ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CA07-254

September 5, 2007

ERWIN BRADFORD APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TENTH DIVISION [JJN-2005-1917]
V.	
ARKANSAS DEPARTMENT OF HEALTH & HUMAN SERVICES and MINOR CHILDREN	HONORABLE JOYCE WILLIAMS, JUDGE
APPELLEES	AFFIRMED

Appellant, Erwin Bradford, appeals from the termination of his parental rights with respect to K.B., a minor child (D.O.B. May 21, 2001). Appellant is K.B.'s biological uncle, and he had previously adopted her. K.B. was removed from appellant's house on September 9, 2005, and, on November 9, 2005, she was found to be dependent-neglected as a result of sexual abuse. Appellant appealed the dependency-neglect determination, and it was affirmed by this court in an unpublished opinion delivered September 20, 2006. His parental rights were terminated by order filed on December 15, 2006. We affirm the termination.

Cases involving the termination of parental rights are reviewed *de novo*. *Griffin v. Ark. Dep't of Health & Human Servs*., 95 Ark. App. 322, ____ S.W.3d ____ (2006). We do not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *Benedict v. Ark. Dep't of Health & Human Servs.*, 96 Ark. App. 395, ____ S.W.3d ____ (2006). 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. *Id*. This does not mean, however, that the appellate court is to act as a "super fact-finder," substituting its own judgment or second guessing the credibility determinations of the court. *Id.* We reverse only in cases where a definite mistake has occurred. *Id*.

For his first point of appeal, appellant contends that the trial court erred in terminating his parental rights because "he was penalized" for asserting his Fifth-Amendment right to be free of compelled self-incrimination in that he was reluctant to participate in sex-offender treatment because it would require him to admit that he was a sex offender. In other words, appellant takes the position that his parental rights were terminated in large part because he did not engage in sex-offender therapy, that the reason he did not engage in the therapy was because it was his understanding that he would have to admit that he had sexually abused his daughter, that he had a constitutional right not to incriminate himself in that manner, and that he was thereby penalized "for asserting" his Fifth-Amendment right not to incriminate himself. Both the DHHS and the *ad litem* attorneys counter appellant's contention under this point by noting that it is not preserved

for appeal. Arguably, appellant has not properly preserved this issue for appeal. However, even if we were to conclude that this issue was properly preserved, we find no merit in the argument.

While appellant danced around his Fifth-Amendment rights at the termination hearing, we are not convinced that he ever actually properly asserted them. That is, appellant never even started the sex-abuse therapy program, contending at the termination hearing that to do so would have required him to admit sexual abuse as a condition of the therapy, and that in doing so his Fifth-Amendment right to be free of self-incrimination would have been violated. Neither DHHS progress notes nor appellant's testimony presented at the hearing revealed any such prior assertion of Fifth-Amendment rights by appellant. Rather, the progress notes stated that appellant's sex-offender assessment program was "on hold" during the pendency of appellant's appeal of the dependency-neglect adjudication in which he was found to have sexually abused K.B. As mentioned previously, that determination was affirmed by this court in an opinion delivered September 20, 2006. In addition, even though appellant's counsel mentioned appellant's Fifth-Amendment rights during opening and closing arguments at the termination hearing on November 21, 2006, appellant took the stand and testified. When he was directly asked about the sexual abuse, rather than asserting his constitutional right not to incriminate himself, he simply denied abusing his daughter. He raised no Fifth-Amendment objections to testifying.

In fact, appellant raised no formal Fifth-Amendment objection to the trial court, prior to the termination hearing, that his constitutional rights would be violated if he were required to engage in the sex-offender therapy. Prior to the termination hearing, he simply avoided the treatment. Then, he did not assert his Fifth-Amendment right not to testify at the termination hearing. Instead, he took the stand and denied that he had abused the child. Thus, his "assertion" of his Fifth-Amendment rights, for which he claims to have been erroneously penalized, was essentially limited to his failure to attend sex-offender therapy and to his attorney's arguments during opening and closing statements.

The trial court did, however, acknowledge, in comments from the bench and in the order terminating appellant's parental rights, that appellant had hidden behind "appeals, *Fifth-Amendment rights*, DHHS caseworker changes, and any other excuses except the fact that he alone is the reason we are here today," and, "[h]e *invokes his Fifth-Amendment rights*, his right to appeal, his right not to attend any therapy that requires him to admit to something that he says he did not." (Emphasis added.) Consequently, we are not convinced that appellant properly asserted his Fifth-Amendment rights in order to preserve this issue for review, nor that the trial court was actually addressing that argument in its comments.

Even if this issue had been properly preserved, however, we would find no merit in the argument. The short answer to appellant's first argument is that, even if he were correct in claiming a Fifth-Amendment right not to engage in sex-offender therapy that

required an admission of sexual abuse, it does not follow that he would be thereby shielded from the consequences of asserting that right, *i.e.*, the termination of his parental rights for not taking part in the therapy. Appellant has cited no cases that convince us otherwise. As the trial court explained at the close of the termination hearing, the fact that appellant invoked his various rights in this case did not mean that K.B. was left without any rights, including the "right not to be sexually abused by her father" and the "right to have a safe, permanent, loving home with a parent or parents who can protect her." We agree.

For his remaining point of appeal, appellant contends that DHHS did not make a meaningful effort to rehabilitate him, that he cannot be at fault for not participating in a service when that service was never even provided until the same month as the termination hearing, and that the trial court therefore erred in terminating his parental rights. The service to which he is referring is the sex-offender therapy. We find no merit in the argument.

Following the November 9, 2006 adjudication hearing, K.B. was found dependent-neglected due to sexual abuse by appellant. Arkansas Code Annotated section 9-27-303 (46) (C)(Supp. 2005) provides in pertinent part:

> (C) Reasonable efforts to reunite a child with his or her parent or parents shall not be required in all cases. Specifically, reunification shall not be required if a court of competent jurisdiction, including the juvenile division of circuit court, has determined by clear and convincing evidence that the parent has:
>
> (i) Subjected the child to aggravated circumstances[.]

"Aggravated circumstances" is defined in pertinent part as follows: "A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, *sexually abused*, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]" Ark. Code Ann. § 9-27-341 (Supp. 2005) (emphasis added). *Also see Brewer v. Ark. Dep't of Human Servs*., 71 Ark. App. 364, 43 S.W.3d 196 (2001). Accordingly, under the circumstances of this case, DHHS was under no obligation to provide appellant with any reunification services.

Although under no obligation to do so, DHHS offered counseling and sex-offender therapy to appellant; however, the evidence before the trial court supported the notion that appellant never intended to attend sex-offender therapy, certainly not before the dependency-neglect adjudication was decided on appeal. As noted by the trial court following the termination hearing:

> Even though not ordered until August ... 2006, he, his attorney, the attorney ad litem, and DHHS all knew about the sexual abuse finding of this Court and knew that was for – – knew that was the reason for K.B.'s entry into foster care. He and his attorney could have asked DHHS for referral. Instead he stonewalls, he refuses to consider and outright refuses to have any such treatment until, again, the midnight hour. It is far too little. It is much too late.

We agree and find no basis for reversal in his argument that DHHS did not make a meaningful effort to rehabilitate him because it failed to make a referral for sex-offender therapy until the case had been going on for over a year.

Affirmed.

ROBBINS and BAKER, JJ., agree.