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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-680

	Opinion Delivered December 13, 2017
MICHAEL FISHER AND CARRIE FISHER APPELLANTS	APPEAL FROM THE LOGAN COUNTY CIRCUIT COURT, SOUTHERN DISTRICT [NO. 42BJV-16-06]
V.	HONORABLE TERRY SULLIVAN, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILDREN APPELLEES	
	AFFIRMED

BRANDON J. HARRISON, Judge

Under Arkansas law, the State may sever completely the rights of parents upon a finding by the circuit court that a statutory ground for termination of parental rights exists and a termination is in the children's best interest. Ark. Code Ann. § 9-27-341 (Supp. 2017). Due process requires that the State support its allegations by at least clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982). Michael Fisher and Carrie Fisher challenge the sufficiency of the State's evidence presented during a termination hearing in the Logan County Circuit Court. We hold that the circuit court's decision to terminate Michael and Carrie's parental rights was not clearly erroneous and affirm.

I. *Background*

In March 2016, the Arkansas Department of Human Services (DHS) petitioned for emergency custody of K.F. and J.F. based on the affidavit of caseworker Terrie Goff. The

court found that an emergency existed because the children had been left at an after-school program without a caregiver and that DHS custody was necessary to protect the juveniles' health, safety, and welfare. According to Goff, the children's mother, Carrie Fisher, was in jail, and no other family members were available to care for the children. The children's legal father, Michael Fisher, reportedly had stated that he was in Tulsa, Oklahoma, had no money or food, and to "just call DHS." Goff's affidavit noted nine "CHRIS Search" referrals for the children from 2013 to 2016.

The circuit court adjudicated the children dependent-neglected in May 2016. The adjudication order states that Carrie stipulated that she was an unfit parent "due to drug addiction." At the time of the adjudication, Carrie was a patient at Valley Behavioral Hospital. The court found that Michael was a noncustodial parent, not fit, and that the children could not be safely placed in his custody because

> [h]e could not tell the Court exactly where he was living as he could not recall the street number for his address. He did admit that the place he is living is not his own, nor was the place he lived before his current home. He was argumentative while on the witness stand and refused to answer questions. He also refused to screen for drugs either before or after Court. The Court finds his refusal and overall behavior to be indicators that he was under the influence of some substances.

The court set the case goal as reunification. It ordered Carrie to submit to a drug-and-alcohol assessment and complete all recommended treatment; submit to a psychological evaluation or mental-health assessment and complete any recommended counseling made by Valley at her discharge; obtain and maintain stable and appropriate housing; have sufficient income and reliable transportation; complete parenting classes and display improved parenting skills; submit to drug screening and hair-follicle testing; and "if she is

going to continue to have a relationship with her current boyfriend, secure his cooperation in working on any of his issues and following the case plan."

The court ordered Michael to "obtain counsel privately if he wishes to be represented by counsel as he is not entitled to appointed counsel;" submit to drug-and-alcohol and hair-follicle testing; watch "The Clock is Ticking" video; submit to a drug-alcohol assessment and complete any recommended treatment; complete anger-management classes; and have stable housing and sufficient income. It also found that the parents were divorced and as part of the divorce decree, Michael was ordered to pay $160 a week in child support. The court ordered that the divorce decree be provided to the office of child support enforcement and that DHS be the payee for support.

The court entered a review order in July 2016 finding that DHS had made reasonable efforts to provide the family services to achieve the goal of reunification. It stated,

> The Court finds that the parents are not making progress towards reunification. The mother has not maintained stable housing. She has lived in several residences since this case opened. The mother receives disability income. She is working off community services time and paying fines regarding a criminal offense. The father reports that he is living in a home that [he] is remodeling for his brother and that [he] works at self-employment and is paid by the job. He reports having no transportation and that it would cost him $6,000 to resolve the barriers in Oklahoma that prevent him having an Arkansas's driver's license.

The court noted that its previous orders to both parents continued to be in effect, and it further ordered Carrie and Michael to submit to hair-follicle testing and to "not cut, dye, or otherwise alter his or her hair." Importantly, the court made this specific finding regarding the children:

> The Court finds the case plan, services, and placement meet the special needs and best interest of the juveniles, with the juveniles' health, safety, and

> education needs specifically addressed. It is not in the juveniles' best interest to be placed together at this time. The Department has made reasonable efforts to reunite the siblings and to allow contact consistent with Ark. Code Ann. § 9-28-1003(d). The Department has presented evidence that an assessment by a mental health professional has determined that placement of the siblings together would be detrimental to the health, safety and well-being of one (1) or more of the juveniles.

In a January 2017 review order, the court substantially repeated the above statement regarding the children, adding that "[a]t this time, [J.F.] is in need of residential treatment. At this time, [K.F.] is not. And that [J.F.] is making some progress in Woodridge." As for the parents, the court found,

> The mother has partially complied with the case plan in that she has gone to an inpatient substance abuse program, has obtained HUD housing, and receives disability benefits in the amount of $733 per month. However she has stated that she will be going into the Chem-Free program after she is discharged from her inpatient program. Chem-Free assists with obtaining housing and Carrie has stated that she does not want to live in Boonville. Carrie has been in Valley Behavior Health on the acute unit for mental health issues since this case opened in March. Due to health reasons, she was unable to complete her community service for a shoplifting charge in Sebastian County. She owes $600 in fines, her last payment was $60 on August 2, and, due to her failure to complete community service, she has a court hearing scheduled on November 3. The father has not complied with the case plan. The Department is unaware of an address for him. Carol Geels testified that she spoke with Michael Fisher the first week that Carrie was in inpatient treatment, that she cannot get ahold of him now, and that he is a licensed electrician.

The court authorized a plan for adoption on 9 January 2017. It found that Carrie had not complied with the case plan, yet it noted she had seen the "Clock is Ticking" video, completed a drug-and-alcohol assessment. It wrote,

> The drug/alcohol assessment recommended she have a minimum of 16 weeks in outpatient dual-diagnosis treatment. She sporadically attended outpatient treatment and continued to test positive, so inpatient was later recommended. She completed a residential chemical dependency treatment

program through Harbor House/Gateway. However, she has continued to test positive since her completion of the Gateway program. Outpatient was recommended as aftercare when she was discharged from inpatient. She is scheduled for an intake on January 5, 2017. She completed a psychological evaluation. The psychological evaluation recommended that she work with her physician to find a medicine that could stabilize her mood, have stable housing, avoid drugs/alcohol, and continue with counseling, which is needed to stabilize her mood, build her self-esteem, encourage her to make more mature responses, accept responsibility for the needs of her children, and address her significant trauma history. She has not followed any of these recommendations. She has not had stable housing for the entire pendency of this case. . . . She is not employed, but she receives $733.00 in disability benefits monthly. She has not completed parenting classes through ADHS. She has continued to test positive for illegal substances throughout the pendency of this case, and her hair follicle came back positive for methamphetamine. She has visited each child minimally this review period. She visited with [K.F.] on October 27 and with [J.F.] on November 4. She visited with both last week. She testified that she has visited [K.F.] an additional time this review period. . . .

The Court finds that the father HAS NOT complied with the case plan and the orders of this Court, specifically, he has not completed a drug/alcohol assessment, has not completed anger management classes, has not provided proof of his income, and has not shown that he has his own housing. He is currently $6,800.00 in arrears for his child support. OCSE is in the process of having him held in contempt. However, they have had trouble serving him due to the instability of his housing. On December 7, the Department contacted Carrie Fisher to ask her to submit to a drug screen. She stated that she was at Michael's residence, could not provide an [sic] address, and put Michael on the phone. Michael cursed and threatened the worker, refusing to provide an address and hung up. He was served OCSE paperwork today in court. He has an order to show cause for February 21, 2017.

. . . .

The Court orders that [J.F.] is to remain at Woodridge, unless the treatment team at Woodridge recommends he be moved. The order that [J.F.] is to remain is based upon testimony that Woodridge is an appropriate placement for [J.F.] and testimony the Department has not been able to find another placement for him. The Court finds that neither parent is complying. The father has totally failed to comply. The mother has just been released from inpatient and is continuing to test positive. Neither has an appropriate place for their children to live. This Court will not find that either parent is

indigent based on testimony for both parents that they intend to hire private counsel.

DHS moved to terminate parental rights, and an order terminating Carrie and Michael's parental rights was entered in May 2017. The court made detailed findings in its termination order:

> Since the permanency-planning hearing, [Carrie] tested positive for Xanax and THC in January, tested positive for Xanax in February, and tested positive for Xanax, methamphetamine, and amphetamine in February. She claims to have had a prescription for the Xanax, but did not provide a prescription to the drug assessors. Ms. Fisher also has a history of mental health issues, but as of today's [date] is not in individual mental health counseling, because the co-occurring program with The Guidance Center and Western Arkansas Counseling and Guidance would not accept her for co-occurring treatment while she continued to take Xanax. The co-occurring program decided to accept her despite her Xanax use on April 26, 2017. However, Ms. Fisher testified today that she has not seen an individual counselor since April 26. 2017.
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> Today, Mr. Fisher testified that he is residing with Ms. Smothers, an aunt of Carrie Fisher's. Additionally, he has tested positive for methamphetamine since the permanency planning hearing, on February 7, 2017. Furthermore, Mr. Fisher testified today that [he] owes over $6,000 in child support . . . Mr. Fisher is not employed, is seeking disability, and has not yet retained counsel for his disability claim. . . Since the permanency planning hearing that was held in January of 20l7, Mr. Fisher completed the drug and alcohol assessment that was court ordered at the adjudication hearing in April of 2016 and started anger management classes that were court ordered at the adjudication hearing in 2016. He has never completed parenting classes with the Department of Human Services. Ms. Fisher testified today that she has had three separate residences since she completed her inpatient drug treatment in October of 2016. She testified that she receives $735 monthly from SSI, $200 monthly from loans for her higher education, and additional income from house painting. She has never completed parenting classes with the Department of Human Services. She also testified that the Family Service Worker Supervisor and the Program Assistant for Arkansas Department of Human Services, Division of Children and Family Services, in Logan County, were "railroading" her during an incident at a gas station in Logan County, that following this incident she "called the Attorney General on them," and that after calling the Attorney General, she "filed stalking charges" against

them. The Court finds that the Department of Human Services has offered appropriate services to these parents, that, unfortunately, the Department's efforts have been to no avail, since the Court does not know how long these children would need to linger in the Department's custody until the parents could achieve enough stability to be considered for placement of their children. Thus, the Court finds that there is little likelihood that additional services offered to the parents would result in successful reunification. The Court finds Pamela Feemster's testimony was credible.

The Court finds by clear and convincing evidence that it is in the best interest of the juvenile[s] to terminate parental rights. In making this finding, the court specifically considered (A) the likelihood that the juvenile will be adopted if the termination petition is granted, specifically the testimony of Pamela Feemster who stated that [K.F.] does not have special needs that would make finding an adoptive home more difficult for her, that Pamela Feemster did not think there would be any impediments to finding an adoptive home for [K.F.], that [J.F.] does have special needs that would make finding an adoptive home for him more difficult, that children with special needs similar to the special needs [J.F.] has have been successfully placed, and that Pamela Feemster believes ADHS can find an adoptive home for [J.F.]; (B) the potential harm on the health and safety of the juvenile[s] caused by returning the juvenile[s] to the custody of the parents. The Court finds the testimony of Pamela Feemster to be credible and Carrie and Michael Fisher's lack of stable and appropriate housing and continued drug problems demonstrate how [J.F. and K.F.] would be at risk of potential harm if returned to the parent[s].

Carrie Fisher and Michael Fisher appealed the termination order.

II. *Carrie Fisher*

Carrie Fisher makes a carefully tailored argument on appeal about the sufficiency of the State's adoptability evidence. To understand her argument, we need some details from the termination-hearing testimony.

Pamela Feemster, the DHS caseworker, testified that eight-year-old K.F. does not have any special needs that would make adoption more difficult. She was doing well in her placement, and is a "brilliant" child with straight As in school. Feemster did not foresee any impediments to finding an adoptive placement for K.F. J.F., on the other hand, has "a

lot" of mental-health needs. He was in a residential program "making very little progress." But Feemster was "hopeful" that J.F. would be able to work through his mental-health issues and that "once those are under control" DHS would have "no problems" finding an appropriate placement and that children with needs similar to those of J.F. had been successfully placed for adoption before. On cross-examination by the attorney ad litem, Feemster stated that she did not feel that the children could be placed with either parent because "neither one has addressed issues of their substance abuse."

The CASA report in evidence stated that J.F.'s foster parent was concerned "with the burden [J.F.] is carrying, thinking that the separation of the family is his fault." K.F.'s foster parent noted that J.F. must "earn time" to talk to K.F. on the phone, that J.F. told K.F. he "misses her and he loves her" and that he feels it is his fault that the family isn't together. The report also notes that K.F. "misses her mom and wants to return home." CASA ultimately recommended that J.F. continue with inpatient treatment at Woodridge Behavioral Care and that both children remain in DHS custody in their current placements. The report notes that the "goal be changed to adoption with termination of parental rights."

An April 2017 report from Woodridge entered into evidence stated that J.F. had been diagnosed with disruptive mood dysregulation disorder, ADHD, combined presentation, "Generalized Anxiety Disorder h/o Trauma (sexual)." The report identified that barriers to the discharge plan were that it was unknown if J.F.'s guardian has a viable home for the child and that DHS "has reported that [J.F.'s] biological mother's parental rights are in the process of being terminated—no alternative placement plans were

communicated." It noted that J.F.'s estimated length of stay was four to six months. One comment in the report states,

> [J.F.] continues to struggle with processing/accepting the reasons he is in SCFS care and in this facility as he comes up with numerous excuses for why it is not his mom's fault she did not pick him up from school or why she cannot work and provide money/food for the family and that she is sick. He also struggles with understanding why he cannot go home to his mom and dad and rationalizes reasons he is here by blaming others[.]

Other mental-health reports note J.F.'s significant aggressive and inappropriate behavior.

On appeal, Carrie argues that terminating her parental rights was in not in her children's best interest because J.F. and K.F. are not adoptable as a sibling group and DHS did not have an appropriate permanency plan for J.F. In her view, J.F. "could not cope because the very agency that had custody of him systematically destroyed his relationship with his mother due to a lack of resources, and then after being unable to meet his needs and causing him to become unplaceable, the agency recommended termination." She cites, among other things, a first quarterly report issued by DHS that only 10 percent of the 212 adoptions reported in the three months covered were in the 10–13 age range. The conclusion she wants us to draw is that,

> [s]tatistically, just being a thirteen year old male makes it very challenging for J.F. to find permanency through adoption. But with the system being flooded with children 12 years old and up, and with J.F. being unable to leave the institution he had been in throughout the entire case with no evidence of even hope of improvement, the black and white facts make it unreasonable to conclude that the evidence presented by the Department met the level of proof required to find that termination was ultimately in J.F.'s best interest.
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> Throughout the case, the court found that children needed to be separated, yet at no time during the termination hearing was any testimony introduced regarding the likelihood that J.F. and K.F. could be adopted together—or whether it was in their best interest not to be adopted together, as well as their prospects to be adopted together given J.F.'s issues—despite there being

> testimony and documentary [evidence] that resuming sibling visits would be beneficial to both children. A complete lack of evidence can never be sufficient evidence of something. . . . Sibling groups matter, DHS's burden at trial matters.

She asks us to "make good" on our warning in *Renfro v. Arkansas Department of Human Services*, 2011 Ark. App. 419 at 8 n. 3, 385 S.W.3d 285, 289 n. 3, that "bare minimum" evidence is not sufficient concerning the adoptability prong of best interest.

DHS responds that it does not have to prove the likelihood or probability of adoption. "Rather, there must be evidence presented and the trial court must consider that evidence. That's all. To set the bar higher would unfairly punish children with special needs or developmental disabilities who need permanency—especially if the behavior and development issues are a direct result of the parent's inattention and unfitness—as in this case." DHS cites *McDaniel v. Arkansas Department of Human Services*, 2013 Ark. App. 263, arguing that even if a child is unlikely to be adopted, it can still be in his or her best interests to terminate the parents' rights. "DHS is not required to disprove all possible barriers to adoption, such as behavioral issues, with clear and convincing evidence." The circuit court is required only to weigh the evidence of adoptability.

Under Arkansas law, to terminate parental rights, a circuit court must find by clear and convincing evidence that termination is in the best interest of the juvenile, taking into consideration (1) the likelihood that the juvenile will be adopted if the termination petition is granted and (2) the potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A)(i)–(ii). While the likelihood of adoption must be considered by the circuit court, that factor is not required to be established by clear and convincing

evidence. *Hamman v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 295, at 9, 435 S.W.3d 495, 501. A caseworker's testimony that a child is adoptable is sufficient to support an adoptability finding. *Caldwell v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 144, at 5, 484 S.W.3d 719, 722. Adoptability is not an essential element of proof. *McDaniel*, 2013 Ark. App. 263. The statute does not require any "magic words" or a specific quantum of evidence regarding a child's adoptability but simply provides that the circuit court consider the likelihood that the child will be adopted in making its best-interest determination. *Sharks v. Ark. Dep't of Human Servs*, 2016 Ark. App. 435, 502 S.W.3d 569; *see also Renfro*, 2011 Ark. App. 419, at 10, 385 S.W.3d at 290 ("neither the statute nor our case law requires any specific quantum of evidence [on adoptability]").

In this case, the circuit court did not have the benefit of the 2017 DHS report on foster care and adoption that Carrie cites in her brief, because it was not entered as evidence into the record. An appellate court does not consider matters outside the record, and it is an appellant's burden to bring up a record sufficient to demonstrate error. *Dep't of Career Educ., Div. of Rehab. Servs. v. Means*, 2013 Ark. 173, 426 S.W.3d 922. In this case, the circuit court heard the evidence of adoptability, the evidence that J.F. and K.F. would likely not be together, the evidence that J.F. had significant behavioral and mental-health issues, and the evidence of the parents' major drug problems and instability, and weighed the evidence in favor of termination. We cannot say that the circuit court erred in finding that termination of parental rights was in J.F. and K.F.'s best interest.

III. *Michael Fisher*

Michael argues on appeal that DHS produced insufficient evidence of any termination ground and that a termination was not in the children's best interest.

We affirm the termination of Michael's parental rights on the subsequent-factors ground, which is a statutory ground that DHS pled and the circuit court found. This ground requires clear and convincing proof that other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that placement of the juvenile in the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent the placement of the juvenile in the custody of the parent. Ark. Code Ann. § 9-27-341 (b)(3)(B)(vii)(*a*). Termination of parental rights is a drastic remedy that is necessary to provide permanency in a juvenile's life in circumstances in which return to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341(a)(3). That means that a child's need for permanency and stability may override a parent's request for additional time to improve the parent's circumstances. *Fredrick v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 104, 377 S.W.3d 306.

In this case, Robert Hammond, a substance abuse counselor, submitted a letter to the court that stated Michael had completed an assessment in February 2017, almost a year into the case. The result of the assessment was a recommendation of two (12-week)

outpatient services to address Michael's psychiatric issues and substance abuse. Michael did not comply with the outpatient recommendation, did not return phone calls or written correspondence and tested positive for methamphetamine. As stated in the facts above, Michael pretty much failed to follow any court order throughout the entire case. There was other testimony that before February 2017, he had few visits with the children, he had not addressed substance-abuse issues, had not maintained stable housing, and had not participated in counseling services. During the termination hearing, he testified that he was waiting on disability benefits and that he did not know how long it would be before he could support his children. The circuit court's decision to terminate his parental rights on the subsequent-factors ground was not clearly erroneous.

As far as best interest, Michael does not challenge the court's adoptability finding as to K.F., but he does as to J.F. Michael's argument about J.F.'s best interest is like the argument Carrie made on the lack of adoptability evidence of J.F. We affirm for the same reasons we gave earlier in the opinion. The circuit court heard the evidence of adoptability, the evidence that J.F. and K.F. would likely not be together, the evidence J.F. has significant behavioral and mental-health issues, the evidence of the parents' major drug problems and instability, and weighed the evidence in favor of termination. We cannot say that the circuit court clearly erred in deciding that terminating Michael's rights was in J.F.'s best interest.

Affirmed.

GRUBER, C.J., and VIRDEN, J., agree.

Leah Lanford, Arkansas Public Defender Commission, for appellant Carrie Fisher.

Dusti Standridge, for appellant Michael Fisher

Mary Goff, Office of Chief Counsel, for appellee.

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