

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA 12-526

MICHELLE OGDEN and
DANIEL MCCLANAHAN
APPELLANTS

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES and A.O., MINOR
APPELLEES

Opinion Delivered October 10, 2012

APPEAL FROM THE MADISON
COUNTY CIRCUIT COURT,
[NO. JV2011-24-3]

HONORABLE STACEY
ZIMMERMAN, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellants Michelle Ogden and Daniel McClanahan appeal from the order terminating their parental rights to their daughter A.O. (DOB 02/15/11). Appellants concede that they were in no position to reunify with A.O. at the time of termination; however, they argue that termination was erroneous because A.O. could have been placed in the custody of Daniel's mother, Cynthia McClanahan. Because this "less restrictive alternative" was available, appellants contend, the circuit court erred in terminating their parental rights. We affirm.

Background

A month after she was born, A.O. was taken into emergency custody by the Arkansas Department of Human Services (DHS) due to Michelle's drug use during and after

pregnancy.¹ Daniel was believed to be A.O.'s father and was in the Benton County jail at the time. The circuit court granted the petition and entered an ex parte order for emergency custody on March 21, 2011. A.O. was placed in foster care and was adjudicated dependent-neglected on April 22, 2011, on the grounds of Michelle's drug use and the fact that paternity had not been established. The circuit court set reunification with Michelle as the goal of the case and a DHS case plan was developed; however, appellants failed to comply with the case plan or follow the circuit court's orders. In July 2011, Daniel was arrested for domestic violence against Michelle and, throughout the case, failed to appear at hearings. At a review hearing on August 26, 2011, the circuit court ordered that reunification with Michelle would remain the goal of the case but that Daniel was to have no contact with A.O.

Following a permanency-planning hearing on October 28, 2011, the circuit court changed the goal of the case to adoption, finding that Michelle had failed to comply with the case plan or any of the court orders; had failed to attend counseling and had continued to use illegal drugs; had not maintained stable employment or completed parenting classes; and had not maintained contact with DHS. The court also found that Daniel had failed to comply with the case plan or any court orders; had not established paternity as ordered by the court; had failed to appear for the hearing and had not completed weekly drug screens; and had not

¹Michelle had five other children and had custody of none of them. The affidavit attached to the petition for emergency custody noted that there were several substantiated DHS cases involving these children, dating back to 1995, and that Michelle had continued to use drugs in those cases and had not complied with any court orders.

cooperated with or maintained contact with DHS. The court continued its previous orders and reiterated that Daniel was to have no contact with A.O.

DHS filed a petition for termination of parental rights (TPR) on November 10, 2011, citing the following statutory grounds:

Subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances which prevent return of the juvenile to the family home.²

A TPR hearing was held on March 30, 2012, and the circuit court heard testimony from Michelle, Daniel, Cynthia McClanahan, and DHS caseworker Tessa Bunch. Following the hearing, the circuit court found that A.O. was likely to be adopted; that there was a substantial risk of potential harm if she were returned to either parent, both of whom were incarcerated at the time; that neither parent had complied with the DHS case plan or the court's orders and neither parent had stable employment; that "the father has been in jail more than he has been out throughout this case";³ and that Michelle had been arrested at least twice. The circuit court found that statutory grounds for TPR had been satisfactorily proved and that TPR was in A.O.'s best interest, in light of the fact that her parents were still having the same problems with drug use, instability, and arrests that had led to her initial removal. In addition, the court found that placement with Cynthia McClanahan was not in A.O.'s best interest

²Ark. Code Ann. § 9-27-341(b)(3)(B)(vii) (Supp. 2011).

³Daniel testified at the TPR hearing that over the course of the case, he had been arrested for domestic violence, obstruction of government operations, and theft by receiving.

because Ms. McClanahan had not attended visitation when authorized to do so and thus had not established any connection with A.O., and because Daniel had been arrested at her house in October 2011 and the court was concerned that she could not keep Daniel away from A.O. The circuit court explained its reasoning:

And then we get the home study on your mom, and her home is clean and her home physically is appropriate, but then I'm hearing all this stuff about your criminal record for domestic violence and getting into it with Miss Michelle, and your long criminal record and a registered sex offender.⁴ And so then I'm thinking, uh-oh, I don't think that's gonna be an appropriate placement with grandmom So placement with grandmom, even though her home was clean and safe that way, it wasn't appropriate or in the best interest of A.O. for A.O. to be placed with your mother, so that's why I didn't do it.

The order terminating appellants' parental rights was filed April 17, 2012, and timely notices of appeal were filed on April 20 and April 26, 2012.

Discussion

Appellants do not argue that there was insufficient evidence to support termination of their parental rights; rather, they argue that TPR was erroneous because A.O. should have been placed with Cynthia McClanahan, Daniel's mother. Appellants contend that Arkansas Code Annotated section 9-27-341, the TPR statute, should be read "in conjunction with other provisions of the Juvenile Code and case law," and they cite sections 9-27-355(b)(1) (Supp. 2011), 9-27-338(c) (Supp. 2011), and 9-28-105 (Supp. 2011) to support their argument that placement with a relative should be preferred as a "less restrictive alternative" to termination. However, this court has heard and rejected appellants' argument on more

⁴Official documentation of this conviction is not contained in the record on appeal, but Daniel testified at the TPR hearing that he was a registered sex offender.

than one occasion and has clearly held that the statutes cited by appellants are not relevant to a TPR determination.⁵

Arkansas Code Annotated sections 9-27-355(b)(1) and 9-28-105, which concern the placement of juveniles by DHS, both state that a relative of the juvenile shall be given preferential consideration for placement if the relative meets all relevant child protection standards and it is in the best interest of the juvenile to be placed with them. However, section 9-27-341 does not contain any such requirement, and this court has held that section 9-27-355 is not relevant to a request for TPR.⁶ By the same reasoning, neither is section 9-28-105. Appellants also cite section 9-27-338(c) to advance their argument that placing a child with relatives is preferred at all stages of a case, not just at the time of initial placement. However, that statute addresses the requirements for a permanency-planning hearing and is no more pertinent to our review of a TPR determination than the other sections cited by appellants. Appellants have appealed from the TPR order in A.O.'s case, not from a permanency-planning order or a denial of placement under sections 9-27-355 or 9-28-105. The issue before the circuit court at the termination hearing was a petition for TPR, not a custody, guardianship, or adoption petition, and appellants have not advanced any new or persuasive argument that a grandmother's willingness to care for A.O. somehow precluded the termination of appellants' parental rights. Accordingly, we affirm.

⁵*Henderson v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 430; *Davis v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 469.

⁶*Id.* (citing *Davis*); see also *Andrews v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 22, ___ S.W.3d ___ (affirming circuit court's exclusion of evidence concerning placement on the grounds that it was "irrelevant at the termination hearing").

Affirmed.

ABRAMSON and HOOFFMAN, JJ., agree.

Leah Lanford, Arkansas Public Defender Commission, for appellant.

Tabitha B. McNulty, Office of Chief Counsel, for appellee.