Cite as 2024 Ark. App. 15

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-23-382

KIRSTIE MCCULLAR AND MARSHEON NUNN APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	Opinion Delivered January 17, 2024 APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT [NO. 56JV-21-117] HONORABLE CHARLES M. MOONEY, JR., JUDGE AFFIRMED; MOTIONS TO BE RELIEVED GRANTED

BART F. VIRDEN, Judge

This is a combined no-merit appeal from the Poinsett County Circuit Court order terminating the parental rights of Kirstie McCullar and Marsheon Nunn to their children, MC1 and twins, MC2 and MC3. 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) (2021), appellants' attorneys have filed separate motions to be relieved as counsel and separate no-merit briefs asserting that there are no issues of arguable merit to support an appeal. The clerk of our court sent copies of the briefs and the motions to withdraw to McCullar and Nunn, informing them of their right to file pro se points for reversal pursuant to Rule 6-9(j)(3); they have not done so. Having examined the record, we are satisfied that

there are no issues of arguable merit to support an appeal; therefore, we affirm the termination decision and grant counsel's motions to be relieved.

I. *Factual and Procedural History*

On October 10, 2021, the Arkansas Department of Human Services (Department) removed MC1, who was eighteen months old, and MC2 and MC3, both nine months old, from McCullar and Nunn's care and custody due to the parents' arrest for third-degree domestic battery, public intoxication, and three counts of endangering the welfare of a minor.

On October 12, the circuit court entered an order for ex parte emergency custody, and subsequently the parents stipulated to probable cause. In the probable-cause order entered October 27, the court ordered the parents to comply with the case plan and court orders, cooperate and stay in contact with the Department, watch the video "The Clock is Ticking," abstain from drug use, provide the Department with prescription information, complete parenting classes, obtain appropriate housing and employment, and provide the Department with a budget.

The adjudication hearing was held on November 16. The parties stipulated and the court found that the children were dependent-neglected. The court also noted that its finding was due to neglect as the result of the parents' alcohol use that led to domestic violence involving injuries to both parents and their subsequent arrest, which left the children without a caretaker. The parents were ordered to undergo drug-and-alcohol

assessment, psychological evaluation, anger-management and domestic-violence counseling, and follow all recommendations. The circuit court determined that the goal of the case was reunification.

The court conducted two review hearings. At the first hearing on March 1, 2022, the court heard evidence McCullar was "for the most part" not in compliance. She was incarcerated, failed to undergo the recommended treatment pursuant to the drug-and-alcohol assessment, tested positive for methamphetamine three times since November, and failed to complete anger-management or parenting classes. Additionally, McCullar had been arrested three times for violating the no-contact order regarding Nunn, charged with public intoxication twice, and charged with disorderly conduct and resisting arrest. She had attended only two out of nine visitations with her children, and both times she left early. Regarding Nunn, the court found that he had not complied with the case plan or orders of the court, and he had not demonstrated progress toward reunification. Specifically, he had not obtained a "regular residence" and was unavailable for home visits and random drug screens. He had not completed parenting or anger-management classes, and he was arrested along with McCullar for violating the no-contact order and charged with public intoxication. Nunn had attended two out of six visitations, and he left early both times. The court retained reunification as the goal of the case.

At the second review hearing on June 14, the court heard evidence that McCullar was still incarcerated, and she was not attending treatment or counseling sessions recommended pursuant to the drug-and-alcohol assessment. The Department was ordered to attempt to

provide services to McCullar despite her incarceration, and the court noted that she would be released August 22. The court found that Nunn had not complied with the case plan, benefited from services, or demonstrated any progress toward reunification. Specifically, he had not obtained regular housing and was unavailable for home visits or random drug testing. He had not completed parenting or anger-management classes, and he had not undergone drug-and-alcohol assessment. He requested reduced visitation, from four hours a week to two hours a week. The goal of the case remained reunification.

A permanency-planning hearing was held on October 11. In the permanency-planning order, the court found that McCullar had not complied with the case plan. Specifically, she had not completed parenting or anger-management classes and had not obtained stable housing, and after her release from her previous incarceration, she had incurred new charges for violating the no-contact order, public intoxication, and assaulting a police officer. The court found that Nunn had not complied with the case plan or the orders of the court by failing to obtain a regular residence, make himself available for home visits and random drug screens, and complete anger-management classes. Nunn missed several scheduled drug-and-alcohol assessments and did not complete the assessment until July. He had not resolved his legal issues. The goal was changed to adoption.

On January 9, 2023, the Department filed its petition to terminate parental rights alleging multiple statutory grounds: twelve months failure to remedy; subsequent factors; and aggravated circumstances with little likelihood that further services would lead to reunification. On February 28, the circuit court held a hearing on the petition at which time

it heard testimony from an adoption specialist, the Department caseworker, the foster mother, a paternal uncle, McCullar, and Nunn.

On March 10, the circuit court entered an order terminating McCullar and Nunn's parental rights, finding that the Department had proved each of the statutory grounds it had alleged on the bases of the parents' rearrests, housing and employment instability, lack of compliance with drug-and-alcohol treatment programs, and failure to attend counseling. Additionally, the court found that McCullar candidly admitted that she could not provide a home for the children that day. The court found that McCullar was more interested in her relationship with Nunn than with her children. There was evidence that MC1, MC2, and MC3 are adoptable, and the foster parent was interested in adopting all three children. The court determined that the children would be exposed to the potential for harm because of the parents' housing instability, potential exposure to domestic violence, and parental drunkenness. Additionally, the court addressed the parents' assertion that the Department failed to consider relative placement, finding that the "relatives were aware that this case was pending, and the mother admitted that the relatives were looked at and none have intervened." The court ordered that the parents were to receive further reunification services, including visitation, until the adoption was finalized.[1] McCullar and Nunn have filed timely

[1]The Department filed a petition for reconsideration in which it challenged the court's ruling that the parents would receive further services until the adoption was finalized. The Department contended that there was no statutory authority for continuing services after the parents' rights were terminated. The circuit court reversed this aspect of the order.

notices of appeal, and their attorneys have now filed separate no-merit briefs and motions to be relieved as counsel.

II. *Standard of Review*

Arkansas Supreme Court Rule 6-9(j)(1) allows counsel for an appellant in a termination case to file a no-merit brief and motion to withdraw if, after studying the record and researching the law, counsel determines that the appellant has no meritorious basis for appeal. In the brief, counsel must include an argument section that lists all circuit court rulings that are adverse to the appellant on all objections, motions, and requests made by the party at the hearing from which the appeal arose and an explanation why each adverse ruling is not a meritorious ground for reversal. Ark. Sup. Ct. R. 6-9(j)(1)(A). In evaluating a no-merit brief, we determine whether the appeal is wholly frivolous or whether there are any issues of arguable merit for appeal. *Linker-Flores*, *supra*; *Cullum v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 34, at 5–6.

We review termination-of-parental-rights cases de novo. *Holmes v. Ark. Dep't of Hum. Servs.*, 2016 Ark. App. 495, 505 S.W.3d 730. We will not reverse the circuit court's ruling unless its findings are clearly erroneous. *Id.*

III. *Discussion*

A. Statutory Grounds

To terminate parental rights, a court must find sufficient proof of one or more of the statutory grounds for termination. Ark. Code Ann. § 9-27-341(b)(3)(B) (Supp. 2021). Here, the court terminated McCullar's and Nunn's parental rights after it found three statutory

grounds to exist: abandonment, subsequent other factors, and aggravated circumstances. Although the circuit court found three statutory grounds for termination, we may affirm a termination on only one ground. *Cullum*, *supra.* We hold that there was ample evidence submitted to support the court's aggravated-circumstances finding.

A court of competent jurisdiction may terminate parental rights when the parent is found to have subjected any juvenile to aggravated circumstances. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)*. As applied in this case, aggravated circumstances means that "a determination has been or is made by a judge that there is little likelihood that services to the family will result in successful reunification." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(B)(i)*. To prevail on this ground, the Department was required to demonstrate that if appropriate reunification services were provided, there is little likelihood that reunification could be achieved. *Rocha v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 454, 637 S.W.3d 299; *Yarborough v. Ark. Dep't of Hum. Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). A parent can create this type of aggravated circumstance by not following through with offers of assistance, by not completing basic goals of the case plan, and when there is a lack of significant progress on the parent's part. *Collier v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 100, at 9, 641 S.W.3d 67, 73.

Here, the circuit court heard clear and convincing evidence in support of the aggravated-circumstances ground. McCullar and Nunn failed to comply with the case plan or show any progress toward reunification. The parents had been ordered to follow the recommendations stemming from drug-and-alcohol assessment and psychological

evaluation, and they failed to do so. McCullar and Nunn were arrested several times in which alcohol was a contributing factor. McCullar had been incarcerated for at least seven months, and both parents had pending criminal charges. Nunn did not exercise visitation, choosing to cut his visitation time in half. McCullar did not complete domestic-violence classes and violated the no-contact order regarding Nunn.

In her no-merit brief, McCullar's counsel asserts that there are no meritorious grounds for appeal. We agree. McCullar continued to suffer from housing instability; she had pending criminal charges relating to intoxication and domestic violence; she had not completed any of the programs ordered by the court, despite the Department's assistance; and she was simply not making the kind of progress necessary for reunification with her children. In Nunn's no-merit brief, counsel also asserts that there are no meritorious grounds for appeal, and again, we agree. Nunn almost completely failed to comply with the case plan, was charged with new offenses, continued to use drugs, was discharged from his substance-abuse treatment program because he had not attended scheduled meetings, and had been consistently unavailable for random drugs screens. Of the drug screens he did submit to, one had been tampered with.

These are the kinds of situations in which we have consistently found aggravated circumstances to exist. *See, e.g.*, *Cullum*, *supra* (father received various services but continued to test positive for drugs, suffer from housing instability, and have anger-management issues); *Kloss v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 389, 585 S.W.3d 725 (despite services, father continued to test positive for drugs and failed to take advantage of therapy and

counseling). We have frequently held that a parent's failure to benefit from the services provided demonstrates little likelihood that further services will result in a successful reunification. *Jones v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 299, 578 S.W.3d 312; *Reyes-Ramos v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 46, 571 S.W.3d 32; *Bentley v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 374, 554 S.W.3d 285. We therefore conclude that the circuit court's findings are supported by the testimony and evidence presented at the termination hearing and that there would be no meritorious ground for arguing that the statutory grounds were not sufficiently proved.

B. Best Interest

In addition to finding the existence of at least one statutory ground in order to terminate parental rights, a court must also find that termination of parental rights is in the child's best interest, taking into consideration two statutory factors: (1) the likelihood of adoption if parental rights are terminated and (2) the potential harm caused by continuing contact with the parent. Ark. Code Ann. § 9-27-341(b)(3)(A). Here, the court considered both statutory factors in light of the overall evidence, finding that termination was in the children's best interest. Both McCullar and Nunn's counsel contend that there are no issues of arguable merit for reversal in challenging this best-interest finding.

Regarding adoptability, the circuit court heard testimony from the adoption specialist that the children are adoptable, and the foster parent testified that she wanted to adopt the children. We have frequently held that the testimony of an adoption specialist alone is sufficient to support a circuit court's adoptability findings; therefore, we agree with counsel

that there could be no meritorious challenge on this point. *See Hardiman v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 542, 589 S.W.3d 412.

As to potential harm, the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. *Ross v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 503, 529 S.W.3d 692. Potential harm must be viewed in broad terms, and "potential" necessarily means that the court is required to look to future possibilities. *Id.* We have held that continued drug use and instability demonstrate potential harm sufficient to support a best-interest finding in a termination-of-parental-rights case. *See Beaird v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 415, 585 S.W.3d 172.

The circuit court was presented sufficient evidence of potential harm, and the same facts that support the aggravated-circumstances finding support the court's potential-harm finding. In both no-merit briefs, counsel asserts that the circuit court's finding that the children would be at risk of potential harm if returned to McCullar or Nunn was not erroneous. We agree with their assessment and conclude that the evidence was sufficient to support the circuit court's best-interest analysis.

C. Other Adverse Rulings

Regarding McCullar, counsel notes that other than the termination decision itself, there were other adverse rulings that do not present a meritorious basis for appeal. First, McCullar moved for a directed verdict after the Department concluded its case, and the court denied the motion. McCullar based her motion on the Department's failure to make reasonable efforts to provide meaningful services; however, prior to the termination hearing,

McCullar had not challenged the court's findings that the Department had made reasonable efforts to provide meaningful services and had complied with the case plan. *Rocha v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 454, 637 S.W.3d 299. Moreover, the Department's reasonable effort to provide services is not an element of the aggravated-circumstances ground; thus, there is no nonfrivolous argument that could be propounded regarding the denial of the directed verdict. *See* Ark. Code Ann. § 9-27-341(h)(1). Second, at the conclusion of the hearing, McCullar requested that the court deny the termination petition and allow her more time to find placement with a family member. The court denied the request, finding that the family members were aware of the children's circumstances, and no one had contacted the Department to express interest in being a potential placement. Nunn's brother testified at the termination hearing that he was willing to take the children; however, he explained that he did not have a bonded relationship with the children because of their young age when they entered the Department's custody. Our court has held that a circuit court is permitted to set termination as a goal even when a relative is available and requests custody. *Dominguez v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 2, at 11, 592 S.W.3d 723, 729. Here, none of McCullar's relatives expressed interest in providing a home for the children; thus, counsel correctly asserts that this issue presents no meritorious ground for appeal. Moreover, McCullar does not have standing to propound an argument that stems from Nunn's parental rights and is barred from arguing that there are members of the children's paternal family that could provide placement. *See id.*

Another adverse ruling occurred during the Department's examination of Nunn's probation officer. The Department asked the probation officer, "And to be convicted of violating the terms of your probation or the terms of your probation or suspended sentence, it's often new offense that triggers that; is that correct? . . . It's the new offense that would trigger whether or not he gets violated. . . ." Counsel objected, asserting that the question required speculation as to whether Nunn would be convicted of the new offense. The court overruled the objection, finding that the Department's inquiry did not call for speculation. Because the Department did not inquire whether the probation officer believed that Nunn would be convicted of the new offense, the basis for the objection does not reflect the content of the question asked; thus, we agree with counsel that this did not constitute reversible error.

Another ruling adverse to Nunn is that his motion for a directed verdict was denied. At the close of the Department's case-in-chief, Nunn argued that the petition for termination should be denied because the Department had not thoroughly investigated possible family placement. Nunn propounded this argument again during closing. The denial of the directed verdict presents no meritorious grounds for appeal. As stated above, this court has held that a circuit court is permitted to set termination as a goal even when a relative is available and requests custody. *Dominguez*, *supra*. 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. *Otis v. Ark. Dep't*

of Hum. Servs., 2018 Ark. App. 28, 538 S.W.3d 870. The relative preference outlined by the legislature must be balanced with the individual facts of each case. *Id.* Here, no relatives had been approved for placement at the time of the termination hearing, and Nunn's brother, who admitted he did not have a significant relationship with the children, only that day expressed an interest in providing a home for them. Above, we held that the court's best-interest finding presents no basis for reversal; therefore, we agree with counsel that the denial of Nunn's motion for a directed verdict presents no meritorious grounds for appeal.

Additionally, at the close of the hearing, the circuit court ordered the Department to provide McCullar and Nunn continued reunification services. The Department filed a petition for rehearing, explaining that pursuant to Ark. Code Ann. § 9-27-341(h)(1), the Department is relieved of the duty to provide services upon termination. The circuit court agreed and reversed the order. Because McCullar and Nunn were not entitled to Department services after termination, this ruling cannot constitute reversible error.

Having carefully examined the records and the no-merit briefs, we hold that McCullar's and Nunn's counsel have complied with the requirements for a no-merit termination-of-parental-rights appeal and that the appeals are wholly without merit. We therefore affirm the termination of McCullar's and Nunn's parental rights and grant counsels' motions to be relieved.

Affirmed; motions to be relieved granted.

KLAPPENBACH and WOOD, JJ., agree.

Jennifer Oyler Olson, Arkansas Commission for Parent Counsel, for separate appellant Kirstie McCullar.

James & Streit, by: *Jonathan R. Streit*, for separate appellant Marsheon Nunn.