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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-164

BRUCE BURKHALTER APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES and Z.B., a MINOR APPELLEES	**Opinion Delivered** JUNE 23, 2010 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. JN-20081350] HONORABLE JOYCE WILLIAMS WARREN, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Bruce Burkhalter challenges the December 3, 2009 termination of his parental rights in the Pulaski County Circuit Court. He contends that the termination order should be set aside as void because the special judge who heard the case and signed the order was not elected pursuant to the procedures set forth in Arkansas law and was not sitting as special judge on the day the order was signed. Because the issues on appeal are not preserved, we affirm.

Burkhalter's parental rights were terminated after a hearing before Special Judge Tjuana Byrd on November 4, 2009, a date when the regular sitting judge, Joyce Warren, was unable to attend. At the hearing, Burkhalter requested a continuance arguing that Judge Warren had presided over all the previous hearings and knew the case. Both the attorney for the

Department of Human Services (DHS) and the attorney ad litem for the minor child opposed the continuance claiming that it was more important for the child to achieve permanency in his life. The special judge denied the request for continuance. Counsel for Burkhalter asked again for a continuance, reminding the trial court that DHS had been granted a continuance earlier in the case when it had subpoenaed the wrong medical records for the juvenile. counsel further asked the trial court to take into consideration that her son had been ill and that she had been appointed to the matter only six weeks before the termination hearing. Again, the special judge denied the request, finding that no good cause was shown to continue the case beyond the ninety days within which the trial court is required to have the termination hearing. At the conclusion of the one-day trial, the special judge rendered an order terminating parental rights, specifically finding by clear and convincing evidence that it was in the child's best interest to do so. From that order, which was signed by the special judge on December 3, 2009, this appeal timely followed.

An order terminating parental rights must be based upon a finding by clear and convincing evidence that 1) termination of parental rights is in the best interest of the children, considering the likelihood that the children will be adopted if the parents' rights are terminated and the potential harm caused by returning the children to the parents' custody, and 2) at least one ground for termination exists. *See* Ark. Code Ann. § 9-27-341(b)(3)(A) and (B) (Repl. 2008). We review termination-of-parental-rights cases de novo. *Lee v. Ark. Dep't of Human Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008). However, we will not reverse

the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *See Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). 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. *Id.*

In this appeal, Burkhalter does not contest the circuit court's finding that termination was in the child's best interest. Instead, he argues only that the special judge was not elected pursuant to the procedures set forth in the Arkansas Constitution or the Arkansas Supreme Court Rules and that the special judge had no authority to sign the order after the regular sitting judge had resumed her position on the bench. Appellees DHS and the attorney ad litem respond that Burkhalter has abandoned any challenge to the circuit court's findings of the best interest of the child and the grounds for termination. We agree. Failure to challenge the lower's court's findings on appeal constitutes a waiver of the issues. *See Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, 366 S.W.3d 351.

The Arkansas Constitution provides for a procedure to elect special judges when the regular judge cannot preside:

> If a Circuit or District Judge is disqualified or temporarily unable to serve, or if the Chief Justice shall determine there is other need for a Special Judge to be temporarily appointed, a Special Judge may be assigned by the Chief Justice or elected by the bar of that Court, under rules prescribed by the Supreme Court, to serve during the period of temporary disqualification, absence or need.

Ark. Const. Amend. 80 § 13(C). The rule prescribed by the Arkansas Supreme Court states in pertinent part:

> When the judge of a circuit court shall fail to attend on any day scheduled for the holding of that court, or if such a judge is disqualified from presiding in any pending case, upon notice from the clerk of the court, the regular practicing attorneys attending the court may elect a special judge. The attorneys present in the courtroom shall elect one of their number as special judge. The election shall be conducted by the clerk of the court, who will accept nominations from the attorneys present. Only attorneys who are qualified to serve as special judge may vote in the election of a special judge. The election shall be by secret ballot. The attorney receiving a majority of the votes shall be declared elected as special judge. He shall immediately be sworn in by the clerk and shall immediately enter upon the duties of the office. He shall adjudicate those causes pending at the time of his election.
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> The clerk of the court in the county in which the special judge election is held shall make a record of the proceedings, which shall be a part of the record of the court.

Ark. Sup. Ct. Admin. Order No. 1(1), (5) (2010).

Burkhalter argues that if the election was not held in the manner prescribed above, then the special judge had no power, and, on direct attack, the decree must be set aside as void. *See Titan Oil & Gas v. Shipley*, 257 Ark. 278, 517 S.W.2d 210 (1974). Burkhalter claims that, even though he did not specifically object on the grounds that the special judge had no authority to preside as she was not duly elected, he did argue that the special judge should not hear the case, and he claims that he never consented for the case to be tried before the special judge. Further, Burkhalter argues that under *Cates v. Wunderlich*, 210 Ark. 724, 197 S.W.2d 477 (1946), the termination order is voided because it was entered by the special judge after she ceased to be circuit judge and the regular circuit judge had resumed her duties.

The Arkansas Supreme Court addressed the issue of whether a special judge had

judicial authority in *Foundation Telecommunications, Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000), where it stated as follows:

> The election of a special judge is presumed to be valid, *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997), and, under the law, that election is impervious to attack unless the facts that would defeat the election are recited in the record. *Metal Proc. Inc. v. Plastic & Recon. Assoc., Ltd.*, 287 Ark. 100, 697 S.W.2d 87 (1985). It is the appellant's burden to produce a record showing that an attack on the election was made in the trial court, *Travis*, *supra*, and it is anticipated that the trial court, by the regular circuit judge, will make a finding whether the special judge was duly elected. *Metal Proc. Inc.*, *supra*. Because the record is devoid of any facts that would defeat the election, and because appellant failed to raise this issue to the trial court in a proper pleading and obtain a ruling upon the issue, we must first determine whether the question is preserved for appeal.
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> An issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal. Even a constitutional issue must be raised at trial in order to preserve the issue for appeal. *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994). A defendant may not wait until the outcome of a case to bring an error to the trial court's attention. *Id*. Furthermore, parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of their objections as presented at trial. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000). Even if we were to accept Foundation's correspondence to the judge as a valid objection, notwithstanding that there was no ruling on the issue, the objection raised to the trial court did not point out the reasons it believed the procedure was defective. We note further that the letter only contended that the selection of the special judge did not meet the statutory requirements of Ark. Code Ann. § 16-10-115. Only on appeal has Foundation sought to raise the issue of compliance with the constitutional provisions for conducting an election.
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> On appeal the burden is placed on the challenger to show that he properly challenged and offered specific facts and reasons why the election was void. The proceedings of the circuit court are presumed to be regular, unless the contrary is made to appear upon the record of the cause in which error is alleged. *Sweeptzer v. Gaines*, 19 Ark. 96 (1857). "Nothing short of the proper record to the contrary can rebut the violent presumption, that the regular Judge, in the midst of his regular term, would not permit a mere usurper to take the bench and presume to administer justice to his Court." *Id*. In order to present any question of that sort for our review here, the power and authority of the special judge must have been questioned in the court

> below, and the grounds of the objection stated in the record. Nothing of this sort appears in this record. *See Fernwood Mining Co. v. Pluna*, 136 Ark. 107, 205 S.W. 822 (1918)(*citing Blagg v. Fry*, 105 Ark. 356, 151 S.W. 699 (1912); *Caldwell's Adm'r. v. Bell*, 6 Ark. 227 (1845); and *Caldwell v. Bell & Graham*, 3 Ark. 419 (1840)).

Id. at 237–38, 16 S.W.3d at 535–36.

As in *Foundation Telecommunications*, Burkhalter failed to preserve his argument. Burkhalter failed to raise any argument regarding the election of the special judge or her lack of authority to sign the termination order at the circuit-court level. Instead, he makes such allegations for the first time on appeal. Failure to raise challenges or to obtain a ruling below is fatal to the appellate court's consideration on appeal. *Lamontagne*, *supra*; *Ark. Dep't of Health & Human Servs. v. Jones*, 97 Ark. App. 267, 248 S.W.3d 507 (2007); *Walters v. Ark. Dep't of Human Servs.*, 77 Ark. App. 191, 72 S.W.3d 533 (2002). Further, Burkhalter had the burden of bringing a record sufficient before this court to make a determination of the issue presented. *See Foundation Telecommunications*, *supra*.

Affirmed.

ROBBINS and BAKER, JJ., agree.