ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA06-624

November 15, 2006

NANCY HUTCHINSON APPELLANT	AN APPEAL FROM SEBASTIAN COUNTY CIRCUIT COURT [NO. JV2004-223]
V.	HON. MARK HEWETT, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	AFFIRMED

On February 16, 2006, the Sebastian County Circuit Court filed an order terminating Nancy Hutchinson's parental rights to her two children: J.W.H. (born September 7, 2000) and J.H. (born June 12, 2002). She challenges the termination order, arguing that the circuit court erred in finding that termination was in the children's best interests and that she failed to remedy the conditions that caused removal of the children. We affirm.

Background Facts

The children came into the custody of Arkansas Department of Human Services (DHS) on March 20, 2004, after appellant was arrested on an outstanding warrant. The arrest happened during a traffic stop, and her two children were in the car with her. Further investigation showed that appellant did not have appropriate housing for the children or

sufficient income to support the children. DHS filed for emergency custody, and an order was entered March 24, 2004. The children were adjudicated dependent-neglected on April 26, 2004. After several review hearings, a permanency planning order was filed on June 2, 2005, where the case plan was changed to termination of appellant's parental rights with the concurrent goal of reunification. DHS filed a petition to terminate appellant's parental rights on June 16, 2005, but the case was continued because appellant began making progress with the case plan after the petition was filed. Another permanency planning hearing was held on November 17, 2005, and December 8, 2005, where the court found that appellant was in partial compliance with the case plan; however, appellant had tested positive for methamphetamine, had no transportation, and lacked the necessary utilities in her home. The termination hearing was held on February 10, 2006.

Testimony at the termination hearing shows that appellant moved into 4512 High Street in Fort Smith with A.J. Branch in mid-summer 2004. She and Branch worked off the rent by doing repairs to the home. Appellant worked while living with Branch. She was unemployed for a period of time, but Branch taught her to install siding. The electricity was turned off on January 12, 2005, because appellant had an outstanding balance of $146.46. Branch put the service in his name in February 2005, but removed his name on July 14, 2005. Records from the utility company showed that appellant received three shut-off notices in 2005. At the hearing, Branch testified that he was involved in a romantic relationship with appellant, but that the relationship ended when "she started behaving in ways I didn't approve of. I saw she wasn't dedicated to them kids anymore." Appellant

started paying rent at 4512 High Street in June 2005. Branch purchased the home in either the end of January or beginning of February 2006 and evicted appellant for failure to pay rent. DHS worker Robbie McKay inspected the house after appellant moved out and found it in a filthy condition, including dog feces on the floor. Branch testified that appellant owed him $1500 for back rent and property she took from the house, including a washer, dryer, dressers, and other furniture.

Chris Lang testified that he had a serious relationship with appellant for about a month and a half and that he had concerns about appellant's behavior. He stated that he knew that appellant's children were in DHS's custody. However, he noted that he saw drug paraphernalia around appellant and that he knew appellant had used drugs in the past. Lang testified that he paid appellant's electric and phone bills once and bought items for appellant's home.

Appellant testified that she was currently living in a two-bedroom apartment at 701 "A" Street in Barling and that her rent was $317 per month. She noted that immediately before moving into that apartment, she had lived with friends for two to three months and that, at that time, her personal belongings were still at 4512 High Street. Before she was at 4512 High Street, she lived in an apartment across the street at 4511 High Street. Appellant testified that she had no place to live after she was arrested in March 2004 and just stayed with friends. She noted that she always had someone living with her but that she paid the bills. She denied asking Lang to pay the phone or electric bills, stating that he offered to pay them. She acknowledged that she would have had no electricity from February to July 2005

had Branch not put the electricity in his name. She testified that the furnishings in the home at 4512 High Street belonged to her, not Branch, and that the bed, dressers, washer, and dryer were acquired when the two were together.

Appellant acknowledged that the court had ordered her to attend parenting classes and a domestic violence support group, to submit to a psychological evaluation and drug and alcohol assessment, and to obtain stable housing, employment, and transportation. She admitted that despite completing the domestic violence intervention classes in November 2004, she was in abusive relationships with Branch and Lang. Appellant admitted to using methamphetamine in November 2005, and she stated that she last used it on December 21, 2005. She admitted that she lied on her assessment about her past methamphetamine use, and as a result, she was not provided with drug treatment.

On cross-examination, appellant noted that she received a paycheck the previous day, which showed that she was earning $8.35 an hour and that she received a gross pay of $669.17 and a net pay for $546.63 for a two-week period. She stated that she worked on a job building cabinets since March 28, 2005. She acknowledged that her children had been out of her custody for two years, but stated that she would be ready to have them back in her home within five months. Appellant testified that she attended NA meetings to help with her drug problems and that she started going to the meetings on her own because she realized that she had a drug and alcohol problem.[1] She testified that for the last few weeks,

[1]The court also heard testimony from Lori McKinney, appellant's NA sponsor, who stated that appellant was making progress in the program and would probably be a sponsor

she had been exercising visitation regularly, but she noted that she did not visit the children for a five-week period because she had no transportation.

Robbie McKay, the caseworker assigned to the case from the beginning, stated that DHS had provided foster care services; transportation; referrals to parenting classes, domestic-violence classes, and HUD; drug and alcohol assessments; random drug testing; a psychological evaluation; and food stamps. She noted that appellant's inability to have stable and appropriate housing for the children was a major issue and that appellant refused the HUD assistance, stating that she would find housing on her own. McKay testified that, had appellant been honest on her drug and alcohol assessment, she would have been referred to treatment. McKay recalled that she asked the court to change the goal of the case from reunification to termination in February 2005. By the following August, appellant appeared to be making progress by finding employment and appropriate housing. However, the following November, appellant was again using drugs and could not keep a clean home. On cross-examination, McKay testified that had appellant been truthful and taken advantage of the services offered, she might have been in a position to have her children back. She also noted that, during the visitations, appellant would leave before the visit was over.

Jackie Beavers stated that she had been treating J.W.H. since June 6, 2005. She noted that J.W.H. was in therapy because he experienced explosive behavior and recurring nightmares. Beavers testified that the previous fall, appellant was not visiting on a regular

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herself one day.

basis, and J.W.H. was doing well; when the visits began, she noticed a correlation between appellant's visits and outbursts in his behavior. His behavior escalated to the point where he had to be admitted to Vista Health. She recommended that contact with appellant be discontinued.

The court ordered appellant's parental rights to be terminated based upon findings that termination was in the children's best interests and that the children had been out of appellant's home in excess of twelve months and, despite meaningful efforts by DHS to rehabilitate appellant, appellant had failed to remedy the conditions that caused removal. Specifically, the court noted that the children had been out of appellant's care for thirty-five percent of J.W.H.'s life and fifty-two percent of J.H.'s life. It noted that appellant had made progress on the case plan in August 2005, but that appellant had regressed by the subsequent permanency planning hearing. The court described appellant's efforts as an "eleventh hour" attempt to comply with the case plan.

Discussion

Appellant challenges the sufficiency of the evidence to terminate her parental rights. An order terminating parental rights must be based upon a finding by clear and convincing evidence that termination of a parent's rights is in the best interest of the children, considering the likelihood that the children will be adopted if the parent's rights are terminated and the potential harm caused by returning the children to the custody of their parent. Ark. Code Ann. § 9-27-341(b)(3)(A) (Supp. 2005). The court must also find one of the grounds outlined in § 9-27-341(b)(3)(B). In this case, the court based its termination

order on subsection (b)(3)(B)(i):

> (i)(*a*) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Causer v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 483, — S.W.3d — (2005). However, courts are not to enforce parental rights to the detriment or destruction of the health and well-being of a child. *Id.* A heavy burden is placed upon a party seeking to terminate the parental relationship, and the facts warranting termination must be proven by clear and convincing evidence. *Id.* Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* We do not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Yarbrough v. Arkansas Dep't of Human Servs.*, — Ark. App. —, — S.W.3d — (Oct. 4, 2006).

Appellant argues that termination of her parental rights was not in the best interests of the children. A review of the record, however, shows that the decision to terminate appellant's parental rights was not clearly erroneous. The children were removed from her custody because she did not have stable and appropriate housing for the children. From her initial arrest leading to DHS exercising emergency custody to the termination proceeding,

appellant lived in several different residences. She spent the most time at 4512 High Street, where she was unable to maintain utility payments on a consistent basis. By the termination hearing, she had recently moved into yet another apartment. Her failure to secure safe and appropriate housing is contrary to her children's well-being and best interests. *See Carroll v. Arkansas Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004).

Further, appellant explicitly testified that she was not ready to take custody of her children at the termination hearing and would need about five months. Almost two full years had passed between DHS's petition for emergency custody and the termination hearing. *See J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997) (affirming a termination order when, among other things, the children had been out of the parent's custody for two years and the parent had conceded that she was still unready to obtain custody of the children).

Appellant appears to rely on *Bush v. Deitz*, 284 Ark. 191, 680 S.W.2d 704 (1984), where our supreme court reversed an order terminating parental rights. However, the reversal was based on the fact that the lower court terminated the appellant's rights almost entirely on the fact that she was in prison and had no income. While we acknowledge the heavy burden required to terminate parental rights, we note that termination is warranted when a parent manifests an inability to maintain a stable household.

Appellant also cites *Anderson v. Douglas*, 310 Ark. 633, 638, 839 S.W.2d 196, 199 (1992), where our supreme court affirmed a termination order after stating, "[W]hen the circumstances reveal a studied indifference to the child, termination must result." While

appellant argues that the proof does not show "studied indifference," the proof shows that appellant's efforts to regain custody of her children were lackluster until after DHS filed the order to terminate her parental rights. Although she maintained progress for a brief period of time, she eventually went back to her unstable ways.

In a separate argument, appellant contends that the circuit court erred in finding that she had not remedied the conditions that caused removal of the children. She notes that she testified that she was employed, had adequate utilities, and was attending NA classes. However, the record shows that these efforts were at the "eleventh hour." Evidence that a parent begins to make improvement as termination becomes more imminent will not outweigh other evidence demonstrating a failure to comply and to remedy the situation that caused the children to be removed in the first place. *Lewis v. Arkansas Dep't of Human Servs.*, 364 Ark. 243, — S.W.3d — (2005).

The circuit court did not err in terminating appellant's parental rights. Accordingly, we affirm.[2]

PITTMAN, C.J., and GLOVER, J., agree.

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[2]We offer no opinion on DHS's argument that the termination order should be summarily affirmed because appellant limited the record on appeal to the termination hearing only. However, we note that Ark. Sup. Ct. R. 6-9(c)(1), which is inapplicable to this case because the termination was prior to July 1, 2006, limits the appellate record to the transcript of the hearing from which the order on appeal arose only. Under the new rule, the record on appeal in this case would be adequate.