

Cite as 2024 Ark. App. 364
ARKANSAS COURT OF APPEALS
DIVISION III
No. CV-24-92

ERICA PHILLIPS

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILDREN

APPELLEES

Opinion Delivered June 5, 2024

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT
[NO. 70]V-22-12]

HONORABLE EDWIN KEATON,
JUDGE

AFFIRMED

BRANDON J. HARRISON, Chief Judge

In an order entered 17 November 2023, the circuit court terminated Erica Phillips’s parental rights to three daughters. The older two, MC1 and MC2, were twenty months and nine months old, respectively, when they entered the Arkansas Department of Human Services’ (DHS’s) custody in February 2022 on a petition for emergency custody and dependency-neglect. Erica and her boyfriend, Justin Marks, had been arrested for drug possession, leaving the children without a caretaker. A third child, MC3, was born about nine months into these dependency-neglect proceedings. DNA tests confirmed Justin is MC3’s father. She too was removed from Erica’s custody based on concerns about Erica’s erratic behavior and drug use, following a second emergency petition filed in May 2023. MC3 is the sixth child of whom Erica has lost custody.

Erica does not appeal the termination of her parental rights to MC1 or MC2 or contest that the record of the termination hearing contained sufficient grounds to terminate her parental

rights to MC3. But she argues the court procedurally erred because (1) DHS had not sought termination of her rights to MC3 in the petition to terminate parental rights; and (2) the termination order does not include adequate findings that termination was in MC3's best interest, since MC3 was in her father's custody.

Because Erica does not challenge the grounds for termination, we can abbreviate the discussion of her fitness. The circuit court repeatedly noted her aggressive and erratic in-court behavior. She was found in contempt twice. Despite a long history of substance abuse, including admitted methamphetamine use after the children were removed, she had not completed inpatient drug treatment. In January 2023, custody of MC1 and MC2 was returned to Erica and, for a few months, no news had seemed to mean good news. But Erica had given custody (well, possession) of the children to MC1 and MC2's former foster parent without telling DHS. It appears that from March through August 2023, she visited them once.

On that background, DHS filed a motion on August 9 to terminate reunification services for Erica as to all three children. The statute it cited, Ark. Code Ann. § 9-27-365 (Repl. 2020), allows the court to do so for proof of aggravating circumstances that are mostly identical to the grounds for termination in section 9-27-341(a)(3)(B)(ix). The court held a hearing on the motion September 1. In a September 13 order (amended September 24), it found that clear and convincing evidence supported terminating reunification services as to MC3 in particular.

Ahead of a November 6 termination-of-parental-rights hearing, the goal for MC1 and MC2 was to achieve permanency through adoption. The goal for MC3 was to remain with Justin, who had been awarded temporary custody. The circuit court terminated Erica's parental rights to all three children on DHS's oral motion at the end of the hearing. In doing so, the

court also awarded sole custody of MC3 to Justin and warned him that it would be illegal to permit Erica to access the child.

Erica argues that terminating parental rights to a child who was not named in a termination petition must violate due process, like terminating parental rights on grounds that were not alleged. See *Jackson v. Ark. Dep't of Hum. Servs.*, 2013 Ark. App. 411, 429 S.W.3d 276. As a general matter, we can hardly disagree. However, on this record, unlike the one in *Jackson*, it was clear from the start of the hearing that Erica's rights to MC3 would be adjudicated, and she had an opportunity either to object or to develop proof on the merits of that decision. MC3 was, if anything, the focus of the testimony. Justin, who had been determined to have fathered MC3 only, was present at the hearing, represented by counsel. He was allowed, without objection, to call witnesses. Justin himself testified to contradict Erica's testimony that they planned to share custody of MC3. Also, MC1 and MC2's foster mother testified that she had cared for these children, and MC3, when Erica faced her difficulties and explained the fallout the children suffered because of those troubles. The petition to terminate is not model legal drafting, true. But we are not persuaded that there was any meaningful surprise—nor was there any contemporaneous objection—to the court's adjudicating Erica's parental rights to all three children when and as it did.

Further, and relevant to both points on appeal, DHS relied in its oral motion on the court's previous finding that reunification services should be terminated for Erica because they “will not likely result in reunification.” We have noted that the statutory grounds for terminating parental rights and terminating reunification services overlap. *Thompson v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 478, 655 S.W.3d 874. The “little likelihood” aggravating circumstance is one place where they overlap. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3)(B);

Ark. Code Ann. § 9-27-365(c)(2)(A)(v). Importantly, where MC3's placement with a custodial and biological parent meant adoptability was not relevant,¹ evidence that there is little likelihood of successful reunification can demonstrate that termination is in a child's best interest regardless of adoptability. *Kloss v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 389, 585 S.W.3d 725.

In the termination order, the circuit court found Erica's behavior—much of which it had witnessed—was “erratic and out of control.” It noted that she had tested positive for illegal drugs after the children's *second* removal, presenting a risk of potential harm if the children were returned. And unlike other parent-placement termination cases, *e.g.*, *Caldwell v. Ark. Dep't of Hum. Servs.*, 2010 Ark. App. 102, there was no evidence the circuit court might have compromised financial support or a stabilizing relationship with Erica's extended family by opting for termination instead of a less restrictive option for MC3.

Affirmed.

KLAPPENBACH and MURPHY, JJ., agree.

Leah Lanford, Arkansas Commission for Parent Counsel, for appellant.

James & Streit, by: *Jonathan R. Streit*, for separate appellee Justin Marks.

¹*Lively v. Ark. Dep't of Hum. Servs.*, 2015 Ark. App. 131, 465 S.W.3d 383.