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ARKANSAS COURT OF APPEALS

DIVISIONS I, III & IV
No. CA12-828

Opinion Delivered March 13, 2013

JOSIE PAYNE APPELLANT	APPEAL FROM THE UNION COUNTY CIRCUIT COURT [No. JV2011-188]
V.	HONORABLE EDWIN KEATON, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILD APPELLEES	REMANDED TO SUPPLEMENT RECORD; REBRIEFING ORDERED; MOTION TO WITHDRAW DENIED

LARRY D. VAUGHT, Judge

This appeal arises from an order of the Union County Circuit Court terminating appellant Josie Payne's parental rights to her daughter, A.S. (born 5/28/2000), after the non-accidental death of Payne's other daughter, C.S.[1] Payne's attorney has filed a no-merit brief and a motion to withdraw as counsel, contending that there are no meritorious issues that could arguably support an appeal. We remand for a supplementation of the record and rebriefing.

[1]The court also terminated Payne's parental rights to two other children—twin boys who were born after the death of C.S. and after A.S. was removed from Payne's custody. Although the matters were tried together at the same hearing, the twins' case was a separate case from A.S.'s with a separate case number, and Payne had separate counsel representing her in that case. No notice of appeal was filed from the order terminating Payne's parental rights to the twins and, thus, Payne's rights to those children are not at issue in this appeal. Payne also has an older child, A.S.1, who is not the subject of the termination proceedings and is in the custody of his grandmother.

In compliance with *Linker–Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Rule 6-9(i) (2012) of the Rules of the Arkansas Supreme Court and Court of Appeals, Payne's counsel ordered the entire record and examined it for adverse rulings. Payne's counsel identified fourteen adverse rulings: the order terminating Payne's parental rights and thirteen adverse evidentiary rulings. Counsel then explained why a challenge to these adverse rulings would not support a meritorious argument for reversal. Payne was provided a copy of her counsel's brief and motion, and she was informed of her right to file pro se points. She has done so. DHS has opted not to file a responsive brief at this time.

Our review of a trial court's decision to terminate parental rights is de novo. *Porter v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 680, at 10, 378 S.W.3d 246, 251. Furthermore, because termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents, there is a heavy burden placed upon the party seeking to terminate the relationship. *Id.* at 9–10, 378 S.W.3d at 251. The facts warranting termination of parental rights must be proved by clear and convincing evidence. *Id.* at 10, 378 S.W.3d at 251.

We are asked to review the record for error, yet the testimony of Payne is neither in the record nor in the abstract of the appeal. This is because the termination hearing had been continued to May 22, 2012, to allow psychologist Lewis Campbell to testify. However, at the hearing, the parties stipulated to the admission of his report in lieu of live testimony conditioned upon Payne agreeing not to testify. The parties also stipulated that Payne's testimony would be substantially the same as it had been in the adjudication hearing. However, her testimony from the adjudication hearing was not included in the record or in the abstract, despite the fact that

the parties agreed that her testimony from the adjudication hearing could be considered and relied on by the trial court in the termination proceeding. Therefore, although the trial court had previously determined the credibility of Payne, we have no idea what she said (or failed to say). We are also unable to determine how her testimony influenced the trial court's determination of her credibility (or lack thereof). In fact, from the record before us, we have no understanding of the substance of her testimony whatsoever. Yet, we are asked to review the entire record for possible error and definitively state that any appeal on the merits would be wholly frivolous. This simply cannot be done in any meaningful way without consideration of Payne's testimony. *Lewis v. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005) (finding that for purposes of reviewing the sufficiency of the evidence in a termination-of-parental-rights case, evidence from all hearings and proceeding in the case must be reviewed if the trial court took judicial notice of or incorporated by reference pleadings or testimony that occurred before the termination hearing).

If anything material to either party is omitted from the record, by error or accident, we may direct that the omission or misstatement be corrected, and, if necessary, that a supplemental record be certified and transmitted. Ark. R. App. P.–Civ. 6(e) (2012); *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, at 6. Therefore, recognizing the impossibility of a meaningful review without consideration of Payne's testimony and the irresponsibility of affirming a decision of such magnitude without a complete record, we deny Payne's counsel's motion to withdraw, and we remand the case and order counsel to file a supplemental record within thirty days of the date

of our opinion. Payne shall then have fifteen days to file a substituted brief, and DHS shall have fifteen days to respond, if it so desires.

Remanded to supplement record; rebriefing ordered; motion to withdraw denied.

GLADWIN, C.J., and PITTMAN, HIXSON, and BROWN, JJ., agree.

WALMSLEY, GLOVER, WHITEAKER, and WOOD, JJ., dissent.

PHILLIP T. WHITEAKER, Judge, dissenting. I respectfully dissent. Rule 6-9(c)(1) specifically states that "[t]he record for appeal *shall be limited to the transcript of the hearing from which the order on appeal arose*." (Emphasis added.) It does not require the transcripts of all the previous hearings be included in the record on appeal. The record before us contains the entire transcript of the hearing terminating parental rights. No other record is necessary under Rule 6-9(c)(1).

The majority correctly states that Ms. Payne did not testify at the termination hearing but the parties stipulated that her testimony would be no different than her testimony at the adjudication hearing. The majority asserts that Ms. Payne's testimony is somehow necessary for this court to evaluate how it "influenced the trial court's determination of her credibility (or lack thereof)" and to allow us to "examine the propriety of any adverse rulings" made during her previous testimony. This assertion is incorrect for the following reasons. First, there is no indication in the record that the trial court even took Ms. Payne's adjudication testimony into account at the termination hearing. Neither the trial court's ruling from the bench, nor its written order indicates that any part of its ruling was predicated upon her testimony. Even assuming that the trial court considered her testimony in its termination decision, it still need not be included in the record on appeal. Trial courts in all termination cases necessarily consider evidence elicited

from previous hearings in making their termination decisions. The process through which a parent or parents travel when a child is removed from their home consists of a series of hearings—probable cause, adjudication, review, no reunification, disposition, and termination. *Osborne v. Ark. Dep't of Human Servs.*, 98 Ark. App. 129, 252 S.W.3d 138 (2007). All of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings. *Id.* (quoting *Neves da Rocha v. Ark. Dep't of Human Servs.*, 93 Ark. App. 386, 219 S.W.3d 660 (2005)). In fact, the termination statutes mandate that the trial court rely on the record of the parent's compliance in the entire dependency-neglect case, in addition to the evidence presented at the termination hearing, in determining whether it is in the juvenile's best interest to terminate parental rights. Ark. Code Ann. § 9-27-341(a)(4)(B). In essence, the evidence the trial court can and must consider in making the ultimate termination determination is distinctly different from what evidence must be included in the record on appeal.

Second, the credibility of Ms. Payne's testimony was determined at adjudication. The trial court expressly found Ms. Payne to be not credible. She appealed the adjudication determination. Ms. Payne did not attack the credibility findings of the adjudicating court in that appeal. Given our deference to the trial court's determination of credibility and the absence of a timely appeal of that determination, the inclusion of Ms. Payne's testimony in the abstract will make absolutely no difference to the outcome of this appeal.

Third, the law is crystal clear that we are precluded in this appeal from reviewing any adverse rulings from the adjudication, review, or permanency-planning hearings. *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005). If any adverse rulings or objections

had been made during her testimony at the adjudication hearing, she should have raised those adverse rulings in her appeal from that determination. She should not get a second bite at the apple, as the majority clearly intimates she will.

It is wholly unnecessary to remand this case to settle the record or to order rebriefing. By doing so, the majority has expanded the limits of the record in no-merit terminations, has ordered counsel to abstract testimony that simply cannot affect the outcome of this appeal, and has needlessly delayed permanency for this child. For these reasons, I respectfully dissent.

WALMSLEY, GLOVER, and WOOD, JJ., join.

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

No response.