

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-474

ERIC PHILPOTT

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES and N.P., MINOR
CHILD

APPELLEES

Opinion Delivered SEPTEMBER 28, 2011

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. JV2009-151]

HONORABLE MARK HEWETT,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Eric Philpott appeals from the order of the Sebastian County Circuit Court terminating his parental rights to his daughter, N.P., born October 9, 2008. He contends that the circuit court should be reversed because (1) the case worker who testified at the termination hearing was not a qualified expert witness under the Indian Child Welfare Act, 25 U.S.C. § 1912(f); and (2) her testimony was insufficient to support the conclusion that N.P. would suffer serious emotional and physical damage if returned to him. We affirm the order of the circuit court.

On February 20, 2009, the Arkansas Department of Human Services (DHS) placed a seventy-two-hour hold on N.P. because both of her legal care givers, her mother Kristen Philpott and her mother's husband Jeremy Philpott, were arrested. The court entered an order for emergency custody, and a probable-cause hearing was held on February 26, 2009.



The court found probable cause to believe that N.P. was dependent-neglected and that it was contrary to her welfare to return to the custody of her parents at that time.

In April 2009, the court entered an adjudication and paternity order, finding N.P. to be dependent-neglected and, based on genetic testing, appellant Eric Philpott to be her biological and legal father. The court set reunification as the goal of the case. Custody remained with DHS, but the court approved a trial placement with appellant. Appellant was ordered to maintain stable, appropriate housing; maintain income sufficient to support his child; submit to a drug/alcohol assessment and complete any treatment recommended therefrom; submit to random drug screens at the request of DHS; complete parenting classes; and maintain reliable transportation.

Following a review hearing on June 18, 2009, the court found that DHS had made reasonable efforts to provide services and N.P. continued to be in need of those services. Custody was changed to appellant.

In April 2010, DHS took a seventy-two-hour emergency hold on N.P. and filed a motion for emergency change of custody. This was based on appellant's mother's report that appellant had broken out the back window of her vehicle while N.P. and another child were in the back seat. Appellant's mother suspected that he was using methamphetamine. According to the DHS employee's affidavit attached to the motion, appellant's mother also stated that he had come into her bedroom one night and put a gun to her head, demanding money; he was also seeing Kristen Philpott, who recently tested positive for methamphetamine; and the two had taken N.P. to Oklahoma, but failed to take the



medication she needed to treat a bacterial infection in her colon. Following a hearing, the court found that it was contrary to N.P.'s welfare to remain in her father's custody. N.P. was placed in DHS custody, and appellant was given weekly supervised visitation. In a May 2010 order (filed July 2010), N.P. was found to be dependent-neglected based on appellant's drug use. Appellant was ordered to submit to a psychological evaluation and complete any counseling recommended; submit to a drug/alcohol assessment and complete any treatment recommended; obtain and maintain stable, appropriate housing, income sufficient to support his child, and reliable transportation; submit to random drug screens, including hair follicle testing, as requested by DHS; and visit on a regular basis.

On September 14, 2010, DHS filed a petition for termination of parental rights, and the termination hearing was held on December 3, 2010.¹ Appellant testified that as of the date of the hearing he had been sober and living in a residential treatment facility for twenty-seven days. He was thirty-two years old and had been using methamphetamine for seventeen years—although he claimed to be sober when he had custody of N.P. He admitted to using methamphetamine after he lost custody of N.P. Appellant discussed his treatment for addiction and for anger management. He explained that he was in a twelve-step program and asserted his commitment to sobriety. However, he could not remember what the second step was, which he attributed to being nervous.

¹This hearing also dealt with the termination of the mother's parental rights as to N.P. and her other child, J.P. On August 4, 2010, the mother, Kristen Philpott, had received a twenty-five-year sentence with an additional twenty-five years suspended for delivery of methamphetamine. Her parental rights were terminated, and she is not a party to this appeal.



As for housing, appellant testified that he had not had a home of his own since May, and he had been living with either his mother or his brother until he entered the treatment facility. The last time he worked was at the time of the last hearing, when he was working for a party supply company. He testified that his brother would help him get a vehicle when he got out of the treatment facility. He planned to get out on December 23, 2010, and live with his brother (who was then on parole), and he acknowledged that he would not be prepared to take care of his daughter immediately.

Also testifying at the hearing was DHS case worker Robbie McKay. She testified that she had a staffing with appellant and N.P.'s mother on May 19, 2010. A copy of the case plan was introduced into evidence, and McKay testified that DHS had made several referrals during the course of the case for drug and alcohol assessments and psychological evaluations. She further testified that appellant had not maintained stable and appropriate housing. She stated that appellant had, at various times, stayed with his mother, his grandmother, his brother, and with Kristen at her mother's home. Since April 2010, appellant had not provided proof of income sufficient to support N.P. He told McKay that he had worked and been paid in cash, but he never provided any documentation of income. McKay cited appellant's housing situation and reliance on others to take care of him as evidence of a lack of stability.

In McKay's opinion, appellant's drug addiction was his major obstacle in achieving reunification. Drug tests were required before each visit with N.P. McKay testified that appellant did not submit to all drug screens he was asked to take. He refused some urine tests



and did not show up to take the first hair follicle test. Of thirty-two possible visits with N.P. while she was in DHS custody, appellant had exercised only eight visits. McKay recalled at least two times that appellant arrived for a visit and behaved inappropriately; she described him as hostile, belligerent, out of control, and high on methamphetamine.

McKay recommended that parental rights be terminated and that N.P. be free for adoption. According to McKay, N.P. was adoptable. N.P.'s current foster placement, a relative, had expressed a desire to adopt her, and the foster parent later verified this during his testimony. McKay believed, based on appellant's condition, that N.P. would be at risk of serious physical or psychological harm if she were to continue to have contact with him. She again noted the services that had been provided by DHS and stated that these services were active efforts to prevent the break-up of the Indian family. Upon being questioned by the court, McKay testified that she had been a case worker for almost seventeen years and had previously testified in termination proceedings involving Indian children.

At the close of DHS's case, appellant moved to dismiss the termination petition. Appellant's attorney asserted that DHS had not met its burden of proof; that the clock should have starting running as to appellant in May; and that no substantial risk of harm to N.P. was shown if she were placed with appellant. The defense went on to call Kristen Philpott, appellant, and Howard Simmons, the provisional foster parent for N.P. The attorney ad litem for N.P. recommended that appellant's parental rights be terminated based on his long history of drug use, the effects that has had on his judgment, and the time it would take him to achieve stability. At the close of all evidence, appellant again moved for dismissal.



The court found that DHS had proved beyond a reasonable doubt that continued custody of the parents would result in serious emotional or physical harm to N.P. The court further found that appropriate services had been provided. Appellant's parental rights to N.P. were terminated based in part on other issues arising after the original filing of the dependency-neglect petition. The termination order was entered on February 7, 2011, and this timely appeal followed.

Appellant does not challenge the statutory grounds for termination, so it is not necessary to address them in detail. The Indian Child Welfare Act of 1978 (ICWA) imposes an additional requirement for the termination of parental rights:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f). On appeal, appellant argues that the DHS case worker who testified at the termination hearing was not a "qualified expert witness" under the ICWA. He failed to make this argument to the trial court, however, and it is well settled that arguments made for the first time on appeal will not be considered. *Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005). Appellant's counsel neither objected to McKay's testimony nor did he voir dire McKay regarding her qualifications as an expert under the ICWA. As such, the present arguments were never presented to the trial court, and the trial court had no opportunity to rule on them.



For his second point on appeal, appellant contends that, even if McKay was a qualified expert witness, her testimony was insufficient to support her conclusion that N.P. would suffer serious emotional and physical damage if she were returned to appellant. First, we note that the standard is whether DHS proved beyond a reasonable doubt that N.P. would suffer serious emotional *or* physical damage if she were returned to appellant. Here, there was evidence of appellant's physically aggressive behavior due to his long-term methamphetamine use. Appellant had abused drugs since he was a teenager and, even though he was fully aware that he could lose parental rights to his daughter, he did not enter a treatment facility until about one month before the termination hearing. Appellant's eleventh-hour willingness to seek treatment did not preclude the court from finding that DHS had met its burden of proof. See *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005). We hold that, under the particular facts of this case, there was substantial evidence to support the trial court's finding that the return of N.P. to appellant was likely to result in serious emotional or physical damage to the child.

Affirmed.

GLOVER and MARTIN, JJ., agree.

Leah Lanford, Ark. Pub. Defender Comm'n, for appellant.

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

Jo Carson, attorney at litem for minor child.