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ARKANSAS COURT OF APPEALS
DIVISION III
No. CV-22-793

RICHARD REYNOLDS

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILD

APPELLEES

Opinion Delivered May 17, 2023

APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. 71JV-20-12]

HONORABLE SUSAN WEAVER,
JUDGE

AFFIRMED

BART F. VIRDEN, Judge

The Van Buren County Circuit Court terminated the parental rights of appellant Richard Reynolds to his minor child (MC), a daughter born in 2011.¹ On appeal, Reynolds argues that the trial court erred in terminating his rights because the facts demonstrate that he was not permitted to meaningfully participate in the case, which deprived him of even basic due process. Reynolds further contends that, even if he was afforded due process, the trial court erred in terminating his parental rights because there was insufficient evidence of grounds to support termination. We affirm.

¹The record indicates that MC's mother, Crystal Lowery, voluntarily consented to termination of her parental rights pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(v) (Supp. 2021).

I. *Background*

On June 2, 2020, the Arkansas Department of Human Services (DHS) filed a petition for dependency-neglect with respect to MC and her two half siblings.² In the affidavit attached to the petition, a family-service worker attested that DHS had placed a hold on all three children on May 30 after police responded to the home of Karlie Wacholtz following the report of a disturbance; specifically, Wacholtz and her boyfriend were drunk and physically fighting. It was noted that, although Reynolds had legal custody of MC, she had been living with Wacholtz for more than six months because Reynolds was in federal prison after having been convicted of two counts of being a felon in possession of a firearm.

On June 3, 2020, the trial court entered an ex parte order for emergency custody and appointed a lawyer, Tyler Henderson, to represent Reynolds. A probable-cause order was entered on August 18, and the order indicates that a Zoom hearing was held for which Henderson was present.³ On November 11, MC was adjudicated dependent-neglected due to neglect through inadequate supervision and the parental unfitness of Reynolds. The order indicates that Henderson was present at the hearing to represent Reynolds, who was still in prison. The trial court set reunification as the goal.

²There is a companion case, No. CV-22-794, involving MC's two half siblings, a sister born in 2008 and a brother born in 2015. Their mother is Karlie Wacholtz.

³The introductory paragraph of this order omits Reynolds's name and states that Henderson was present to represent Lowery. The subsequent adjudication order suggests that Henderson had been representing *both* Reynolds and Lowery but that, going forward, Lowery would be appointed separate counsel.

Review orders were entered on January 11 and March 5, 2021. It was noted that Reynolds had remained in prison and that Henderson had represented Reynolds at both review hearings. The trial court continued the goal of reunification in each order but added a concurrent goal of adoption. In a permanency-planning order entered August 30, the trial court changed the goal to adoption. The order noted that Reynolds, who was still in prison, had been represented by Henderson at the hearing.⁴

DHS and the attorney ad litem first filed a petition to terminate Reynolds's parental rights on August 25, but subsequent petitions were filed on January 7 and April 29, 2022. A hearing was eventually held on June 1 at which both Reynolds and Henderson appeared. Reynolds testified, as did Michael Blox, the federal case manager at City of Faith Reentry Service, a halfway house where Reynolds resided after his release from prison. Lorie Hutto, a DHS supervisor who had been involved with the case since its inception, also testified. Following the hearing, the trial court entered an order terminating Reynolds's parental rights on several grounds listed in Ark. Code Ann. § 9-27-341(b)(3)(B), including (i)(a) (twelve-month failure to remedy); (vii)(a) (subsequent factors or issues); (viii) (sentenced in a criminal proceeding); and (ix)(a)(3)(B)(i) (aggravated circumstances—little likelihood that services will result in successful reunification).

II. *Standard of Review*

⁴While Reynolds claims that this hearing was held on June 2, 2020, the record indicates that it was held on June 2, 2021.

In order to terminate parental rights, a trial court must find by clear and convincing evidence that termination is in the best interest of the juvenile, taking into consideration (1) the likelihood that the juvenile 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 of clear and convincing evidence as to one or more of the grounds for termination listed in Ark. Code Ann. § 9-27-341(b)(3)(B).

The appellate court reviews termination-of-parental-rights cases de novo but will not reverse the trial court's ruling unless its findings are clearly erroneous. *Price v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 140. 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 determining whether a finding is clearly erroneous, an appellate court gives due deference to the opportunity of the trial court to judge the credibility of witnesses. *Id.*

III. Discussion

A. Due Process

Reynolds argues that DHS “completely abrogated” its duty to include him in the case until termination was sought. He claims that he did not have counsel until September 1, 2021, when Henderson officially entered his appearance in case No. CV-22-794—the companion case involving MC’s half siblings. Reynolds asserts that he was stripped of his

parental rights “in the complete absence” of basic due process. Reynolds, however, is raising his due-process argument for the first time on appeal; thus, it is not preserved for our review. *Williams v. Ark. Dep’t of Human Servs.*, 2019 Ark. App. 280, 577 S.W.3d 402. We will not consider arguments made for the first time on appeal, even constitutional arguments, because doing so deprives the trial court of the opportunity to fully develop the issue. *Mixon v. Ark. Dep’t of Human Servs.*, 2019 Ark. App. 554, 590 S.W.3d 746.

We will note, however, that Reynolds was identified as MC’s father from the outset and made a party to the case. The trial court’s order entered as early on as June 3, 2020, indicates that a lawyer had been appointed to represent Reynolds. Although Reynolds was unable to be present at any of the hearings until the termination hearing because he was in prison out of state, the trial court’s orders indicate that Henderson was present at every hearing. See *Edwards v. Ark. Dep’t of Human Servs.*, 2016 Ark. App. 37, 480 S.W.3d 215 (affirming termination and rejecting a *Wicks* argument to the lack of a contemporaneous objection to alleged due-process violation because, although the father was not present at the termination hearing, his attorney had fully participated during the hearing, and there was no indication that the father’s due-process rights could not have been safeguarded in his absence).

B. Grounds for Termination

Reynolds argues that, even if he was afforded sufficient due process, the record does not support the grounds relied on by the trial court. Reynolds challenges each ground; however, we will address his argument regarding aggravated circumstances because proof of

only one statutory ground is sufficient to terminate parental rights. *Debiasse v. Ark. Dep't of Human Servs.*, 2022 Ark. App. 331, 651 S.W.3d 736. To support this ground, the trial court found that Reynolds had been permitted additional time to demonstrate stability after he was released from prison but that, instead of demonstrating stability, he was incarcerated twice. The trial court found that DHS had referred Reynolds for counseling but that he was incarcerated during two of the intakes and did not show up for the third. The trial court concluded that Reynolds was not committed to providing a stable environment for MC.

Reynolds argues that this ground requires some combination of the following: the offer of appropriate services; time to engage in those services; the incapacity or indifference to work those services, which results in unremedied issues that prevent reunification; and a finding that further services will not make a difference. Reynolds maintains that he was not offered services because he was in prison, yet the trial court found that he failed to comply with the case plan and that DHS had made reasonable efforts to reunify him with MC.⁵

A finding of aggravated circumstances does not require DHS to prove that meaningful services toward reunification were provided. *Cloninger v. Ark. Dep't of Human Servs.*, 2020 Ark. App. 282. Nevertheless, Hutto testified that she was not able to offer services to Reynolds while he was incarcerated in another state. She said that she had made referrals for a drug-and-alcohol assessment and counseling when Reynolds was released from prison in October

⁵Reynolds does not challenge the trial court's finding that termination of his parental rights was in MC's best interest. Any argument in that regard is therefore waived. *See, e.g., Watkins v. Ark. Dep't of Human Servs.*, 2021 Ark. App. 55.

2021 but that, by the time of his appointments, Reynolds was in the Pulaski County Detention Center (PCDC) for disciplinary infractions at the halfway house. When he returned to the halfway house in April 2022, Hutto made the referrals again, but Reynolds had not taken advantage of those services by the time of the termination hearing in June. Hutto testified that there were no other services DHS could offer Reynolds that would result in successful reunification with MC.

The testimony indicated that Reynolds was released from prison in October 2021, but he was sent to the PCDC in December for an infraction at the halfway house. Blox explained that after an investigation that infraction had been “recoded,” meaning that it had been reduced to a lesser offense. Reynolds returned to the halfway house in February 2022 but was sent back to the PCDC for a second time in March. In April 2022, he returned to the halfway house. According to Blox, Reynolds had been written up a total of six or seven times while at the halfway house. Moreover, Blox stated that at the time of the termination hearing, Reynolds had one outstanding disciplinary issue with the potential to send him back to the PCDC for a third time. We have recognized that a parent’s past behavior is often a good indicator of future behavior. *Murphy v. Ark. Dep’t of Human Servs.*, 2018 Ark. App. 426, 560 S.W.3d 465. Reynolds’s misbehavior at the halfway house following his release from prison does not bode well for the future likelihood of successful reunification with MC. See, e.g., *Kohlman v. Ark. Dep’t of Human Servs.*, 2018 Ark. App. 164, 544 S.W.3d 595 (affirming termination on aggravated-circumstances ground because father’s persistent criminal misconduct for which he was incarcerated for the majority of the case provided

support for the trial court’s conclusion that there was little likelihood that services would result in successful reunification between the father and his children); *Willis v. Ark. Dep’t of Human Servs.*, 2017 Ark. App. 559, 538 S.W.3d 842.

At the time of the termination hearing, MC had been in foster care for two years. A stable home is one of a child’s most basic needs. *Wright v. Ark. Dep’t of Human Servs.*, 2019 Ark. App. 263, 576 S.W.3d 537. Reynolds conceded that MC could not live with him at the halfway house. He testified that he would be free to live elsewhere in August 2022 and that he planned to live with his grandmother. Reynolds said that he will still have three years of supervised release beginning in August. He testified that he is currently “not in a place” to take care of MC. A child’s need for permanency and stability may override a parent’s request for additional time to improve his circumstances. *Wheeler v. Ark. Dep’t of Human Servs.*, 2020 Ark. App. 453, 607 S.W.3d 536. We are simply not left with a definite and firm conviction that the trial court made a mistake in terminating Reynolds’s parental rights on the basis of aggravated circumstances in that there is little likelihood that services would result in successful reunification with MC.

Affirmed.

THYER and HIXSON, JJ., agree.

Leah Lanford, 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.