Cite as 2010 Ark. App. 623

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-389

DAWN MASTERSON-HEARD AND JAMES HEARD APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	Opinion Delivered September 22, 2010 APPEAL FROM THE MARION COUNTY CIRCUIT COURT [NO. JV-07-45-B] HONORABLE GARY ISBELL, JUDGE AFFIRMED; MOTIONS TO WITHDRAW GRANTED

DAVID M. GLOVER, Judge

The Marion County Circuit Court terminated the parental rights of appellants, Dawn Masterson-Heard and James Heard, in their two-year-old daughter, KH2. In a previous proceeding, the court terminated appellants' parental rights in another child, KH1. We affirmed that termination decision in *Masterson-Heard v. Arkansas Department of Human Services*, 2009 Ark. App. 623.

In this appeal, appellants' attorneys have filed no-merit briefs and motions to withdraw pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Ark. Sup. Ct. R. 6-9(i) (2010). In accordance with Rule 6-9(i)(A), the briefs list all adverse rulings on appellants' objections at the termination hearing and discuss why the adverse rulings do not present meritorious grounds for reversal. Our supreme court clerk's office mailed copies of counsels' briefs and motions to appellants as required by Arkansas

Supreme Court R. 6-9(i)(B)(3) (2010), and appellants have filed pro se letters in response. We conclude that appellants' attorneys have complied with the requirements for no-merit termination cases and that an appeal would be wholly without merit. We further conclude that appellants' pro se letters present no meritorious grounds for reversal. Accordingly, we affirm the termination order and grant the motions to withdraw.

The Arkansas Department of Human Services (DHS) became involved with appellants in June 2007 when James Heard appeared at a DHS office with eleven-month-old KH1. James told DHS workers that he had no place to live; that he was afraid of the child's mother, Dawn Masterson-Heard; and that Dawn had hit KH1 and spoken of suicide. The workers observed that James's conversation was rambling and disjointed and that he exhibited an impaired thought process. DHS obtained emergency custody of KH1, and the circuit court adjudicated the child dependent-neglected. Thereafter, KH1 continued out of appellants' custody for approximately twenty months, living some of that time with Dawn's sister in California. Appellants received reunification services but did not remedy the conditions that caused KH1's removal. As a result, the circuit court terminated appellants' parental rights to KH1 in February 2009 based on their failure to obtain appropriate housing and follow recommendations regarding counseling and medications; on James's violent and aggressive behavior in KH1's presence; and on Dawn's inability to maintain steady employment, including being fired for stealing from her last job.

Approximately four months after DHS took KH1 into emergency custody, Dawn gave

birth to KH2. On May 13, 2008, DHS petitioned for emergency custody of KH2, asserting that Dawn and James had an unstable relationship with frequent separations and that Dawn had made several allegations of abuse against James, only to return to him after living in a shelter for brief periods. DHS also averred that Dawn had left KH2 with relatives in California and had told others that she was not ready to be a parent to KH2. Further, DHS noted several problems that had occurred during Dawn's and James's visits with KH1 at the DHS office, including late arrivals; yelling and cursing at staff or counselors; Dawn's inappropriate language, throwing things, removing clothing, playing loud music, and cell-phone usage; and James's inability to interact with KH1 without directions. Attached to DHS's affidavit was a therapist's report stating that KH2 was in imminent danger due to appellants' severe instability, violence, and erratic behavior.

The circuit court granted DHS emergency custody of KH2 on May 13, 2008. Near that time, Dawn drafted a hand-written letter recommending that both of her daughters live with her sister, Tabitha, in California. The court subsequently adjudicated KH2 dependent-neglected, placed her with relatives in California, and established a goal of reunification. The court's orders and the DHS case plan required appellants to obtain counseling and follow recommendations; to maintain stable housing, employment, and income; and to apply the skills taught to them in previous parenting and anger-management classes. Appellants conducted their visitation with KH2 by telephone.

Following a lengthy review period, DHS filed a petition to terminate appellants'

parental rights on November 2, 2009. By that time, KH2 had been out of appellants' custody for approximately eighteen months. At the termination hearing, the circuit court heard evidence that James had a job at Wal-Mart and that Dawn had made improvements in some of her relationship issues. However, the court also heard testimony that Dawn continued to require extensive psychological intervention and possibly needed another six months of therapy; that she had attempted suicide in February 2009; that James did not participate in therapy with Dawn; that both appellants acted inappropriately during telephone visits with KH2; that appellants' home was extremely cluttered, flea-ridden, and had floors covered with animal waste during a September 2009 visit by DHS; that appellants made no progress in couples' counseling, according to one therapist; that James was hostile and unstable during counseling; that Dawn had no job or driver's license; and that appellants were not current on their utility bills and faced eviction within the next month. DHS additionally produced evidence that KH2 was adoptable.

On January 28, 2010, the circuit court entered an order terminating appellants' parental rights. The court found that, despite DHS's provision of extensive services to appellants, there existed "a plethora" of reasons to terminate appellants' parental rights, including 1) the prior termination of appellants' parental rights in KH1; 2) appellants' marital issues; 3) appellants' mental-health instability; 4) appellants' environmental neglect; 5) appellants' lack of compliance with court orders; and 6) appellants' indifference to changing the circumstances that caused KH2's removal from the home. The court also found that KH2

had been living in a "stable home chosen by her mother" (in California) and that this was the same home in which KH1 was residing. Appellants filed timely notices of appeal from the court's order.

An order forever terminating parental rights must be based upon a finding by clear and convincing evidence that termination is in the child's best interest and that at least one statutory ground for termination exists. Ark. Code Ann. § 9-27-341(b)(3)(A), (B) (Repl. 2009). We review the circuit court's termination decision to determine whether it is clearly erroneous. *Meriweather v. Ark. Dep't of Human Servs.*, 98 Ark. App. 328, 255 S.W.3d 505 (2007). Considering the proof in this case, we see no basis on which we could hold that the circuit court's termination decision was clearly erroneous. DHS produced clear and convincing evidence that termination was in KH2's best interest given that she was adoptable and that returning her to appellants would expose her to the potential harm of their volatile relationship, unresolved mental-health problems, unsanitary environment, and unstable housing. As for grounds, DHS was required to prove only one, and it satisfied that burden by showing that appellants' parental rights had been involuntarily terminated as to KH2's sibling. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*4*) (Repl. 2009). Finally, DHS had an appropriate placement plan of adoption, as required by Ark. Code Ann. § 9-27-341(b)(1)(A) (Repl. 2009). Under these circumstances, an appeal from the termination decision would be wholly without merit.

Counsels' briefs also list and discuss ten adverse evidentiary rulings from the

termination hearing. We have thoroughly reviewed the pertinent testimony and counsels' discussions of these rulings, and we conclude that none of them would support an argument for reversal. In all instances, appellants either received all of the relief that they requested, *Mikel v. Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994); withdrew their objection, *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580; failed to object in a timely fashion, *Herrington v. Ford Motor Co.*, 2010 Ark. App. 407, 376 S.W.3d 476; or cannot show prejudicial error, *Kuelbs v. Hill*, 2010 Ark. App. 427, 379 S.W.3d 47. Furthermore, the quantum of proof on appellants' unfitness as parents clearly overwhelms any possible evidentiary error. *See Tadlock v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 821, 373 S.W.3d 361.

Turning to appellants' pro se letters, they claim that their attorneys worked against them in collusion with the court; that DHS did not complete a home study on James's mother; that DHS did not offer appropriate services; that DHS did not explain why it took custody of their children; and that their civil rights were violated. The record reveals that these assertions have no basis in the evidence and that they are, for the most part, raised for the first time on appeal. *See Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005) (refusing to consider arguments raised for the first time on appeal). Appellants also challenge the termination of their parental rights to KH1, but that termination decision was affirmed in a prior appeal and is law of the case. *See Turner v. N.W. Ark. Neurosurgery Clinic, P.A.*, 91 Ark. App. 290, 210 S.W.3d 126 (2005). Finally, appellants contend that James's steady employment, Dawn's improvement in counseling, and their compliance with some

aspects of the case plan weigh against the termination of their parental rights in KH2. It is well established that parental rights may be terminated even where the parents have complied with the case plan if their compliance did not render them capable of caring for their child. *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). Given the significant number of supportable reasons for termination set forth by the circuit court in this case, we hold that an appeal on this basis would be wholly without merit.

We address one final adverse ruling out of an abundance of caution, even though it did not arise from appellants' objection at trial and has not been discussed by counsel in the no-merit briefs. *See Hughes v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 526 (holding that this court may affirm a termination order in a no-merit appeal if the unbriefed issue would clearly not be a meritorious ground for appeal). At the termination hearing, James's mother, Anita, testified that the children were members of the Rednation of the Cherokee tribe and therefore entitled to the protections of the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. §§ 1901 to 1963 (1995). The circuit court ruled that the ICWA did not apply because the Rednation of the Cherokee tribe did not appear in the federal register of eligible tribes.

The circuit court was correct. If a child's membership tribe does not appear on the list of tribes that are eligible to receive federal services, the ICWA does not apply. *See Masterson-Heard*, *supra*. Our review of the most recent federal eligibility roster at 74 Fed. Reg. 40218 (Aug. 11, 2009), confirms that the Rednation of the Cherokee tribe is not listed.

Affirmed; motions to withdraw granted.

GLADWIN and ABRAMSON, JJ., agree.