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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-334

ROYAL MARTIN APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	OPINION DELIVERED DECEMBER 14, 2022 APPEAL FROM THE DALLAS COUNTY CIRCUIT COURT [NO. 20JV-20-12] HONORABLE DAVID W. TALLEY, JR., JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Royal Martin appeals from the February 28, 2022 order of the Dallas County Circuit Court terminating his parental rights to his minor child (Minor Child 1). He argues that the circuit court's best-interest determination was flawed because the Arkansas Department of Human Services (DHS) failed to prove that termination was in Minor Child 1's best interest because (1) the circuit court failed to consider the potential-harm prong as required by the plain language of the relevant statute, and (2) there was a less restrictive alternative to termination available. We affirm.

I. *Facts and Procedural History*

This case began on November 16, 2020, when DHS filed a petition for dependency-neglect concerning Samantha Castillo and her two minor children. Although not initially

named as parties, Martin was identified as Minor Child 1's putative father, and Addison Carver was named as Minor Child 2's putative father. The petition also noted that Martin was currently incarcerated at the Arkansas Department of Correction (ADC).

DHS became involved with the family because Castillo had been leaving the young children home alone, and she had failed to actively participate in the protective-services case offered by DHS. When the case began, both minor children remained in Castillo's custody.

On January 20, 2021, the circuit court held an adjudication and disposition hearing and found the two minor children to be dependent-neglected on the basis of inadequate supervision by Castillo. The resulting order was entered on February 26. Martin was not listed as attending the hearing, and the order made no findings regarding service of process on him. Pursuant to the order, the minor children remained in Castillo's custody, and Castillo was ordered to comply with court orders to complete certain tasks and cooperate with DHS. The circuit court also ordered paternity testing for Minor Child 2 and the putative father, Carver, but did not issue any orders regarding Martin.

A review hearing was held on March 17 with an order entered on April 19 and an amended order entered on May 7. The circuit court placed both minor children in DHS custody because of Castillo's unfitness and failure to comply with services. The case goal was amended to reunification with relative placement or adoption as concurrent goals. Martin was not present at the hearing, and there were no findings regarding service, notice, or orders directed toward him. DHS, however, was again ordered to perform paternity testing for Minor Child 2 and the putative father, Carver.

Another review hearing was held on July 21. In the resulting order entered August 11, Carver, as Minor Child 2's father, was added as a party to the case. The goal of the case remained reunification, but the concurrent goals were set as adoption, guardianship, and permanent custody. Although Martin was not present at the hearing, the circuit court did order that paternity testing be completed to determine if he is Minor Child 1's father. Additionally, the circuit court found that Castillo was not in compliance with the case plan and court orders.

In a September 27 order that followed a September 15 teleconference, the circuit court placed permanent custody of Minor Child 2 with her father, Carver, and closed the case with respect to Minor Child 2.

On November 17, 2021, the circuit court held a permanency-planning hearing and changed the goal to adoption for Minor Child 1. Martin again was not present and remained incarcerated. In support of the change, the circuit court cited Castillo's failure to comply with the case plan and court orders. Additionally, it found Martin to be Minor Child 1's biological father on the basis of DNA testing and listed Martin as a parent in the case style. Further, the circuit court found that Minor Child 1 is adoptable and that her current paternal relative foster-care placement, Norikia Mason, was interested in adopting her.

On November 29, DHS filed a termination petition against both Castillo and Martin. For the first time in any pleading, Martin was listed as a party and named as a parent of Minor Child 1. DHS alleged that termination of Martin's parental rights was in Minor Child 1's best interest and warranted pursuant to multiple statutory grounds. DHS pled facts as to

the potential harm Castillo posed but made no such allegation about Martin. The petition noted Martin had not been served pursuant to Rule 4 of the Arkansas Rules of Civil Procedure when the case began.

The circuit court entered a permanency-planning order on December 3, directing Martin to attend the next hearing in the matter, which was scheduled to be the termination hearing, via Zoom. The goal of the case was changed to adoption as a result of Castillo's actions. The circuit court concluded concurrent planning was not necessary. Martin was found to be Minor Child 1's father and was made a party to the case. DHS was ordered to investigate Martin's contact with Minor Child 1. The circuit court again found that Minor Child 1 is adoptable and that her current paternal relative foster-care placement, Norikia Mason, was interested in adopting her.

Following a continuance, the termination hearing was held on February 16, 2022. Martin was again ordered to appear via Zoom. The first witness to offer testimony was Lasonya Goffin, a family-service worker with DHS. She recounted the history of the case, focusing on DHS's efforts regarding Castillo. Goffin did discuss that DHS had conducted a DNA test on Martin following a court order and acknowledged that Martin had requested the testing. She noted that the DNA test confirmed that Martin is Minor Child 1's father but acknowledged that it was known in November 2020 that Martin was alleged to be Minor Child 1's father. Goffin explained that she knew Martin was incarcerated and had been receiving services from the ADC. She testified that she had spoken with Martin either two or three times during the case.

Quita Harris, another DHS worker, testified that she believes Minor Child 1 is adoptable. She confirmed that Minor Child 1's current foster parent—a relative of Martin—wanted to adopt Minor Child 1.

Martin also testified at the termination hearing that when Minor Child 1 was born, he sent money to pay for items for Minor Child 1. He explained that he became imprisoned shortly after Minor Child 1's birth. He testified that while incarcerated, he had video visits with Minor Child 1 and also visited with Minor Child 1 while in foster care at least three times a week by phone. Minor Child 1 knew him and called him "Daddy." Martin testified that DHS did not offer him any services, but he confirmed Goffin's testimony that he spoke with someone from DHS approximately three times during the pendency of the case. He testified that he did not want his parental rights terminated.

Norikia Mason, Martin's relative and Minor Child 1's foster parent, also testified. She stated that she was not opposed to having Minor Child 1 in her home through a guardianship or permanent custody rather than adoption. This testimony was not challenged by DHS or the ad litem.

In his closing argument, Martin's counsel noted that DHS failed to present evidence as to why adoption was necessary for Minor Child 1 to achieve permanency or proof that Martin posed a risk to his child. When ruling, the circuit court noted that the issue of adoption versus guardianship was "premature" and that even if the court granted the termination petition, "we still have to figure out what the ultimate goal is going to be, and I

still have several goals to choose from." The circuit court authorized Martin to continue to have contact with Minor Child 1, which DHS did not object to or argue against.

The circuit court entered its order terminating the parental rights of both Castillo and Martin on February 28. The circuit court found that termination of Martin's parental rights was in Minor Child 1's best interest and warranted pursuant to one statutory ground, specifically, the "sentenced in a criminal proceeding" ground. Within its best-interest analysis, the circuit court, however, considered the potential harm to Minor Child 1 as it related only to Castillo and not to Martin. Following the entry of the order, the circuit court entered a continuance order in the matter, continuing the next permanency-planning hearing as DHS needed "time to develop a permanency plan." Martin filed a timely notice of appeal on March 17.

II. *Standard of Review and Applicable Law*

Our court recently reiterated our standard of review in parental-rights termination cases in *Houston v. Arkansas Department of Human Services*, 2022 Ark. App. 326, at 6–7, 652 S.W.3d 188, 191–92:

> A circuit court's order terminating parental rights must be based upon findings proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2021). Clear and convincing evidence is defined as that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Posey v. Ark. Dep't of Health & Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). On appeal, the appellate court reviews termination-of-parental-rights cases de novo but will not reverse the circuit court's ruling unless its findings are clearly erroneous. *Id.* 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 order to terminate parental rights, a circuit court must find by clear and convincing evidence that termination is in the best interest of the child, taking into consideration (1) the likelihood the child will be adopted if the termination petition is granted; and (2) the potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii). The order terminating parental rights must also be based on a showing by clear and convincing evidence as to one or more of the grounds for termination listed in section 9-27-341(b)(3)(B). However, only one ground must be proved to support termination. *Reid v. Ark. Dep't of Hum. Servs.*, 2011 Ark. 187, 380 S.W.3d 918.

III. *Discussion*

A. Consideration of Potential-Harm Prong Regarding Martin

DHS pled that termination of Martin's parental rights was warranted pursuant to the substantial-sentence ground, Ark. Code Ann. § 9-27-341(b)(3)(B)(viii) (Supp. 2021); the aggravated-circumstances ground,[1] Ark. Code Ann. § 9-27-341(b)(3)(B)(ix); the willful-failure-to-maintain-contact-or-provide-support ground, Ark. Code Ann. § 9-27-341(b)(3)(B)(ii); and the abandonment ground, Ark. Code Ann. § 9-27-341(b)(3)(B)(iv). The circuit court specifically granted DHS's petition on the basis of the substantial-sentence ground.[2] Martin concedes that DHS demonstrated that he was sentenced in a criminal proceeding that constituted a substantial period of Minor Child 1's life and met its burden pursuant to the substantial-sentence ground.

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[1]DHS pled that termination was warranted under two aggravated circumstances. Specifically, DHS alleged that Martin had abandoned Minor Child 1 and alleged that there was little likelihood that services would result in successful reunification.

[2]The circuit court's oral ruling seemed to indicate it was granting DHS's petition on multiple grounds; however, only one ground was included within the written order, which controls. *See* Ark. Sup. Ct. Admin. Order No. 2 (2022).

Because Martin does not challenge the circuit court's findings regarding either statutory grounds or adoptability, we need not consider those issues. *See Houston*, 2022 Ark. App. 326, at 7, 652 S.W.3d at 192. But we note that unchallenged statutory findings can "inform" the appellate court on the best-interest issues. *Cancel v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 198, at 9; *see also Miller v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 396, at 14, 525 S.W.3d 48, 57.

Arkansas Code Annotated section § 9-27-341(b)(3)(A) uses the conjunction "and" rather than "or" when mandating what must be considered when making a best-interest determination. The Juvenile Code requires that the circuit court consider *both* adoptability and potential harm. *Id.* As such, just as the law requires that the circuit court consider adoptability when deciding whether termination of Martin's parental rights was in Minor Child 1's best interest, the law equally requires that the circuit court consider the potential harm Minor Child 1 would face as it related to Martin. Ark. Code Ann. § 9-27-341(b)(3)(A)(ii).

Martin argues that, just as the circuit court did in *Haynes v. Arkansas Department of Human Services*, 2010 Ark. App. 28, at 4—albeit regarding the adoptability prong in that case—the circuit court in this case, as it relates to Martin, only made a surface finding that termination of "both parents' parental rights" was in Minor Child 1's best interest. He urges that the specific consideration regarding potential harm was made only with respect to Castillo; there was no consideration as it related to Martin. *Id.* He claims that this failure to

comply with the plain language of the statute, which requires consideration of potential harm, requires reversal of this termination decision. *See Haynes*, *supra*.

Haynes is distinguishable in that the primary issue involved the adoptability prong, which requires at least some evidence of a discussion about the potential for adoption, and in that case, the juveniles' potential for adoptability was never even mentioned. *Id.* at 2–4. Here, the caseworker specifically testified that (1) Martin had never met Minor Child 1 in person; (2) termination of Martin's parental rights was in Minor Child 1's best interest; and (3) Martin's incarceration would account for a substantial period of Minor Child 1's life. This testimony, along with Martin's own testimony about his sentence and the actual sentencing order, support the circuit court's best-interest finding.

Although Martin acknowledges that DHS provided evidence that he had been sentenced in a criminal case to a substantial period of incarceration, he submits that a parent's incarceration is not dispositive in the court's best-interest analysis. *Malone v. Ark. Dep't of Hum. Servs.*, 71 Ark. App. 441, 447-48, 30 S.W.3d 758, 761–62 (2000). This court explained that an "appropriate inquiry" concerning an incarcerated parent is whether the parent used available resources to maintain a close relationship with his child. *Id.* Martin claims that he did just that by enrolling in classes, receiving services from the ADC, and engaging in what he defines as regular visitation with Minor Child 1. He submits that Minor Child 1 knows him and calls him "Daddy" and that it was known that their relationship would continue beyond the termination decision with the blessing of the circuit court and without any objection from Minor Child 1's ad litem or DHS. He submits that his actions

constitute the exact oppositive of causing potential harm to Minor Child 1, including having an appropriate relative willing to provide long-term care for Minor Child 1 without terminating his parental rights. He asserts that in light of the foregoing, the circuit court's failure to perform the statutorily required potential-harm consideration and DHS's failure to offer proof on the issue require reversal.

We disagree. Initially, we note that Martin's complaints about the delayed DNA testing and his inability to become a party to the case are not preserved for our review; moreover, he has failed to identify any violation of Arkansas Code Annotated section 9-27-325(n)(3)–(5) (Supp. 2021).

Regarding Martin's argument that his incarceration, alone, is insufficient to prove the potential-harm prong, we note that Arkansas appellate courts have consistently held that a lack of stable housing and employment due to incarceration are sufficient to support a potential-harm finding, and according to Martin's sentencing order, he was sentenced to 110 years in the ADC. *E.g.*, *Brumley v. Ark. Dep't of Hum. Servs.*, 2015 Ark. 356, at 10–12 (affirming potential-harm finding due to the appellant's incarceration, which naturally demonstrates the appellant's lack of appropriate and stable housing and employment). *Malone* is distinguishable in that it did not involve a parent who was essentially sentenced to life in the ADC. Rather, the appellant in *Malone* was in and out of jail during the pendency of the case, and due to the appellant's failure to comply with services and court orders both while incarcerated and while not incarcerated, this court affirmed the termination. *Malone*, 71 Ark. App. at 447–49, 30 S.W.3d at 761–62.

Moreover, contrary to Martin's argument, the evidence demonstrates that he had no real relationship with Minor Child 1, which has also been held to support a potential-harm finding. *E.g.*, *Fraser v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 395, at 10, 557 S.W.3d 886, 893 (affirming termination where no relationship or bond with the juvenile existed). Despite Martin's assertion that he maintained a relationship with Minor Child 1 via telephone while incarcerated, the only evidence to support this was his own testimony at the termination hearing—which the circuit court was not required to believe. *See Younger v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 138, at 12, 643 S.W.3d 487, 494.

Furthermore, the statute does not require the circuit court to make specific findings on potential harm, and we can affirm based on the evidence under our de novo review. *See, e.g.*, *Crawford v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 474, at 2–7, 588 S.W.3d 383, 385–87. In determining whether a finding is clearly erroneous, an appellate court gives due deference to the opportunity of the circuit court to assess the witnesses' credibility. *Isom v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 159, at 5.

B. Failure to Give Preference to the Least Restrictive Placement

Martin also argues that the circuit court erred in finding that termination of his parental rights was in Minor Child 1's best interest because Minor Child 1's paternal relative placement was willing to take guardianship rather than adoption. This argument was specifically rejected in *Coulter v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 398, at 14–16, 636 S.W.3d 377, 386–87:

Although phrased slightly differently, each of the appellants argues that the court's best-interest determination is clearly erroneous because a less-restrictive alternative to termination existed, which the court failed to consider. Their arguments focus on the court's failure to consider the grandfather as a permanent-relative placement or guardian. Appellee contends that appellants' failure to appeal the permanency-planning order and designate the transcript of the permanency-planning hearing precludes our review of this issue. We agree.

Appellants' least-restrictive-alternative arguments essentially challenge the court's permanency-planning decision changing the goal of the case from reunification or placement with a fit and willing relative to adoption. Appellants failed in their notices of appeal, however, to indicate that they were appealing this intermediate order and did not designate the transcript of the permanency-planning hearing wherein the court heard the testimony of the grandfather and found that, although willing, he was not a fit relative for long-term placement.

Rule 6-9 of the Rules of the Arkansas Supreme Court specifically addresses appeals in dependency-neglect cases. Our cases have held that that in order to challenge findings made in the permanency-planning order, the order must be designated in the notice of appeal, and the record must include the transcript of the hearing. For example, in *Velazquez v. Arkansas Department of Human Services*, 2011 Ark. App. 168, we held that the appellant's arguments challenging termination of parental rights actually related to the earlier permanency-planning hearing. The appellant's notice of appeal failed to designate the permanency-planning order and bring up the record of the permanency-planning hearing. "While a termination order might bring up all intermediate orders, appellant did not designate the permanency-planning hearing in his notice of appeal, effectively waiv[ing]" his arguments related to the permanency-planning order. *Velazquez*, 2011 Ark. App. 168, at 5. Similarly, in *Bryant v. Arkansas Department of Human Servs*, 2011 Ark. App. 390, at 7, 383 S.W.3d 901, 905, we held that "Bryant failed to designate the permanency-planning hearing in her notice of appeal. Although she designated the permanency-planning order in her notice of appeal, the transcript of that hearing is not in the record." *See also Thomas v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 457, at 5, 610 S.W.3d 688, 692 (stating that while a termination order might bring up all intermediate orders, including an unappealed permanency-planning order, the intermediate order must be designated in the notice of appeal); *Cole v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 481, 611 S.W.3d 218 (appellant's argument that the circuit court failed to consider alternatives for permanency less restrictive than termination was not preserved because appellant failed to raise it at the termination hearing and to bring up the transcript of the review hearing where the goal was changed).

Martin argues that *Coulter* is distinguishable because the circuit court in this case had not yet determined what the final disposition would be as of the termination hearing. Although there was some discussion at the end of the hearing about whether Martin would be allowed future phone contact with Minor Child 1, the final termination order made it clear that the goal for final disposition was adoption.

We have held that a circuit court is permitted to set termination as a goal even when a relative is available and requests custody because the Juvenile Code lists permanency goals in order of preference, prioritizing a plan for termination and adoption unless the juvenile is already being cared for by a relative, the relative has made a long-term commitment to the child, and termination of parental rights is not in the child's best interest. *See Best v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 485, at 23, 611 S.W.3d 690, 704.

In this case, Minor Child 1 remained in DHS's custody at the time of the termination hearing and was only in a temporary provisional placement with the paternal relative;[3] accordingly, the decision regarding Minor Child 1's final disposition was not one for the paternal relative solely to make. *See, e.g.*, *Phillips v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 383, at 14, 585 S.W.3d 703, 710. Because the evidence supports the circuit court's finding that termination of Martin's parental rights was in Minor Child 1's best interest, we hold that no error occurred when the circuit court prioritized a plan for termination and adoption over the available relative placement.

[3]At the termination hearing, the circuit court incorrectly stated that Minor Child 1 was in the relative's custody. No prior order supports this statement.

Affirmed.

ABRAMSON and MURPHY, JJ., agree.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for appellant.

Ellen K. Howard, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

Dana McClain, attorney ad litem for minor child.