

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA10-881

JOSHUA HAYES

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered January 12, 2011

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
[NO. J2008-860-D/N]

HONORABLE JAY T. FINCH, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

The Benton County Circuit Court terminated appellant’s parental rights in his four children but maintained custody of the children with their mother/stepmother, Isa Hayes. Appellant argues that, because the children remained with Mrs. Hayes, termination of his parental rights was not in the children’s best interest and was contrary to Arkansas law. For the reasons set forth below, we affirm the termination order.

Appellant is the biological father of D.H., C.H., J.H.1, and J.H.2, who were ages eight, six, four, and two when the termination order was entered. At the time of the termination hearing, he was married to Isa Hayes, the biological mother of C.H., J.H.1, and J.H.2, and the long-time stepmother of D.H. On August 11, 2008, the Benton County Circuit Court entered an “Order For Less Than Custody,” which restricted appellant’s access

to the children while allowing them to remain in the custody of Mrs. Hayes.¹ The basis for the order was a petition filed by the Arkansas Department of Human Services (DHS) detailing appellant's excessive drinking and violence in the home, including shooting one of the children with a toy pellet gun; throwing one child across the floor; and physically abusing Mrs. Hayes over a lengthy period of time. Following entry of the order, DHS maintained a protective-services case, and the children were adjudicated dependent-neglected.

During the next seventeen months, the circuit court directed both parents to work toward reunification. Custody of the children remained with Mrs. Hayes, but appellant maintained contact with the family and, at times, lived with them. It is no exaggeration to say that appellant terrorized his family during this period. He gave Mrs. Hayes a black eye; shocked her with a cattle prod; restricted her use of vehicles, telephones, and money; threatened to kill her; broke into the house where she and the children were staying, then cut himself and bled all over the children; watched inappropriate videos with his daughters; shot out a car tire; continued to drink excessively despite inpatient treatment; and committed other acts of fraud, violence, drunkenness, and disobedience. As a result, the circuit court changed the goal of the case to termination of appellant's parental rights. A termination hearing was held on April 20, 2010, and appellant disputed very few of the above-mentioned incidents.

On June 4, 2010, the circuit court entered an order terminating appellant's parental

¹An "Order For Less Than Custody" protects children who are safely in the custody of one parent but who are subject to severe maltreatment from a person who has a legal right to custody or visitation with them. *See* Ark. Code Ann. § 9-27-314(a)(2)(A) (Repl. 2009).

rights. The court found that termination was in the children's best interest and that grounds for termination existed. The court also established a goal of maintaining the children in the custody of Mrs. Hayes. Appellant filed this appeal.

An order terminating parental rights must be based on a finding by clear and convincing evidence that termination is in the children's best interest and that at least one statutory ground for termination exists. Ark. Code Ann. § 9-27-341(b)(3)(A) and (B) (Repl. 2009). We will not reverse an order terminating parental rights unless the circuit court's findings are clearly erroneous. *Smith v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 747, 379 S.W.3d 663. We review termination cases de novo. *Id.*

In this appeal, appellant does not challenge the circuit court's findings of grounds for termination; nor does he claim that he is an appropriate custodian for the children. Rather, he contends that, because the children have continued in the custody of Mrs. Hayes, whose parental rights remain intact, terminating his parental rights is contrary to Arkansas law and is not in the children's best interest.

To support his argument, appellant first cites Arkansas Code Annotated section 9-27-341(a)(3) (Repl. 2009), which provides that the purpose of our termination statute is to provide permanency in a juvenile's life in instances where returning the juvenile to the family home is contrary to the juvenile's health, safety, or welfare. Appellant states that the policy behind section 9-27-341(a)(3) is to provide for children whose fate is indeterminate, and he argues that this policy is not served when the children remain with another parent. We

rejected this argument in *Ross, supra*, noting that our termination statute permits termination of just one parent's parental rights. See Ark. Code Ann. § 9-27-341(c)(2)(A)(i) (Repl. 2009); *Ross v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 660, 378 S.W.3d 253; *Griffin v. Ark. Dep't of Human Servs.*, 95 Ark. App. 322, 236 S.W.3d 569 (2006). In any event, termination of appellant's parental rights meets the purpose of section 9-27-341(a)(3) in this instance. Appellant's children need permanency in the form of an irrevocable break from appellant's violence toward them and their mother. And, as envisioned by the statute, the children will not be returned to the "family home" as it once existed. That home included appellant as a member of the family.

Next, appellant likens his situation to *Caldwell v. Arkansas Department of Human Services*, 2010 Ark. App. 102, where we held that terminating a father's parental rights was clearly erroneous because the permanency plan called for the child to remain in the mother's custody. However, in *Ross, supra*, we distinguished *Caldwell* and affirmed the termination of a father's parental rights even though the children remained with their mother. In doing so, we concluded that *Caldwell* differed from *Ross* in three particular respects: 1) there was no evidence in *Caldwell* that the father had physically abused or harmed his child; 2) the paternal grandmother in *Caldwell* was the child's most stable influence; 3) there was no evidence that the father in *Caldwell* had harmed anyone after the DHS case began. These same distinctions apply to the case at bar. The evidence adduced at the termination hearing shows that appellant's violence against his family was unrelenting, both before and after the DHS case

began, and that Mrs. Hayes was the children's most stable influence, not the paternal grandparents. *Caldwell*, therefore, does not require reversal.

Finally, appellant argues that termination of his parental rights was not in the children's best interest. In conducting a best-interest analysis, the circuit court must consider the likelihood of the children's adoption and the potential harm in returning the children to the parent's custody. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii) (Repl. 2009). Likelihood of adoption and potential harm, however, need not be proved by clear and convincing evidence; they are simply matters to be considered in the court's overall analysis of whether termination is in the children's best interest. *Reed v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 416, 375 S.W.3d 709; *McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005).

In the present case, three of these children are not likely to be adopted (unless it is by a future stepparent) because they will remain in the custody of their biological mother.² But adoptability is only one factor to be considered. *Lechner v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 494. Potential harm, another factor, weighs very heavily here in favor of terminating appellant's parental rights. Appellant has shown a propensity for alcohol abuse and extreme violence toward Mrs. Hayes and the children, and his behavior did not abate during the case despite DHS's provision of treatment and other services. Under these circumstances, we cannot say that the circuit court clearly erred in finding that termination was in the

² The fourth child, D.H., is not Mrs. Hayes's biological child and will be subject to adoption. Mrs. Hayes testified that she wanted to adopt D.H.

children's best interest.

Appellant argues that termination will deprive the children of his financial support and their relationship with his parents and grandparents. The evidence showed, however, that appellant provided no meaningful financial support to the children during this case and had no potential to earn significant income other than occasional jobs provided by his family. Furthermore, the proof revealed no bond between the children and their paternal relatives that was so profound that it would override the children's interest in being free from appellant's dangerous conduct.³

Affirmed.

PITTMAN and ABRAMSON, JJ., agree.

³ Appellant also argues that Arkansas's permanency-planning statute, Ark. Code Ann. § 9-27-338(c)(3)(A) (Repl. 2009), does not authorize DHS to seek termination of parental rights where the children are being cared for by a relative and termination is not in the children's best interest. Our holding that the circuit court did not clearly err in ruling that termination was in the children's best interest disposes of this argument.