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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-22-427

	Opinion Delivered May 10, 2023
KEVIN JOHNSON APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72JV-21-83] HONORABLE DIANE WARREN, JUDGE AFFIRMED; MOTION TO WITHDRAW GRANTED

WENDY SCHOLTENS WOOD, Judge

Kevin Johnson appeals the Washington County Circuit Court's order terminating his parental rights to his daughter, Minor Child (MC), born on January 30, 2021. Johnson's attorney seeks to be relieved as appellate counsel and has filed a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(j) (2022). We affirm and grant counsel's motion to withdraw.

On January 31, 2021, the Arkansas Department of Human Services (DHS) placed an emergency hold on MC and, three days later, filed a petition for emergency custody and dependency-neglect against Marisa Nelson, MC's mother, and Johnson. The affidavit attached to the petition stated that MC had been born with clinical signs of drug withdrawal,

Nelson had tested positive for methamphetamine at MC's birth, Johnson had tested positive for THC the same day, and the couple did not have an adequate child-care plan or support system.

On February 3, the circuit court granted the petition for emergency custody and subsequently found probable cause to continue MC's custody with DHS. The court found that MC could not be returned to Nelson's custody because, by her own admission, she continued to use illegal drugs. The court also found that MC could not be placed in Johnson's custody because he resided with Nelson, he was not prepared to take MC, and he had no child care for her while he was working. The court ordered Johnson to submit to a hair-follicle drug screen by March 23, 2021, and authorized him to have unsupervised visitation with MC at least four times a week.

At the adjudication hearing on March 29, the parties stipulated to the allegations in the petition and the accompanying affidavit, and the court found MC dependent-neglected due to parental unfitness. The court ordered services, continued all previous orders, and set the goal of the case as reunification.

On May 20, DHS filed a motion to modify Johnson's unsupervised visitation to supervised visitation alleging that Johnson (1) had missed four of seven visits with MC without a reasonable cause; (2) had not been in contact with DHS until May 19, when he came to the DHS office and said he had not maintained contact or consistently visited MC because he was mad at DHS for taking her; (3) had not submitted to the hair-follicle test ordered in February; (4) refused to be screened for drugs on May 19; and (5) was not

participating in services. The motion also alleged that Nelson admitted that she and Johnson would test positive for methamphetamine if they were screened. The court granted DHS's motion on May 21 and modified visitation as requested.

Following their visit to the DHS office on May 19, Nelson and Johnson left for Wisconsin and resided there until sometime in September. In June, the court held a review hearing via Zoom, and in a June 27 review order, the court found that both parents remained unfit and that MC's health and safety could not be protected if she were returned to them. The court noted that Johnson testified that he has a well-established, untreated substance-abuse problem and felt he should not have visitation with MC until he was sober. The court also found that DHS had made reasonable efforts to finalize a permanency plan for MC, had complied with the case plan and the court's orders, and had made reasonable efforts to provide family services. The court found that despite these efforts, Johnson had not complied with the case plan or the orders of the court, and he had not demonstrated progress toward the goal of reunification with MC. Specifically, the circuit court found that Johnson had been inconsistent in submitting to drug screens and, when he did submit, had tested positive for methamphetamine; he had not completed the hair-follicle drug screen; he had not submitted to a drug-and-alcohol assessment; he had not participated in counseling despite his continued substance-abuse issues; and he lacked stable housing and the means to care for MC. The court ordered Johnson to comply with the case plan and obtain stable housing and employment. The circuit court found that the goal of the case was reunification with the concurrent goal of adoption.

At the permanency-planning hearing on October 4, both Nelson and Johnson admitted that they were still actively using methamphetamine. The court found Johnson remained unfit for the same reasons given in the review order. The goal of the case was changed to adoption, and the court appointed an attorney for Johnson.

On December 10, DHS filed a petition to terminate parental rights, alleging that termination was in MC's best interest and, as to Johnson, alleging the following statutory grounds: (1) aggravated circumstances, Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)* (Supp. 2021); (2) subsequent factors, Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)*; and (3) abandonment, Ark. Code Ann. § 9-27-341(b)(3)(B)(iv).

At the termination hearing on January 11, 2022, Nicole Netherton, a DHS family-service worker, testified that MC would be in danger if she were placed in her parents' custody because they continued to struggle with an untreated addiction to illegal substances, did not have stable housing or employment, and had not completed substance-abuse treatment. Netherton also stated that Johnson had not complied with the case plan or maintained contact with DHS. She said that he had missed thirty-five out of forty-five visits with MC and had missed twenty out of twenty-three of his weekly drug screens, refused two of the remaining three, and tested positive for the third one. Netherton testified that MC is adoptable and that she is happy, healthy, and doing well in foster care. Netherton explained that DHS explored relatives for placement of MC, including Nelson's mother, who was denied placement because she tested positive for methamphetamine, and Johnson's father, who was denied placement because he was on parole and has a history in the child-abuse-

and-neglect reporting system. Netherton reported that both Johnson's mother and his aunt, "Shannon," were unwilling to accept placement of MC.

Nelson testified that she and Johnson were living with Johnson's father in Arkansas. She admitted that she had attended only one drug-counseling session, had not submitted to drug screens, and was still using methamphetamine. She said her obstacle to becoming sober had been a lack of transportation and "everyday life." She said with an additional three months' time and transportation she could complete the treatment necessary to become sober and reunite with MC.

Johnson admitted at the termination hearing that he had been using methamphetamine for eighteen to nineteen years, was still using methamphetamine, and had used it two or three days before the hearing. He recognized that he needed help to overcome his addiction, yet he conceded that he had been given referrals for counseling and three referrals for drug rehabilitation but did not attend or complete the services. He candidly testified that because of his methamphetamine use, he is not able to appropriately function in society. He also said that he was not employed, had unreliable transportation, and had no driver's license. He stated that his last visit with MC was about six weeks prior to the hearing and that the visit was awkward because he does not know her well. Nevertheless, Johnson testified that he wanted to raise MC with Nelson and thought that, with more time, he and Nelson would be able to take care of MC. When asked with whom he would like MC to be placed if she could not be placed with Johnson, he said, "I guess Samantha Irvin," the guardian of Nelson's son.

At the conclusion of the hearing, the circuit court orally granted DHS's petition to terminate Johnson's parental rights to MC. The circuit court found that termination was in MC's best interest and that three statutory grounds supported termination: aggravated circumstances, subsequent factors, and abandonment. On April 25, 2022, the court entered a termination order restating its finding. Johnson appealed from this order.[1]

As previously stated, Johnson's attorney has filed a motion to withdraw, arguing that the appeal has no merit. Counsel's motion is accompanied by a brief that lists all rulings adverse to his client and explains why each ruling does not present a meritorious ground for reversal. The clerk of this court mailed copies of the brief and motion to Johnson at his last known address, informing him of his right to file pro se points for reversal. He has not done so.

The first adverse ruling discussed by Johnson's attorney is the circuit court's termination decision. This court reviews termination-of-parental-rights cases de novo. *Lloyd v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 461, at 7, 655 S.W.3d 534, 540. Termination requires a finding of at least one statutory ground and a finding that termination is in the child's best interest. *Id.* at 8, 655 S.W.3d at 540. Arkansas Code Annotated section 9-27-341(b)(3) requires a circuit court's order terminating parental rights to be based on clear and convincing evidence. *Lloyd*, 2022 Ark. App. 461, at 8, 655 S.W.3d at 540. Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm

[1]The order also terminated Nelson's parental rights to MC, but Nelson is not a party to this appeal.

conviction as to the allegation sought to be established. *Baker v. Ark. Dep't of Hum. Servs.*, 340 Ark. 42, 48, 8 S.W.3d 499, 503 (2000). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the circuit court's finding was clearly erroneous. *Payne v. Ark. Dep't of Hum. Servs.*, 2013 Ark. 284, at 3. 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.* This court gives a high level of deference to the circuit court because it is in a far superior position to observe the parties before it and to judge the credibility of the witnesses and the weight of the evidence. *Id.*

Johnson's counsel argues that there is no merit to an appeal of the circuit court's aggravated-circumstances finding. This finding was premised on the fact that there was little likelihood that services would result in successful reunification. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)*, *(B)(i)*. Johnson's counsel argues that the evidence shows that Johnson has a longstanding, untreated addiction to methamphetamine. He was offered services to address his addiction, including entry into a residential program, but he took no steps to avail himself of the services. Counsel argues that Johnson was not in compliance with the case plan or the orders of the court. He never submitted to the follicle-hair screening, and he did not attend weekly drug screens. He admitted using methamphetamine days before the termination hearing. Johnson also lacked steady employment, stable housing, and a plan to care for MC throughout the case. He missed thirty-five out of forty-five visits with her, and he indicated that his last visit was awkward because he does not know MC

well. On this record, the circuit court did not clearly err in finding that Johnson subjected MC to aggravated circumstances because there was little likelihood that services would result in successful reunification. *See Shaffer v. Ark. Dep't of Hum. Servs.*, 2016 Ark. App. 208, at 4–6, 489 S.W.3d 182, 185–86 (affirming little-likelihood finding where father's primary obstacle to reunification—his methamphetamine addiction—remained unresolved due to his failure to attend drug treatment); *Smith v. Ark. Dep't of Hum. Servs.*, 100 Ark. App. 74, 82–83, 264 S.W.3d 559, 565–66 (affirming little-likelihood finding for lack of significant progress where father's drug use persisted throughout the case, he did not follow treatment recommendations, and he remained unemployed). Accordingly, we hold that there is no merit to an appeal of this finding.

Johnson's attorney also argues that there is no merit to an appeal of the circuit court's best-interest finding. When making the best-interest finding, a circuit court must consider (1) the likelihood that 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. *Migues v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 439, at 10, 586 S.W.3d 221, 227–28.

Johnson's counsel points out that Netherton testified that MC is adoptable, which this court has held supports an adoptability finding by the circuit court. *Cole v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 121, at 6–7, 543 S.W.3d 540, 544. Johnson's counsel also contends that the evidence demonstrates that MC would be subjected to potential harm if

returned to Johnson because he has a drug addiction, has failed to remedy his addiction, and has no stable home or employment.

This court has held that evidence of a parent's continued drug use or failure to comply with court orders constitutes sufficient evidence of potential harm. *Johnson v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 313, at 11, 603 S.W.3d 630, 636. Considering the evidence, the circuit court's finding that termination of Johnson's parental rights was in MC's best interest was not clearly erroneous and presents no nonfrivolous basis for an appeal.

Counsel identifies four other rulings that were potentially adverse to Johnson. One occurred before the termination hearing began, when Johnson's counsel called into question whether Johnson had received service of the termination petition and notice of the hearing. However, the record reflects that Johnson's counsel conceded these issues; therefore, there was no ruling adverse to Johnson.

Johnson's counsel next discusses the circuit court's denial of Johnson's request for three additional months to work toward reunification with MC. Counsel argues that there is no merit to an appeal of this issue because the evidence shows that Johnson did not make any progress in his case, he admittedly used drugs just days before the termination hearing, he "did not even know his daughter," and he did not diligently comply with the case plan.

In terminating Johnson's parental rights—and thereby denying his request for additional time—the circuit court noted his longstanding addiction to methamphetamine and his failure to avail himself of the many services offered by DHS to make meaningful progress toward overcoming it. A parent's past behavior is often a good indicator of future

behavior. *Shaffer*, 2016 Ark. App. 208, at 4–5, 489 S.W.3d at 185. And a child's need for permanency and stability may override a parent's request for more time to see if he can change his past behavior. *Id.* at 5–6, 489 S.W.3d at 185. We hold that the circuit court's denial of Johnson's request for additional time was not clearly erroneous and that there is no merit to an appeal of the denial.

The next adverse ruling that Johnson's attorney discusses is the circuit court's failure to consider placing MC with Samantha Irvin, the guardian of Nelson's son. Johnson's counsel argues that there is no merit to an appeal of this adverse ruling because DHS looked at several relative placements for MC, but no relative was willing or appropriate. Counsel also argues that Irvin is not MC's relative.

We hold that there is no merit to an appeal of this adverse ruling because it is not preserved for appellate review. In *Hile v. Arkansas Department of Human Services*, 2023 Ark. App. 173, at 7–8, the appellants contended that the circuit court erred because it did not consider relative placement as part of its best-interest analysis. This court affirmed without reaching the merits of the argument because the appellants failed to develop it at the termination hearing. While noting that one of the appellants' attorneys argued in closing, "I think the Department should have made better efforts to find those other family members, especially since they knew in January that the parents were incarcerated," this court held that there was no indication as to the purpose of the statement, and there was nothing to tie it to the best-interest determination. *Id.* at 8. Moreover, the circuit court's termination order in *Hile* made no reference to relative placement at all. *Id.*

In the instant case, Johnson likewise failed to sufficiently develop the argument below that the circuit court failed to consider relative placement as part of its best-interest analysis. While Johnson mentioned in his hearing testimony that he "guess[ed]" he would like MC to go to Irvin, he failed to raise the issue in closing argument or at any other time during the hearing. Moreover, he failed to obtain a ruling on it. Accordingly, it is not preserved, and there is no merit to an appeal of this argument.

The final adverse ruling discussed by Johnson's attorney is the circuit court's order that modified Johnson's visitation from unsupervised to supervised. Counsel further notes that the circuit court ruled on DHS's motion without affording Johnson ten days to respond to it under Arkansas Rule of Civil Procedure 6(c) (2022). However, Johnson's counsel asserts that there is no merit to an appeal of this adverse ruling because the argument was not raised below. We agree. This court will not address arguments that are raised for the first time on appeal. *Kloss v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 389, at 9, 585 S.W.3d 725, 731. Accordingly, this issue presents no nonfrivolous basis for an appeal.

From our review of the entire record and the brief presented by Johnson's counsel, we conclude that an appeal would be wholly frivolous in this case. Therefore, we affirm the order terminating Johnson's parental rights and grant his counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

HARRISON, C.J., and GLADWIN, J., agree.

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

One brief only.