

Cite as 2024 Ark. App. 16  
**ARKANSAS COURT OF APPEALS**  
DIVISION IV  
No. CV-23-507

MARILEE KIRK

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES AND MINOR  
CHILDREN

APPELLEES

Opinion Delivered January 17, 2024

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, EIGHTH  
DIVISION  
[NO. 60JV-21-572]

HONORABLE TJUANA BYRD  
MANNING, JUDGE

AFFIRMED

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**BART F. VIRDEN, Judge**

Marilee Kirk appeals the Pulaski County Circuit Court’s decision terminating her parental rights to her children MC1, MC2, MC3, MC5, and MC6,<sup>1</sup> who, at the time of termination ranged in age from six to sixteen. On appeal, she asserts that the circuit court erred by denying her requests for a continuance of the termination hearing. Additionally, she contends that the Arkansas Department of Human Services (Department) and attorney ad litem failed to prove that termination was in the children’s best interest, and the court

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<sup>1</sup>MC1’s putative father is Derrick Barney. MC2 and MC3’s father is Bobby Easter. Brandon Collins is the father of the deceased child, MC4. Alfred Taylor, Sr., is the putative father of MC5 and MC6. None of the fathers are parties to this appeal.

did not consider the impact termination would have on the siblings' relationships. Because her arguments on appeal are not preserved or are without merit, we affirm.

### I. *Relevant Facts*

On September 23, 2021, the Department filed a petition for ex parte emergency custody and dependency-neglect in the Pulaski County Circuit Court after exercising an emergency hold on MC1, MC2, MC3, MC5, and MC6 based on inadequate supervision; inadequate food, clothing, shelter and/or medical or mental healthcare; failure to protect a child from serious physical injury; and previous maltreatment. In the affidavit attached to the petition, the Department stated that removal was necessary because on September 20, the children's sibling, MC4, drowned while being cared for by MC1, who is developmentally delayed and was thirteen years old at the time. MC2 reported to the caseworker that MC1 often watched the children, and there was no food in the home. The family had been involved with the Department since 2011. In 2015, there was a true finding of physical abuse by Marilee's boyfriend against one of Marilee's children, and in 2017 and 2021, reports of inadequate supervision were substantiated. Marilee completed parenting classes both times.<sup>2</sup>

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<sup>2</sup>The Crimes Against Children Division (CACD) conducted an investigation, and the investigator found MC4's cause of death to be accidental drowning. The investigator reported that Marilee explained she had not been supervising the children while they were at the pool and that it was difficult to raise and supervise six children with disabilities. The report included that the home was cluttered, there were piles of dishes, and there was a strong smell of urine, although no animals lived in the home.

The same day, the circuit court entered an ex parte order placing the children in the Department's custody. At the probable-cause hearing, Marilee stipulated to probable cause, and she was granted a minimum of four hours supervised visitation a week.

On December 14, the circuit court entered the adjudication order finding the children dependent-neglected based on parental unfitness due to inadequate supervision. The court ordered that the children remain in the Department's custody, and the goal of the case was reunification with a concurrent goal of custody with a fit and willing relative. The Department was ordered to move MC5 to a placement closer to her siblings and to seek a placement for all five siblings together. The court determined that the Department had not made reasonable efforts to prevent or eliminate the need for removal of the children. Specifically, the court found that it was "frustrated that Department had so many contacts with this family for various allegations, some found true, some for inadequate supervision even, and the only service provided was parenting."

On February 24, 2022, a review hearing was held. In the review order entered April 7, the court found that Marilee had complied with the case plan and court orders; however, it also determined that Marilee had not demonstrated that she had "gained any insight into why her children came into care." The court found that the Department had complied with the case plan but had failed to see that visitation with Marilee and between the siblings took place as ordered. The court ordered the Department to ensure that visitation was regular and consistent and continue to try to place the children together. The court ordered the

Department to provide Marilee's counselor with a copy of her psychological evaluation and provide the court with the counselor's therapy reports at the next hearing.

After the June 7 review hearing, the court entered a review order in which it found that the Department was minimally compliant because it had only recently arranged therapy and visitation for MC1. The court reserved the determination of a reasonable-efforts finding. Visitation was expanded to unsupervised daytime visits in Marilee's home, and weekend visits with MC1 and MC2 were ordered to begin immediately. Weekend visits with all five children were scheduled to begin July 1, and if there were no issues with visitation, then a trial home placement would begin on August 8. The court found Marilee had complied with the case plan; however, the court expressed that Marilee's "gaining insight" remained important to the case. The court stated that it

wishes that Ms. Kirk could articulate what she has learned over the course of the case, and who supports her other than DHS and Youth Villages, and wishes she would stop using THC, the court did hear that she knows the safety of her children is the most important thing and that they enjoy their time together.

On November 1, the permanency-planning hearing took place. In the permanency-planning order, the court found that Marilee had made "significant and measurable progress" toward reunification; however, the court also found that Marilee still lacked insight into her children's situation. The court determined that Marilee understood that her children's safety was important, but she had not articulated how she would see to the children's needs and had not demonstrated the ability to do so because visitation had not progressed beyond a few weekend visits. The court noted that Marilee's boyfriend, who

would be around the children if they were returned to Marilee's custody, had refused to undergo a background check. The court found that the Department had made reasonable efforts to provide family services; however, the court also expressed frustration with the Department's failure to arrange visits between the children and with Marilee. The court noted that the Department had not finalized the details of the permanency plan as ordered. The court granted Marilee three additional months of services to demonstrate that she could provide for her children and put together an expanded support system.

Following the January 3, 2023 review hearing, the court entered an order changing the goal of the case to termination of parental rights. The court noted that the Department's recommendation of reunification based on the children's bond with their mother and the Department's inconsistency in offering services was "compelling." Despite this acknowledgement, the court changed the goal of the case to termination and adoption, finding that the case was in its eighteenth month, and the children needed permanency. The court found that Marilee had not exercised unsupervised visitation with all five children, therapy with MC1 was not going well, and Marilee's limited response regarding what she had learned from therapy indicated that she had not progressed in her understanding. Additionally, Marilee's boyfriend had refused to complete a background check, and Marilee had a history of poor judgment regarding men that had led to past true findings of physical abuse of her children by former boyfriends. The court found that the Department had made reasonable efforts to provide family services and finalize a permanency plan.

The Department and attorney ad litem filed a joint petition for termination of Marilee's parental rights based on the following statutory grounds: twelve months failure to remedy, subsequent issues, and aggravated circumstances with little likelihood that further services would result in reunification. In addition to recounting the testimony and evidence that led up to the termination petition, the petition contained information regarding the CACD's recent true finding of physical abuse pursuant to the investigation of a report that during a weekend visitation in January, Marilee had choked MC6.

The termination hearing took place on April 1, 2023. At the outset of the hearing, Marilee requested a continuance. Counsel for Marilee asserted that Bobby Easter had not been properly served, and his parental rights could not be terminated until he was served. Specifically, counsel contended that "the court is certainly able to move forward with the termination upon one parent, but we're asking for a continuance since service was not perfected." The request was denied. Marilee requested a continuance a second time, this time asserting that she had hired private counsel the day before, although her new counsel had not contacted either the attorney ad litem or the Department and was not present at the hearing. The court denied the motion for a continuance, finding that there was no evidence that Marilee had hired counsel, and the only purpose of requesting a continuance was to delay the hearing.

At the hearing, Marilee testified that she had lived in the same home for four years and received Social Security income. Marilee testified that in August 2022, a trial home placement was scheduled to begin but did not because of allegations that MC2 had given

MC3 a black eye, and MC6 had returned to the foster home smelling of urine after visitation. Marilee denied that MC6 had a problem with soiling herself and stated that no one had ever called the children's hygiene to her attention. Marilee explained that her last relationship ended four months earlier because her boyfriend refused to submit to a background check. Marilee denied that her boyfriend's refusal to submit to a background check had been brought up as a concern at multiple hearings and stated she had only a vague memory of the issue being brought up in November 2022. Marilee admitted that her ex-boyfriend had been in her home with the children, and she lied to the caseworker about it. She explained that the five true findings of abuse against her children from ex-boyfriends were "the men in my life. That wasn't me." Marilee stated that she had benefited from her parenting classes and believed she could keep her children safe and meet their individual needs. She participated in a few family sessions with MC1 and MC2 and felt like those sessions were helpful. Marilee was aware that there was a true finding regarding the allegation that she choked MC6, but she denied the allegation. Marilee stated that she believed ending visitation after this event had negatively impacted the children. She stated that she had made significant progress and that she is bonded with her children. Marilee contended that "before all this happened," she had attended to the children's needs and taught them to be respectful and love each other. Marilee believed that the visits had gone well. Marilee explained that she did not have any relatives who could provide a home for the children, but she had a support system in place and named several people who would help her; however, only one of the people she named, former caseworker Richard Johnson, was in court that day. She expressed concern that if her

parental rights were terminated, her children would be permanently separated from one another.

Dr. George DeRoeck opined that Marilee's choking her daughter at this stage of the case showed that she did not have effective parenting skills. Dr. DeRoeck further testified that Marilee is "low functioning," and he gave a guarded prognosis as to her ability to parent her children.

Chareia Virgil, a Department program assistant, testified that MC1 was quiet and positioned her body away from Marilee when they were together, but when Marilee was not there, MC1 smiled and opened up. MC1's foster parent, Trina Mitchell, noted that MC1 did not want to visit Marilee and became quiet when visitation or therapy with Marilee was brought up. MC1 had disclosed concerning things about the visits she had with Marilee, and she had not retracted any of her statements.

Kimberly Hardin, MC6's therapist, stated that she had safety concerns about returning MC6 to her mother's care based on what MC6 had told her in therapy. MC6's foster parent, Brenda Randall, stated that after weekend visits, MC6 reverted to wetting the bed and that she came back to the foster home smelling bad and in dirty clothes. Brenda explained that MC6 was not prone to making up stories, and she believed MC6 when she reported that Marilee had choked her.

Richard Johnson, the former caseworker who was fired for cause while he was the family's caseworker, testified that he would be a support for Marilee. Johnson stated that he



and members of his church had supplied food to Marilee and had dropped by the house on one or two occasions.

Cedric Jones, the family's current caseworker, stated that Marilee received Department services, including psychological evaluation, individual counseling, referrals for Youth Villages family support, visitation, and family counseling. Jones stated that Marilee participated in the services, but there were still concerns about her ability to supervise. Jones expressed concern about Marilee's boyfriend refusing to do a background check, and the CACD's true finding of abuse. He did not believe she was able to use what she had learned in parenting classes, and the children would suffer as a result. Jones's testimony was contradictory at times, but ultimately, he testified that though Marilee had benefited from services, he recommended termination because she had not been able to show that she could parent each of her kids, physical abuse was a concern, the children need permanency, and the children could not be returned to her the day of the hearing. Jones admitted that consistent visitation was not set up until halfway through the case and could not recall the language in the review order criticizing the Department's failure to offer timely services.

The Youth Villages caseworker, Abrianna Bedford, stated that any inadequacies Marilee demonstrated initially were rectified after six months of participating in the services Youth Villages offered. Bedford believed that Marilee understood the severity of the situation involving her ex-boyfriend, and she would not make similar mistakes in the future. Bedford denied receiving the CACD investigative findings regarding the report of Marilee choking MC6 but stated that she would have concerns if there was a true finding. After

reading the February email informing her of the results of the investigation, Bedford stated that she now had concerns about the children's safety.

Alexis Hill, the adoption specialist, testified that data matching resulted in two potential adoptive homes for the children as a group, and there were no barriers to adoption. Hill testified that some of the children's current placements were interested in adoption.

On May 18, the circuit court entered the order terminating Marilee's parental rights, finding that both the statutory grounds and best-interest determinations supported the decision. The court specifically relied on the CACD's true finding of abuse and the testimony that MC1 and MC6 had reported the incident to other adults in their lives. The court found persuasive Dr. DeRoeck's opinion that Marilee's choking her daughter at this stage of the case showed that she did not have effective parenting skills. The court also relied on Dr. DeRoeck's testimony that Marilee was "low functioning," and his guarded prognosis as to her ability to parent her children. The court cited testimony that the children returned from visitation dirty, and visits were stopped twice for safety concerns. The court found that the family had eleven previous contacts with the Department since 2011, and there were five true findings of the men in her life abusing her children. The court determined that Marilee had a history of having boyfriends who abused her children, and her decision to break up with her latest boyfriend came late in the case. Moreover, the court stated that it only had Marilee's word that she had broken up with him, and Marilee had lied before. The court relied on the testimony at the termination hearing that MC1 was quiet when she was around Marilee and refused visitation with her mother and testimony that MC6 regressed to bed

wetting and had poor hygiene when she returned from visitation. Additionally, the court relied on the Department caseworker's and the Youth Villages caseworker's testimony that the children were at risk of potential harm if returned to Marilee's custody. The court found that the Department had made meaningful efforts to rehabilitate Marilee, and Marilee participated in all the services; however, she had never transitioned to trial home placement, and MC1 and MC2 refused to see Marilee, with the exception of limited family therapy sessions.

The court found that the children are adoptable based on the adoption specialist's testimony that there were two adoptive resources for all five children and that several of the children's foster parents were interested in adoption. The court concluded that Marilee had not benefited from services. She had not shown that she was capable of providing for the children's special needs or providing basic care for all five children at the same time. The court found that Marilee "lacks insight necessary to protect the children and keep them safe." Given Marilee's history with the Department and her lack of improvement, the court determined that there was little likelihood additional time would result in successful reunification, and the children would be at substantial risk of further abuse, neglect, and inadequate supervision. Marilee timely filed her amended notice of appeal.

## II. *Discussion*

### A. Denial of Marilee's Requests for Continuances

For her first point on appeal, Marilee asserts that the circuit court erred when it “summarily denied” her request for a continuance based on the Department’s failure to serve proper notice to the father of MC2 and MC3, Bobby Easter.

Marilee contends that on the day of the hearing, it was not possible to terminate both her and Easter’s parental rights to MC2 and MC3, and the children would not be available for adoption until Easter was properly served and his rights were terminated. Marilee claims for the first time on appeal that the court failed to consider the permanency implications for the children resulting from the denial of the continuance or “perform any balancing test, or even consider Marilee’s rights[.]”

Because Marilee did not present the above arguments to the circuit court at the termination hearing, we are unable to review them. *See Lyall v. Ark. Dep’t of Hum. Servs.*, 2023 Ark. App. 81, 661 S.W.3d 240. Below, Marilee’s sole basis for requesting the first continuance was that Bobby Easter’s rights could not be terminated that day; thus, we affirm without reaching the merits of her new argument.

Similarly, Marilee’s argument regarding her second motion for a continuance is also not preserved for appeal. After the denial of her first request for a continuance, Marilee informed the court that she had retained private counsel the day before and requested a continuance to allow her new attorney time to prepare for the termination hearing. Marilee’s her new attorney was not present at the hearing and had not contacted either the attorney ad litem or the Department. The court heard argument that the case was in its eighteenth month, and the children needed permanency. Moreover, the ad litem asserted that Marilee

had been represented by counsel the entire time, including at the termination hearing that day. The court denied the continuance, finding that there was no evidence that Marilee had hired private counsel, and the only purpose for requesting the continuance was to delay the proceedings.

For the first time on appeal, Marilee contends that there is an exception in termination-of-parental-rights cases to the general rule that the constitutional protections afforded by the Sixth Amendment are not typically extended in an ordinary civil case. See *Jones v. Ark. Dep't of Hum. Servs.*, 361 Ark. 164, 205 S.W.3d 778 (2005) (holding that the right to counsel in termination cases includes the right to effective counsel). She argues that the exception should also apply when a parent in a termination case seeks to obtain new counsel because the Sixth Amendment grants the right to counsel of the defendant's choosing. *Arroyo v. State*, 2013 Ark. 244, 428 S.W.3d 464. Marilee contends that the Arkansas Supreme Court declared that the determination of whether the circuit court committed reversible error is based on whether the defendant's motion to substitute counsel was wrongly denied, not whether the defendant was prejudiced by the denial. *Id.* Marilee urges this court to apply the same standard here and argues that the relevant question is whether the circuit court wrongly denied her motion for new counsel without regard for prejudice. Marilee contends that the circuit court was required balance her right to counsel of her choice against the needs of fairness and the demands of the court calendar.

We will not consider issues raised for the first time on appeal, even constitutional ones. *Kohlman v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 164, 544 S.W.3d 595. Marilee did

not propound the above arguments to the circuit court; thus, the arguments are not preserved for appeal, and we affirm without reaching the merits. See *Cullum v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 62, 639 S.W.3d 905.

#### B. Best-Interest Determination

Marilee contends that the circuit court clearly erred by determining it was in the children's best interest to terminate her parental rights because the court did not consider the effect termination and adoption would have on the siblings' relationships. Specifically, Marilee asserts that there was insufficient evidence that all five siblings could be adopted together, and there was little to no evidence or testimony regarding the effect of the siblings' separation caused by individual adoptions.<sup>3</sup> Marilee's argument is not well taken.

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)(i), (ii) (Supp. 2023). Adoptability is not an essential element in a termination case; rather, it is merely a factor that must be considered by the circuit court in determining the best interest of the child.

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<sup>3</sup>On appeal, Marilee does not challenge the circuit court's statutory-grounds findings; thus, she abandons any challenge to those findings. *Isbell v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 110, 573 S.W.3d 19. Also, Marilee does not raise a challenge pursuant to the potential-harm prong of the best-interest determination, and so we address only the adoptability aspect of the circuit court's best-interest finding. See *Easter v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 441, 587 S.W.3d 604.

*Tucker v. Ark. Dep't of Hum. Servs.*, 2011 Ark. App. 430, 389 S.W.3d 1; *see also* Ark. Code Ann. § 9-27-341(b)(3).

The Juvenile Code does not require certainty, or a “guarantee,” that siblings be adoptable as a group. *Corley v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 397, at 9, 556 S.W.3d 538, 544. While keeping siblings together is a commendable goal and an important consideration, it is but one factor that must be considered when determining the best interest of the child. *Nichols v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 420, 636 S.W.3d 114.

In the instant case, we hold that the circuit court did not err in its adoptability finding. The adoption specialist testified that the children are adoptable and that some of the foster families were interested in adoption. She explained that there were two data matches for preadoptive homes for all five children together; thus, there was even evidence of the siblings’ adoptability as a group. A caseworker’s testimony that the children are adoptable is sufficient to support an adoptability finding. Given the adoption specialist’s testimony, there is sufficient evidence to support the court’s adoptability finding. *See Strickland v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 608, 567 S.W.3d 870. Accordingly, we affirm.

Affirmed.

KLAPPENBACH and WOOD, JJ., agree.

*Jennifer Oyler Olson*, 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 children.