker for MC. Passarelli had not completed the case plan or demonstrated an ability to meet MC's basic needs on her own. See *Guardado v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 16, 568 S.W.3d 296 (potential-harm finding supported by evidence of mother's instability, lack of income and inadequate housing, and reliance on others for financial and transportation support). Counsel contends that the facts supporting potential harm, in conjunction with the evidence of MC's adoptability, provided sufficient evidence for the circuit court to find that termination of Passarelli's parental rights was in MC's best interest.

Finally, counsel asserts that other than the termination order, there were no other rulings adverse to Passarelli. This is incorrect; at the conclusion of Passarelli's testimony, her attorney

moved for a continuance to allow Passarelli to be drug tested, but the court denied the request, ruling that it was “not necessary” because DHS had not presented evidence that Passarelli was currently using drugs. The court later ruled that because there was no evidence of current drug use, it would “not assess[] that against [her] in this case.” Our case law holds that even if an adverse ruling is omitted from a no-merit brief in a termination case, we may affirm if the ruling would clearly not constitute a meritorious ground for appeal. *Beaty v. Ark. Dep’t of Hum. Servs.*, 2017 Ark. App. 621, 534 S.W.3d 190.

We hold that this adverse ruling on the motion for continuance would clearly not constitute a meritorious ground for appeal. We also hold that the circuit court had sufficient evidence upon which to find that it was in MC’s best interest for Passarelli’s rights to be terminated and that statutory grounds for termination existed. Thus, we grant counsel’s motion to withdraw and affirm the termination of Passarelli’s parental rights.

Affirmed; motion to withdraw granted.

GRUBER and HIXSON, JJ., agree.

Leah Lanford, Arkansas Commission for Parent Counsel, for appellant.

One brief only.