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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-310

APRIL BLANKENSHIP AND DONALD ROSS APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	Opinion Delivered February 15, 2023 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72JV-21-38] HONORABLE DIANE WARREN, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART

BART F. VIRDEN, Judge

April Blankenship appeals the Washington County Circuit Court decision to terminate her parental rights to MC1 and MC2. Donald Ross appeals the circuit court's decision to terminate his parental rights to MC2. We affirm the circuit court's termination as to April. We reverse the termination of Donald's parental rights and remand to the circuit court for further proceedings.

I. *Relevant Facts*

On January 14, 2021, the Arkansas Department of Human Services filed a petition for emergency custody regarding eleven-year-old Minor Child 1 (MC1) and two-year-old Minor Child 2 (MC2). The affidavit attached to the petition set forth the following facts. On January 10, during an investigation regarding a half sibling, newborn Minor Child 3 (MC3),

who had been taken into foster care, family service worker Stacie Warren learned that MC1, MC2, their mother April Blankenship, and MC2's putative father, Donald Ross, were living in a motel and getting ready to move into a camper. April and Donald regularly used methamphetamine and required MC1 to parent MC2. When MC1 stayed with her father, the family slept in a tent behind her uncle's house, and she took care of MC3. MC1 explained that Donald was mean and angry, which made her feel unsafe and afraid. April claimed she had a kidney infection and could not produce urine for a drug test but admitted using methamphetamine twice a week and stated that she had used within the last week. April stated that they took the children to Donald's mother's house when they used drugs. While the caseworker was in the motel room, Donald said that MC3's case had nothing to do with their family. He left the room to put their belongings in the car and check out of the motel. April told the family service worker that she understood why the children had to go into foster care and explained that they had been homeless for three years. April told the family service worker that she had a seven-year-old child who was living in a camper with his father in Iowa, but she had no way to contact him and did not know where he was. April stated that there was a history of domestic violence between her and Donald as well as with MC3's father and the father of the seven-year-old. Meanwhile, Donald would not answer texts, and April was afraid he was going to leave with MC2, which he did. MC2 was found at Donald's mother's house, and a seventy-two-hour hold was taken on the children due to parental drug use. Donald suggested that his mother or his sister could take the children but did not provide any contact information. MC1's paternal aunt said she could take MC1, but

not MC2, because she was already caring for a three-month-old. When the children arrived at the Department office, the family service worker realized that MC2 was "extremely dirty" with a diaper "so full and dirty that it was brown in color." MC1 was distraught at being away from MC2.

In the January 15 ex parte order for emergency custody, the court found probable cause that the juveniles were dependent-neglected, and it was contrary to their welfare to remain with their mother. Donald was named as MC2's putative parent. The probable-cause order was entered February 11, and the court found that none of the putative fathers had established paternity. The court determined that April had unstable housing and substance-abuse issues that affected her ability to safely care for her children. The court also found that April had enrolled with the Cherokee Nation, and the Department had made active efforts to prevent the breakup of an Indian family. The court ordered the Department to continue to try to find placement of the children together to satisfy the Indian Child Welfare Act (ICWA). Sibling and parental visitation were ordered.

On March 24, an adjudication order was entered. The order set forth that Donald was still considered MC2's putative parent, and the court ordered him to produce a copy of an acknowledgement of paternity. The circuit court found that it was necessary to remove MC1 and MC2 from the home due to parental drug use; MC2's positive test for methamphetamine and amphetamines, which indicated "a significant level of substance abuse in the juveniles' living environment"; the children's poor physical state at removal; inadequate housing; and inadequate supervision––namely, that MC1 was forced to parent

MC2. April and Donald stipulated to the conditions that caused removal. The circuit court determined that April had not begun substance-abuse treatment and had tested positive for methamphetamine within the last month. MC1 was placed with her paternal aunt, and MC2 was placed in a foster home. Donald was given supervised visitation with MC2. A case plan was developed for April, including drug screening, drug-and-alcohol and psychological assessments, parenting classes, and counseling. April was ordered to follow the case plan, maintain stable employment and housing, and stay in contact with the Department. The court ordered that Donald would be assessed for individual counseling, and he was ordered follow all recommendations, including submitting to drug screening, attending counseling, and reporting his progress to the Department. The goal was reunification.

In the June 27 review order, Donald was still listed as MC2's putative father, and MC1's father had signed and delivered his acknowledgment of paternity to the court. MC1's father had become a fit parent by complying with his case plan and was granted unsupervised visitation with MC1. The court found that April presented no evidence that she had complied with the case plan in any way. As to Donald, it found that he had not established paternity or presented his acknowledgment of paternity to the court or obtained adequate housing or employment, a driver's license, or means of transportation.

A permanency-planning hearing regarding MC1 took place in November, and the permanency-planning hearing regarding MC2 was continued. Donald was listed as the parent on the heading of the order regarding MC2 was entered on December 8. The court determined that MC1 would be placed with her father, who was a fit parent and had

corrected the conditions that prevented placement at the time MC1 was removed from her mother's custody. April had still not obtained employment, but because she was not disabled and had been employed in the past, she was ordered to pay $125 in monthly child support to MC1's father.

The permanency-planning order regarding MC2 was entered on January 4, 2022. The heading listed Donald as MC2's father, though no finding of paternity was made. The circuit court found that both parents had undergone psychological evaluations and attended parenting classes and counseling. The court found that April admitted that she could not take custody of MC2 and that her circumstances were "fragile and [she] cannot get to services even with assistance and the court continues to have a concern for the relationship between the parents." The court found that Donald was homeless and had no steady income, he had unresolved criminal issues, and was not in counseling. Neither parent had obtained a driver's license or a car, the no-contact order between them had impeded their ability to work together, and domestic violence had come to light after the children were removed from April's custody. The court found Donald indigent and appointed an attorney to represent him.

The Department filed a petition for termination of April's and Donald's parental rights to MC2, citing three statutory grounds: twelve-month failure to remedy; subsequent factors arising since the filing of the original petition; and aggravated circumstances. The Department asserted that MC2's foster parents and the LeMasterses were interested in adopting him and that neither parent had corrected the conditions that caused removal.

Specifically, the Department alleged that neither Donald nor April had stable employment or housing, and both had consistently lied to the court and were still using drugs. Moreover, the Department alleged that April

> located a relative at the last minute. While it may appear that she just wants the child to be with family, she has also made comments that make it appear that she has found an arrangement so she can get the child back later without having to complete the services in this case.

At the January 31 termination hearing, Donald testified that he lived with his mother, uncle, and grandmother in Springdale in a three-bedroom house, and he slept at that house five or six nights a week. He testified that if he was given custody of MC2, his mother would move out so that MC2 would have his own room. Donald stated that he is self-employed as a mechanic and kept receipts in CashApp, Chime, and Venmo. He explained that he drove (without a license) to his customers' houses and worked on their cars in situ. He had not had a license for twenty years due to his failure to pay $20,000 in fines and fees. Donald contended that he made about $2000 in January, and he did not pay rent, though he occasionally helped with the utilities. He testified that he would provide for MC2 by "work[ing] my ass off." Donald explained that at work, April handled the paperwork and customers, and she ran errands for him. Donald admitted using methamphetamine within the past week, and he stated that he had used meth for about fifteen years. He admitted that he has a drug problem and claimed that his drug counselor had blown him off and never returned his phone call. He said that he spent about $200 to $300 a month on groceries, and about $200 a month on meth. Donald explained that he lived with April in her home

in Lincoln for about two months, but he moved in with his mother in August 2021. Donald stated that the domestic-battery charges against him had been pending for around eight months, and there was a no-contact order between him and April. Donald explained that they had not resolved the no-contact order, but they had both filed affidavits and were trying to take care of the paperwork. Donald stated that he had completed one or two parenting classes, but he had been busy working, averaging sixty hours a week in January. He wanted MC2 to be placed with April's half sister and her husband, Leticia and Joe LeMasters, in Oklahoma. Donald said that the home study was pending at the time of the hearing, and though the LeMasterses had been approved, they were still waiting on paperwork.

April testified that she and Donald chose to live in Lincoln to help them get away from drugs and people they knew who used drugs. They signed the lease on a home through the Seven Hills Homeless Shelter in July 2021. April explained that the home is public housing, so they pay a portion of the rent, and gradually they will begin to pay the full amount. April stated that she did not have a driver's license or car, but they used Donald's mother's car, and they bought the landlord's car, which was still in the landlord's name. She explained she and Donald worked together but did not live together. She described her job duties as general assistant work—bidding the jobs, doing the paperwork, and bringing him tools if he needed them. April testified that she still had charges pending in Rogers, and her next court date would be in February. April stated that she attended parenting classes by Zoom, and she had completed seven or eight since the children had been removed from her custody. She stated that she had attended counseling until October but was not in counseling

presently due to a lack of appointments available and a conflict of interest that arose with one counselor who was also MC1's father's counselor. She was not taking her bipolar medication because she was unable to get an appointment with a counselor, and she had never attended drug rehab. April asserted that no drug treatment was recommended, and it was determined that "counseling should suffice." She claimed that she had been sober from March to August or September 2021 and had relapsed after that. April explained that she was trying to get into a sober-living house, but she also stated, "I'm not a big group of people person, so NA and Celebrate Recovery are kind of not my thing. . . I don't think would benefit because it would be too stressful, you know." April stated she used meth the week before with Donald and that Donald's estimated expense of $200 a month for meth included her usage. She explained that the domestic-violence issues went hand in hand with their drug use. April wanted MC2 to go live with her half sister, Letiticia LeMasters, and her husband, Joseph, and she denied that she would move to Oklahoma to be near MC2 while she continued to use drugs. April explained that she saw her estranged half sister at a funeral in late August 2021, and they agreed that she would take MC2. The caseworker filled out the wrong paperwork, and there was a six-week delay while the error was sorted out. She testified that the LeMasterses had been married fifteen years, have no criminal history or a history of drug use, were employed in stable jobs, and have two teenaged children of their own.

Caseworker Jasmine Miller testified that she supervised the visitation between April and MC2 and that visitation initially went smoothly; however, within the last two months, April had become less communicative. Miller stated that April "would come really tired. Not

as talkative, kind of loungy so that's when I started noticing a difference in her[.]" Miller stated that April had tested positive for methamphetamine and amphetamines at visitation. About six weeks prior to the hearing, Miller observed April dipping her urine-sample cup into the toilet, and she believed that April's drug screens had not been accurate throughout the case. Miller testified that she was suspicious of the negative screens because April was on Suboxone, which should have shown up on the screens but did not. April also came to visitation with open wounds and "acting and looking high in the face." Miller also stated that April told her that sometimes Donald received meth in exchange for working on customers' cars. Miller recalled a time when April told her that she wanted to leave Donald, but she was dependent on him and could not. She stated that she had not seen any growth in April, "only backsliding," and that MC2 is doing very well in foster care. Miller stated that April told her she wanted MC2 to go to her sister so that "she can go there all the time and see him and spend as much time with him and they were going to let her see him a lot and she's going to be a part of his life."

At this point in the hearing, there was a discussion among the parties regarding how to spend the remaining scheduled time, and the court decided not to take testimony from the LeMasterses. Dr. Laura Rowletts, the family advocate at MC2's Head Start program, testified that MC2 was doing "really, really well" and that he was eating well, he was making friends, and his foster parents were good at checking in on his progress. MC2, she testified, was very bonded to his foster parents. Karen Lee, the caseworker, stated that MC2 is adoptable and healthy, and the foster family was interested in adopting him. Lee testified

that the Department had completed a home study on the LeMasterses, and when she had checked a few days before the hearing, the report was still pending. Lee stated that she had concerns about placing MC2 with the relatives because they had met MC2 only once, and there was no bond. Lee also expressed concern that April told her that she would still be in MC2's life if he was placed with her half sister. Lee admitted that she had filled out the wrong paperwork but that she did not intentionally slow down the process, and she submitted the paperwork on October 8. Tad Teehee of the Cherokee Nation ICWA Department testified that the Cherokee Nation recommended that the parents' rights be terminated, and he stated that the Department had made active efforts to prevent the breakup of an Indian family. Teehee testified that the parents' drug use and instability posed potential mental and physical harm to MC2. Teehee stated that there was no relationship between MC2 and the LeMasterses, and the foster parents were his family.

The court took a break to try to obtain the Interstate Compact on the Placement of Children (ICPC) paperwork. After the break, Karen Lee testified that she talked to her supervisor, who stated that there was no update on the report. She testified that her supervisor said that the Oklahoma authorities had expressed some concern "about boundaries with the biological mom and the relative." Parent counsel jointly requested a continuance until the home-study report was available. The court invited counsel to present "your legal argument that would argue for not terminating parental rights, even if we had a—a placement—a potential placement[.]" Parent counsel asserted that the LeMasterses are good, reliable relatives, and the court should give them preferential consideration. Counsel

requested a continuance until the report was available, arguing "to really hear the balance of this, the court needs to hear what Oklahoma has said regarding the ICPC." The court denied the motion and found that the home study had no bearing on the termination because MC2 was not in relative custody at the time of termination, and relative placement does not have an impact on the court's determination of whether termination is in the child's best interest. It found that the LeMasterses' testimony was not relevant because there was no approved home study, and it did not have the authority to place MC2 in their home without one. Additionally, the court found that

> the Court determined at the permanency planning hearing that the goal of this case should be adoption and whether -- and the independent of which family is finally able to adopt this child that the issue of a relative placement does not prevent the Court from terminating parental rights in order to make the child available for adoption, which is the permanency plan that the Court had previously determined was in the best interests of this child.

The circuit court entered the order terminating April's and Donald's parental rights on March 3. The court found two statutory grounds: twelve-months failure to remedy and subsequent factors. The court found that the following facts supported these grounds. MC2 was removed from the home due to parental drug use. At the time of removal, MC2's hygienic needs were left untended by his parents. During the case, DNA testing proved that Donald is MC2's father. The Department made reasonable and active efforts to provide services, including referrals for counseling, a drug-and-alcohol assessment, a psychological evaluation, drug screening, visitation, an ICPC home-study request, case-plan staffings, hair-follicle testing, and parenting classes; however, neither parent was able to remedy their drug

use. Both parents admitted regular methamphetamine use, neither had attended counseling consistently or completed parenting classes, and both had criminal charges preventing them from being able to offer an appropriate home. Domestic violence came to light and continued during the case, and neither could get a driver's license until the fines and fees were paid. The court found that it was in MC2's best interest to terminate April's and Donald's parental rights, and at least two families were interested in adopting MC2. The court determined that the ongoing meth use and domestic violence presented potential harm to MC2 and could result in serious mental or physical harm. The court noted that an ICPC home study was pending on relatives in Oklahoma and was pending at the permanency-planning hearing when the court changed the goal to adoption. The court found that "independent of when adoption is achieved, relative placement does not prevent termination of the parental rights in order to free the child for adoption." The Cherokee Nation supported the court's decision to terminate as well as the finding that the Department made active efforts.

On March 24, April and Donald filed an amended joint motion for reconsideration of the decision to terminate their parental rights pursuant to Rule 60. They argued that Leticia and Joseph LeMasters were improperly excluded from the termination hearing because the home study had been approved, and they were awaiting written approval at the time of the hearing. The court erred, they asserted, by not allowing the LeMasterses to testify and for not continuing the termination proceeding until a written copy of the home study was ready; thus, the circuit court terminated parental rights when a statutorily preferential

relative caregiver had been approved. The circuit court did not rule on the motion. April and Donald timely filed their notice of appeal.

II. *Standard of Review*

We review termination-of-parental-rights cases de novo. *Shawkey v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 2, at 4, 510 S.W.3d 803, 806. At least one statutory ground must exist, in addition to a finding that it is in the child's best interest to terminate parental rights; these must be proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341 (Supp. 2021). In making a "best interest" determination, the circuit court is required to consider two factors: (1) the likelihood that the child will be adopted and (2) the potential of harm to the child if custody is returned to a parent. *Pine v. Ark. Dep't of Hum. Servs.*, 2010 Ark. App. 781, 379 S.W.3d 703. The "best interest" finding that must be supported by clear and convincing evidence. *Id.* The potential-harm analysis is to be conducted in broad terms. *Id.* The appellate inquiry is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *J.T. v. Ark. Dep't of Hum. Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). Credibility determinations are left to the fact-finder. *Kerr v. Ark. Dep't of Hum. Servs.*, 2016 Ark. App. 271, at 6, 493 S.W.3d 342, 346. The intent behind the termination-of-parental-rights statute is to provide permanency in a child's life when it is not possible to return the child to the family home because it is contrary to the child's health, safety, or welfare, and a return to the family home cannot be accomplished in a reasonable period of time as viewed from the child's perspective. Ark. Code Ann. § 9-27-341(a)(3).

B. Points on Appeal

1. *Donald's parental status*

The parties agree that Donald's parental rights to MC2 could not be terminated on either of the statutory grounds cited by the circuit court because he was never determined to be MC2's parent. Donald eventually was listed in the heading of the pleadings as the parent; however, the circuit court never made a specific finding that he is a parent. Recently, this court handed down a case involving the same issue, reversing the circuit court's termination decision and remanding for the circuit court to make the necessary finding. *Kugler v. Ark. Dep't of Hum. Servs*, 2022 Ark. App. 485, 656 S.W.3d 1.

The subsequent-factors statutory ground provides that the court may terminate parental rights when

> other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)*.

The twelve-months ground similarly requires that one be a parent. Parental rights may be terminated on this ground when

> a juvenile has been adjudicated by the court to be dependent-neglected and has continued to be out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

Ark. Code Ann. § 9-27-341(b)(3)(B)(i)*(a)*.

This court reversed Kugler's termination and remanded to the circuit court, holding that he was identified as the putative parent at the outset of the case but had never established paternity. We held that because "the circuit court never entered an order expressly finding him to be a parent, Kugler's rights had not attached to be terminated." *Kugler*, 2022 Ark. App. 485, at 11, 656 S.W.3d at 8. In *Earls v. Arkansas Department of Human Services*, 2017 Ark. 171, 518 S.W.3d 81, the supreme court held that Earls, who was listed as the putative father, had not been determined to be the biological parent, which was necessary to apply any statutory ground that required one be a "parent." The same is true in the instant case. Accordingly, we reverse Donald's termination and remand to the circuit court.

2. *The termination of April's parental rights*

a. Relative placement

April does not challenge the statutory grounds the circuit court relied on in terminating her parental rights. April does not challenge the circuit court's findings regarding MC2's adoptability and whether returning him to her custody would pose potential harm, and she does not challenge the ICWA-related findings. Instead, she propounds a limited best-interest argument that the circuit court's mistaken belief that "the relative issue was not relevant to the termination decision" underlies each of the court's three alleged errors. First, she contends that the circuit refused to consider relative placement, which rendered the court's best interest determination "incomplete and flawed." Second, she asserts that the circuit court erred when it refused to allow the LeMasterses to testify regarding "the relative issue." Third, she argues that the circuit court erred in denying the

request for a continuance to allow time to determine whether the ICPC home study had been approved. April has not demonstrated clear error in the circuit court's best-interest finding.

Arkansas Code Annotated section 9-27-329(d) (Repl. 2020) provides that in initially considering the disposition alternatives and at any subsequent hearing, the court shall give preference to the least restrictive disposition consistent with the best interest and welfare of the juvenile. A circuit court is permitted to set termination as a goal even when a relative is available and requests custody. *King v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 126, at 3, 620 S.W.3d 529, 53. This is 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. *Id.* Each termination-of-parental-rights case is decided on a case-by-case basis. *Migues v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 439, 586 S.W.3d 221. In all custodial placements by the Department in foster care or adoption, preferential consideration shall be given to a relative over a nonrelated caregiver if the relative caregiver meets all relevant child protection standards *and it is in the best interest of the child to be placed with the relative caregiver*. Ark. Code Ann. § 9-28-105 (Repl. 2020) (emphasis added).

April contends that the circuit court erroneously determined that the "the relative issue was not relevant to the termination decision" and that other errors flowed from this initial determination. She argues that this case is like *Prows v. Arkansas Department of Health*

& Human Services, 102 Ark. App. 205, 283 S.W.3d 637 (2008), in which the circuit court refused to exercise its discretion based on a misapprehension of the law. In *Prows*, the circuit court stated, "[T]his is probably one of the hardest cases I've had to decide . . . so I went back and started reading the Code . . . once I read the law it's actually crystal clear . . . if [MC] is not able to go home today, then I have to terminate . . . ." 102 Ark. App. at 208, 283 S.W.3d at 639. *Prows* is inapplicable here because the court did not misapprehend the law. The circuit court considered the issue of MC2's possible placement with the LeMasterses. In the ruling denying the continuance, the court stated that

> the reason given for the continuance does not have a bearing on the termination hearing. . . . based on *Robinson v. Arkansas Department of Human Services*, the 2017 case that said again, when the child is not in the custody of the relative at the time of termination that the consideration of placement with a relative does not have ~does~ does not impact the Court's determination of whether or not termination is in the child's best interest. So as of ~ so I'm going to find that the testimony of the relatives today is not relevant because the Court does not have the authority to place the child with the relatives unless we have an approved ICPC home study and we do not have that in evidence today.

Before ruling, the court asked counsel to present argument as if the home study had been approved. Counsel stated that there was a relative willing to take MC2, and relative placement was preferred. To this, the court responded that (1) the relative did not have custody of MC2 at that time, (2) the home study had not yet been approved, (3) without an approved home study, the court had no authority to place MC2 with the relatives, and (4) MC2 and the relative had no relationship. Contrary to April's assertion, the circuit court considered the issue and stated the reason that, under the facts of this case, relative

placement was not dispositive of termination; thus, the court did not err in its initial analysis of the best-interest relative-placement issue.

We now turn to April's assertion that the circuit court erred in terminating her parental right because a less restrictive alternative could be achieved in placing custody MC2 with April's half sister. Considerations in making a best-interest finding may include the preservation of the children's relationship with a relative; the severance of child support from a parent; whether a less drastic measure could be employed, such as a no-contact order or supervised visitation; whether continued contact with the parent would be beneficial to the children if or when the children are living with a relative and not in an indeterminate state that is working against them; and whether the children are living in continued uncertainty. *Phillips v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 383, 585 S.W.3d 703. Consideration of these factors is not a statutory requirement, nor has this Court used *shall* in describing these factors. *See Ring v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 146, at 1, 620 S.W.3d 551, 557. The failure to consider such discretionary factors does not warrant reversal.

April asserts that her situation is similar to that in *Clark v. Arkansas Department of Human Services*, 2019 Ark. App. 223, 575 S.W.3d 578, in which we held that the circuit court's decision to forgo a relative-placement option in favor of termination was clearly wrong under the circumstances. The instant case is unlike *Clark* in that the grandparents identified in that case had a longstanding relationship with the minor children, and the circuit court was "clearly wrong about the grandparents not wanting to be involved in this case." *Id.* at 16, 575 S.W.3d at 587–88. The LeMasterses did not have any relationship with

MC2 and had met MC2 only once. The circuit court here acknowledged the LeMasterses' interest in placement; however, it chose MC2's need for permanency over further delaying the case and noted that termination was necessary for either the LeMasterses or the foster parents to adopt MC2. April's contention that *Borah v. Arkansas Department of Human Services*, 2020 Ark. App. 491, 612 S.W.3d 749, is applicable to the instant case is also not well taken. In *Borah*, this court held that the circuit court clearly erred by failing to consider placing the child with the paternal grandmother as less restrictive alternative to termination of parental rights. There, the paternal grandmother repeatedly reached out to the Department to have a home study conducted, but the Department did not turn in the ICPC paperwork until about a month before the termination hearing. In the instant case, April identified her half sister as a possible placement for MC2 about eight months into the case, and the caseworker filled out the paperwork incorrectly, which caused a six-week delay. Though similar, there is a critical difference between *Borah* and the instant case because in *Borah*, the child had a good preexisting relationship with her paternal grandmother, and termination would jeopardize that relationship. Moreover, in *Borah*, the circuit court did not acknowledge the possibility of placing the child with her grandmother, and the child's permanency was in question because the foster parents had not expressed an interest in adopting her, as is the case with MC2.

The relative preference outlined by the legislature must be balanced with the individual facts of each case. *Dominguez v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 2, 592 S.W.3d 723. MC2 was never in a relative's custody, and there was no demonstration of any

bond with the LeMasterses. Effectively, they are strangers to MC2. At the termination hearing, the caseworker testified that there were concerns that April expected to have access to MC2 if he was placed with her half sister, and she had plans to move to Oklahoma to be closer to him. April testified at the termination hearing that she had failed to comply with the no-contact order between her and Donald throughout the case; thus, there was evidence that even if there was a no-contact order, she would not follow it. April's contention that continuing the sibling relationship between MC1 and MC2 should weigh against termination is also without merit. Consideration of the sibling relationship is a factor that the court may consider in a termination decision; however, it is not mandatory. The circuit court noted that the siblings had visitation throughout the case and that visitation would continue if parental rights were terminated. This court recently held that when it is expected that the relationship between siblings will continue after termination, then the court's best-interest finding is not clearly erroneous based on legal severance of the sibling relationship. *See Jackson v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 156; *Allen-Grace v. Ark. Dep't of Hum. Servs*, 2019 Ark. App. 286, 577 S.W.3d 397.

Considering the facts of this case and given our high deference to the circuit court's determination of the evidence and the credibility of the witnesses, we cannot say that the circuit court clearly erred when it determined that terminating April's parental rights was in MC2's best interest.

b. Denial of a continuance

April and Donald assert that the circuit court abused its discretion by denying the request for a continuance to allow time for the written ICPC report to become available. We disagree.

A motion for continuance shall be granted only upon a showing of good cause and only so long as is necessary. *Smith v. Ark. Dep't of Hum. Servs.*, 93 Ark. App. 395, 400–01, 219 S.W.3d 705, 708 (2005) (citing *Green v. State*, 354 Ark. 210, 118 S.W.3d 563 (2003)). In *Smith*, this court stated as follows:

> The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. When deciding whether a continuance should be granted, the trial court should consider the following factors[:] (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness's attendance in the event of postponement; (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. Additionally, the appellant must show prejudice from the denial of a motion for continuance.

The circuit court did not act improvidently or without due consideration when it denied the request for a continuance. Donald testified that that he learned that the ICPC had been approved a week before the hearing, and neither April nor Donald requested a continuance during that week, or even before the hearing commenced when it was apparent that the report had not been obtained. The first request for a continuance was well after the hearing had begun. When deciding whether to grant a continuance, the circuit court should consider the diligence of the movant, and we have held that a lack of diligence alone is sufficient to deny a continuance. *Williams v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 194,

at 7, 575 S.W.3d 415, 419. We further conclude that April and Donald also failed to demonstrate prejudice because there is no evidence before us to show the effect the home study might have had on the circuit court's decision. The circuit court ruled that

> [t]here is an ICPC home study pending on a relative at this time. That ICPC home study was pending at the time of the permanency planning hearing but the Court finds that the Court determined at the permanency planning hearing that the goal of this case should be adoption and whether – and the independent of which family is finally able to adopt this child that the issue of a relative placement does not prevent the Court from terminating parental rights in order to make the child available for adoption, which is the permanency plan that the Court had previously determined was in the best interests of this child

The circuit court heard testimony that the LeMasterses were likely to be approved, and the report was forthcoming. About two months after the termination hearing, April filed the motion for reconsideration in which she asserted that the home study had been completed, and the LeMasterses had been approved. In the motion, Blankenship states that she attached the home-study report; however, the report is not in the record for our review.

The court considered the situation and, in its discretion, chose MC2's need for permanency over continuing the case until the report could be obtained. As we discussed above, the circuit court considered the relative placement, even requesting counsel's statements on that issue. The circuit court's ruling that "the reason for the continuance" had "no bearing" on the termination hearing, if it is examined in the context of the entire hearing, reflects that there was no written ICPC report necessary for relative placement, and MC2 needed permanency. April has failed to demonstrate that the circuit court erred or that prejudice occurred because of the denial of the continuance.

c. The LeMasterses' testimony

April argues that the court's decision to exclude the LeMasterses' testimony is reversible error. We disagree.

This court will not reverse a circuit court's ruling on the admissibility of evidence absent a manifest abuse of discretion. *Hooks v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 687, 536 S.W.3d 666. Arkansas Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Brown v. Ark. Dep't of Hum. Servs.*, 2015 Ark. App. 725, at 6, 478 S.W.3d 272, 276.

The court ruled that the LeMasterses' testimony was irrelevant, stating, "I don't know that it matters what I hear from them at this time because the law prohibits me from placing the child with them without an approved ICPC home study." Counsel explained that the LeMasterses would testify that the home study had been approved, and they were awaiting written documentation. The court recessed to obtain the approved study if it was available. When the parties returned, it was determined that "there's still no approval." There was no request to hold open the record for the home study, no proffer was made regarding what the LeMasterses' testimony would be aside from that the home study had been approved. Even if there was judicial error in an evidentiary ruling, this court will not reverse unless the appellant demonstrates prejudice. *Joslin v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 273, 577 S.W.3d 26. The LeMasterses' anticipated testimony that the report was available was repeatedly testified to; thus, no prejudice resulted from excluding the testimony.

Affirmed in part; reversed and remanded in part.

HARRISON, C.J., and THYER, J., agree.

James & Streit, by: *Jonathan R. Streit*, for separate appellant Donald Ross.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for separate appellant April Blankenship.

Kaylee Wedgeworth, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

Dana McClain, attorney ad litem for minor children.