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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-17-621

LORI ELLIOTT APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILDREN APPELLEES	**Opinion Delivered** December 6, 2017 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72JV-15-757] HONORABLE STACEY ZIMMERMAN, JUDGE AFFIRMED

LARRY D. VAUGHT, Judge

Lori Elliott appeals the Washington County Circuit Court's permanency-planning order changing the goal of her dependency-neglect case from reunification to termination and adoption and the court's subsequent order terminating her parental rights to her three children, A.G., C.G., and K.G. We affirm both orders.

In September 2015, the Arkansas Department of Human Services (DHS) exercised an emergency seventy-two-hour hold on Elliott's three youngest children[1] after receiving a call alleging that they had been physically abused by Lori's boyfriend, Jerry Glass. The children had bruises and reported physical abuse, and the affidavit of facts attached to the petition indicated that Lori denied the abuse, blamed the children, and was unlikely to protect them from future abuse. Lori's daughter K.G. also revealed that, when Lori was

[1]Elliott also has three adult children from previous relationships.

working nights, K.G. and Jerry Glass slept in the same bed.[2] In its order awarding DHS emergency custody, the court noted that DHS had been involved with the family and had provided services since 2007. On DHS's recommendation, the children were immediately placed in the custody of their maternal grandparents, Robert and Margaret Elliott.

Once it was discovered that the children's father, Rocky Graham, was a member of the Cherokee Nation, and that the children were therefore eligible to become members of the tribe, a Cherokee representative intervened in the case, and it proceeded under the federal Indian Child Welfare Act (ICWA).

As the case progressed, A.G. was placed with her sister, Katherine Lammers, who is one of Lori's three adult children. K.G. and C.G. remained with their maternal grandparents through the permanency-planning hearing, but Robert Elliott testified that he and his wife were "too old" to adopt any of the children. Instead, at the time of the permanency-planning hearing, DHS was looking into placing the two youngest children with other relatives.

The evidence at the permanency-planning hearing revealed that, although Lori had been working the case plan and her counselor had testified that she no longer had any concerns that Lori would not protect her children, a DHS caseworker, the Cherokee Nation representative, and Lori's father all expressed serious concerns about Lori's current truthfulness regarding her relationships with men and her ability to protect her children. They testified that they were concerned that Lori was continuing a long pattern of relationships with inappropriate men, some of whom had previously harmed her children,

[2]Although K.G. did not initially allege sexual abuse, her older half sister, Katherine Lammers, with whom K.G. was placed as the case progressed, testified about sexual impropriety that she (Katherine) had witnessed as a child in her mother's home and about allegations of sexual abuse K.G. had made against Glass.

and that she would continue to prioritize these relationships over her children's well-being. Specifically, they noted that a week before the hearing Lori was dishonest and evasive about her current romantic relationships with two men, stating that they were only "friends" but then later describing the sexual dysfunction of one of these men and the fact that she regularly spent the night at their houses when she was too tired to drive home from work. The tribe representative, Nicole Alison, also testified that Lori had become extremely angry and had yelled at her over the phone for almost an hour upon learning that the tribe's recommendation was to change the case goal to termination of parental rights and adoption. Lori testified that she was not romantically involved with any men, had learned a lot through counseling, and believed that she could now protect her children. Following the hearing, the court changed the case goal from reunification to termination and adoption.

DHS then filed a motion for termination of parental rights on January 10, 2017. A few months later (but before the termination hearing), the court entered an amended adjudication order that contained the findings required under the ICWA (which the court had not known was applicable when the first adjudication order was entered approximately seventeen months earlier). Two days later, the termination hearing was held, and the evidence presented was substantially the same as at the permanency-planning hearing. Following the hearing, the court entered an order terminating Lori's parental rights, finding beyond a reasonable doubt (pursuant to the ICWA) that returning the children to Lori would put them at a serious risk of emotional or physical harm, that termination was in their best interest, and that termination was appropriate under two statutory grounds: failure to remedy

the conditions causing removal and other subsequent factors.[3] Lori filed a timely notice of appeal, designating both the termination order and the permanency-planning order.

We review findings in dependency-neglect proceedings de novo, but the trial court's findings will not be reversed unless the findings are clearly erroneous.[4] *Adkins v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 229, at 5, 518 S.W.3d 746, 750 (citing *Ellis v. Ark. Dep't of Human Servs.*, 2016 Ark. 441, 505 S.W.3d 678). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a distinct and firm conviction that a mistake was made. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999); *Hopkins v. Ark. Dep't of Human Servs.*, 79 Ark. App. 1, 83 S.W.3d 418 (2002).

This case is governed by the Indian Child Welfare Act of 1978, codified at 25 U.S.C. sections 1901 through 1963. The ICWA was enacted to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" and provides "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." *Allen v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 608, at 8, 377 S.W.3d 491, 496 (citing 25 U.S.C. § 1902). The ICWA provides that no termination of

[3]The order also terminated the parental rights of the children's biological father based on abandonment, but he is not a party to this appeal.

[4]In *Timmons v. Arkansas Department of Human Services*, 2010 Ark. App. 419, 376 S.W.3d 466, this court noted that Arkansas has not applied the higher substantial-evidence standard of review to cases involving the ICWA as some other jurisdictions have done.

parental rights may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. *Id.* at 8, 377 S.W.3d at 496. The "beyond a reasonable doubt" burden required by the ICWA is more stringent than the one imposed by the Arkansas Code. *Id.*

Lori's first point on appeal is that the court erred in changing the case goal from reunification to termination and adoption at the permanency-planning stage.[5] Specifically, she argues that the court should have considered relative placement as a preference over termination and adoption when the evidence showed that the children were currently living with relatives. Lori relies on *Cranford v. Arkansas Department of Human Services*, 2011 Ark. App. 211, 378 S.W.3d 851, in which we reversed the termination of both parents' rights because the child had already achieved permanency in the custody of maternal grandparents and there was specific evidence that continued contact and visitation with the parents was in the child's best interest. In *Cranford*, we acknowledged the important need for stability, certainty, and permanency in a child's life and recognized that the continued uncertainty of languishing in the foster-care system is potentially harmful to children, but we noted that the child in *Cranford* was, had been, and would continue to be in the permanent custody of his grandparents, who were willing to adopt him. We specifically noted that termination did not

[5]While Lori points out the court labeled the relevant order a "15 Month Permanency Planning Hearing Order," which seems to combine a fifteen-month review order and a permanency-planning order, the order itself specifically states that it is pursuant to Arkansas Code Annotated section 9-27-338, which is the relevant code section for permanency-planning orders.

provide additional stability and permanency for the child in *Cranford* because he would remain with his grandparents regardless of whether the court terminated his father's parental rights. Moreover, in *Cranford*, we found no potential harm in allowing the parents to maintain visitation and pursue further reunification efforts. For example, as to the father, we noted that he had achieved stability before his incarceration and would likely reestablish that stability once he was released, which was anticipated to be only six weeks after the termination hearing.

We have repeatedly distinguished and declined to follow *Cranford*, however, in cases where either the child is not already in a permanent, stable placement or termination is in the best interest of the child. *See White v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 529, ___ S.W.3d ___, *Watson v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 484, 529 S.W.3d 259, *Cobb v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 85, 512 S.W.3d 694. In *Helvey v. Arkansas Department of Human Services*, 2016 Ark. App. 418, at 12, 501 S.W.3d 398, 405–06, and *McElwee v. Arkansas Department of Human Services*, 2016 Ark. App. 214, 489 S.W.3d 704, we distinguished *Cranford* and rejected arguments that the court erred in failing to consider the less restrictive option of permanent placement with a relative. In both cases, we noted that a trial court is permitted to set termination and adoption as case goals even when a relative is available and requests custody because the Arkansas juvenile code lists permanency goals in order of preference, prioritizing a plan for termination and adoption unless the juvenile is already being cared for by a relative and the court finds that the relative has made a long-term commitment to the child and termination of parental rights is not in the best interest of the juvenile. *See Helvey*, 2016 Ark. App. 418 at 12, 501 S.W.3d at 405–06; *McElwee*, 2016 Ark.

App. 214, 489 S.W.3d 704. In both cases, relying on the plain language of the juvenile code, we distinguished *Cranford* and rejected the idea that placement of children in the custody of a relative must be prioritized over the more stable and permanent goal of adoption.

In this case, the children had not already achieved permanency. While A.G. was living with her older half sister, Katherine Lammers, after a period of inpatient treatment, C.G. and K.G. were living with their maternal grandparents, a placement that everyone acknowledged could not be permanent due to the grandparents' age. In fact, in her appellant's brief, Lori argues that the children wanted to return to her, and that she wanted to take them, while also arguing that there were plans to place them each with other relatives, indicating that they had not at this point achieved permanency. Clearly, this is not akin to *Cranford*, in which the child had been living with his grandparents since before the case had begun and would remain there permanently.

Second, there was ample evidence that changing the case goal to termination and adoption was in the children's best interest, even if they remained in the custody of relatives. The caseworker, the tribal representative, Lori's father, and Lori's adult son all testified that Lori's inability to protect the children and her proven pattern of putting them in dangerous situations involving the men she dated would pose a risk of serious harm to the children if they were returned to her. Moreover, there was evidence that Lori's involvement in the children's lives only created conflict and stress—there was testimony that she yelled at her parents about visitation and other issues involving the children, that her parents had requested that visitation be moved to the DHS office and supervised by a neutral third party rather than continuing to occur in their home under their supervision, and that Lori had

become extremely angry and yelled at the tribal representative for almost an hour over the phone when the tribe recommended termination and adoption. Finally, there was testimony that the children would remain in contact and maintain a relationship with their siblings, grandparents, and other family members even if Lori's rights were extinguished.

We therefore affirm the circuit court's permanency-planning order, which changed the case goal to termination and adoption. There was significant evidence that Lori had a long history of placing her children at risk by prioritizing inappropriate romantic relationships with men over the safety and well-being of her children and failing to protect the children from those men. There was evidence that she was continuing that pattern of behavior by lying to DHS and the tribal representative about her current boyfriends, one of whom she described as jealous and controlling. The court agreed with DHS, the tribal representative, Lori's father, and Lori's adult son that returning the children to her care would place them at risk. We see no basis for reversing that determination.

Lori next challenges the court's order terminating her parental rights. She argues that there was insufficient evidence to support the court's finding that her parental rights should be terminated pursuant to the failure-to-remedy ground set forth in Arkansas Code Annotated section 9-27-341(b)(3)(B)(i)*(a)* (Repl. 2015). This section provides that termination is appropriate if the court finds, by clear and convincing evidence, that the juveniles have been adjudicated dependent-neglected and have continued to be out of the parents' custody for at least twelve months, and despite meaningful efforts by DHS to rehabilitate the parents and correct the conditions that caused removal, those conditions have not been remedied. *See Loveday v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 282, at 6,

435 S.W.3d 504, 508. This statutory ground requires, as an element, an adjudication of dependency-neglected, and Lori challenges the validity of the circuit court's amended adjudication order, which was entered approximately fifteen months after the original order and appears to simply change the burden of proof for the court's findings to comply with the ICWA.[6]

However, an adjudication order is immediately appealable pursuant to Rule 6-9(a)(1)(A) of the Rules of the Supreme Court and Court of Appeals. In *Ashcroft v. Arkansas Department of Human Services*, we stated that "we have held that a parent's failure to appeal the rulings made in an adjudication order precludes appellate review of those findings in an appeal from a subsequent order." *Ashcroft*, 2010 Ark. App. 244, at 8, 374 S.W.3d 743, 747 (citing *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005); *White v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 609, 344 S.W.3d 87; *Causer v. Ark. Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005)). The same rule applies to the court's amended adjudication order. Because she failed to appeal the amended adjudication order, we cannot address the merits of Lori's claim that the children were not properly adjudicated dependent-neglected pursuant to the ICWA.

Lori also argues that she successfully remedied the conditions causing removal. We disagree. As discussed above, while there was evidence that Lori had made progress in therapy, the caseworker, the tribal representative, her father, and her adult son all thought that she still prioritized her romantic relationships with questionable or inappropriate men

[6]She states that she is not attacking the amended order, just the court's finding in the termination order that the failure-to-remedy ground's elements had been met, but we see no substantive distinction.

over her children's well-being. Lori relies on *Guthrey v. Arkansas Department of Human Services*, 2017 Ark. App. 19, 510 S.W.3d 793, in which we held that a lack of credibility, standing alone, does not amount to a failure to remedy. This case is distinguishable from *Guthrey* because the circuit court in this case was concerned with Lori's credibility *about something* that had already been established as an issue in this case: her continued pattern of choosing and prioritizing her romantic relationships with questionable men over the well-being of her children. The circuit court was presented with evidence that one of the men about whom Lori had been dishonest was jealous and controlling; Lori testified that "he kept tracking me all the time." Because the original cause for removal was Lori's failure to protect her children from her boyfriends' abusive behavior, we see no error in the circuit court's consideration of her continued dishonesty about her romantic relationships as evidence of her failure to remedy that condition.

Moreover, one of the reason that the children were removed was Lori's failure to demonstrate adequate parental judgment. When she knew that her boyfriend and her young daughter were sleeping in the same bed together while she worked nights, she did nothing other than telling the *child* to quit. The evidence at the termination hearing demonstrated that Lori's lack of judgment persisted throughout the case. She had altercations with her parents, who had taken in, and were caring for, her children, that prompted the Elliotts to request a change in visitation so that Lori no longer visited the children in their home. She became irate with the tribal representative, yelling at her over the phone for almost an hour. She lied to DHS and to the tribal representative about material facts, such as her current romantic involvements. The fact that Lori discussed with DHS the details of one of her boyfriend's

sexual dysfunction (after having initially lied by saying they were only friends) and then stated that she would quit seeing him as soon as she regained custody of her children indicates a lack of insight and judgment about the root problems that initially led to removal. Even at the termination hearing, Lori made excuses, explaining that although the case plan required her to maintain stable housing, she had been sporadically "living in a man's home instead of [her] own" because she was too tired to drive back and forth to work and didn't want to spend money on gas. Her adult son, Andrew Sanders, testified that he had agreed to help her get back on her feet and remedy the conditions causing removal, as long as she promised not to get romantically involved with a new man while they were working on addressing the issues that had caused removal of her children. Yet, just a few months later, Sanders began to notice evidence that his mother was not living in her home (she wasn't using the wood for the stove to keep the house warm and all the food in the refrigerator had gone bad). Based on her history and the fact that she currently appeared to be surreptitiously living with someone, Andrew testified that he was afraid of what would happen if the children were returned to her custody.

We hold that there was sufficient evidence to support the circuit court's termination of Lori's parental rights based on the failure-to-remedy ground. Although the juvenile code provides nine different grounds that warrant termination of parental rights, *see* Ark. Code Ann. § 9–27–341(b)(3)(B), DHS need only prove one ground to support termination. *Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). Because we affirm the termination of Lori's parental rights pursuant to the failure-to-remedy ground, we need not discuss the merits of her appeal as to the other statutory grounds for termination.

Last, Lori also challenges the court's finding that termination was in the children's best interest. The evidence and analysis on this point is virtually identical to the best-interest analysis discussed above, regarding the court's decision to change the case goal to termination and adoption. For the same reasons stated above, we affirm on this point as well.

Affirmed.

KLAPPENBACH and WHITEAKER, JJ., agree.

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