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SUPREME COURT OF ARKANSAS

No. CV-13-269

JOSIE PAYNE APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES & A.S. APPELLEES	**Opinion Delivered** June 27, 2013 APPEAL FROM THE UNION COUNTY CIRCUIT COURT [NO. JV2011-188] HONORABLE EDWIN A. KEATON, JUDGE SUPPLEMENTAL RECORD ORDERED AND REBRIEFING IN THE COURT OF APPEALS; COURT OF APPEALS OPINION VACATED.

PAUL E. DANIELSON, Associate Justice

Appellant Josie Payne appeals from an order of the Union County Circuit Court terminating her parental rights to her daughter, A.S., after the nonaccidental death of Payne's other daughter, C.S. Counsel for Payne filed a motion to withdraw as counsel on appeal along with a no-merit brief, concluding that after review, there are no arguably meritorious issues that would support an appeal. The court of appeals remanded to supplement the record, denied counsel's motion to withdraw, and ordered rebriefing. *See Payne v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 186. Subsequently, this court granted a joint petition for review. Typically, when we grant a petition for review, we treat the appeal as if it had been originally filed in this court. *See Fowler v. State*, 2010 Ark. 431, 371 S.W.3d 677.

The pertinent facts are these. Arkansas Department of Human Services took an

emergency hold on A.S. on August 9, 2011, after her sister, C.S., suffered a nonaccidental death. An adjudication hearing was held on December 5, 2011, after which the circuit court found A.S. dependent-neglected. Subsequently, on April 5, 2012, the termination-of-parental-rights hearing was held. The circuit court found clear and convincing evidence that termination of Payne's parental rights was in A.S.'s best interest, that A.S. was adoptable, and that A.S. would face potential harm if returned to Payne. The ruling terminating Payne's parental rights was announced from the bench on May 30, 2012, followed by a written order issued on June 29, 2012.

As previously noted, Payne's attorney, Deborah Sallings, filed a motion to withdraw as counsel and a no-merit brief, pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*). *Linker-Flores v. Arkansas Department of Human Services*, 364 Ark. 224, 217 S.W.3d 107 (2005) (*Linker-Flores II*) requires a list of all rulings adverse to the appellant with an explanation of why each ruling is not a meritorious ground for reversal. Counsel filed an abstract, brief, and addendum listing all adverse rulings made at the termination hearing and explaining why there was no meritorious ground for reversal as to each of the circuit court's rulings, including the termination decision. *See* Ark. Sup. Ct. R. 6-9(i)(1) (2012). Appellant filed one prose point for reversal pursuant to Arkansas Supreme Court Rule 6-9(i)(3) (2012). Payne argues that because a jury convicted Mr. Desmond Evans[1] for the death of C.S., her parental rights as to A.S. were

[1]Desmond Evans was the appellant's boyfriend at the time of C.S.'s death.

wrongly terminated. We now turn to the merits.

Our standard of review for cases involving the termination of parental rights is well established. *See Seago v. Ark. Dep't of Human Servs.*, 2011 Ark. 184, 380 S.W.3d 894. Arkansas Code Annotated § 9-27-341(b)(3) (Supp. 2011) requires an order forever terminating parental rights to be based on clear and convincing evidence. Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *See id.* When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the circuit court's finding was clearly erroneous. *See id.* 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. *See id.* Such cases are reviewed de novo on appeal. *See id.* This court does, however, give a high deference to the circuit court because that court is in a far superior position to observe the parties before it and to judge the credibility of the witnesses. *See id.*

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. *See* Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii) (Supp. 2011). Additionally, the circuit court must find by clear and convincing evidence that one or more statutory grounds for termination exists. *See* Ark.

Code Ann. § 9-27-341(b)(3)(B). Proof of only one statutory ground is sufficient to terminate parental rights. *See Gossett v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 240, 374 S.W.3d 205.

In the instant case, the circuit court's order terminating Payne's parental rights specifically states that "statements of the parties and counsel" were considered to make the required findings. While Payne did not make a statement or give testimony at the termination hearing, the only reason she did not was because all parties stipulated that her testimony would be substantially the same as it had been during the adjudication hearing. Furthermore, in announcing its ruling from the bench, the circuit court focused on the potential-harm prong of why it was in A.S.'s best interest for Payne's parental rights to be terminated. The court clearly considered Payne's testimony and other evidence that was presented at the adjudication hearing including: Payne's anger as a teen; Payne's violence toward her aunt; specific instances of Payne's actions when angry; that disturbance of Payne's sleep is a concern; her agitation when out of cigarettes; and findings from Payne's psychological evaluation. However, none of this evidence or testimony from the adjudication hearing is included in the record now before us.

Rule 6-9 of the Arkansas Supreme Court Rules states in pertinent part:

> (c)(1) The record for appeal *shall be limited to the transcript of the hearing from which the order on appeal arose*, any petitions, pleadings, and orders relevant to the hearing from which the order on appeal arose, all exhibits entered into evidence at that hearing, and all orders entered in the case prior to the order on appeal.
> (i)(1)(B) The abstract and addendum shall contain all rulings adverse to the appellant, made by the Circuit Court *at the hearing from which the order of appeal arose*.

Ark. Sup. Ct. R. 6-9(c)(1) & (i)(1)(B) (2012) (emphasis added).

This court's opinion in *Lewis v. Arkansas Department of Human Services*, 364 Ark. 243, 217 S.W.3d 788 (2005), which pre-dates the adoption of Rule 6-9, seems to cause some confusion. In *Lewis*, we explained:

> Under Ark. R. App. P.-Civ. 2(c)(3), any party would have been entitled to appeal prior final orders from the adjudication hearing, review, and permanency-planning hearings. In this case, the parents did not choose to appeal from those final, appealable orders. Thus, we are precluded from reviewing any adverse rulings from these portions of the record. Appellant's attorney, Val Price, stated in his motion to withdraw "[t]hat after reading the entire record, [I have] the opinion that this is a no-merit appeal and [have] filed a no-merit abstract, addendum, and brief pursuant to the law." The record is now before us, and for purposes of appellate review, we apply a de novo standard of review. Based upon Ark. R. App. P.-Civ. 2(c)(3), our *review* of the record *for adverse rulings* is limited to the termination hearing, and we have determined that there are no errors with respect to rulings on objections or motions prejudicial to the defendant.
>
> The second question involves what constitutes a "conscientious review of the record" under *Linker–Flores*. For purposes of reviewing the sufficiency of the evidence *in this case*, we must examine evidence from all hearings and proceedings in the case, *as the circuit court took judicial notice and incorporated by reference into the record all pleadings and testimony in the case that occurred before the termination-of-parental-rights hearings*.

Id. at 251, 217 S.W.3d at 793 (emphasis added).

Lewis and Rule 6-9 are consistent in instructing that for purposes of reviewing the record for adverse rulings, the record that is required is limited to the termination hearing, or the "hearing from which the order on appeal arose." What causes confusion is that in *Lewis* we held that we also had to examine evidence from all the hearings and proceedings in the case. While at first blush this seems to conflict with Rule 6-9, *Lewis* specifically stated that it was because of the circumstances in that particular case that the evidence from all hearings

and proceedings had to be examined. There, the circuit court took judicial notice of that evidence and incorporated it by reference into the record. In other words, it was clear that the court considered those hearings and proceedings and that they contributed to its final order terminating the parental rights of the appellant.

Likewise, the circuit court in the instant case clearly considered evidence in its final order, including the previous testimony of Payne, that was not made part of the record before us. Rule 6-9 does explicitly require that the record also contain any petitions, pleadings, and orders relevant to the hearing from which the order on appeal arose, all exhibits entered into evidence at that hearing, and all orders entered in the case prior to the order on appeal. While the circuit court and the attorneys failed to formally enter it into evidence, and while it does not technically fall under the category of a petition, pleading, or order, it is evident to this court that Payne's prior testimony, along with other evidence that had been previously admitted in the case, was relevant to the termination hearing and the circuit court's final order of termination. This especially holds true regarding Payne's testimony as she was set to testify at that hearing until she agreed not to in order to prevent the hearing from being continued, and it was stipulated by the parties that her testimony would have been substantially the same at the termination hearing as it had been in the previous hearing.

In conclusion, while it is clear that the appellate court will not review adverse rulings from anything other than the termination hearing, to do a thorough and meaningful review of the final order terminating parental rights, we must consider everything that the circuit court considered when it made the determination that it was in A.S.'s best interest to not be

in the care of her mother. A clearly-erroneous standard of review expressly contemplates a review of the entire record. *See Busbee v. Ark. Dep't of Health & Human Servs.*, 369 Ark. 416, 255 S.W.3d 463 (2007) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)). Therefore, we must remand the case and order that a supplemental record be filed with Payne's testimony and anything else that was relevant to the termination hearing and the final order of the circuit court.

Supplemental record ordered and rebriefing in the court of appeals; court of appeals opinion vacated.

Deborah H. Sallings, Arkansas Public Defender Commission, for appellant.

No response.