

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CA 07-336

September 5, 2007

MELINDA CAMPBELL

APPELLANT

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[NOS. J-04-442, J-04-443, & J-04-444]

V.

HONORABLE MARK HEWETT,
JUDGE

ARKANSAS DEPARTMENT OF HEALTH
AND HUMAN SERVICES

APPELLEE

AFFIRMED

Melinda Campbell appeals from an order terminating her parental rights in her three children. For reversal of that decision, appellant argues that the trial court's findings in support of the termination decision are clearly erroneous. We disagree and affirm.

Appellant is the mother of three daughters. They were placed in the emergency custody of the Arkansas Department of Health and Human Services (ADHHS) on September 22, 2004, when appellant was hospitalized following an incident involving domestic violence. An order declaring the children to be dependent-neglected was entered on January 14, 2005. Reunification was the stated goal of the case plan, and appellant was ordered to maintain stable and appropriate housing; to maintain sufficient income to support the children; to submit to an alcohol and drug assessment and to complete all recommended treatment; to complete parenting classes; to submit to random

drug screens; to complete domestic violence intervention classes; and to complete marital counseling should she continue her relationship with Vernon Holden. Appellant was afforded weekly supervised visits with the children.

The case was reviewed at appropriate intervals, and a permanency-planning hearing was held on September 22, 2005. The goal of the case plan continued to be reunification. Appellant was still ordered to obtain and maintain appropriate housing and stable employment; to attend counseling; to visit with the children regularly; to complete domestic violence intervention classes; and to complete any treatment recommended from the drug and alcohol assessment.

After other review hearings, three of which appellant did not attend, another permanency-planning hearing was held in August 2006. At this time, the goal of the case plan was changed to termination. In making this determination, the trial court found that appellant had not followed the dictates of the case plan because she had not maintained stable housing or employment; she had not completed any of the classes she had been ordered to attend; she had not participated in counseling; she had not completed drug treatment; she had not visited with the children since December 2005; and she had tested positive for cocaine usage on June 26, 2006.

The termination hearing was held on October 13, 2006, after which the trial court entered its termination order on January 16, 2007. In the order, the trial court found that there was an appropriate permanency plan for the juveniles, namely adoption, and that termination was in the best interest of the children. The trial court further found:

... that the juveniles have been out of the home of the mother since 9/22/04, and that, despite meaningful efforts on the part of the Department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parents. Specifically, the Court finds that: all prior pleadings in this matter shall be made part of the record herein; the mother has

failed to complete in-patient drug treatment as ordered, the Department having referred her to Gateway the last time in October 2005 and the mother having entered residential treatment 3 days ago; the mother has no housing, having just entered residential drug treatment; the mother has had no stable employment or source of income throughout this case, having been terminated from her most recent employment due to excessive absenteeism; the mother has not completed parenting classes although she is closer to completing that case plan task than any other; the mother has failed numerous drug screens throughout the course of this case, the most recent being a positive cocaine test on 9/27/06; the mother has failed to complete domestic violence intervention/anger management classes, the administrator of that program having testified that the mother completed only the intake and 2 of the 26 sessions; the mother has failed to complete individual, family or marital counseling as ordered; and the mother has failed to visit regularly, there having been long periods during this case with no visitation at all. The Court finds that there is very little likelihood that further services to the mother would result in reunification and that there is a strong likelihood that continued contact with the mother would result in harm to the juveniles.

Appellant brings this appeal from the termination order.

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Browning v. Arkansas Dep't of Human Services*, 85 Ark. App. 495, 157 S.W.3d 540 (2004). Termination of parental rights is an extreme remedy in derogation of the natural rights of parents. *Id.* Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of a child. *Id.*

An order forever terminating parental rights must be based on clear and convincing evidence that termination is in the child's best interest and on clear and convincing proof of one or more statutory grounds. Ark. Code Ann. § 9-27-341(b)(3)(A) & (B) (Supp. 2005). The ground upon which appellant's parental rights were terminated is found at Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), which provides "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 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.”

When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the trial court’s finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Mayfield v. Arkansas Dep’t of Human Services*, 88 Ark. App. 334, 198 S.W.3d 541 (2004). 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.*

Appellant first argues that the trial court erred in finding that termination was in the children’s best interest and that one of the grounds was proven. She contends that the evidence shows that she visited regularly with her children until there was a change in caseworkers and that she brought the children presents and sent money to them. She also points out that she was receiving residential drug treatment at the time of the termination hearing. She also refers to her testimony that she would be able to care for the children in three months’ time. Appellant cites the decision in *Anderson v. Douglas*, 310 Ark. 633, 638, 839 S.W.2d 196, 199 (1992), where a termination order was affirmed because the evidence showed a “studied indifference” to the child by the parent. Appellant argues that the evidence in the present case does not show that she possessed a studied indifference to her children.

Upon our review of the record, there was evidence that the children had been out of the home for two years before appellant’s rights were terminated. During this period of time, appellant

seriously and substantially failed to comply with the terms of the case plan. Appellant did not maintain stable housing, as she moved from place to place, sometimes staying with relatives. She had been in jail five times since the case began, once for domestic third-degree battery in which her mother was the victim. Appellant's employment history was also sporadic, and she lost her most recent job because of absenteeism. She failed to attend three review hearings.

As appellant concedes in her brief, her addiction to crack cocaine was her most pressing problem. Appellant failed a number of drug tests throughout the course of the proceedings and twice tested positive for cocaine in the month prior to the termination hearing. Yet, she had only begun treatment three days before the hearing.

Appellant also failed to attend counseling, and in two years she had failed to complete parenting classes, though she was only one session shy of finishing. Appellant appeared for domestic-violence classes only twice, and there was testimony that her attitude toward the class was not constructive. She was said to have stomped her feet and rolled her eyes during the class, and afterwards, she told another student that the class was a "bunch of s***." In her testimony, appellant admitted that she was most uncooperative when she was using cocaine.

As for visitation, appellant testified that she encountered problems with visitation for an unspecified period of time because her caseworkers had changed. She said that her attorney had written letters to ADHHS to address this issue. However, appellant also testified that there was a period between November 2005 and July 2006 when she did not visit the children because she was using drugs and had "disappeared." After the last permanency-planning hearing in August 2006, a visitation schedule was specifically established that required appellant to arrive an hour early so that she could be drug tested before seeing the children. Appellant missed the visit on

September 18; she refused a drug test on September 25; she tested positive for cocaine at the visit on September 27; and she did not show up for the visit on September 28.

In sum, the record shows that appellant engaged in a sustained and prolonged effort not to comply with the requirements of the case plan. Although she had begun drug treatment in the days preceding the termination hearing, last minute compliance with the case plan is not a sufficient reason to not terminate parental rights. *Camarillo-Cox v. Arkansas Dep't of Human Services*, 360 Ark. 340, 201 S.W.3d 391 (2005); Ark. Code Ann. § 9-27-341(a)(4)(A). We affirm on this point.

As her second issue, appellant contends that the trial court's finding that ADHHS had made reasonable efforts to provide reunification services is clearly erroneous. Appellant argues that ADHHS did not refer her for drug treatment until November 2005; that it failed to afford her visitation; and that the orders stemming from the various hearings were consistently filed beyond the statutory deadlines.

We have already touched upon the issue of visitation in the previous discussion, and we are unable to say that appellant was denied visitation. Appellant raised no objection about the late entry of the orders below, and it is well-settled that an appellant cannot make an argument for the first time on appeal. *Harwell-Williams v. Arkansas Dep't of Human Services*, 368 Ark. 183, ___ S.W.3d ___ (2006). Nor can we say that the trial court's finding with respect to the delay in the referral is clearly erroneous. As noted by the court, appellant did receive a referral for drug counseling and treatment a year before her parental rights were terminated, yet in that year she failed to take advantage of the referral until three days before the termination hearing. We also affirm on this point.

As her final issue, she contends that the trial court erred in finding clear and convincing

evidence that an appropriate permanency plan existed. Appellant contends that adoption is not likely because the oldest child, age fifteen, preferred not to be adopted. According to Arkansas Code Annotated section 9-27-341(b)(3)(A)(i), termination of parental rights must be based on a finding by clear and convincing evidence that it is in the best interest of the child, including consideration of such factors as the likelihood of adoption. However, adoptability is but one factor that is considered when making a best-interest determination. *McFarland v. Arkansas Dep't of Human Services*, 91 Ark. App. 323, 203 S.W.3d 630 (2005). There is no requirement that every factor must be established by clear and convincing evidence; rather, after consideration of all the factors, the evidence must be clear and convincing that the termination is in the best interest of the children. *Id.* On this record, we cannot say that the trial court's best-interest determination is clearly erroneous. We also note that, although a minor over the age of ten is required to consent to his or her adoption, a court may dispense with the minor's consent if the adoption is found to be in the minor's best interest. Ark. Code Ann. § 9-9-206(a)(5) (Supp. 2005).

Affirmed.

BIRD and MARSHALL, JJ., agree.