Cite as 2018 Ark. App. 523

ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CV-17-992

RHONDA CANERDAY-BANKS AND DONALD BANKS APPELLANTS V. DAVID BARTON, REBECCA BARTON, MINOR CHILD, AND ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEES	**Opinion Delivered** October 31, 2018 APPEAL FROM THE POPE COUNTY CIRCUIT COURT [NO. 58JV-14-135] HONORABLE KEN D. COKER, JR., JUDGE AFFIRMED

LARRY D. VAUGHT, Judge

Appellants Rhonda Canerday-Banks and Donald Banks (collectively referred to herein as the Bankses) appeal the Pope County Circuit Court's orders dismissing their petition to adopt a minor child, P.S., and granting the adoption petition filed by appellees David and Rebecca Barton. We affirm the circuit court's orders.

The parental rights of P.S.'s biological parents were terminated on January 20, 2017, by an order of the Pope County Circuit Court. Pursuant to that order, P.S. was placed in the care and custody of the Arkansas Department of Human Services (DHS). At that time, P.S., age four, was living with the Bartons, who had been her foster parents since she was removed from her parents' custody at the age of sixteen months. P.S. had spent the majority of her life living with the Bartons, save for short trial placements with a relative in Louisiana and with

her mother, both of which did not work out. Each time she was returned to the Bartons' home where she lived with the Bartons and their three older adopted children.

On April 12, 2017, the Bartons filed a motion to intervene in the dependency-neglect case in order to file a petition to adopt P.S. The Bankses then filed a motion to intervene on April 24, 2017, also for the purposes of petitioning the court for adoption of P.S. Rhonda Canerday-Banks is P.S.'s paternal grandmother, and the Bankses had been involved in the case for years. The Bankses had, at one point, moved from Florida to Arkansas to be closer to P.S. and had exercised visitation with the child, but they returned to Florida when P.S.'s biological mother began exercising visitation and seemed to be on track to regain custody of P.S. Following an initial hearing on May 1, 2017, the court granted both motions to intervene. The court ordered that, pending a final hearing, P.S. would remain with the Bartons and would have extended visitation with the Bankses in Florida.

On May 16, 2017, the Bartons filed a petition to adopt P.S. Pursuant to statute, the Bartons had submitted a written request to DHS for its consent to the adoption, but on May 17, 2017, DHS sent the Bartons a letter stating that it was declining to consent to their adoption petition. The letter's subject line referenced the circuit court case name and number, and the letter stated in its entirety:

> The Department does not feel it is in the best interest of the juvenile to be adopted by David and Rebecca Barton. In addition, Donald and Rhonda Banks have been involved in the case for some time and have a relationship with the child. Prior to termination, Mr. and Ms. Banks requested placement of the child in their home on more than one occasion. Mr. and Ms. Banks should be given preference in the adoption of the child due to their family connection and relationship with the child.

On May 31, 2017, DHS removed P.S. from the Bartons' home pursuant to a maltreatment investigation. One of the Bartons' older children, who had previously been

adopted through the foster-care system, alleged that the Bartons used food as punishment and that they used "bending back of the thumb" as punishment.

On June 5, 2017, the Bankses filed a petition to adopt P.S.

On August 11, 2017, DHS sent the Bartons a letter stating that while it appreciated the Bartons' many years of service as foster parents, their home would be officially closed on August 11, 2017, for the following reasons:

> •Using food as punishment,
>
> •Complexity of care of the adoptive child and the concerns you mentioned with the child during the child maltreatment investigation,
>
> •The Department found the neighbor to be credible and the adoptive child was fearful,
>
> •The Department does believe that the bending back of the thumb is taking place in the home,
>
> •The Department does believe that the Bartons have spanked the foster child.

It is undisputed that the language of this letter neither referenced the adoption case nor mentioned the Bartons' adoption petition or DHS's denial of consent to that petition. The letter was sent from a DHS office in Little Rock, not the local county office with which the Bartons had been communicating regarding their adoption petition.

On August 18, 2017, the court-appointed special advocate (CASA) filed a CASA court report in which he stated that "[t]his CASA respectfully recommends adoption [of P.S.] by the Barton family." The CASA report stressed that P.S. is only four years old and needs permanency. The CASA stated that he had concerns that the Bankses would allow P.S.'s biological parents, whose rights had been terminated, to have access to the child, emphasized that P.S. should not have any contact with her biological parents, noted that Mrs. Canerday-

Banks had been in recent contact with her son, and noted that her son lived near his father in Louisiana. The CASA report also raised a concern that, during the dependency-neglect case, P.S.'s father had "refused services telling the caseworker that he would have access to [P.S.] when his parents get custody." The CASA report also addresses the allegations of abuse against the Bartons, noting that the CASA had requested but not been provided a copy of the investigation report. Finally, the CASA noted that P.S. had lived with the Bartons the majority of her life, the Bartons had agreed to allow the grandparents to have visitation, the Bartons recently passed their DHS quarterly review of their home,[1] and that DHS had stated during an August 11 mediation that there was nothing that would prevent either party from adopting the child.

The circuit court held a hearing on both adoption petitions on August 25, 2017. The day before the hearing, the Bankses filed a consent to adoption that had been executed in their favor by DHS. It was signed August 24, 2017. At the outset of the adoption hearing, the Bartons orally moved to dismiss the Bankses' petition, arguing that the consent form did not comply with the statutory requirements (specifically the ten-day or five-day waiting periods for withdrawal of the consent). DHS's consent did not contain any language waiving the specified waiting period, and DHS never requested that the court waive it.[2] After hearing

[1]This appears to be based on a letter dated May 19, 2017, which was introduced as the Bartons' exhibit 7 and is contained in the record but not the addendum. The letter, which was sent from DHS to the Bartons, states that "your home has been reevaluated and approved from 5/23/2017 through 5/23/2018 provided that you remain in compliance with DCFS foster home standards during this time period."

[2]Despite the court's multiple statements that "nobody's asked me to waive it," the DHS attorney present at the hearing never requested that the court waive the waiting period. Mr. Worsham, who represented the Bankses, made one oral request, but the statutory waiting

arguments from both sides and determining that the Bankses' attorney had presented DHS with the consent the day before trial, the court dismissed the Bankses' petition for failing to meet the statutory requirements of Arkansas Code Annotated section 9-9-214(c)–(d) (Repl. 2015).[3]

The Bankses were excused from the courtroom, and the court proceeded with the hearing as to the Bartons' petition to adopt. Rebecca Barton testified that she and David Barton have been married for approximately six years, had adopted three children together, and have five older children from previous marriages. Rebecca testified that she and David became foster parents for P.S. on August 15, 2014, and that except for two unsuccessful trial placements with relatives, P.S. had remained with the Bartons until May 31, 2017, when DHS removed her. Rebecca testified that P.S. had spent more than half her life in their home, had formed a bond with the Bartons and their children, and was very much a part of their family. Rebecca testified that the family loves P.S. She also testified to their ability to care for P.S., stating that they own a 5,800-square-foot home with five bedrooms and four and a half baths, and that P.S. shared a room with the Bartons' seven-year-old daughter, where P.S. had her own bed, dresser and toys. Rebecca estimated the Bartons' annual income to be approximately $410,000 per year. She stated that they had no debt, had reliable transportation, and had the facilities and resources to take care of P.S. She also testified to the ways in which she had been

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period is not subject to waiver by anyone other than the party giving consent. It was not the Bankses' to waive.

[3]The Bankses' attorney moved for a continuance, which the court denied when it determined that the attorney had been responsible for drafting the consent and presenting it to DHS the day before trial. The Bankses, in their opening brief, did not challenge the court's denial of their request for a continuance; therefore, it is not before us on appeal.

providing for P.S.'s medical needs. Rebecca also testified that she had been adopted from the foster-care system as a child and could relate to P.S.'s experiences.

On cross-examination, Rebecca testified that earlier in the case, P.S. had gone for weekend visits with the Bankses for approximately three months. When questioned about the child-maltreatment allegations, counsel for the Bartons objected, arguing that the claims were found to be unsubstantiated, DHS had already indicated there was nothing that would prohibit the Bartons from adopting the child,[4] and the fact that allegations had been made and found to be unsubstantiated should be enough to establish a record on that issue. DHS's attorney never spoke during this exchange and did not explain the purpose for which the testimony was being offered; but the court, in overruling the objection, stated, "I'm going to go ahead and allow it, though, and I can determine whether DHS is being reasonable here in withholding their consent or not."

Rebecca testified that on May 31, 2017, one of her older children, whom she and David had previously adopted through the foster-care system, was grounded for taking candy from the kitchen after being told not to, flushing her breakfast cereal down the toilet, and lying. Rebecca testified that the child became angry and ran away to a neighbor's house a few doors away. Rebecca tried to run after her, but after losing sight of the child, Rebecca called 911. The neighbor also called 911, and a sheriff's deputy arrived soon thereafter. Rebecca testified that the sheriff's deputy evaluated the situation and said, "It's a kid being a kid and go back home with mom and dad and behave," and that the sheriff's office took no action. However,

[4]This appears to be a reference to the statement DHS made during mediation, which is also cited in the CASA report.

at some point during or after this incident, the child made allegations that the Bartons withheld food as punishment and had bent her thumb back as punishment. Rebecca stated that she met with Deanna Lacefield from the Arkansas State Police, who investigated the allegations and found them to be unsubstantiated. Rebecca denied ever bending any of her children's thumbs back or spanking any of her children, including P.S. She also denied withholding food as punishment. She explained that in the Barton household, getting to go out to eat at a restaurant was considered a treat, and that a child who was grounded at the time of the outing would not be allowed to order at the restaurant. The child would be given the choice to eat before going, eat after they got home, or pack a meal to take to the restaurant. She stated that the children would always be allowed to eat at home but that going out to eat was a privilege that was taken away from a child who was grounded.

She testified that although the state police found that the allegations were unfounded, DHS removed P.S. from the Barton home and sent them a letter dated August 11, 2017, notifying them that it was closing their home as a foster placement. Rebecca testified that DHS never asked her or David any questions about the allegations, and they were not involved in the DHS investigation. When DHS counsel moved to introduce the August 11, 2017 letter, counsel for the Bartons objected, arguing that it had not been turned over in discovery and was not provided to counsel until the day before the hearing. The court admitted the letter, finding that Rebecca had already testified as to its contents and that there was no prejudice from the discovery omission because the Bartons had received the letter. At no point in this exchange did DHS's counsel indicate that the letter was being introduced as a reason for

DHS's decision to withhold consent to the adoption petition. Consent to adoption was never discussed in relation to the August 11 letter.

Rebecca testified that the Bartons' home had been open as a foster home for a little over three years and had been reevaluated annually. A favorable home study of the Barton home, produced by Grace Adoptions, was admitted into evidence. Rebecca testified that through their attorney, the Bartons had submitted a written request to DHS for consent to their adoption petition. Rebecca noted that the May 15, 2017 letter denying the Bartons' request for consent to adopt P.S. was sent two weeks before the May 31 event giving rise to the maltreatment allegations. Rebecca testified that the decision to close her home as a foster home was made by a committee that met in Little Rock.

David Barton testified in keeping with Rebecca's testimony. The Bartons also presented the testimony of several family friends, daycare teachers, and their adult daughter, who all testified that the Bartons are great parents and love P.S., that the child has a strong bond with the entire Barton family, and that P.S. was very much "part of the family." P.S. had been the flower girl in the wedding of the Bartons' older daughter and always referred to the Bartons' other children as her brothers and sisters.

DHS called Victoria Smith, who identified herself as the DCFS County Supervisor for Pope County. Counsel for DHS asked Smith why "the Department prefer[red] the Banks[es] over the Bartons." Smith responded, "The Banks are family." She later again testified that it was DHS's concern that it would be "severing the bond - - this family relationship with the Banks[es]." Smith's only testimony related to the maltreatment allegations is as follows:

Q: Okay. Now, as far as Ms. Barton had testified as to why the Department had closed the foster home, is that your understanding of that's why the Department closed her foster home?

A: Yes.

At no point did Smith testify that DHS's decision to withhold consent to the Bartons' adoption petition was based on the maltreatment allegations.

Smith stated that a home study was done on the Bankses[5] and that they had been involved in the case for "quite some time." She testified that the Bankses had undergone background checks and had their home approved as a provisional foster home in order to allow for weekend visitation with P.S. Smith also testified that the transfer of P.S. between the Bartons and the Bankses before and after each visitation went smoothly and that P.S. had been excited to see Mrs. Banks.

On cross-examination, Smith reiterated that DHS's preference was for the Bankses to adopt P.S. "because they're family." Smith acknowledged that Rhonda Canerday-Banks's son's parental rights to P.S. had been terminated because he did not follow through with the case plan or abide by court orders. She acknowledged that P.S. and the Bartons have a bond because the child had lived with them for over half her life. Smith testified that having sufficient financial stability to adopt a child is important and is required by statute, and she testified that she was aware that a credit-card company had recently sued Rhonda Canerday-Banks for failure to pay. She also acknowledged that the DHS home study of the Bankses

[5]Smith noted that "there should have been another one done, but I've never seen it." The CASA report also noted that, while the Bankses had another grandchild living with them while they were in Arkansas, the Florida home study does not mention this grandchild, and it was unclear whether he was also living in the Bankses' home.

outlined several medical conditions from which they suffer, including depression, diabetes, and heart problems.

Smith further acknowledged that the Bankses indicated in their home study that they would not speak ill of P.S.'s biological parents "in hopes that one day the child can be reunified" with them, would support visitation with the biological parents, and were willing to assist in family visitation. However, Smith testified that she did not interpret these statements as an indication that the Bankses wanted to reunify P.S. with her biological parents.[6]

Smith also acknowledged the presence of certain notes in P.S.'s file regarding the risk that the Bankses would allow their son to have access to P.S. but stated that she was not familiar with the notes in the case file because she had not been the Pope County supervisor at that time. She stated that she was not familiar with the June 2015 note stating that P.S.'s biological father had advised DHS that he was "just going to have a family member adopt P.S. so that he doesn't have to follow any orders of the court." Smith acknowledged that while she is the person who signed DHS's consent to the Bankses' adoption petition, she had neither read the Bankses' home study nor reviewed the notes in P.S.'s file. Smith also acknowledged that for approximately two months following P.S.'s removal from the Bartons' home, the Bartons, their attorney, and the CASA advocate had all tried to find out the nature of the allegations against the Bartons and that her office did not provide anyone with that information.

[6]In an order entered on January 20, 2017, the circuit court terminated the parental rights of both of P.S.'s biological parents, in part based on its finding that returning P.S. to her parents' custody posed a serious risk of potential harm to her health and safety and that reunification was not in P.S.'s best interest.

The court took the matter under advisement. On September 4, 2017, it issued a final decree of adoption granting the Bartons' petition to adopt P.S. The order found that all statutory requirements had been met and that it is in P.S.'s best interest to be adopted by the Bartons. The court also found that DHS was unreasonably withholding consent to the Bartons' adoption petition. On September 18, the court issued a written order dismissing with prejudice the Bankses' petition to adopt P.S. The order stated that the consent form executed by DHS in favor of the Bankses was invalid because it failed to comply with Arkansas Code Annotated section 9-9-202, specifically that the statutorily required waiting period for withdrawal of consent had neither expired nor been waived. This timely appeal followed.

Before we turn to the merits of this case, we must address several motions filed by the parties on appeal. On December 4, 2017, the Bankses filed a motion with this court seeking clarification as to whether this case is governed by Arkansas Supreme Court and Court of Appeals Rule 6-9 (2017), stating that the circuit court and the clerk of this court treated the case as such. Rule 6-9 enumerates the types of orders from which an appeal may be taken in dependency-neglect cases and provides for an expedited appeal process for those matters. The Bankses argue that this appeal should not be governed by Rule 6-9 because, although it originates from a dependency-neglect case, the appeal stems solely from post-termination adoption proceedings. We agree. The types of orders enumerated in Rule 6-9 do not contemplate adoption proceedings. Moreover, Arkansas Code Annotated section 9-9-216(a), entitled "Appeal and Validation of Adoption Decree," mandates that "[a]n appeal from any final order or decree rendered under this subchapter may be taken in the manner and time

provided for appeal from a judgment in a civil action." Therefore, we agree with the Bankses that this appeal is not governed by Rule 6-9.

We next address the Bartons' motion to dismiss the Bankses' appeal filed on December 20, 2017, in which they argue that the Bankses' appeal should be dismissed as untimely pursuant to Rule 6-9, based on the arguments just discussed. Because the appeal is not governed by Rule 6-9, the Bartons' argument has no merit. To the extent that this motion also argues that the Bankses' October 2, 2017 notice of appeal failed to designate the court's order dismissing the Bankses' petition for adoption, we disagree. The Bankses' first and second notices of appeal both specifically mention the denial of their petition for adoption as well as the court's order granting the Bartons' petition for adoption.

On May 18, 2018, the Bartons filed a motion to strike the "appellee's brief" filed by DHS. The Bartons argue that DHS neither appealed nor cross-appealed, and that its brief was filed after the deadline for appellants' briefs (abiding instead by the deadline for appellees' briefs), but that DHS argues in favor of the appellants and asks this court to reverse the circuit court's orders. The Bartons argue that DHS cannot seek affirmative relief from the appellate court without abiding by the rules applicable to an appealing party, and the Bartons point out that they have had no opportunity to respond to the arguments in DHS's brief because, as co-appellees, there is no mechanism for them to do so. In response, DHS argues that (1) it has previously filed appellees' briefs in numerous other cases in which it argued in favor of the appellants without issue, and (2) it is a party to the action, and its consent is required for adoption. It also argues that the Bartons' motion is unsupported by persuasive precedent and lacks a memorandum of authorities.

We agree with the Bartons' argument and therefore grant their motion to strike DHS's brief. We recently addressed this issue in *Washington County Regional Medical Center v. Northwest Physicians, LLC*, 2018 Ark. App. 497, 562 S.W.3d 239. There, we declined to consider arguments raised in an appellee's brief in which the party had neither appealed nor cross-appealed but argued in favor of the appellant and sought affirmative relief from this court. We reasoned that the party did not file a notice of appeal as required by Arkansas Rule of Appellate Procedure–Civil 3(b) (2017) and was therefore not an appellant. As an appellee, Dr. Shaun Senter failed to file a notice of cross-appeal as required by the same rule. *Id.* We noted that when there is no notice of cross-appeal, we will not consider the issue raised by an appellee. *Id.* at 8 n.2, 562 S.W.3d at 245 n.2. (citing *Egg City of Ark., Inc. v. Rushing*, 304 Ark. 562, 566, 803 S.W.2d 920, 923 (1991); *Elcare, Inc. v. Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980); *Slaton v. Slaton*, 336 Ark. 211, 219–20, 983 S.W.2d 951, 956 (1999) (declining to address appellee's claim for additional affirmative relief on appeal because the record contained no notice of cross-appeal filed by appellee)). Second, we noted that the "appellee brief" constituted an untimely attempt to file an appellant's brief because it was filed one month after the due date for appellants' briefs in that case. As in the case at bar, Senter filed his brief in accordance with the appellee's brief due date but argued in favor of the appellant's request for reversal, which prevented the appellee from being able to respond to his arguments. *Id.* (citing *Ark. Cnty. v. Desha Cnty.*, 342 Ark. 135, 139–40, 27 S.W.3d 379, 382 (2000) (striking appellee's brief as untimely because it failed to file either a notice of appeal or a notice of cross-appeal, and it filed a brief advancing the appellant's arguments too late to give the remaining appellee an

opportunity to respond)); *Boyle v. A.W.A., Inc.*, 319 Ark. 390, 392–93, 892 S.W.2d 242, 244 (1995).

While it is true that DHS cites numerous cases in which it filed an appellee's brief but argued in favor of the appellant, none of the cited cases address the propriety of that practice. DHS has provided us with no persuasive argument or authority for why it should be exempt from the standard rules of appellate procedure applicable to all other litigants. Moreover, its argument that it is a party to the case whose input is extremely important is not persuasive. DHS was free to file a notice of appeal or cross-appeal, especially since, in this case, its role in withholding consent to the adoption was directly at issue. In keeping with our recent opinion in *Washington County Regional Medical Center*, we grant the motion and strike DHS's brief.

Finally, we turn to the Bartons' motion to strike the portions of the Bankses' reply brief that incorporate arguments first raised by DHS in its appellee's brief. Although we are granting the motion to strike DHS's brief, as discussed above, we see no need to strike those portions of the Bankses' reply brief raising arguments not originally raised in its opening brief. It is well settled that we do not consider any arguments not raised in an appellant's opening brief. *See Stacks v. Marks*, 354 Ark. 594, 600, 127 S.W.3d 483, 486 (2003). Therefore, the Bartons' motion is essentially moot because the Bankses are limited to the arguments that were preserved below and presented in their opening brief on appeal. Further relief is unnecessary, and we therefore deny the motion.

We now address the merits of the Bankses' appeal. Under Arkansas law, a party is required to prove two things to succeed with respect to his or her petition to adopt a child: (1) that all necessary consents to the adoption have been obtained or waived, and (2) that clear

and convincing evidence proved that their adoption of the child is in the child's best interest. *In re Adoption of K.M.*, 2015 Ark. App. 448, at 4, 469 S.W.3d 388, 391 (citing *Lewis v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 347). We will not reverse a circuit court's decision regarding the best interest of a child to be adopted unless it is clearly against the preponderance of the evidence, giving due regard to the opportunity and superior position of the circuit court to judge the credibility of the witnesses. *K.M.*, 2015 Ark. App. 448, at 3, 469 S.W.3d at 390. In *Newkirk v. Hankins*, 2016 Ark. App. 186, 486 S.W.3d 827, we explained:

> In cases involving minor children, the trial court must utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interest. Because the appellate court has no such opportunity, the superior position, ability, and opportunity of the trial court to observe the parties are afforded their greatest weight in cases involving minor children.

Newkirk, 2015 Ark. App. 186, at 8–9, 486 S.W.3d at 832–33 (internal citations omitted).

We have previously stated that the code grants the circuit court the authority to decide the issue of whether DHS unreasonably withheld its consent to the adoption of a minor in its care and custody. *Davis-Lewallen v. Clegg*, 2010 Ark. App. 627, at 7, 378 S.W.3d 185, 190 (citing *Patterson v. Robbins*, 295 Ark. 511, 749 S.W.2d 330 (1988)). In *Davis-Lewallen*, we stated that "[n]either this court nor the supreme court has provided a test as to what constitutes unreasonable withholding of consent." *Id.*, 378 S.W.3d at 190 (citing *Tom v. Cox*, 101 Ark. App. 388, 278 S.W.3d 110 (2008)). However, the *Tom* case, cited in *Davis-Lewallen*, applied the clearly-erroneous standard. *Tom*, 101 Ark. App. at 393, 278 S.W.3d at 113 ("The issue at hand in this case is whether the circuit court's finding that Ms. Cox reasonably withheld her consent to the adoption is clearly erroneous."). *Tom* is therefore our best guidance, and we apply the clearly-erroneous standard to questions of whether consent was unreasonably withheld.

On appeal, the Bankses first argue that the circuit court erred in dismissing their petition for adoption for failure to properly obtain or excuse DHS's statutorily required consent. It is undisputed that DHS executed a written consent in favor of the Bankses on the day before the adoption hearing. The circuit court's September 18, 2017 order dismissing the Bankses' adoption petition found that the consent failed to comply with the requirements of Arkansas Code Annotated section 9-9-209 in that the necessary waiting period for withdrawal of consent had not expired. A review of the relevant statutory provisions is necessary on this point.

In *Tom*, we explained:

> Arkansas Code Annotated section 9-9-206(a)(3) states that "a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by any person lawfully entitled to custody of the minor or empowered to consent." One exception to this requirement is that the consent of a legal guardian is not necessary if the guardian "has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably." Ark. Code Ann. § 9-9-207(a)(8).

101 Ark. App. at 393, 278 S.W.3d at 113 (internal citations omitted). Arkansas Code Annotated section 9-9-212(a)(1) states that "[b]efore any hearing on a petition, the period in which the relinquishment may be withdrawn under [section] 9-9-220 or in which consent may be withdrawn under [section] 9-9-209, whichever is applicable, must have expired," and subsection (2) states that "[n]o orders of adoption, interlocutory or final, may be entered prior to the period for withdrawal."

The waiting period is governed by section 9-9-209(b):

> (b)(1) A consent to adopt may be withdrawn within ten (10) calendar days, or, if a waiver of the ten-day period is elected under subdivision (b)(3) of this section, five (5) calendar days after it is signed or the child is born, whichever is later, by filing an

> affidavit with the probate division clerk of the circuit court in the county designated by the consent as the county in which the guardianship petition will be filed, if there is a guardianship, or where the petition for adoption will be filed, if there is no guardianship. If the ten-day period, or, if a waiver of the ten-day period is elected under subdivision (b)(3) of this section, the five-day period ends on a weekend or a legal holiday, the person may file the affidavit the next working day. No fee shall be charged for the filing of the affidavit. The court may waive the ten-day period for filing a withdrawal of consent for agencies as defined by § 9-9-202(5), minors over ten (10) years of age who consented to the adoption, or biological parents if a stepparent is adopting.
>
> (2) The consent shall state that the person has the right of withdrawal of consent and shall provide the address of the probate division clerk of the circuit court of the county in which the guardianship will be filed, if there is a guardianship, or where the petition for adoption will be filed, if there is no guardianship.
>
> (3) The consent shall state that the person may waive the ten-day period for the withdrawal of consent for an adoption and elect to limit the maximum time for the withdrawal of consent for an adoption to five (5) days.

Ark. Code Ann. § 9-9-209(b). Furthermore, section 9-9-214(c)–(d) states,

> (c) If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and the required period for the withdrawal of consent and withdrawal of relinquishment have passed and that the adoption is in the best interest of the individual to be adopted, it may (1) issue a final decree of adoption; or (2) issue an interlocutory decree of adoption which by its own terms automatically becomes a final decree of adoption on a day therein specified, which day shall not be less than six (6) months nor more than one (1) year from the date of issuance of the decree, unless sooner vacated by the court for good cause shown.
>
> (d) If the requirements for a decree under subsection (c) of this section have not been met, the court *shall dismiss the petition* and the child shall be returned to the person or entity having custody of the child prior to the filing of the petition.

Ark. Code Ann. § 9-9-214 (emphasis added).

Here, the written consent form did not contain the necessary waiver information mandated by section 9-9-209(b)(3), nor had the statutorily required time period expired prior to the hearing. The Bankses cite section 9-9-209(b)(1), which states in relevant part that "[t]he court may waive the ten-day period for filing a withdrawal of consent for agencies as defined

by section 9-9-202(5)" and frame the question on appeal as "whether the court had the authority to waive the 10-day period for DHS consent and whether such waiver activated the 5-day period." The Bankses argue that the circuit court should have waived the ten-day period and that the legislature did not intend for the alternative five-day waiting period to apply to agencies because "DHS is not subject to the emotional issues of relinquishing custody." The Bankses cite legislative history regarding DHS's ability to withdraw consent, demonstrating that agencies were originally governed by the same consent provisions as parents but that in 1995, the legislature amended the statute to prevent DHS from ever being able to withdraw consent. However, in 2009, the legislature again amended the statute, this time allowing DHS to withdraw consent just as a parent can but also allowing for waiver pursuant to subsection 209(b)(1). The Bankses argue that this history indicates an intent to allow the court to entirely waive any waiting period for an agency like DHS.

The Bankses have cited no authority for this interpretation of subsection 209(b)(1), and we find their reasoning unpersuasive. A later subsection, 209(b)(3), mandates that "[t]he consent shall state that the person may waive the ten-day period for the withdrawal of consent for an adoption and elect to limit the maximum time for the withdrawal of consent for an adoption to five (5) days." On its face, this provision applies to all consents, including those executed by an agency such as DHS. It would be inconsistent for the phrase "waive the ten-day period" to have different meanings in two separate subsections of section 9-9-209. We have repeatedly held that adoption statutes are strictly construed, *Newkirk*, 2016 Ark. App. 186, at 8–9, 486 S.W.3d at 832–33, and the clear language of subsection 209(b)(3) indicates

that a consenting party may elect to waive the ten-day waiting period in favor of a five-day period but not less.

Moreover, DHS never elected to waive the ten-day waiting period in this case. While subsection 209(b)(3) mandates that the waiver information be included in the language of the consent, the consent form executed by DHS says nothing about waiver. Despite the Bankses' insistence that DHS asked the court to waive the ten-day period at the hearing, it did not. DHS was represented at the hearing by counsel who stated, "I think the Department's position has been for quite some time, even before the termination of parental rights, that the child should be placed with the Banks[es]. I think the Department has executed a consent for the Banks[es] to adopt. I mean, the Department prefers the Banks[es] at this point." At no point during the hearing did counsel for DHS request that the court waive the waiting period, despite the fact that the court stated numerous times from the bench, "I don't think I can waive the time requirement unless I'm asked to waive it, and nobody's asked to waive it." The only party who orally requested waiver of the ten-day waiting period was counsel for the Bankses. However, the Bankses were not legally entitled to consent to the adoption, nor were they legally authorized to waive the ten-day withdrawal period for that consent.

It is clear that, at the time of the hearing, the Bankses' petition for adoption did not meet the statutory requirements set out in section 9-9-214(c). The question is then whether the court's decision to grant the Bartons' motion to dismiss the Bankses' petition was an appropriate remedy. Pursuant to the clear language of subsection 214(d), it was. The statute states that "[i]f the requirements for a decree under subsection (c) of this section have not been met, the court shall dismiss the petition." We have previously affirmed the dismissal of

a biological relative's petition for adoption based on the petitioner's failure to obtain proper consent from DHS. *K.M.*, 2015 Ark. App. 448, at 6, 469 S.W.3d at 392; *see also In re Adoption of J.J.*, 2014 Ark. App. 659, at 3; *Cowan v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 576, at 16, 424 S.W.3d 318, 327. The court's decision was in keeping with the relevant statutes, was supported by unambiguous precedent, and was not clearly erroneous. We affirm the circuit court's dismissal of the Bankses' adoption petition.

The Bankses next challenge the court's final decree of adoption granting the Bartons' petition to adopt P.S. Before we can address the merits of the Bankses' arguments, we must address an argument raised by P.S., through her appointed counsel, that the Bankses lack standing to challenge the Bartons' adoption of P.S. Arkansas Civil Practice and Procedure describes the issues as such: "As a threshold matter, the appellant must have standing to appeal. This is not a problem in most cases. If the appellant was a party to the action in the trial court and aggrieved by the judgment, the standing requirement is satisfied." David Newbern, John J. Watkins, Brandon J. Harrison, and D.P. Marshall, Jr., *Arkansas Civil Practice and Procedure* § 40:1 (5th ed. 2011) (citing *Springdale Sch.Dist. No. 50 v. The Evans Law Firm, P.A.*, 360 Ark. 279, 200 S.W.3d 917 (2005); *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Sebastian Lake Pub. Utility Co., Inc. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996)). P.S. acknowledges this general rule but argues that whether a person has standing in an adoption proceeding turns on whether they were entitled to statutory notice of the adoption petition. The two cases she relies on, however, *Hinton v. Bethany Christian Services*, 2015 Ark. App. 301, 462 S.W.3d 361, and *In re Adoption of J.L.T.*, 31 Ark. App. 85, 788 S.W.2d 494 (1990), are distinguishable. In each of those cases, the circuit court found that a party seeking to

intervene and set aside a previously entered adoption decree had not been entitled to statutory notice and lacked standing to petition the court to set aside the decree. Those cases did not address a named party's standing to appeal, and we see no basis for deviating from the general rule stated above. In this case, the Bankses were named parties to the case when the court issued the final decree of adoption in favor of the Bartons, and they are aggrieved by the order because it prevents them from further pursuing adoption of P.S. The Bankses therefore have standing to challenge the adoption decree on appeal.

The central issue in this appeal is the Bankses' challenge to the circuit court's findings, pursuant to section 9-9-214(c) that DHS unreasonably withheld consent for the Bartons to adopt P.S. Arkansas Code Annotated section 9-9-206(a)(3) states that "a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by any person lawfully entitled to custody of the minor or empowered to consent." One exception to this requirement is that the consent of a legal guardian is not necessary if the guardian "has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably." Ark. Code Ann. § 9-9-207(a)(8).

Here, the circuit court's order states that, "after examining the Arkansas Department of Human Services' written reasons for withholding consent, the Court finds that the Arkansas Department of Human Services is unreasonably withholding consent." DHS's written reasons were provided to the Bartons via a letter dated May 15, 2017, which stated that DHS did not feel it was in P.S.'s best interest to be adopted by the Bartons and that DHS preferred that she

be adopted by the Bankses, who are biological relatives. There is no dispute that DHS's preference for the Bankses, as biological family members, standing alone, would constitute an unreasonable basis for withholding consent to the Bartons' adoption petition.[7] The Bankses do not argue otherwise.

Instead, the Bankses claim that withholding consent was reasonable in light of the maltreatment allegations against the Bartons, and that is the issue on which the dissenting judges base their analysis. The issue must be addressed in two parts: (1) whether DHS included

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[7]It is well established under Arkansas law that grandparents' rights are derivative of their child's parental rights. *Burt v. Ark. Dep't of Health & Human Servs.*, 99 Ark. App. 402, 405, 261 S.W.3d 468, 471 (2007). "Because a grandparent's rights are only derivative, they may be contingent upon the establishment of paternity or maternity and are subject to divestment when parental rights are terminated." *Suster v. Ark. Dep't of Human Servs.*, 314 Ark. 92, 96, 858 S.W.2d 122, 124 (1993) (quoting Chauncey Brummer & Era Looney, *Grandparent Rights in Custody, Adoption, and Visitation Cases*, 39 Ark. L. Rev. 259, 261 (1985)). In *Suster*, for example, the supreme court affirmed the denial of a maternal grandmother's motion to intervene in a dependency-neglect case after her daughter's parental rights to the child had been terminated, stating that "Mrs. Suster's rights as a grandparent were derivative of her daughter's parental rights and as a result were terminated when her daughter's parental rights were terminated." *Suster*, 314 Ark. at 97, 858 S.W.2d at 125. Therefore, while the juvenile code contains a preference for relative placement in dependency-neglect proceedings, *Ellis v. Ark. Dep't of Human Servs.*, 2016 Ark. 441, at 8, 505 S.W.3d 678, 683 (citing Arkansas Code Annotated section 9-27-355(b)(1)), our supreme court has made clear that a biological grandparent's status as a "relative" terminates when his or her child's parental rights are terminated. With respect to termination of parental rights, the Arkansas Supreme Court has stated:

> These statutes point to a public policy which, in determining what is in the child's best interest, favors a complete severing of the ties between a child and its biological family when he is placed for adoption. We have said it is "unquestionably within the province of the legislature to decide that the reasons favoring the solidarity of the adoptive family outweigh those favoring grandparents and other blood kin who are related to the child through the deceased parent." *Wilson v. Wallace*, 274 Ark. 48, 50, 622 S.W.2d 164, 166 (1981). Our legislature has declined to adopt another rule, so we will not here.

Suster, 314 Ark. at 97, 858 S.W.2d at 125.

the allegations of maltreatment as one of the "written reasons for withholding consent" pursuant to section 9-9-207(a)(8), and if so, (2) whether the circuit court's determination that DHS unreasonably withheld consent was clearly erroneous.

As to the first question, there is no basis in the record for concluding that DHS presented the maltreatment allegations as one of its reasons for withholding consent. The May 15 letter did not include mention of the allegations, nor could it, as the decision to deny consent was issued before the allegations arose. The August 11 letter does not constitute a "reason for withholding consent" to the Bartons' adoption under any common-sense reading of that phrase.[8] Unlike the May 15 letter, which clearly refers to the Pope County Circuit Court adoption case by both name and case number; states that it is a response to the Bartons' request for consent to adopt P.S.; and unequivocally provides written reasons for the denial of that consent, the August 11 letter never references the adoption case or the Bartons' request for consent to adopt P.S. and does not in any way indicate that its contents have anything to do with DHS's prior decision to deny consent to the Bartons' adoption petition. Moreover,

[8]It is also important to note that the Bankses do not argue in their appellant's brief that the August 11 letter qualifies as a "written reason for withholding consent." Instead, they completely ignore the statute's writing requirement and erroneously rely on *Lewis v. Arkansas Department of Human Services*, 2012 Ark. App. 347, for the proposition that "where there is justifiable cause for withholding the consent, there can be no finding by the court that DHS is unreasonably withholding consent." *Lewis* stands for no such rule; in fact, when discussing whether DHS had unreasonably withheld consent to the Lewises' adoption petition, we noted that "[t]here was no evidence that appellants sought DHS's consent." *Id.* We affirmed the circuit court's dismissal of the Lewises' adoption petition on numerous grounds, including their failure to file necessary documents, the court's finding that adoption was not in the child's best interest, and its finding that DHS did not unreasonably withhold consent. *Lewis* does not purport to override the statutory requirement that the circuit court must evaluate DHS's *written* reasons for withholding consent, nor could it.

the August 11 letter was sent by an entirely different DHS office than the Pope County office responsible for executing the Bankses' consent and denying the Bartons' consent. Additionally, at the hearing neither counsel for DHS nor Victoria Smith ever represented to the circuit court that the maltreatment allegations were a basis on which consent was denied or that the August 11 letter was intended to be a "written reason for withholding consent." Instead, even after admission of the August 11 letter and questioning about the maltreatment allegations, Smith unequivocally testified that DHS's reason for granting the Bankses' consent while denying the Bartons' request was its preference for the Bankses as family. The CASA report specifically notes that during an August mediation (after the allegations of abuse arose), DHS stated that there was nothing to prevent either party from adopting P.S. It is clear, then, that the true reason for withholding consent to the Bartons' petition was exactly what DHS claimed it was: a preference for the Bankses as biological kin. We cannot manufacture a reason for withholding consent that DHS never asserted.

Even assuming that the August 11 letter was properly before the circuit court as a "written reason for withholding consent," we still could not say that the circuit court erred in its finding of unreasonableness. First, we note that if DHS is deemed to have relied on the maltreatment allegations as a basis for withholding consent, it was well within the purview of the circuit court to evaluate the credibility and veracity of those allegations and determine whether DHS's reliance on them was reasonable. *Newkirk*, 2015 Ark. App. 186, at 8–9, 486 S.W.3d at 832–33. DHS provided no testimony, evidence, or explanation as to why it chose

to believe the maltreatment allegations over the Bartons' denials.[9] Rebecca Barton testified at length about the allegations, explained the context, denied any acts of maltreatment, and testified that the state police had found that the claims were unsubstantiated. The Bartons also rebutted the allegations with the testimony of friends, preschool teachers, and their oldest daughter, all of whom assured the court that the Bartons are great parents who deeply love P.S. Finally, and most tellingly, the CASA advocate's report acknowledged the maltreatment allegations but recommended that P.S. be adopted by the Bartons despite those allegations. The report revealed that the CASA had far more serious concerns about the risk that the Bankses' might allow P.S.'s biological parents to have contact with her. Given these facts, we reject the dissent's argument that the mere existence of maltreatment allegations automatically rendered DHS's decision to withhold consent reasonable in this case. DHS never asserted that its decision to withhold consent was based on the maltreatment allegation. Even if it had, the circuit court was entitled to judge the credibility and seriousness of those allegations. Based on the record before us, we conclude that the circuit court's finding that DHS unreasonably withheld consent was not clearly erroneous.

Finally, we note that the circuit court was also presented with troubling evidence about *how* DHS reached its decision to withhold consent. The Arkansas General Assembly has mandated that "the best interests of the children must be paramount and shall have precedence

[9]Our point is not that DHS should not have believed the child; our issue is with the lack of evidence DHS presented to the circuit court on this issue. While the Bartons presented significant evidence from which the court could have concluded that the allegations of abuse were either not credible or not sufficiently serious to warrant withholding consent, DHS presented no testimony or documentary evidence about the allegations except for the August 11 letter.

at every stage of juvenile court proceedings." Ark. Code Ann. § 9-28-104(a). Subsection (b) goes on to state that "[t]he best interest of the child shall be the standard for recommendations made by employees of the Department of Human Services as to whether a child should be reunited with his or her family or removed from or remain in a home wherein the child has been abused or neglected." Ark. Code Ann. § 9-28-104(b). While not directly on point, subsection (b) clearly indicates the legislature's expectation that DHS's decisions will be guided by concern for the child's best interest. Despite that mandate, Victoria Smith's testimony revealed that DHS withheld consent to the Bartons' adoption petition without reviewing the Bankses' home study, consulting the CASA, or reading the notes in P.S.'s file. There is no evidence that DHS considered the risk that the Bankses would allow P.S.'s biological parents to have access to her, a concern that the CASA repeatedly raised. Finally, while DHS's letter advising the Bartons that it would not consent to their adoption petition used the phrase "the best interest of the juvenile," neither the letter nor Victoria Smith's testimony included any substantive best-interest analysis. Under these circumstances, we see no error in the circuit court's finding that DHS unreasonably withheld consent to the Bartons' petition to adopt P.S.

For their final argument on appeal, the Bankses challenge the sufficiency of the evidence supporting the circuit court's finding that adoption by the Bartons was in P.S.'s best interest. They rely solely on the allegations of maltreatment against the Bartons. At trial, the Bartons testified as to these allegations, provided context for the allegations, denied that they had in any way abused or mistreated any of their children, and provided several witnesses who testified that they are very good parents who love their children. DHS introduced the August 11 letter outlining the specific allegations of abuse, and DHS supervisor Victoria Smith

testified that she believed P.S. had been removed from the Bartons' home based on those allegations. Neither DHS nor the Bankses provided any additional evidence to support the maltreatment allegations. Whether and the extent to which the circuit court should have considered the maltreatment allegations in its best-interest finding, therefore, hinges on the weight and credibility of the evidence related to those allegations. In *Newkirk*, we explained that

> [i]n cases involving minor children, the trial court must utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interest. Because the appellate court has no such opportunity, the superior position, ability, and opportunity of the trial court to observe the parties are afforded their greatest weight in cases involving minor children.

2015 Ark. App. 186, at 8–9, 486 S.W.3d at 832–33 (internal citations omitted). We will not reverse a circuit court's decision regarding the best interest of a child to be adopted unless it is clearly against the preponderance of the evidence, giving due regard to the opportunity and superior position of the circuit court to judge the credibility of the witnesses. *K.M.*, 2015 Ark. App. 448, at 3, 469 S.W.3d at 390. Here, we see no reversible error in the circuit court's best-interest finding. By all accounts, P.S. was closely bonded with the Bartons, who had cared for her and provided for her medical needs for more than half her life. P.S. was considered part of the family and was treated just like the Bartons' older children. Several witnesses described the Bartons as "good" and "great" parents. Rebecca, who had herself been adopted through the foster-care system, could relate to P.S.'s experiences as a foster and adoptive child. Rebecca testified at length about the maltreatment allegations, providing reasonable explanations for the claims and denying any abuse. She testified that the Arkansas State Police investigated the matter and found it unsubstantiated. In comparison, DHS provided no evidence or testimony

to support its belief that the allegations were true. Finally, the CASA recommended that adoption by the Bartons was in P.S.'s best interest and raised serious concerns that the Bankses would expose P.S. to her biological parents. Under these circumstances, the circuit court's best-interest finding was not clearly erroneous.

Affirmed.

GRUBER, C.J., and WHITEAKER and BROWN, JJ., agree.

GLOVER and HIXSON, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. "You can't see the forest for the trees." This is an expression typically used in an opening statement by an attorney to a jury. One source defines it as "an expression used of someone who is too involved in the details of a problem to look at the situation as a whole." In my opinion, this expression is apropos in this case.

This case can be reduced to its basics. This is a simple contest between grandparents (the Bankses) and foster parents (the Bartons) over the adoption of the grandchild. The majority opinion takes twenty-eight pages to explain the details of its decision. The child was placed under the care and custody of the Arkansas Department of Human Services (DHS) during a termination-of-parental-rights case. While the termination case was pending, the child lived primarily with the foster parents in Russellville but was given visitation with the grandparents in Florida. In May 2017, DHS removed the child from the foster parents' home. On May 15, 2017, DHS refused the foster parents' request to consent to place custody of the child with them, citing that it was not in the best interest of the child. On the other hand, shortly before the adoption hearing, DHS consented to placing custody of the child with the

grandparents. In an unrelated proceeding with unrelated foster children, fourteen days prior to this adoption hearing, DHS disqualified and terminated the Bartons as foster parents; not to this child, but to all foster children in the State of Arkansas. On August 11, DHS mailed a letter to the Bartons thanking them for their previous services as foster parents and informing them that their home would officially be closed as a foster home for the following reasons:

- Using food as punishment.
- Complexity of the care of the adoptive child and the concerns you mentioned with the child during the child maltreatment investigation.
- The Department found the neighbor to be credible and the adoptive child was fearful.
- The Department does believe that the bending back of the thumb is taking place in the home.
- The Department does believe that the Bartons have spanked the foster child.

The Bartons disagreed with their disqualification by DHS and appealed the decision. According to Mrs. Barton, their appeal of their disqualification as foster parents was pending at the time of the adoption proceeding. The circuit court specifically stated that the August 11 letter was relevant in its determination of whether DHS unreasonably withheld consent for the Bartons to adopt the child.

There we have it: The forest or the trees? Are we too involved in the details to look at the situation as a whole? I cannot in good conscience and within my interpretation of legal jurisprudence affirm an award of custody of a minor child to a couple who have been disqualified by the State of Arkansas to serve as foster parents for maltreating foster children. I understand that DHS has its detractors; however, there is nothing in the record to suggest

that the investigation by DHS into the Bartons' fitness as foster parents was inappropriate or not based on objective evidence. The majority extols the premise that the Bartons were investigated by the Arkansas State Police and that the Bartons' conduct did not rise to the level of criminality. However, the failure to have criminal charges pressed by the Arkansas State Police does not diminish nor detract from the fact that the Department of Human Services received legitimate complaints of child maltreatment from a third party against the Bartons, investigated the complaints including interviews with the Bartons, found the complaints of child maltreatment to be true, and determined that the Bartons should be disqualified to serve as foster parents. Having said that, I fully appreciate the fact that the Bartons have appealed their disqualification, and the Bartons are very much entitled to due process. Based on the evidence presented, I have the definite and firm conviction that a mistake was made, and I would hold that the circuit court was clearly erroneous in finding that DHS unreasonably withheld consent for the Bartons to adopt the child. Accordingly, I would reverse the circuit court's order granting the Bartons' adoption petition.

GLOVER, J., joins in this dissent.

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