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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-17-615

RHONDA ANN DONHAM APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	**Opinion Delivered:** December 13, 2017 APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. 40JV-16-43] HONORABLE EARNEST E. BROWN, JR., JUDGE AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Rhonda Donham appeals from an order placing permanent custody of her daughter with Danny and Helen Carrington. On appeal, she argues that there was insufficient evidence presented at the permanency-planning hearing to support an award of permanent custody to a third party. Rhonda alternatively argues that the trial court erred in declining to award her unsupervised visitation or set a visitation schedule. We affirm.

This dependency case involves Rhonda Donham and her only child, fifteen-year-old R.D. Rhonda had custody of R.D.[1] A family-in-need-of-services case was opened in February 2016 at Rhonda's request. Rhonda was on a fixed income ($1700 per month in Social Security disability benefits) and asked for assistance with getting her water reconnected and having adequate food in the house. Arkansas Department of Human

[1]R.D.'s father is unknown.

Services (DHS) provided supportive services to Rhonda to help with food and utilities and to assist with her budgeting skills.

On August 8, 2016, emergency custody of the child was taken and R.D. was placed in the custody of Danny and Helen Carrington.[2] The emergency custody was based on Rhonda's failure to keep food in the home, failure to set up a budget with DHS, and failure to attend counseling. On August 12, 2016, DHS filed a petition for emergency custody and dependency-neglect, and the trial court entered an ex parte order for emergency custody on August 15, 2016. The trial court entered a probable-cause order on August 23, 2016.

On October 11, 2016, the trial court entered an adjudication order of a dependent juvenile. In that order, the trial court found that R.D. was a dependent juvenile as defined by Arkansas Code Annotated section 9-27-303(17)(B) (Repl. 2015).[3] The trial court found that, despite receiving adequate income, Rhonda did not budget properly to provide for R.D., that the water was shut off for a period of time, and that there was not adequate food in the home. The trial court also found that Rhonda suffered from mental disorders for which she takes medication.[4] The trial court set the case goal as reunification.

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[2]R.D. has remained in the Carringtons' custody ever since.

[3]That provision provides that a dependent juvenile is a child whose parent is incapacitated so that the parent cannot provide care for the juvenile and the parent has no appropriate relative or friend willing or able to provide care for the child.

[4]These medical disorders were documented as bipolar disorder and borderline-personality disorder.

A review order was entered on January 23, 2017. In the review order, the trial court continued the case goal as reunification. The trial court found that Rhonda had partially complied with the case plan, maintained contact with R.D., maintained stable housing, and completed a psychological evaluation. However, Rhonda had refused to participate in budgeting-assistance services and had missed some counseling appointments.

After a permanency-planning hearing held on March 27, 2017, the trial court entered a permanency-planning and permanent-custody order on April 21, 2017. In that order, the trial court found that the return of R.D. to the custody of her mother was contrary to the welfare of the child. In accordance with the best interest of the child, the trial court placed R.D. in the permanent custody of the Carringtons. The trial court found that Rhonda had not complied with the case plan or orders of the court in that she had failed to (1) attend two court-ordered psychological evaluations; (2) maintain stable housing; (3) maintain reliable transportation; (4) participate in individual counseling; (5) properly complete budgeting sheets; and (6) cooperate with DHS. The trial court further found that R.D. was fearful for her safety while in her mother's care, and that R.D. was "a different child than the one who initially entered DHS custody in that said juvenile is now well-adjusted, happy, and unafraid." The trial court ordered that Rhonda have no unsupervised contact with R.D., but stated that the Carringtons were willing to arrange, at their discretion, supervised visits between Rhonda and R.D. The order of permanent custody was to remain in effect until further orders of the court, and the matter was subject to being reopened for modification.

Maxine Sterrate, the caseworker for this case, testified at the permanency-planning hearing. Ms. Sterrate stated that, despite DHS efforts, Rhonda had not been cooperative or compliant with the case plan. Ms. Sterrate indicated that one of Rhonda's problems was budgeting, and that she could never budget properly or comply with the budgeting plan. Ms. Sterrate further testified that Rhonda was bipolar and was no longer attending mental-health counseling sessions. Ms. Sterrate testified that Rhonda did have weekly supervised visits with R.D., but said that there was little communication during the visits. Ms. Sterrate also stated that during her home visits there was not much food in Rhonda's house. In Ms. Sterrate's opinion, R.D. could not be returned to Rhonda's custody at that time.

Ms. Sterrate testified that R.D. was doing well, making good grades, and had no behavioral problems while in the Carringtons' custody. She stated that the Carringtons' home was clean and suitable and that they had received an approved home study. Ms. Sterrate stated that R.D. wished to remain with the Carringtons and that the Carringtons wanted permanent custody of her. Ms. Sterrate recommended that permanent custody be awarded to the Carringtons. With respect to Rhonda's visitation with R.D., she hoped it could be worked out between Rhonda and the Carringtons, but she did not think it should be unsupervised.

Danny Carrington testified that he and his wife, Helen, wanted permanent custody of R.D. He stated that they were trying to help R.D. in any way they could, and he indicated that R.D. had become part of their family. If granted permanent custody,

Mr. Carrington said he would not have any problem with Rhonda having visits if they were supervised. He thought that unsupervised visits with Rhonda might be unsafe.

R.D. testified that she had been to court several times, that each time her testimony was that she did not wish to return home to her mother, and that was still true today. R.D. did not feel like her mother could adequately care for her at this time. R.D. stated that her life has changed dramatically since she has been with the Carringtons. She receives support she had never received before, and she enjoys having meals cooked for her, as well as being helped with school and extracurricular activities. R.D. stated that, when she was with her mother, she could not be a typical teenager, and she was always worried about whether the water would be disconnected or if they had enough food. However, in the Carringtons' care she no longer has such worries. Her life with her mother was stressful, and her life in her present placement is not. If the trial court granted permanent custody to the Carringtons, R.D. still wanted visitation with her mother, but she thought it would be good if the visits were supervised because she and her mother are known for conflict and do not have the best relationship.

Rhonda testified on her own behalf, and she stated that she had been attending counseling and had been doing her best to budget her finances. However, Rhonda acknowledged that things had fallen apart financially for her and that her car had been repossessed. Rhonda stated that her house was for sale, and that if it sold she would move to an apartment. Rhonda thought she could adequately take care of R.D., and asked the trial court to send R.D. home with her. Rhonda testified that she suffers from bipolar

schizophrenia and depression, and that when unmedicated she has hallucinations. She stated that she was diagnosed with mental-health conditions in 1998 and has been on medication ever since.

On appeal from the trial court's order placing permanent custody of R.D. with the Carringtons, Rhonda argues that there was insufficient evidence that the custody placement was in the child's best interest. She further contends that the order must be reversed because the trial court did not explicitly find her to be unfit in its order. Rhonda cites *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007), where the supreme court stated that the law prefers permanent custody with a parent over a third party unless the parent is proved to be incompetent or unfit. Finally, Rhonda argues that, even if we affirm the permanent placement with the Carringtons, the trial court erred in not awarding her unsupervised visitation or setting a definite visitation schedule. Rhonda asserts that unsupervised visits with R.D. would not be a safety concern.

Juvenile proceedings are equitable in nature; therefore, our standard of review on appeal is de novo. *Chase v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 474, 429 S.W.3d 321. However, the trial court's findings of fact are not reversed unless they are clearly erroneous. *Rose v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 668. 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.*

The provisions in the Arkansas Juvenile Code relevant to this appeal are in the permanency-planning statute, Arkansas Code Annotated section 9-27-338 (Repl. 2015). Subsection (c) of the statute provides, in relevant part:

> (c) At the permanency planning hearing, based upon the facts of the case, the circuit court shall enter one (1) of the following permanency goals, listed in order of preference, in accordance with the best interest, health, and safety of the juvenile:
>
> (1) Placing custody of the juvenile with a fit parent at the permanency planning hearing;
>
> (2) Returning the juvenile to the guardian or custodian from whom the juvenile was initially removed at the permanency planning hearing;
>
> (3) Authorizing a plan to place custody of the juvenile with a parent, guardian, or custodian only if the court finds that:
>
> (A)(i) The parent, guardian, or custodian is complying with the established case plan and orders of the court, making significant measurable progress toward the goals established in the case plan and diligently working toward reunification or placement in the home of the parent, guardian, or custodian.
>
> (ii) A parent's, guardian's, or custodian's resumption of contact or overtures toward participating in the case plan or following the orders of the court in the months or weeks immediately preceding the permanency-planning hearing are insufficient grounds for authorizing a plan to return or be placed in the home as the permanency plan.
>
> (iii) The burden is on the parent, guardian, or custodian to demonstrate genuine, sustainable investment in completing the requirements of the case plan and following the orders of the court in order to authorize a plan to return or be placed in the home as the permanency goal; and
>
> (B)(i) The parent, guardian, or custodian is making significant and measurable progress toward remedying the conditions that:
>
> *(a)* Caused the juvenile's removal and the juvenile's continued removal from the home; or
>
> *(b)* Prohibit placement of the juvenile in the home of the parent.
>
> (ii) Placement of the juvenile in the home of the parent, guardian, or custodian shall occur within a time frame consistent with the juvenile's developmental needs but no later than three (3) months from the date of the permanency-planning hearing.
>
> (4) Authorizing a plan for adoption with the department's filing a petition for termination of parental rights unless . . . [.]
>
> (5) Authorizing a plan to obtain a guardian for the juvenile;

> *(6) Authorizing a plan to obtain a permanent custodian*, including permanent custody with a fit and willing relative; or
>
> (7)(A) Authorizing a plan for another planned permanent living arrangement that includes a permanent planned living arrangement and addresses the quality of services, including, but not limited to, independent living services and a plan for the supervision and nurturing the juvenile will receive.

(Emphasis added.)

Based on our review of the record, we conclude that the trial court did not clearly err in finding that permanent custody of R.D. to the Carringtons, under the sixth preference in the permanency-planning statute, was in the best interest of the juvenile and in accordance with her health and safety. The first preference of the statute returns a child to a fit parent only when it is in the best interest of the child and the child's health and safety can be adequately safeguarded if returned home. In the permanent-custody order, the trial court found that the return of R.D. to the custody to her mother was contrary to the welfare of the juvenile.[5] The trial court found that R.D. was fearful for her safety in her mother's custody, and that in the Carringtons' custody she is a "different child" who is "well-adjusted, happy and unafraid." In the permanent-custody order, the trial court did not find Rhonda to be a fit parent.

The testimony at the permanency-planning hearing demonstrated that Rhonda had significant and chronic financial issues, that she had not been compliant with DHS or the case plan, and that R.D. strongly preferred to not be returned to her mother's custody. Rhonda has mental-health issues, no transportation, and a history of providing insufficient

[5]The trial court had previously found in the adjudication order that Rhonda was incapacitated, meaning that she was unable to provide for the child's care.

food and allowing utilities to be disconnected. These issues were, by R.D.'s own testimony, a source of constant stress for R.D. By all accounts, the Carringtons are providing excellent care for R.D., and she wishes to remain in their custody. We hold that the trial court's decision to place R.D. in the Carringtons' permanent custody was not clearly erroneous because that custody placement was in accordance with the best interest, health, and safety of the juvenile.

Rhonda's remaining argument is that the trial court erred in declining to award unsupervised visitation or set a visitation schedule. The fixing of visitation rights is a matter that lies within the discretion of the trial court, with the primary consideration being the best interest of the child. *Hudson v. Kyle*, 365 Ark. 341, 229 S.W.3d 890 (2006).

Here, the trial court allowed Rhonda supervised visitation at the Carringtons' discretion and stated that the Carringtons were willing to arrange visitation. This was consistent with Mr. Carrington's testimony that he would have no problem with Rhonda having supervised visits. As a result of tensions between R.D. and Rhonda, R.D. wanted the visitation with her mother to be supervised as did the caseworker and Mr. Carrington. Based on our review, we conclude that the visitation arrangement set forth in the permanent-custody order was not an abuse of discretion.

Affirmed.

GLADWIN, J., agrees.

GLOVER, J., concurs.

DAVID M. GLOVER, Judge, concurring. Under our standard of review, the circuit court's decision to award permanent custody of R.D. to the Carringtons was not clearly erroneous. Mental-health concerns permeated the entire judicial process. I write separately in protest of DHS's lack of assistance and its disingenuous "attempts" to aid the appellant in her pursuit of having R.D. return home; it is disconcerting. While here the end result may not have been changed due to Ms. Donham's mental-health challenges, I am concerned such failures to assist in another case and then a judicial holding of DHS's failures against the parent may result in an unnecessary removal of a child from their parent.

The factors announced by the circuit court to make its determination it was in R.D.'s best interest to place her in the Carringtons' permanent custody were that Ms. Donham: (1) failed to attend two scheduled, court-ordered psychological evaluations; (2) failed to maintain suitable housing in that Ms. Donham claimed to have been evicted from her current residence and had not secured other housing; (3) failed to maintain reliable transportation because her automobile had been repossessed; (4) failed to participate in and regularly attend individual counseling sessions; (5) failed to properly complete budgeting sheets; and (6) failed to cooperate with DHS.

Psychological evaluations. While Ms. Donham failed to attend two court-ordered psychological evaluations arranged by DHS (due to sickness according to her testimony), she did, immediately on her own initiative without DHS, obtain the requested psychological evaluation. The circuit court's objective—to obtain a psychological

evaluation—was met. The fact Ms. Donham promptly sought on her own accord a psychological evaluation indicates her desire to comply with the circuit court's orders and to do what was required of her to help have R.D. returned to her. I fail to see why this was held against Ms. Donham.

Stable housing. The finding by the circuit court that Ms. Donham did not have stable housing is simply not supported by the evidence. The caseworker, Maxine Sterrate, testified Ms. Donham had both stable housing and income throughout the case. Ms. Donham testified she lived in the same house all of R.D.'s life. The lack of stable housing should not have been a consideration in placing permanent custody with the third-party Carrington family, as there was no evidence Ms. Donham lacked stable housing.

Individual counseling. Ms. Donham attended individual counseling until December 2016, when she was not allowed to return due to outstanding bills, indicating a lack of funds. Since DHS required Ms. Donham to attend individual counseling as a condition of her case, why was DHS not providing assistance to Ms. Donham by paying her individual counseling bills or finding another provider for her? The lack of means to pay for services does not support the finding of willful lack of participation. At the same time, Ms. Donham and her daughter, R.D., were attending family counseling, which indicates Ms. Donham's willingness to participate in counseling.

R.D.'s preference. R.D. asserted her preference to remain in the permanent custody of the Carringtons because her life was stressful when she lived with her mother, and it was not stressful living with the Carringtons. While it is probably true R.D. would live in a less

chaotic home with the Carringtons than she would with Ms. Donham, it is troubling to base a decision of permanent custody with a third-party intervenor on what the child desires. Many children surely experience stress and live in a chaotic environment, yet that is not sufficient to remove them from the custody of their natural parents. A child's preference is not the overriding factor to consider regarding custody between a natural parent and a third party. Whether someone can provide more material things and more opportunities to a child than the natural parent sets us down a slippery slope. The child is not to be awarded to the "highest bidder."

I concur.

Leah Lanford, Arkansas Public Defender Commission, for appellant.

Mary Goff, Office of Chief Counsel, for appellee.

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