

**2019 Ark. 116
571 S.W.3d 15**

**In the MATTER OF the GUARDIANSHIP
OF E.M.R. and D.C.R., Minors**

Christine Hartman, Appellant

v.

**Franklin Reardon and Marla Reardon,
Appellees**

No. CV-18-310

Supreme Court of Arkansas.

Opinion Delivered: April 18, 2019

Gean, Gean & Gean, Fort Smith, by: Michael
Pierce, for appellant.

Law Offices of Craig L. Cook, Fort Smith, by:
Nathan E. Roop, for appellees.

ROBIN F. WYNNE, Associate Justice

Christine Hartman (now Smyth) appeals from the Franklin County Circuit Court's order denying her petition to terminate the guardianship of her two minor children, E.R. and D.R. She argues on appeal that the circuit court was clearly erroneous in applying the best-interest-of-the-child standard as opposed to determining the fitness of the natural mother; not finding her to be a fit parent; and failing to determine whether the guardianship's original function remained, as required by Arkansas Code Annotated section 28-65-401. Furthermore, appellant argues that even assuming arguendo that the correct standard was "best interest," the circuit court was clearly erroneous in finding that it would not be in the best interest of the minor children to be placed with their natural mother. We reverse and remand with instructions for the circuit court to enter an order terminating the guardianship.

The guardianship of E.R., born in 2003, and D.R., born in 2005, arose when appellees Marla and Franklin Reardon, the paternal grandparents, filed a petition for emergency and permanent

guardianship in August 2013 after appellant's husband, Sam Hartman, was charged with the sexual abuse of E.R. The court entered an ex parte order for emergency temporary guardianship.¹ Appellant filed a motion to dismiss the petition for guardianship and an alternative answer in which she denied the material allegations in the petition. Following a hearing, the court granted the

[571 S.W.3d 17]

Reardons a permanent guardianship, finding as follows:

That probable cause existed at the time of the entry of the Ex Parte Order for Emergency Custody and probable cause continues to exist. Specifically, the Court finds that Respondent Christine Hartman has subjected the minor child [E.R.] to Sam Hartman's family and homes of his family members in Logan County. The Court takes notice that Mr. Hartman is facing charges of Rape, a class Y felony for engaging in deviate sexual activity with the minor [E.R.] for a period of time from January 1, 2011 until May 6th, 2013, which was during the course of the marriage with Respondent and Mr. Hartman. Mr. Hartman is also facing charges of Tampering with Physical Evidence, Third Degree Assault on the Respondent, and Interfering with Emergency Communication 1st Degree.^[2] Additionally, the Court finds that Mr. Hartman's family has inappropriately tried to influence the minor child and the court has great concern over the minor children having contact with his family. The minor child testified in court that the situation was troubling her and she felt more safe at the Petitioner's residence.

The court further found that it was in the best interest of both children for the guardianship to be granted. No finding regarding the parental fitness of appellant was made. Appellant was awarded standard unsupervised visitation to take place at the home of her mother, Debra Smyth, with instructions that there was to be no contact between the children and Sam Hartman or his family.

On January 24, 2017, appellant filed a petition to terminate the guardianship. She alleged that since the guardianship order had been entered there had been "material changes in circumstances where it is currently now in the best interest of the minor children to be with their biological mother, [appellant]"; that she was fit and appropriate to care for her children; and that the circumstances had changed such that she had filed for divorce and her husband was currently in the Arkansas Department of Correction. A hearing was held on November 14, 2017. At the hearing, the parties agreed that there had been no finding of unfitness as to appellant in the permanent guardianship order. The court asked, "Is this agreed then that what we are going to be looking at is that Mom needs to set out why things are different than they were as stated in that 2013 order?" Appellant's counsel responded, "We intend to set that out. I believe that the court could also determine whether she is fit or unfit in this case, but we intend to present both."

At the conclusion of the evidence, the court ruled from the bench that the petition to terminate the guardianship would be denied. The court entered an order denying appellant's petition to terminate guardianship, adopting in full the statements of the Reardons' counsel in closing argument at the hearing (attached to the order as an exhibit and incorporated therein), and setting forth additional findings. The court found that "the original order dealt with Petitioner's failure in allowing Mr. Hartman's family to have access to her daughter, with the crux being that she had exhibited poor judgment and did not prioritize her children." The court found that "the Petitioner's lack of prioritizing

[571 S.W.3d 18]

these children and poor judgment was the reason for originally granting this guardianship and those reasons still exist." Specifically, the court faulted appellant for the length of time it took her to get divorced,³ which the court attributed to her continuing to choose her husband over her children until his appeals had been exhausted; the fact that she had recently moved into her mother's four-bedroom house, which raised "concerns regarding whether the Petitioner could herself, provide reasonable accommodations for these children"; her testimony regarding having had issues in the past concerning whether she believed E.R. and whether she had anger at E.R.; and for seeking out parenting education from someone certified in the age group of her youngest child, not the ages of E.R. and D.R. In addition, regarding the second prong of section 28-65-401(b)(3), the circuit court found that the children had flourished in their grandparents' care and that "it is not in the best interest of these children to change things mid-stream and return them to a situation that hurt them before." In its analysis of the best interest of the children the court cited *Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273, a guardianship case that has been overruled, and *Bamburg v. Bamburg*, 2014 Ark. App. 269, 435 S.W.3d 6, a custody-and-visitation case between ex-spouses. This appeal followed.

We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *In re Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* When reviewing the proceedings, we give due regard to the opportunity and superior position of the circuit court to determine the credibility of the witnesses. *Id.*

Arkansas Code Annotated section 28-65-401(b)(3) (Supp. 2017) provides that "[a] guardianship may be terminated by court order

after such notice as the court may require ... [i]f, for any other reason, the guardianship is: (A) [n]o longer necessary; and (B) [n]o longer in the best interest of the ward."⁴ Here, the circuit court found that neither requirement of the statute had been met and that the guardianship should remain in place.

The circuit court did not make a finding of unfitness when it granted the permanent guardianship in 2013 or when it denied the petition to terminate the guardianship. The Reardons argue that the court made a "de facto" finding of unfitness in this case. Specifically, they point to the court's statements from the bench that, going back to the beginning of this case, appellant had shown "a complete disregard for parental responsibility." However, they cite no authority for such a finding and we decline their invitation to recognize a "de facto" finding of parental unfitness. In *Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129, this court rejected the circuit court's reasoning that, while it had not expressly found the father to be unfit, such a finding had been made without the use of the word "unfit." This court held

[571 S.W.3d 19]

that the circuit court's finding of unfitness was clearly erroneous, concluding that "the circuit court could not retroactively declare [the father] unfit." *In re Guardianship of W.L.*, 2015 Ark. 289, at 11, 467 S.W.3d at 135. Then, in *Donley v. Donley*, 2016 Ark. 243, 493 S.W.3d 762, this court addressed a finding of unfitness of the natural mother in a temporary guardianship, which was superseded by the entry of an agreed permanent guardianship that did not contain a finding of unfitness. We held that the mother was a fit parent and that the circuit court had erred in failing to afford her the fit-parent presumption when she revoked her consent and sought to terminate the guardianship. Here, appellant has never been adjudicated an unfit parent. Therefore, in accordance with our reasoning in *W.L.* and *Donley*, appellant in the present case is a fit parent. As we have previously stated:

Parents have a fundamental right to raise their children. We will not lightly intrude on this fundamental right. We have already said that a guardianship is no longer necessary once a fit parent revokes an earlier-given consent. This is because a fit parent is presumed to be acting in the child's best interest. By petitioning to terminate the guardianship and revoking consent, the fit parent, who has the child's best interest at heart, informs the court that the guardianship is no longer necessary.

In re Guardianship of W.L., 2015 Ark. 289, at 7–8, 467 S.W.3d at 133. We recognize that both *W.L.* and *Donley* were decided in the context of guardianships to which the parents had consented but later revoked their consent and petitioned for termination of the guardianships. However, a fit parent who did *not* consent to a guardianship must still be afforded a natural parent's constitutional right to raise his or her child without undue interference from the government as recognized by the Supreme Court of the United States in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69, 120 S.Ct. 2054. Thus, parental fitness is at the heart of termination-of-guardianship cases involving parents of minor wards.

Turning now to the termination-of-guardianship statute, we hold that appellant was entitled to the fit-parent presumption that the guardianship was no longer necessary when she so informed the court in her petition to terminate the guardianship. Ark. Code Ann. § 28-65-401(b)(3)(A); see *In re Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129. At that point, the Reardons had the opportunity to challenge

appellant's fitness or to show exceptional circumstances that would overcome the fit-parent presumption. We note that it is clear from the record that the reasons for the guardianship—exposure to Sam Hartman's family members and E.R.'s feeling safer at the Reardons' home—no longer existed by the time of the termination hearing. Accordingly, we hold that the circuit court clearly erred in finding that the reason for originally granting this guardianship still existed.

Regarding the second prong of the statute, whether the guardianship is no longer in the best interest of the wards, *see* Ark. Code Ann. § 28-65-401(b)(3)(B), it appears that the circuit court focused on the success of the children in the guardians' care and found that "there is no reason to remove them from a stable situation mid-course and send them back to the unknown." However, the circuit court failed

[571 S.W.3d 20]

to accord appellant the presumption that a fit parent acts in her children's best interest. *See Troxel*, 530 U.S. at 68, 120 S.Ct. 2054 ("[T]here is a presumption that fit parents act in the best interests of their children."). Furthermore, nothing in this record rebuts that presumption. The evidence showed that appellant had stable employment, a suitable home, family support, and a close relationship with E.R. and D.R., who both wanted to live with her. Further, overnight visitation had been consistently exercised with no issues other than minor disciplinary disagreements with the Reardons regarding D.R. In short, the presumption that appellant has acted in her children's best interest was not rebutted on this record, and the circuit court clearly erred in finding that it remains in the children's best interest to leave the guardianship intact. Accordingly, we reverse and remand with instructions to the circuit court to enter an order terminating the Reardons' guardianship of E.R. and D.R.

Reversed and remanded with instructions.

Wood and Womack, JJ., dissent.

Rhonda K. Wood, Justice, dissenting.

Because the majority misapplies the fit-parent presumption and departs from our standard of review, I dissent.

First, the majority errs in holding that the appellant was entitled to the fit-parent presumption under *In re Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129 because that case involved a parent that consented to guardianship. In fact, the second sentence of *Guardianship of W.L.* defined the parameters of that case, "hold[ing] that a guardianship is no longer necessary when a fit parent **who consented** to a guardianship revokes consent." *Id.* at 1, 467 S.W.3d at 130 (emphasis added).

Notably, in the present case, the appellant did not consent to the initial guardianship—she contested it. Although, the precise word "unfit" may not have been used, the court found that she was unable to adequately care for her children at the time of the initial guardianship. The court stated, "it was a complete, a complete disregard for parental responsibility, the actions that you [appellant] took.... You chose a rapist over your child." As this appellant was not entitled to the fit-parent presumption, both prongs of the termination of guardianship statute became questions of fact for the circuit court to determine. *See* Ark. Code Ann. § 28-65-401(b)(3) (Supp. 2017).

The majority further errs in its lack of deference to the circuit court's factual findings. In termination of guardianship proceedings, we review matters of law *de novo*, but we will not reverse a finding of fact unless the court is clearly erroneous. *Guardianship of W.L.*, 2015 Ark. at 9, 467 S.W.3d at 134. We defer to the superior position of the circuit judge to determine the credibility of the witnesses. *Id.*

The majority finds the circuit court was clearly erroneous in its finding that the guardianship was no longer necessary or no longer in the best interest of the children because "it appears that the circuit court focused on the success of the

children in the guardians' care." The circuit court and the record demonstrate that the concern was much more than this. The circuit court is in the best position to evaluate the witnesses. This particular circuit court presided over this guardianship for six years and multiple hearings. The circuit court specifically held, "So the question now is, is it in the best interest of the children to provide the children back over to you. And I can safely say without any hesitation the answer is a resounding no." Based on a review of the record, I cannot

[571 S.W.3d 21]

say this was clearly erroneous. I would affirm.

Womack, J., joins in this dissent.

Notes:

¹ The Reardons' son and appellant were divorced, and appellant was the custodial parent. The Reardons' son consented to the guardianship.

² According to the affidavit for Sam Hartman's arrest, police came into contact with him on May 6, 2013, when they responded to a domestic-disturbance call, and he agreed to be interviewed. He admitted having sexual contact with E.R. Sam Hartman was eventually convicted of raping E.R. and received a sentence of life imprisonment.

³ Appellant's divorce decree was entered on July 10, 2017.

⁴ In Act 717 of 2017, the General Assembly amended the termination-of-guardianship statute to make both prongs necessary by replacing the word "or" with "and." Act of Mar. 28, 2017, No. 717, 2017 Ark. Acts 3698. *See In re Guardianship of W.L.*, 2015 Ark. 289, at 8, 467 S.W.3d at 134 (under the prior version, "given that the legislature has created a disjunctive test, the parent can move to terminate under either prong").

**2019 Ark. App. 491
588 S.W.3d 754**

**Brenda KYLE and Thomas Kyle,
Appellants**

v.

**State of Arkansas, OFFICE OF CHILD
SUPPORT ENFORCEMENT; Sheila
Alward; and Phillip K. Pollard, Appellees**

No. CV-18-1035

**Court of Appeals of Arkansas, DIVISION
II.**

Opinion Delivered: October 30, 2019

Appellate Solutions, PLLC, d/b/a/ Riordan Law firm, by: Deborah Truby Riordan, Little Rock, for appellants.

James C. Hale III, for separate appellee Sheila Bailey.

BART F. VIRDEN, Judge

Brenda and Thomas Kyle appeal the Crittenden County Circuit Court's determination that it has continuing and exclusive jurisdiction over the matter of the custody of BP2 (born 06/23/09). We reverse and dismiss.

I. Relevant Facts

This case began on October 9, 2009, when the Office of Child Support Enforcement filed a petition for a determination of child support owed by Phillip Pollard, the father of BP1, PP, and BP2.¹ On April 14, 2010, the Crittenden County Circuit Court entered an order of support stating that Phillip owes a duty of support to BP2 and his two older siblings. On May 7, Sheila Bailey (Alward), BP2's maternal grandmother, filed a motion to intervene and a petition for ex parte custody and permanent custody. Sheila explained that the children's mother, her daughter Ashley, had been arrested on drug charges and that Ashley's minor children had been out of their mother's care for an "extended period of time" before the arrest.

Sheila contended that Phillip had no contact with the children, exercised limited and sporadic visitation, had never paid child support, and lived in an unstable and unfit home; thus, he was an unfit person to have custody of the children, and she should be

[588 S.W.3d 756]

granted custody. The circuit court granted Sheila's petition.

On August 10, the circuit court entered an order setting forth that "a guardianship is desirable to protect the interests of the minor children" and directed that Sheila receive all child-support payments.

Ashley died in October 2013. On February 6, 2014, Sheila wrote a letter allowing Brenda and Thomas Kyle (BP2's paternal great aunt and uncle) to enroll BP2 in a Mississippi school, stating that while she is the legal guardian of BP2, "he stays with my sister Brenda Kyle in Hernando, MS."

On December 15, 2016, the Kyles filed a petition for adoption of BP2 in the DeSoto County Chancery Court in Mississippi. On January 13, 2017, Phillip, then living in Hernando, Mississippi, filed an affidavit in the DeSoto County Chancery Court voluntarily relinquishing his parental rights. On May 16, 2017, the Mississippi court entered an order for emergency custody in favor of the Kyles and enjoined Sheila from removing BP2 from their custody. The order granting emergency custody was restated and confirmed by the Mississippi court in subsequent orders entered June 5, August 9, and August 28, 2017, pending the Arkansas court's determination of jurisdiction.

On May 24, 2017, Sheila filed in the Crittenden County Circuit Court a written objection to the transfer of jurisdiction to the DeSoto County Chancery Court. In her objection, Sheila asserted the following:

- On December 15, 2016, Brenda and Thomas Kyle filed a petition for adoption of BP2 in the DeSoto County Chancery Court.
- Sheila answered the petition for adoption and filed a counterpetition requesting that the court recognize a foreign decree and to transfer jurisdiction back to the Crittenden County Circuit Court.
- Sheila is the court-appointed custodian of BP2.
- Over the years, Brenda Kyle had helped Sheila and her parents by keeping BP2, but Brenda had become more and more reluctant to return the child when it was time to do so.
- Brenda does not answer Sheila's phone calls, and the Kyles conspire with other family members to keep BP2 with them.
- The Kyles misstated the facts in the petition for adoption by claiming that BP2 had lived with them since he was six months old.
- BP2 has ARKids First insurance, and Sheila had taken him to the doctor and dentist as recently as November 2016.
- BP2 has extended family in Arkansas, including his brothers who are in Sheila's care and custody.
- To grant the petition for adoption would sever all ties with BP2's family; thus, the proper forum is in Arkansas and not Mississippi.

On May 26, 2017, the Kyles filed a motion to intervene and a petition to terminate guardianship of BP2 for lack of subject-matter

jurisdiction in the Crittenden County Circuit Court. In the petition the Kyles asserted that from BP2's birth in June 2009 to December 2009, BP2 lived with his maternal great-grandparents in Arkansas and that he had never lived with Sheila. In December 2009, BP2 came to live with the Kyles, where he has lived and attended school ever since. The Kyles assert that they were awarded temporary legal custody by the DeSoto County Chancery Court on May 16, 2017, and that pursuant to the UCCJEA, Mississippi is BP2's home state and the most convenient

[588 S.W.3d 757]

forum. The Kyles requested that any custody matters be decided by the Mississippi court.

On August 30, 2018, the circuit court held a hearing regarding the Kyles' motion to intervene and petition to terminate guardianship. The Kyles asserted that the initial Arkansas order in August 2010 is void because Arkansas had lost jurisdiction by that time. By that time, they explained, BP2 had been living with them for over six months. Additionally, BP2 attended school in Mississippi and received medical care there. The Kyles contended that even if the order is not void, Arkansas still lacks jurisdiction because BP2 does not have a significant connection to Arkansas, though the Kyles conceded that BP2 has extensive family living in Arkansas. As to the relationship with BP2's two siblings, the Kyles asserted that nothing would change and that they "are going to be related regardless of who has custody and whether or not the adoption goes through in Mississippi." Thomas Kyle explained that their attorney advised them to discontinue visitation with Sheila and her family and that the last time they had been to Arkansas was May 2017. He explained that they had tried to cover BP2's medical expenses but that because BP2 has ARKids First in place, they had not been billed for BP2's medical expenses despite their requests for the medical providers to do so.

Sheila explained that BP2 "has never lived with me. The two older brothers do live with me." Then she clarified that she, her parents, and the Kyles

took care of BP2 for the first two and a half years of his life but that eventually the Kyles started keeping BP2 a couple of days and then sending him back to her. When BP2 was two and a half years old, he went to live with the Kyles, and Sheila testified that "I was not okay when she started keeping him more[.]" According to Sheila, the Kyles stopped answering Sheila's calls and found reasons not to allow visitation with BP2. Sheila urged the court to retain jurisdiction over the case, testifying that BP2 has significant family ties to Arkansas and that adoption legally severs ties with all former family members, which is contrary to BP2's best interest. Moreover, the State of Arkansas has provided Medicaid for BP2 since his birth, which she asserted constitutes a significant tie to Arkansas.

In the order, the circuit court granted the Kyles' motion to intervene and found that the August 4, 2010 order determines custody and did not create a guardianship, despite the use of the word "guardianship." The circuit court determined that the Arkansas court made the initial custody determination and has continuing jurisdiction over the case. The circuit court found that the Kyles were aware of the order but took no action to challenge the custody of BP2 until their 2016 petition for adoption filed in Mississippi, and the Kyles were time barred from attacking the custody order. The circuit court noted that the Kyles failed to refer to the custody order in their petition to adopt and to inform the Mississippi court of the extensive family connection in Arkansas, including two siblings. The court also recognized that BP2 had lived in Mississippi with the Kyles for four-to-five years but that he still has extensive and close family ties to Arkansas, which the Kyles had interfered with by filing the adoption petition and suspending visitation. The court found that Arkansas had provided health care and benefits throughout BP2's life through ARKids First. The court determined that Arkansas is a convenient forum for all parties because the Kyles lived only thirty minutes from Crittenden County. The court stated that it would decide between custody and adoption but that the status quo would remain in place until the decision was

[588 S.W.3d 758]

made. The Kyles timely filed a notice of appeal.

II. Discussion

The UCCJEA, codified at Arkansas Code Annotated sections 9-19-101 to -401 (Repl. 2015), provides the exclusive method for determining the proper state for jurisdictional purposes in child-custody proceedings that involve other jurisdictions. *Harris v. Harris*, 2010 Ark. App. 160, 379 S.W.3d 8. We review rulings under the UCCJEA de novo, although we will not reverse a circuit court's findings of fact unless they are clearly erroneous. *Piccioni v. Piccioni*, 2011 Ark. App. 177, 378 S.W.3d 838. A circuit court has the discretion to decide whether to decline to exercise jurisdiction, and we will not reverse the court's decision absent an abuse of discretion. *Id.*, 378 S.W.3d 838.

A court that has made an initial child-custody determination consistent with section 9-19-201 has continuing, exclusive jurisdiction over the determination *until the following occurs* : (1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; *or* (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state. Ark. Code Ann. § 9-19-202(a).

Certainly, the Arkansas Court in Crittenden county made the initial child-custody determination. The issue and general question then becomes: Did the Arkansas court then lose jurisdiction? For the following reasons, we hold that the circuit court did lose jurisdiction and erred in its jurisdiction determination. For at least four to five years, BP2 has been residing in Mississippi with the Kyles who provide for his day-to-day needs and education. On May 16, 2017, the De Soto County Chancery Court granted

the Kyles emergency custody of BP2. In the order, the court acknowledged that BP2 was in the Kyles' physical custody in Mississippi. This action by the Mississippi court constitutes an award of legal custody by a court; thus, the UCCJEA requirement that loss of jurisdiction occurs when a court of another state determines that the child and any person acting as a parent do not reside in the state is satisfied pursuant to 9-19-202(a). In short, under the facts of this case, when the Mississippi court entered the order for emergency custody, Arkansas lost jurisdiction.

Sheila asserts that the Kyles do not fit the definition of acting parents because they have made no claim to legal custody under the law of this state, "their only claim [the adoption petition] having been advanced in Mississippi." She is incorrect.

"Person acting as a parent" means a person, other than a parent, who has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding, and has been awarded legal custody by a court or claims a right to legal custody under the law of this state. Ark. Code Ann. § 9-19-102(13). "Physical custody" means the physical care and supervision of a child. Ark. Code Ann. § 9-19-102(14).

On May 26, 2017, the Kyles filed a petition in the Crittenden County Circuit Court to dissolve the guardianship Sheila was awarded in 2010. In this petition, the Kyles claimed a legal right to custody under Arkansas laws by asserting that in December 2009, BP2 came to live with

court's determination that BP2 was in their physical custody at that time. Undeniably, for well over the six-month requirement of the UCCJEA, BP2 was in the physical custody of the Kyles in Mississippi. This fact combined with the Kyles' assertion of a custody right in the Crittenden County Circuit Court satisfies the UCCJEA requirements for fulfilling the role of a "person acting as a parent."

The circuit court found—and Sheila asserts on appeal—that the Kyles were time-barred from attacking the 2010 guardianship order, which it determined is actually a custody order. Whether the circuit court's 2010 order was for a guardianship or for custody and the fact that the Kyles did not attack the order sooner have no impact in the analysis of jurisdiction. Under the UCCJEA, Arkansas did not have jurisdiction for the reasons stated above. We hold that the Crittenden County Circuit Court clearly erred as a matter of law in determining that it retained jurisdiction over the case, and we reverse and dismiss for lack of jurisdiction.

In light of our holding above, the issue of convenience of forum is rendered moot.

Reversed and dismissed.

Abramson and Hixson, JJ., agree.

Notes:

¹ The twin siblings of BP2, BP1 and PP (born in 2008), are not involved in this appeal.

[588 S.W.3d 759]

them in Mississippi. The Kyles requested that any custody matters be decided by the Mississippi court. Sheila agrees that BP2 lived with the Kyles beginning sometime around 2013 or 2014. A 2014 note from Sheila allowing BP2 to attend school in Mississippi was included in the evidence and supports the Kyles' contention and the circuit

**2019 Ark. App. 456
588 S.W.3d 58**

**In the MATTER OF the GUARDIANSHIP
OF L.J.P., a Minor**

Derek Pike, Appellant

v.

**Marilyn Shuler, Brenda Forthmon, and
Ronnie Forthmon, Appellees**

No. CV-19-221

Court of Appeals of Arkansas, DIVISION I.

Opinion Delivered October 16, 2019

Brooks A. Wiggins, for appellant.

Short Law Firm, by: Lee D. Short, Little Rock, for
separate appellee Marilyn Shuler.

N. MARK KLAPPENBACH, Judge

[588 S.W.3d 60]

Appellant Derek Pike appeals the August 23, 2018 order of the Saline County Circuit Court that denied his petition to terminate guardianship over his daughter LP and granted LP's maternal grandmother, appellee Marilyn Shuler, permission to intervene in the guardianship proceedings. Marilyn had sought to intervene and requested to be appointed LP's guardian or, alternatively, to be awarded grandparent-visitation rights. Marilyn was permitted to intervene, and she was awarded grandparent visitation, but she was not appointed LP's guardian. The circuit court ordered the paternal grandparents, appellees Brenda and Ronnie Forthmon, to continue as LP's guardians. Derek appeals, contending that (1) the circuit court erred in not terminating the guardianship because he had been declared a fit parent by court order; (2) the circuit court erred in requiring him to prove that guardianship was (a) no longer necessary and (b) no longer in LP's best interest; and (3) the circuit court abused its discretion in permitting Marilyn to intervene. We affirm.

Arkansas Code Annotated section 28-65-401(b)(3) (Supp. 2017) governs this guardianship proceeding, and it provides that a guardianship may be terminated by court order "[i]f, for any other reason, the guardianship is: (A) No longer necessary; and (B) No longer in the best interest of the ward."¹ We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *In re Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* When reviewing the proceedings, we give due regard to the opportunity and superior position of the circuit court to determine the credibility of the witnesses. *Id.*

In 2011, Katie and Derek Pike were divorced in the Saline County Circuit Court and agreed to share joint custody of their then two-year-old daughter, LP. In November 2015, Marilyn (Katie's mother) was appointed the temporary guardian of LP by order of the probate division of the Saline County Circuit Court. The attorney ad litem conducted a thorough assessment of Katie, Derek, LP, and Marilyn, and opined that Katie was unstable and suffering from drug-and-alcohol addiction; that Derek was presently a viable parent for LP; and that guardianship was not needed at that time. In May 2016, Derek and Katie agreed that Derek would be awarded primary custody in the domestic-relations proceeding, subject to the visitation rights Marilyn had in the probate proceedings. As of mid-June 2016, Marilyn's temporary guardianship of LP was terminated.

By late 2016, Marilyn petitioned to be appointed LP's guardian as a result of both parents' instability and drug issues. The Forthmons (Derek's mother and stepfather) also petitioned to intervene, to acquire emergency custody, and to be appointed LP's guardians. Following a hearing in January 2017, the circuit court found both Derek and Katie to be unfit, awarded temporary guardianship of LP to

[588 S.W.3d 61]

the Forthmons, gave Marilyn visitation privileges, and gave Derek and Katie supervised visitation.

The matter was heard again in March 2017, and as a result, the circuit court entered an order in April 2017 granting permanent guardianship to the Forthmons. Both Katie and Derek had filed written consents to the Forthmons having guardianship over LP. Derek had pending criminal charges, and he had tested positive for marijuana, opiates, and hydrocodone. The April 2017 order made the following pertinent findings: (1) the Forthmons would be permanent guardians over then eight-year-old LP, (2) both Derek and Katie had entered written consent to permanent guardianship, (3) regardless of parental consent, both Derek and Katie were unfit, (4) Marilyn would be entitled to specific visitation, and (5) Derek and Katie would be permitted supervised visitation.

In separate paternity and child-support proceedings, Derek was found to be the father of a younger daughter, DP, whom he had with his girlfriend Kayla Skinner. In August 2017, Derek sought and was granted ex parte emergency custody of DP, taking the child from Kayla. The order for emergency custody recited that Derek was "the fit and proper person" to have emergency custody of DP pending a hearing.

In September 2017, Derek filed a petition to terminate the guardianship over LP and to withdraw his prior consent. In November 2017, Marilyn sought to intervene, and she resisted the termination of guardianship, contended that guardianship was still needed to protect LP from her unfit parents, and asked to be appointed LP's guardian. Derek filed a motion to dismiss Marilyn's requests because she had not been permitted to intervene, so she had no standing. Marilyn filed a response in which she pointed out that she was the original petitioner, she had existing visitation rights, and Derek's motions should be dismissed in their entirety.

The pending motions and petitions were considered at a July 2018 hearing. At that point, the Forthmons were in favor of Derek regaining custody of LP, which is what Derek wanted. At the beginning of the hearing, Derek's attorney conceded on the record that Derek had the burden of proving that he is a fit parent.

Derek testified that he had lived in Saline County until about May 2018, when he moved to a house in Maumelle with his youngest daughter DP. He explained that DP's mother Kayla had a drug problem and had made up criminal allegations against him, planting guns and drugs in his house; that she admitted later to fabricating those allegations; and that he and Kayla were no longer in a relationship. Kayla had supervised visitation with DP on alternate weekends. He said that he originally agreed to guardianship of LP in March 2017 because of the pending false criminal allegations, although the charges were dropped in August 2017. Derek had his own heating and air business, and he had regular business hours, although much of his time off was spent caring for DP. He said he owns his own home, he is drug free, he does not expose LP to his rock band or its associated activities, and he should have custody of LP as well as DP. If he regained custody, he would move LP from her school in Benton to a school in Maumelle. Derek and Marilyn did not have a good relationship, but he was willing to work with her because she is ten-year-old LP's grandmother. He was appreciative of all that his mother and stepfather had done for and with LP.

Derek's parents testified about their guardianship over LP and their life in Benton. They believed that it was in LP's best interest to be in her father's care, but

[588 S.W.3d 62]

if the guardianship was not going to terminate, then they wanted to continue to be her guardians. They said that Derek's move to Maumelle had caused him to see LP less, and they did not want him to disrupt LP's school-night routine, so he did not visit her during the week. Derek's mother acknowledged that Derek has bipolar disorder

and has a temper but said he does not display his temper in front of the children. She explained that Derek has an older teenage son, JP, but they do not see him much anymore.

Marilyn's other daughter (LP's aunt) testified that Derek has a temper problem, had punched a hole in a wall, and had kicked a hole in a back door. She said that he has a history of aggression, hatefulness, drug abuse, and being around unsavory people, and she worried about LP's well-being as a consequence of being around him.

Marilyn stated that she has lived in Benton for seventeen years. She believed that Derek loves LP, but he has drug- and alcohol-abuse issues, domestic-violence issues, aggression, and issues with destroying and stealing property. She thought he is a bad father and that she would be a better parent than either he or the Forthmons. Marilyn thought the Forthmons did not let LP participate in as many activities as she had, and they were in denial about Derek's drug and violence problems. Marilyn acknowledged that her daughter, Katie, who was in prison, is also an unfit parent. She was concerned that if Derek regained custody, he would make good on his threats to cut them out of LP's life. Marilyn maintained that she is a cornerstone in LP's life, and she is the person best suited to be LP's guardian.

In conjunction with this hearing in early July 2018, Derek was ordered to undergo drug testing. The hair tests were negative, but the fingernail drug screen was positive for cannabinoids and carboxy-THC. A second drug screen was ordered in late July, and those tests were negative.

Having taken the matter under advisement for approximately a month, the circuit court issued a letter opinion. The circuit court found, in summary, that LP was thriving in the care of the Forthmons; that moving LP would require her to change schools and be away from her friends and church; that Derek continued to put his needs before LP's by moving away from both sets of grandparents and toward a more convenient location for him to participate in things with his

rock band; that Derek was not credible in his statement that he no longer used drugs; that Derek should take parenting classes, undergo family counseling, seek drug-and-alcohol counseling, and pass random drug tests in an effort to work toward unsupervised visitation; that Marilyn would have visitation and be the alternate guardian should the Forthmons no longer wish to be guardians; and that LP should resume counseling. A formal order was filed to memorialize the findings, and this appeal followed.

Derek's first two points on appeal are intertwined. Derek's first point asserts that because he was deemed a fit parent in the temporary emergency order filed in August 2017 in the paternity case concerning DP, then he was definitively a fit parent for all purposes from that date forward to include LP's guardianship case. Derek's second point asserts that because he is, by court order, a fit parent, then the circuit court erred in requiring him to prove that the guardianship is no longer necessary and that it is no longer in LP's best interest. Derek's argument fails.

The order in the *paternity* case was an *emergency temporary* order by its own terms. Second, the *paternity* -case order concerned emergency removal of DP

[588 S.W.3d 63]

from her mother's custody, which is wholly separate from LP's situation in the guardianship case. More to the point, Derek was found unfit as a parent in these guardianship proceedings as of the circuit court's April 2017 order. He remained "unfit" by court order in the guardianship proceedings going into the hearing on his petition to terminate the guardianship over LP.

Equally as important, Derek's attorney conceded at the outset of the hearing on his petition to terminate LP's guardianship that Derek bore the burden to establish that he is a fit parent, completely contrary to the position he now takes on appeal. It is well settled that under the doctrine of invited error, a party may not

complain on appeal of an erroneous action of a circuit court if he or she induced or acquiesced in that action. *See Rogers v. Ritchie*, 2017 Ark. App. 420, 528 S.W.3d 272 (holding that pursuant to invited-error doctrine, Rogers was precluded from arguing that guardianship was void on appeal where she had requested the guardianship without obtaining the requisite professional evaluation and had argued its validity when trustees moved to set it aside); *Clark v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 286, at 6, 493 S.W.3d 782, 787 (holding that pursuant to invited-error doctrine, where Clark's attorney argued to the circuit court that a "significant change of circumstances" was required to effectuate a change of custody that arose solely from dependency-neglect action, she could not then argue on appeal that the circuit court had used the wrong standard from the domestic-relations proceedings). Derek invited the error he now complains of on appeal, which cannot form the basis of reversible error.

Derek's third point on appeal asserts that the circuit court erred in not dismissing Marilyn's response to his petition to terminate the guardianship because she should not have been permitted to intervene. He contends that Marilyn lacked standing because she was not already a party, and she did not stand in loco parentis to LP, meaning that she had no right to participate. We disagree that Derek has shown reversible error.

Permissive intervention is a matter within the circuit court's discretion and is subject to the abuse-of-discretion standard of review. *Whaley v. Beckham*, 2016 Ark. 196, 492 S.W.3d 65. When persons have a close relationship to the matter before the circuit court, which is undoubtedly true here for Marilyn as LP's grandmother and her longstanding involvement in LP's care and upbringing, we have no hesitation in holding that there was no abuse of discretion in permitting Marilyn to intervene in this guardianship proceeding. *Compare Whaley*, *supra*. Moreover, Marilyn had already been granted visitation privileges that were ongoing, and the circuit court ultimately found that she would be LP's alternate

guardian. Marilyn was, for all intents and purposes, already a party to the guardianship proceedings before she filed a response to Derek's petition and formally sought to intervene.

For the foregoing reasons, we affirm.

Affirmed.

Hixson and Brown, JJ., agree.

Notes:

¹ The prior version of this statute provided that a guardianship could be terminated if the guardianship was "no longer necessary or for the best interest of the ward." The prior version was in the disjunctive. In contrast, the legislature's 2017 enactment set a statutory requirement that in order to terminate a guardianship, both must be proved.

2019 Ark. 130

ALICIA MORRIS APPELLANT

v.

JANNELLE CLARK APPELLEE

No: CV-18-143

SUPREME COURT OF ARKANSAS

April 25, 2019

APPEAL FROM THE JEFFERSON COUNTY
CIRCUIT COURT
[NO. 35PR-09-63]

HONORABLE LEON N. JAMISON, JUDGE

REVERSED AND REMANDED; COURT OF
APPEALS' OPINION VACATED.

**JOSEPHINE LINKER HART, Associate
Justice**

This matter comes before us as an appeal from Jefferson County Circuit Court. Appellant, Alicia Morris, seeks reversal of the circuit court's March 10, 2017 order, which denied her motion to terminate a guardianship held by Jannelle Clark, who is Morris's niece, over J.M., who is Morris's minor child. The Arkansas Court of Appeals affirmed, and we then granted review. We vacate the opinion from the Arkansas Court of Appeals, and reverse and remand for an order consistent with this opinion.

I. Background

Before any pleadings or other documents related to this action were filed, on July 21, 2007, Morris signed what is titled a "Legal Document," that purported to confer a guardianship over J.M., an infant at the time, to either Collie Bland, who is Morris's sister, or Clark. Morris's statement in the document provides that she was presently "not stable," and that she that she believed Bland, her sister, was the one who would have guardianship

Page 2

over J.M. However, it is Clark's signature that appears on the line in the document for "adoptive parent."

On February 12, 2009, Clark filed a petition for guardianship over J.M., alleging that Morris had numerous criminal charges pending. On February 17, 2009, the circuit court held a hearing and entered an emergency order appointing Clark as J.M.'s temporary guardian. On April 27, 2009, Morris filed a pro se response stating that she was not relinquishing her parental rights and stating that she only intended for Bland to be J.M.'s guardian, not Clark.

On May 11, 2009, the circuit court held a hearing on Clark's petition at which Clark appeared with counsel and Morris, who had a pending felony charge of second-degree battery, appeared pro se. At the hearing, Morris notified the circuit court that she was contesting the petition. The circuit court found that Clark was qualified and that it was in J.M.'s best interests that Clark be appointed as guardian. The court awarded Morris visitation every other weekend with the option to the mother and guardian to agree to additional visitation. The court did not make any explicit finding to the effect that Morris was unfit to parent.

A little over seven years later, on August 18, 2016, Morris filed a Motion for Emergency and Ex Parte Order for Temporary Custody, Motion for Permanent Change of Custody and to Terminate Guardianship, for Contempt and to Abate or Dismiss Petition for Child Support. Alicia alleged, inter alia, that the felonies had been nolle prossed, she had no pending felony charges, and that Clark had willfully denied visitation. Clark

Page 3

responded generally denying the allegations. The circuit court set the matter for hearing on October 26, 2016.

It would be fair to say that the circuit court was presented with "mixed facts" at the October 26, 2016 hearing. In its order, the circuit court

made a number of findings that were either favorable to Morris or unfavorable to Clark. For example, the circuit court found that "[t]he natural mother showed that the conditions that made it necessary for this guardianship no longer exist. The felony charge was nolle prossed. It would appear that the natural mother's personal life is stable." The circuit court also found that Clark had moved the child to Tennessee without permission and had the child using the last name of Clark's then-boyfriend, a convicted felon, both of which "caused (the) circuit court great concern in continuing custody with the guardian." The circuit court also noted, "[t]his court did not find the natural mother to be unfit in its order of May 27, 2009."

However, the circuit court also made several findings that were either unfavorable to Morris or favorable to Clark. The circuit court found that "[t]he natural mother failed to exercise regular visitation with JM through no fault of the guardian." Furthermore, notwithstanding its aforementioned finding that Morris's "personal life is stable," the circuit court noted that "[f]rom the proof, this court concluded that the natural mother is experiencing residential instability." The circuit court also found that "[t]he relationship between the mother and child has been extremely limited for a long time through no fault of the guardian," and that "[t]he minor wishes to live with his guardian." Finally, the

Page 4

circuit court found that "[t]he guardian has shown that it is in the welfare and best interest of the child that this guardianship continues."

Ultimately, the circuit court denied Morris's petition to terminate the guardianship. This appeal followed.

II. Applicable Legal Authority

Our assessment of this matter begins with a natural parent's constitutional right to raise his or her child without undue interference from government. The Supreme Court of the United

States addressed this issue in *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, Eight Justices agreed that the Fourteenth Amendment protects a parent's right to raise his or her child without undue interference from government. Five Justices agreed that a fit parent is accorded a presumption that the parent acts in the child's best interests. Four Justices agreed that "special factors" must "justify" the state's intrusion, and that one of those factors is a finding of parental unfitness. This court has specifically embraced the presumption that a fit parent acts in his or her child's best interests. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002).

Morris filed her petition to terminate the guardianship pursuant to Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2017) (the Termination Statute). The Termination Statute provides in relevant part as follows:

(b) A guardianship *may* be terminated by court order after such notice as the court may require:

Page 5

(3) If, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.

Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2017) (emphasis added). The Termination Statute's plain language contemplates that one can petition a circuit court to terminate an existing guardianship in either of two separate circumstances: when the guardianship is "no longer necessary" or when termination of the guardianship is "for the best interest of the ward." The Termination Statute's plain language also contemplates that the circuit court retains some level of discretion in these cases; i.e., the guardianship "*may* be terminated by court order" under either of the statute's two prongs. This

court's construction of the Termination Statute has evolved in recent years as litigants have raised new arguments concerning this provision's proper interpretation and its place alongside United States Supreme Court jurisprudence.

In *Graham v. Matheney*, 2009 Ark. 481, 346 S.W.3d 273, this court held that one can petition to terminate an existing guardianship when either the guardianship is no longer necessary or termination is in the best interest of the ward, per the Termination Statute. However, this court added that when the ward is a minor child, "[w]hat is in the best interest of the child must *always* be examined," without regard for which "prong" of the statute the petitioner relies upon. 2009 Ark. 481, 14, 346 S.W.3d 273, 281 (overruled by *Matter of Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129) (emphasis added).

Page 6

Then, in *In re Guardianship of S.H.*, 2012 Ark. 245, 409 S.W.3d 307 (*In re S.H. I*), this court was presented with the issue of whether a fit parent who consented to a guardianship had the burden to prove, under *Graham*, both prongs of the statutory test in order for the court to terminate the guardianship. We reasoned that "parents who have not been found unfit do not relinquish their fundamental liberty interest in raising their children by consenting to a guardianship." 2012 Ark. 245, at 14, 409 S.W.3d at 316. Accordingly, we adopted a two-step, burden-shifting procedure for when a fit parent who consented to a guardianship later moves to terminate that guardianship:

A natural parent who has not been deemed unfit is entitled to the presumption that he or she is acting in the child's best interest, even after consenting to a guardianship. Therefore, when a natural parent, who has not been deemed unfit and who has consented to a guardianship, files a petition to terminate that guardianship, that

parent must put forth evidence that the guardianship is no longer necessary. Once the court is satisfied that the conditions necessitating the guardianship have been removed, the guardians shoulder the burden of rebutting the presumption that termination is in the child's best interest.

Id. at 15, 409 S.W.3d at 316. We remanded the case for the circuit court to reevaluate the case applying this procedure.

When that case returned to us after remand, we clarified the test in two ways. See *In re Guardianship of S.H.*, 2015 Ark. 75, 455 S.W.3d 313 (*In re S.H. II*). First, we said that a fit parent meets the burden of showing that a guardianship is "no longer necessary" under the statute simply by revoking consent to the guardianship. *Id.* at 14, 455 S.W.3d at 322. Second, we said that the guardian can rebut this presumption by proving best interests by clear and convincing evidence. *Id.*

Page 7

Then in *In re W.L.*, 2015 Ark. 289, 467 S.E.3d 129, we did away with the burden-shifting/best interest analysis, overruling *Graham* and returning to the statute's plain language, which states that "a guardianship may be terminated by court order ... [i]f, for any other reason the guardianship is no longer necessary *or* for the best interest of the ward." Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2017) (emphasis added). In reaching that decision, this court was concerned with the friction between the burden-shifting/best interest analysis and the United States Supreme Court's holdings in *Troxel*:

Parents have a fundamental right to raise their children. We will not lightly intrude on this fundamental right. We have already said that a guardianship is no longer necessary once a fit parent revokes an earlier-given consent. This is because a fit

parent is presumed to be acting in the child's best interest. By petitioning to terminate the guardianship and revoking consent, the fit parent, who has the child's best interest at heart, informs the court that the guardianship is no longer necessary. That is sufficient to meet the statutory requirement where the court "may" terminate the guardianship. In other words, a guardianship is no longer necessary "per the statute" when a fit parent revokes consent. The fit parent does not have to prove anything else. The statute does contain another method for the guardianship to be terminated, that is, by showing it is no longer in the ward's best interest. However, given that the legislature has created a disjunctive test, the parent can move to terminate under either

prong.

This ruling is consistent with the statutory text and a fit parent's fundamental liberty interest in the care, control, and custody of his or her child. Furthermore, the burden of proof does not and cannot shift to the guardians when a guardianship is terminated based on a fit parent's revocation of consent. Simply put, a fit parent's decision regarding his or her children is conclusive. See *Troxel*, 530 U.S. at 68-69, 120 S. Ct. 2054 ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

2015 Ark. 289, at 6-8, 467 S.W.3d at 132-34. Additionally, in a footnote, the *W.L.* majority addressed a concern raised by the dissent; the dissent took issue with the majority's holding that "a fit parent's decision ... is conclusive," reasoning that this holding was inconsistent with the discretion afforded by the statute to a circuit court when determining whether to terminate a guardianship (See Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2017) ("A guardianship *may* be terminated by court order . . . if . . . the guardianship is no longer necessary or for the best interest of the ward.") (emphasis added)). The majority wrote,

The dissent points out that the statute leaves the trial court with discretion even when the conditions necessitating guardianship no longer exist. This is a correct statement of the law; however, there were no other facts in front of the court that could overcome David's fundamental right to raise his child.

In re W.L., 2015 Ark. 289, 15, 467 S.W.3d 129, 137 at n.6. Finally, this court most recently addressed the Termination Statute in *Donley v. Donley*, 2016 Ark. 243, 493 S.W.3d 762. There, this court cited favorably to the rationale set forth in *W.L.*, and then remanded "to the circuit court to enter an order applying the correct standard." *Id.* at 12, 493 S.E.3d at 769.

Acknowledging that our jurisprudence would benefit from further development on the Termination Statute analysis, we granted review in the present matter and now hold as follows.

A natural parent who has not been declared unfit is presumed to act in his or her own child's best interest. *Troxel*, *supra*. This presumption is applicable when such a parent seeks to terminate an existing guardianship over his or her minor child pursuant to the

Termination Statute. In this situation, parent's petition to terminate the guardianship need only "inform the court that the guardianship is no longer necessary." *W.L., supra*. This is an otherwise fit parent's only burden of proof; once that lack of necessity is communicated to the circuit court by a fit parent, the circuit court ordinarily would terminate the guardianship. *W.L., supra*. The language contained in the Termination Statute does provide the circuit court some discretion in determining whether the guardianship should be terminated, but where the petitioner is a fit parent and the ward is the fit parent's minor child, the guardianship should only remain in place due to some circumstance "that could overcome (the petitioner's) fundamental right to raise (his or her) child." *W.L., supra*.

We hold that a circuit court's determination that it would be in a minor ward's best interests for a guardianship to remain in place, standing alone, is insufficient to defeat a fit parent's substantive Due Process interest in raising his or her own child. There is a constitutional presumption that a fit parent acts in his or her child's best interests, so where the parent has not previously been found unfit, weighing "best interests" at the outset of the termination inquiry is inappropriate. The mere fact that a child may have more or better opportunities with another family cannot be enough to keep that child away from an otherwise fit parent.

None of this, however, should be construed to prohibit a guardian in such cases from actually raising and contesting the issue of the natural parent's "fitness" when the natural parent petitions to terminate the guardianship. Otherwise fit parents are presumed

Page 10

to be acting in their child's best interests, so the guardianship should only remain in place over the natural parent's wishes where the guardian defeats this presumption. To defeat this presumption, the guardian bears the burden of establishing that the natural parent is not fit.

Importantly, whether a natural parent is "fit" is a very different question from whether it would be in a child's "best interest" to live with a natural parent or another family. Per the *Troxel* plurality, "fitness" asks whether a natural parent can "adequately care for his or her children." *Troxel, supra*. If the natural parent is found to be unfit, then the natural parent is not entitled to the constitutional presumption discussed in *Troxel* and *Linder*, and the circuit court accordingly has greater discretion to determine whether to terminate the guardianship based upon the specific circumstances of a given case, including the best interests of the ward.^{1 2}

Accordingly, when a parent who has not previously been determined to be unfit petitions for termination of an existing guardianship over his or her minor child, circuit courts ordinarily should only decline to terminate the guardianship where the guardian contests the parent's fitness and establishes that the parent is presently unfit.³ Where an

Page 11

otherwise fit natural parent seeks to terminate an existing guardianship and the scenario described above is not implicated, the circuit court should dispose of the guardianship routinely.

III. Application

Here, the circuit court's order denying Morris's petition indicates that the trial court followed the burden-shifting/best interest analysis that this court disposed of in *W.L.* The circuit court's order notes that while "[t]he natural mother showed that the conditions that made it necessary for this guardianship no longer exist," the guardianship should nonetheless continue because "[t]he guardian has shown that it is in the welfare and best interest of the child that this guardianship continues." Additionally, the circuit court's order states that it did not find Morris unfit in its prior order of May 27, 2009. The circuit court's order does not make any finding that Morris was unfit at the time of the October 26, 2017 termination hearing. Absent a

finding of unfitness, then it was error for the circuit court to decline to terminate the guardianship by engaging in a best-interest analysis. As Morris argues, the *Troxel* plurality opined that some level of "special weight" must be afforded to a fit parent's preference as to what should happen to his or her child, and we agree with that proposition. Accordingly, we reverse and remand this matter to the circuit court for an order consistent with this opinion.

Reversed and remanded; Court of Appeals' opinion vacated.

Page 12

Sandra Y. Harris, Attorney at Law, PLLC,
by: *Sandra Y. Harris*, for appellant.

One brief.

Footnotes:

¹ By the terms of the statute, even where a parent petitioning to terminate an existing guardianship over his or her minor ward is found to be unfit, there could still be cause to terminate the guardianship if the parent establishes that termination would nonetheless be "for the best interests of the ward."

² We are mindful that the Termination Statute now reads differently due to modifications implemented by the General Assembly in 2017. See Ark. Code Ann. § 28-65-401(b)(3). This opinion concerns the analysis of Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2017), which was the law at the time of the October 26, 2016 hearing.

³ As stated above, our decision in *W.L.* did not foreclose the possibility that some extraordinary circumstance could potentially overcome even a fit parent's constitutional right to parent his or her child. *W.L.*, 2015 Ark. 289, at 18 n.6, 467 S.W.3d at 138 n.6. It suffices to say that no such circumstance was demonstrated here.

**2012 Ark. 245
409 S.W.3d 307**

**In the Matter of the GUARDIANSHIP OF
S.H., a minor.**

Tamera Troeskyn, Appellant

v.

**Larry Herrington and Donna Herrington,
Appellees.**

No. 11–1107.

Supreme Court of Arkansas.

May 31, 2012.

Unconstitutional as Applied

West's A.C.A. § 28–65–401.

[409 S.W.3d 309]

Teresa Wineland, Bonnie Joan Johnson, Williams
& Anderson PLC, Little Rock, for Appellant.

Christina Boyd, Rufus T. Buie, III, Boyd & Buie,
DeWitt, for Appellees.

JIM GUNTER, Justice.

[2012 Ark. 1]Appellant Tamera Troeskyn appeals from an order of the Arkansas County Circuit Court denying her petition to terminate guardianship. She asserts on appeal that Ark.Code Ann. § 28–65–401 (Repl.2012), is unconstitutional as applied to her because it impinges on her fundamental liberty interest with respect to the care, control, and custody of her child; that the circuit court erred in denying the petition to terminate the guardianship; that the circuit court erred in granting a motion for psychological evaluation; and that the circuit court erred in admitting the records and reports

of Lesa Doan and Dr. Steven Shapse into evidence. We assumed jurisdiction over this case as one involving issues of federal constitutional interpretation pursuant to Ark. Sup.Ct. R. 1–2(b)(3).

S.H. was born on July 1, 2005, to Scott Herrington and Tamera Troeskyn when Tamera lived in Minnesota. Thereafter, Tamera moved to Stuttgart, Arkansas, into a house with Scott next door to his parents, Donna and Larry Herrington. On August 19, 2008, the [2012 Ark. 2]Herringtons filed a petition for guardianship of S.H., alleging that Tamera had been granted primary physical custody of S.H. on April 21, 2008, and that since that time, she had cohabitated with persons of the opposite sex; was unemployed; had moved her residence at least six times since January 1, 2008; had been kicked out of her current home at least once; had made statements indicating that she wanted to move back in with the Herringtons to provide stability for S.H.; and had recently been released from drug rehabilitation. An ex parte emergency temporary order of guardianship, indicating that Tamera had subjected the minor child to unstable living conditions by cohabitating with members of the opposite sex and had no visible means of supporting the child, was entered on August 20, 2008. On October 1, 2008, the court entered a temporary order of guardianship continuing the Herringtons' appointment as guardians of S.H. In the order, the court ordered unsupervised visitation for Tamera, supervised visitation for Scott, and mandatory drug testing for all parties to the action. The order noted that Tamera had recently married Tory Brickey.

At a hearing held on November 3, 2008, Tamera, who appeared pro se, consented to a permanent guardianship. Scott had waived appearance and consented to the guardianship previously. The court entered an order of guardianship on November 24, 2008, noting that Tamera had recently instituted divorce proceedings

[409 S.W.3d 310]

against Tory Brickey and that she was again residing with Scott. The order stated that “by agreement of the parties” the guardianship of S.H. was granted to the Herringtons.

On June 25, 2010, Tamera filed a petition to terminate guardianship asserting that the guardianship was no longer necessary; that it was in S.H.'s best interest for the guardianship [2012 Ark. 3]to be terminated; that Tamera was withdrawing any consent she had given to the establishment of the guardianship; that Tamera was a fit parent who was ready and willing to care for S.H.; that failure to terminate the guardianship would violate Tamera's common-law and constitutional rights to parent; that the guardianship statutes, specifically Ark.Code Ann. § 28–65–401, violated due process under the Fifth and Fourteenth Amendments to the United States Constitution and article 2, sections 8 and 21 of the Arkansas Constitution because the statutes do not require proper consideration of parental rights; and that because Tamera lived in Minnesota, termination of the guardianship was appropriate under Ark.Code Ann. § 28–65–401(b)(2).¹ The Herringtons responded to the petition to terminate, denying Tamera's claims, and filed a motion for psychological evaluations claiming that Tamera's psychological fitness and ability to parent were in question. The Herringtons asked the court to direct that all interested parties—Larry, Donna, Tamera, and Tamera's mother, Marcia Dally—submit to a psychological evaluation. Tamera objected to a psychological evaluation on the basis that she had not put her mental condition in controversy and that the Herringtons failed to show good cause to require an examination. Alternatively, Tamera asked the court to also require a mental evaluation of Scott Herrington and to allow Tamera to be evaluated near her home in Minnesota. The circuit court granted the motion for psychological evaluations.

[2012 Ark. 4]The court held a hearing on the petition to terminate on April 8, 2011. ² Tamera testified that she lived in Minnesota in a house that she shared with her sister and that she worked as a certified nursing assistant in an

elder-care facility. She acknowledged that she had agreed to the guardianship in 2008 and admitted that at that time, her life was unstable, she was not working, she lived with the Herringtons, and she could not provide for S.H. financially. Tamera stated that when she consented to the guardianship, she believed that once she was stable, the guardianship would be terminated. Shortly after the permanent guardianship order was entered, Tamera moved back to Minnesota. On several occasions after the move, she visited S.H. in Arkansas and S.H. came to Minnesota to visit. However, after filing the petition to terminate the guardianship in August 2010, it became difficult to contact the Herringtons and schedule visitation. Tamera stated that since filing the petition, she was allowed to visit S.H. for about a week in February 2011. Tamera testified that she was not taking illegal drugs and had been voluntarily taking random drug tests in Minnesota.

Dr. Steven Shapse, who performed the psychological evaluation of Tamera, testified that he did not find any “red flags” with regard to her ability to be a fit parent.

[409 S.W.3d 311]

Dr. Shapse stated that he followed standard procedure in conducting the evaluation, including a comprehensive interview, a battery of standardized tests, a consultation with Tamera's current therapist, and a written report summarizing his evaluation. He testified that nothing in his findings suggested Tamera suffered from a mental health condition that would impair her [2012 Ark. 5]ability to parent, and she did not suffer from a major mental illness. Additionally, there was no indication of poor impulse control and nothing to suggest she was not within a normal spectrum of well-functioning individuals.

Larry Herrington testified that he and his wife, Donna, had been S.H.'s guardians for nearly three years and that during that time, S.H. had been potty-trained, learned to read and write, and participated in dance classes. He testified that in his opinion, S.H. had bonded with him and his

wife. He stated that Donna took S.H. to school most mornings and picked her up; Donna also took S.H. to the majority of her doctors' and counseling appointments. He testified that S.H. had been allowed to visit Tamera in Minnesota but that after the visits, S.H. was often distressed. Larry admitted that he was communicating less frequently with Tamera than he had been the year before and that he had purposefully decreased Tamera's visitation with S.H. because her counselor had recommended that she not travel to Minnesota. He felt that Tamera was inconsistent and not prepared to be a parent.

Lesa Doan, a licensed social worker, testified that she had provided counseling services for S.H. since March 5, 2010. Doan stated that when she first saw S.H., she was clingy and had trouble using the restroom. Over the past year, she had made progress and developed better self-esteem. However, Doan noted that she became concerned in April 2010 after S.H. returned from a Minnesota visit and had three difficult bowel incidents. Doan stated that S.H. became more clingy during this time. Doan recommended to Larry that Tamera's visits with S.H. take place in Arkansas and invited Tamera by letter to participate in S.H.'s therapy. Doan testified that additional setbacks included the manifestation of fear and threatening themes [2012 Ark. 6] during S.H.'s play therapy. Doan stated that once S.H. started school in the fall of 2010, she became more independent and outgoing. In her opinion, Doan believed it to be in S.H.'s best interest to continue living with her guardians.

At the close of the testimony, the court took the matter under advisement. On July 13, 2011, the circuit court entered an order denying the petition to terminate the guardianship, finding that as applied in this case, Ark.Code Ann. § 28–65–401(b)(3) was not an unconstitutional violation of due process under either the federal or state constitution; that Tamera carried the burden of proof in the termination proceeding; that the guardianship of S.H. was still necessary; and that termination of the guardianship would not be in her best interest at this time. The court ordered that Tamera's visitation with S.H. be

expanded as much as possible to create a stronger bond between mother and daughter, giving explicit instructions for such expansion, and that Tamera begin cooperating and participating in S.H.'s therapy sessions to whatever extent possible. Tamera filed a timely notice of appeal from the circuit court's order on August 9, 2011.

I. Constitutionality of Ark.Code Ann. § 28–65–401

In her first point on appeal, Tamera asserts that, as applied to her, the guardianship termination statute, codified at Ark.Code Ann. § 28–65–401, is unconstitutional

[409 S.W.3d 312]

because it impinges on her fundamental liberty interest with respect to the care, custody, and control of her child as articulated in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Although Tamera contends that the statute violates due process as provided in both the federal and state constitutions, her argument focuses on the substantive due-process component of the [2012 Ark. 7] Fourteenth Amendment, and she makes no Arkansas-specific argument. Tamera urges this court to hold that a parent does not surrender her fundamental liberty right in raising her child when she agrees to a guardianship and cites cases from several states as persuasive authority. Moreover, Tamera argues that public policy supports the protection of a fit, natural parent's constitutional liberty interest where that parent has agreed to a guardianship because it encourages a parent who may not be able to care for a child temporarily to seek what is in that child's best interest yet still enjoy the presumption when she petitions to terminate that guardianship. Tamera avers that because Ark.Code Ann. § 28–65–401 impinges on a fundamental right, it is subject to a strict-scrutiny analysis. Even assuming that the state has a compelling interest in protecting children, Tamera contends that such an interest can be adequately protected by placing the burden of proof on the opponent of termination.

In their response, the Herringtons assert that although a parent has a fundamental liberty interest during an initial guardianship proceeding, the parent does not enjoy the full privilege in a proceeding to terminate that guardianship. They maintain that the present case is distinguishable from *Troxel* because Tamera has relinquished custody to nonparent guardians. The Herringtons advocate a rational-basis standard for reviewing the constitutionality of the termination statute. Further, they submit that a parent does not give up all constitutionally protected rights when consenting to a guardianship but that the parent does relinquish the parental presumption to control the care and custody of the child. The Herringtons cite *Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273, as the seminal Arkansas case on the issue of guardianship termination.

[2012 Ark. 8]This case presents us with an issue of first impression with regard to the application of a parent's fundamental right to the care, control, and custody of his or her child within the framework of terminating a consensual guardianship. In Arkansas, all guardianship proceedings are governed by statute. Ark.Code Ann. §§ 28–65–101 to –604 (Repl.2012). Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. *Paschal v. State*, 2012 Ark. 127, at 8, 388 S.W.3d 429. If it is possible to construe a statute as constitutional, we must do so. *Id.* Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. *Id.*

A guardian is “one appointed by a court to have the care and custody of the person or of the estate, or of both, of an incapacitated person.” Ark.Code Ann. § 28–65–101(3) (Repl.2012). Before approving a guardian for a minor, the court must be satisfied that the guardianship is desirable to protect the interests of the minor and the person to be appointed guardian is qualified and suitable. Ark.Code Ann. § 28–65–210 (Repl.2012). The Arkansas General Assembly made clear that, in the case of original

guardianship actions with respect to children, natural parents enjoy a preference in the law.

[409 S.W.3d 313]

Ark.Code Ann. § 28–65–204(a) (Repl.2012). Once established, a guardianship may be terminated by court order after notice as required by the court where the guardianship is no longer necessary or for the best interest of the ward. Ark.Code Ann. § 28–65–401(b)(3); *see also Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273 (clarifying the standard for courts in guardianship-termination proceedings).

In *Linder v. Linder*, we recognized a parent's fundamental liberty interest in the care, [2012 Ark. 9]control, and custody of his or her child:

The Fourteenth Amendment provides in relevant part that “[No state shall] deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. 14 § 1. This language has been interpreted over the years to have both a procedural and substantive component. The substantive component of the due process clause protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

One of the substantive components that has emerged from the Fourteenth Amendment's guarantee of due process of law is the liberty right of a parent to have and raise children. Several cases from the United States Supreme Court have dealt with the contours of this right as it has emerged over recent decades.

348 Ark. 322, 342, 72 S.W.3d 841, 851 (2002). The *Linder* court analyzed in depth the holding of the United States Supreme Court in *Troxel v. Granville*, wherein Justice O'Connor, speaking for four Justices in a plurality decision, summarized

the Court's approach to governmental intrusions on the parent-child relationship:

[T]he interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” We explained in *Pierce* that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.*, at 535, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply [2012 Ark. 10]nor hinder.” *Id.*, at 166, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.... In light of this extensive precedent,

[409 S.W.3d 314]

it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions

concerning the care, custody, and control of their children.

Troxel, 530 U.S. at 65–66, 120 S.Ct. 2054. Moreover, the Supreme Court has recognized a parent's fundamental liberty interest even in cases where the child is not in the parent's custody. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (a parent's “fundamental liberty interest ... in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State”). It is “ ‘plain beyond the need for multiple citation’ that a natural parent's ‘desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.’ ” *Id.* at 758–59, 102 S.Ct. 1388 (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)). In *Linder*, we adopted the *Troxel* plurality's ruling that a fit parent is presumed to be acting in a child's best interest. *Linder*, 348 Ark. at 350–52, 72 S.W.3d at 856–58; see also *Troxel*, 530 U.S. at 68, 120 S.Ct. 2054; *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

It is manifest that prior to the installation of the guardianship, Tamera, as S.H.'s natural mother who had not been deemed unfit, was entitled to the presumption that she was acting in the child's best interest. However, in this case, we must determine whether Tamera retained that fundamental right, and consequently, the presumption, when she consented to the guardianship and gave up custody of her child. Although we have never addressed the issue, the overwhelming majority of jurisdictions that have considered it have held that [2012 Ark. 11]parents do not relinquish their fundamental liberty interest upon consenting to a guardianship. See, e.g., *In re D.I.S.*, 249 P.3d 775, 781–82 (Colo.2011) (concluding that where the parent had consented to the guardianship and now sought termination of it, the trial court was required to give “special weight” to the parent's

decision to terminate); *In re Marriage of Dafoe*, 324 Ill.App.3d 254, 257 Ill.Dec. 761, 754 N.E.2d 419, 423–24 (2001) (“[I]n order to retain custody of a child [through a guardianship] over the superior right of the natural parent, a third party must demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody, and the third party must also show that it is in the child’s best interests that the third party be awarded the care, custody, and control of the child.”); *In re Guardianship of L.L. & J.L.*, 745 N.E.2d 222 (Ind.Ct.App.2001) (although based on the common-law doctrine of natural-parent preference, addressing constitutional implications in holding that the nonparent third party bears the burden of overcoming the natural-parent presumption by clear and cogent evidence); *In re Guardianship of Zachary Blair*, 662 N.W.2d 371 (Iowa Ct.App.2003) (upholding guardianship statutes as constitutional where they clearly establish preference for placement with natural parent, require a finding that the natural parent is unsuitable and not qualified prior to placement with a third party, and burden is always on nonparent to rebut the natural-parent presumption in initial guardianship appointment, modification, and termination); *In re Guardianship of Williams*, 254 Kan. 814, 869 P.2d 661 (1994) (relying on longtime common-law parental-preference doctrine to reverse denial of petition to terminate where natural parent had not

[409 S.W.3d 315]

been deemed unfit); *In re Guardianship of Jeremiah T.*, 976 A.2d 955 (Me.2009) (recognizing a parent’s constitutional right to care and custody of a child and [2012 Ark. 12]requiring guardian to prove that natural parent is unfit and continuing guardianship is in the best interest of child); *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238, 246 (2004) (holding that the best interest of the child is subject to the overriding principle that the relationship between parent and child is constitutionally protected); *In re Guardianship of Reena D.*, 163 N.H. 107, 35 A.3d 509 (2011) (based solely on state

constitutional grounds, joining the majority of jurisdictions that *Troxel* rights apply where parent has consented to guardianship and placing burden of proof on guardians opposing termination); *In re Guardianship of Barros*, 701 N.W.2d 402 (N.D.2005) (concluding that because a natural parent has a fundamental right to custody, in a termination-of-guardianship proceeding, natural parent must prove by a preponderance that conditions requiring guardianship have been removed and then burden shifts to guardians to rebut presumption that parental custody is in the best interest of the child); *Boisvert v. Harrington*, 173 Vt. 285, 796 A.2d 1102 (2002) (recognizing that a parent’s fundamental liberty interest requires that, in seeking to terminate a guardianship, the parent enjoy a presumption that his or her custody is in the child’s best interest); *In re SRB–M*, 201 P.3d 1115 (Wyo.2009) (concluding that constitutional protection of a parent’s fundamental right to parent required a finding of parental unfitness in order to continue an established guardianship over a parent’s objection). *But see In re Guardianship of L.V.*, 136 Cal.App.4th 481, 38 Cal.Rptr.3d 894 (2006) (holding that parents who are not participating in the day-to-day parenting of the minor are not entitled to constitutional protections and that the test in termination proceedings is the best interest of the child); *In re Guardianship of M.R.S.*, 960 P.2d 357 (Okla.1998) (holding that where a natural parent seeks termination of a consensual guardianship, the presumption [2012 Ark. 13]that termination is in the best interest of the child does not arise until the natural parent proves that the impediments that led to the guardianship have been removed and the court is satisfied that parent is fit and placement with the parent would not be harmful); *Grant v. Martin*, 757 So.2d 264 (Miss.2000) (holding that where a natural parent voluntarily relinquishes custody of a minor child, including guardianship, that parent forfeits the right to rely on the common-law presumption in favor of the natural parent); *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.2002) (holding that where a parent consents to awarding custody to a nonparent, the parent cannot later petition to change custody and claim a superior right as a natural parent).

Several of the states that have applied the *Troxel* presumption in proceedings to terminate a consensual guardianship have done so to serve important public-policy concerns. For instance, the Colorado Supreme Court explained,

An important characteristic of a guardianship by parental consent is that parents have exercised their fundamental right to place their child in the custody of another for purposes of furthering the child's best interests. Failure to accord fit parents a presumption in favor of their decision to terminate a guardianship established by parental consent would penalize their initial decision to establish the guardianship and deter parents from invoking the guardianship laws as a means to care for the child while they address significant problems

[409 S.W.3d 316]

that could impair the parent-child relationship or the child's development.

In re D.I.S., 249 P.3d at 783 (internal citations omitted); *see also In re Guardianship of D.J.*, 682 N.W.2d at 246; *In re Guardianship of Reena D.*, 35 A.3d at 513–14. In *Devine v. Martens*, we expressed similar public-policy concerns. 371 Ark. 60, 74, 263 S.W.3d 515, 526 (2007) (“Just as the Arkansas Juvenile Code recognizes the efforts of parents in dependency-neglect actions to improve their homes and parenting skills, we should encourage and recognize such [2012 Ark. 14]improvements by parents in guardianship actions.”).

We align ourselves with the majority view and hold that parents who have not been found unfit do not relinquish their fundamental liberty interest in raising their children by consenting to a guardianship and, thus, they are entitled to the *Troxel* presumption in a proceeding to terminate that guardianship. We resolve that this conclusion best comports with the constitutional right of parents, the temporal nature of guardianships, and public policy.

Next, we must turn to whether the termination statute at issue, as applied to Tamera, violated her fundamental right to the care, control, and custody of her child. A statute that infringes on a fundamental right is subject to strict-scrutiny review, and the statute cannot survive unless “a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.” *Paschal*, 2012 Ark. 127, at 11–12, 388 S.W.3d at 437; *see also Linder*, 348 Ark. at 347–49, 72 S.W.3d at 855–56.

Although the circuit court stated in its order that it “firmly believe [s] it is both the natural and preferable order of things that a child should be raised by her parents,” it made clear that in “the final analysis, [the child's] best interest must be the court's primary concern.” It is evident from the court's findings that Tamera's status as natural parent was afforded no weight in the decision. Rather, the best interest of S.H. was the controlling factor in deciding whether to terminate the guardianship, and the circuit court specifically saddled Tamera with the burden of proving both that the guardianship was no longer necessary and that termination was in S.H.'s best interest. Tamera was required to carry this burden irrespective of the fact that her fitness had never been at issue and she had consented to the initial [2012 Ark. 15]guardianship. As such, even assuming that the termination statute advanced a compelling interest of protecting children who had become stable in their guardianship environment, the statute was not applied to Tamera in the least restrictive available method where there was no weight given to her decision to terminate despite the presumption that she acts in her child's best interest.

Therefore, we hold that the application of Ark.Code Ann. § 28–65–401 in this instance violated Tamera's constitutional right. A natural parent who has not been deemed unfit is entitled to the presumption that he or she is acting in the child's best interest, even after consenting to a guardianship. Therefore, when a natural parent, who has not been deemed unfit and who has consented to a guardianship, files a petition to

terminate that guardianship, that parent must put forth evidence that the guardianship is no longer necessary. Once the court is satisfied that the conditions necessitating the guardianship have been removed, the guardians shoulder the burden of rebutting the presumption that termination is in the child's best interest. We reverse and remand for the circuit court to address Tamera's petition in light of our holding.

[409 S.W.3d 317]

II. Denial of Petition to Terminate Guardianship

Because we hold that the guardianship-termination statute is unconstitutional as applied to Tamera, we need not address whether the circuit court clearly erred in finding that the guardianship was still necessary and that termination of it was not in S.H.'s best interest.

III. Psychological Evaluation

Next, Tamera argues that the circuit court erred in granting the Herringtons' motion [2012 Ark. 16]for psychological evaluation over her objection. Specifically, she asserts that the court's order was not authorized by Rule 35 of the Arkansas Rules of Civil Procedure because her mental condition was not in controversy and good cause was not shown. She relies principally on *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), the pivotal case construing the substantially similar Federal Rule of Civil Procedure 35(a).

A trial court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed by this court absent abuse of discretion that is prejudicial to the appealing party. *Loghry v. Rogers Group, Inc.*, 348 Ark. 369, 72 S.W.3d 499 (2002). To have abused its discretion, the circuit court must not only have made an error in its decision, but also must have acted improvidently, thoughtlessly, or without due consideration. *Chapman v. Ford Motor Co.*, 368 Ark. 328, 245

S.W.3d 123 (2006). Arkansas Rule of Civil Procedure 35 provides in relevant part:

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

Ark. R. Civ. P. 35(a) (2011). In *Schlagenhauf*, the Supreme Court explained,

Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of "in controversy" and "good cause," which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. This does not, of course, mean that the movant must prove his case on the merits in order to [2012 Ark. 17]meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.

379 U.S. at 118–19, 85 S.Ct. 234 (1964) (internal citations omitted).

In their motion, the Herringtons alleged that Tamera was unstable and that an examination was necessary to assess her mental and emotional capabilities prior to allowing the ward to be returned to her

[409 S.W.3d 318]

custody. They submitted that Tamera had “exhibit[ed] behaviors which bring her psychological fitness, and ability to parent into question.” As examples, they listed Tamera's relationship history, including a short six-month marriage, moving in and out of homes with men to whom she was not married, and her failure to communicate with S.H. for a six-week period. Although the allegations asserted in the motion are not especially demonstrative of mental instability, the circuit court found that psychological evaluations would be “beneficial to the court in reaching a decision on the ultimate issues in this case, i.e., the best interest of [S.H.]”

In this instance, the circuit court failed to make the appropriate finding required by Rule 35 to warrant psychological evaluation—namely, that Tamera's mental condition was in controversy and that the Herringtons had shown good cause to warrant an invasive psychological examination. Rather, the circuit court simply found that having a psychological evaluation would be beneficial to the court. Although it may be argued that the mental health of parents or guardians is always an issue in cases involving the placement of children, we conclude that the circuit court abused its discretion where it did not apply the correct legal [2012 Ark. 18]standard in evaluating the motion for psychological evaluation. As such, we reverse and remand on this issue.

IV. Evidentiary Issue

For her last point on appeal, Tamera maintains that the circuit court erred in admitting into evidence the written report of Lesa Doan summarizing her clinical involvement with S.H. and the written report of Dr. Shapse after his

psychological examination of Tamera. She claims that those written documents constituted inadmissible hearsay, that the Herringtons provided no basis for an exception to the rule, and that the admitted evidence prejudiced her because the circuit court relied extensively on information from those reports in its written order denying the petition to terminate. The trial court has broad discretion in its evidentiary rulings; hence, the trial court's admission of evidence will not be disturbed on appeal unless there has been a manifest abuse of discretion. *S. Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003).

As a threshold matter, we note that Tamera never formally objected to the introduction of Dr. Shapse's report. Although the circuit court noted in its order denying the petition to terminate that Tamera was reluctant to introduce the written report, she failed to lodge an objection when the report was offered into evidence. The record reflects that after Tamera called Dr. Shapse on rebuttal, the court inquired as to whether Tamera wanted to offer Dr. Shapse's written report into evidence, and the following colloquy occurred:

Herringtons' Attorney: Well, Your Honor, I was under the impression the Court had the psychologicals anyway. So, I mean they were forwarded here first, I assume. I know the ones on Mr. and Ms. Herrington were. I don't know about Ms. Troeskyn's.

[2012 Ark. 19]Tamera's Attorney: No, Your Honor. Obviously that's, you know, why we had Dr. Shapse here because the report itself, in my view, was hearsay.

Court: Well, you don't want to put his report in?

Tamera's Attorney: I think we covered in evidence—

Court: Okay. All right.

Tamera's Attorney: testimony the pertinent portion of the—

[409 S.W.3d 319]

Court: That's fine. When I go back and review my notes and exhibits it is often very helpful to the Court to be able to go and review a written report, assuming that the testimony that has been given concerning the report is the same thing that is in the written report.

Tamera's Attorney: If the Court—Your Honor, I will be glad to introduce—

Court: I am not going to tell you how—what to do—

....

Herringtons' Attorney: I would move for the introduction of the psychological evaluation of Ms. Troeskyn, as Defendant's Exhibit Number Two for today. Does the Court have a copy or do I need to provide my copy?

....

Herringtons' Attorney: Or do you have an extra copy?

Tamera's Attorney: I have one somewhere.

Thereafter, Dr. Shapse's written report was introduced into evidence.

Unless a party has no opportunity to object to a ruling of the court, an objection must be made at the time of the ruling, and the objecting party must make known to the court the action desired and the grounds of the objection. *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989). Here, although Tamera indicated it was her belief that the written report [2012 Ark. 20]constituted hearsay, she failed to timely object when the report was offered into evidence. It is well settled that this court will not consider arguments raised for the first time on appeal. *Ford Motor Co. v. Ark. Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004). Thus, we

are precluded from reviewing the merits of her argument as to Dr. Shapse's report.

As to Lesa Doan's report, Tamera did make a timely and specific hearsay objection to its introduction. She claimed that because Doan was present to testify, her report was hearsay, that the Herringtons failed to articulate a proper exception to hearsay, and that it was error for the circuit court to allow the written report into evidence. While we agree that the report constituted hearsay, we hold that the admission of the report does not warrant reversal. Where hearsay evidence is improperly admitted, but the same evidence is properly admitted through another source, there is no reversible error. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995). We will not reverse a circuit court's admission of evidence in the absence of a showing of prejudice. *Aka v. Jefferson Hosp. Ass'n*, 344 Ark. 627, 42 S.W.3d 508 (2001). Here, Tamera was not prejudiced from the admission of the report itself because Doan testified at length during the hearing with regard to the contents of the report. As to any statements made by S.H. that were included in the report, those statements were not hearsay because they were not offered for the truth of the matters asserted but to show the basis for Doan's conclusions and recommendation. Therefore, we affirm on this point.

Reversed and remanded in part; affirmed in part.

**CORBIN, BROWN, and GOODSON, JJ.,
concur in part and dissent in part.**

**COURTNEY HUDSON GOODSON, Justice,
concurring in part and dissenting in part.**

[2012 Ark. 21]I fully support this court's decision that the guardianship termination statute is unconstitutional, as applied, for infringing upon Tamera's fundamental liberty interest in the care, custody, and control of

[409 S.W.3d 320]

her child.³ However, I disagree with that part of the majority's decision holding that a natural parent, who consents to a guardianship and has not been found unfit, bears any burden of proving in a termination proceeding that the guardianship is no longer necessary.

The right to care for and raise one's own child is a fundamental liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment. See *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). In *Troxel*, the plurality struck down a “breathtakingly broad” Washington statute that allowed visitation by third parties based solely on a best-interest standard. *Id.* at 67, 120 S.Ct. 2054. The Court recognized that a fit parent is presumed to act and make decisions in the best interest of his or her children and held that courts must, therefore, “accord at least some special weight to the parent's own determination” when a parent's decision becomes subject to judicial review. *Id.* at 70, 120 S.Ct. 2054. The Court thus held that the statute, as applied, unconstitutionally infringed on the protected liberty interest of parents in the care, [2012 Ark. 22]custody, and control of their children by permitting a court to disregard and override a fit parent's wishes based solely on the trial judge's personal view of the children's best interests. *Id.*

Building on these principles, today this court has joined a majority of jurisdictions to hold that parents who have not been deemed unfit do not forfeit their fundamental liberty interest in raising their children by consenting to a guardianship and that such parents are entitled to the *Troxel* presumption that their decision to reassert care, custody, and control of their children is in the children's best interest. In the present case, the termination statute was applied in an unconstitutional manner because Tamera's decision was not afforded the required special weight. With its instructions on remand, the majority gives Tamera the benefit of the presumption that she is acting in the child's best interest, but in the same breath, it disregards the special weight accorded a fit parent's decisions regarding her child by shouldering her with the

burden of demonstrating that the guardianship is no longer necessary. In my view, the fundamental right at stake in this case must be protected by placing the entire burden of proof on those who seek to override the parent's presumptively valid decision. See, e.g., *In re Guardianship of Reena D.*, 163 N.H. 107, 35 A.3d 509 (2011). Not only must the guardians rebut the best-interest presumption, they must also prove that the guardianship remains necessary.

Moreover, the majority does not make clear what standard of proof Tamera is to bear. The opinion merely states that she “must put forth evidence” that the guardianship is no longer necessary. Is this a burden of going forward, or is it a burden of proof? Fundamental [2012 Ark. 23]fairness necessarily requires the standard of proof to be calibrated in advance because the litigants and the fact-finder must know at the outset of a given proceeding how the risk of error will be allotted. See *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The majority should speak plainly on this point, as the parties and the circuit court should know and not be left guessing how to proceed.

For these reasons, I respectfully dissent.

CORBIN and BROWN, JJ., join.

Notes:

¹ The Attorney General was notified of the attack on the constitutionality of the guardianship statute as required by Ark.Code Ann. § 16–111–106(b) but declined to intervene in the action.

² The hearing was continued twice on behalf of the Herringtons over Tamera's objection.

³ I also agree with the majority's decisions regarding the psychological evaluation and the

admission of the reports of Lesa Doan and Dr. Shapse.