Cite as 2018 Ark. App. 65

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-17-640

	Opinion Delivered January 31, 2018
CAROLYN JADE BENSON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, EIGHTH DIVISION
V.	[NO. 60JV-16-963]
ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	HONORABLE WILEY A. BRANTON, JR., JUDGE
	AFFIRMED

DAVID M. GLOVER, Judge

Carolyn Benson appeals the Pulaski County Circuit Court's order terminating her parental rights to her son, T.M., who was born on March 24, 2015.[1] On appeal, Benson argues this decision was in error because the Arkansas Department of Human Services (DHS) failed to prove it was in T.M.'s best interest for her parental rights to be terminated. Specifically, Benson contends it was error to find T.M. would suffer potential harm if returned to her custody. We affirm the termination.

DHS filed a petition for ex parte emergency custody on August 17, 2016. According to the affidavit attached to the petition, Benson was incarcerated in the Drew County Detention Center awaiting transfer to a Regional Punishment Facility to serve a nine-

[1]Todd Monroe was named as T.M.'s putative father, but the identity of T.M.'s biological father is unknown.

month sentence; T.M. had been living with Benson's mother, Jerry Benson, during Benson's incarceration until Jerry Benson passed away; and Benson's sister, Abigail Benson, began to care for T.M. after Jerry Benson's death. DHS became involved on August 14, 2016, when the Little Rock Police Department called for assistance after receiving a call from Michael Grimmer, a level 3 sex offender, who advised the police he needed assistance because "dead kids" were in his home. DHS found Grimmer, Wesley Benson (T.M.'s uncle), and sixteen-month-old T.M. in the home. Grimmer and Wesley Benson appeared to be under the influence of intoxicants and unable to care for T.M., who had what appeared to be a cigarette burn on the back of his hand allegedly caused by Wesley Benson. Grimmer advised the officers that Wesley Benson was keeping T.M. for his sister, who was in prison. Grimmer was concerned about T.M.'s safety because Wesley Benson took a lot of pills, drank, and smoked around T.M. The officers found a pack of diapers, but no baby food or baby clothing; the clothes T.M. was wearing were dirty; and T.M. had black dirt in the creases of his neck. DHS removed T.M. due to the living conditions and the lack of a person who could properly care for him. Abigail Benson contacted DHS on August 15, 2016, stating T.M. had been with Wesley Benson for only one day, and she had planned to pick T.M. up from Wesley Benson the following day.

An ex parte order of emergency custody was entered the same day. That order noted Benson's prior contact with DHS in October 2013 in Chicot County for allegations of newborn illegal-substance exposure concerning another child of Benson's, A.M.; that case concluded with the termination of Benson's parental rights and A.M.'s adoption.

Benson was present at the probable-cause hearing held on August 23, 2016. In an order entered September 9, 2016, the circuit court found probable cause to continue T.M. in DHS custody. The order again referenced the termination of Benson's parental rights to A.M. and the fact Benson was currently incarcerated.

Benson was not present at the adjudication hearing held on October 6, 2016, due to the failure to file a transport order to have her brought to court. The circuit court adjudicated T.M. dependent-neglected in an order filed October 31 and continued his custody with DHS, but left reunification as the goal of the case. The circuit court again made reference to the prior termination of Benson's parental rights and noted Benson remained incarcerated.

In a permanency-planning order filed February 3, 2017, the circuit court changed the goal of the case from reunification to termination of parental rights, finding T.M. had been subjected to aggravated circumstances because it was unlikely any services to the family would result in successful reunification within a reasonable period of time as measured from the child's perspective and consistent with his developmental needs. In making this decision, the circuit court relied on the fact Benson had been incarcerated since June 2016; she was currently serving a six-year sentence in the Arkansas Department of Correction (ADC), with a transfer eligibility date of July 2017; and even if she were released at that time, she would still need six to nine months to receive services and demonstrate to the court she is a fit and appropriate parent. The circuit court noted Benson asserted that the termination of her parental rights in A.M.'s case was a voluntary

surrender. The circuit court stated termination of parental rights in the present case was not a foregone conclusion and ordered that if Benson was released prior to the next hearing, she was to contact DHS so that services could be provided to her. The circuit court denied Benson's request for T.M. to visit her while she was incarcerated, finding it was not in T.M.'s best interest due to his age and his not knowing Benson.

DHS filed a petition to terminate Benson's parental rights on February 27, 2017. The grounds alleged by DHS for termination were Benson had previously had her parental rights involuntarily terminated as to T.M.'s sibling; subsequent factors; aggravated circumstances; abandonment; and Benson had been sentenced in a criminal proceeding for a period of time that would constitute a substantial period of T.M.'s life. After a hearing, the circuit court terminated Benson's parental rights to T.M. in an order filed May 4, 2017, finding DHS had proved all grounds for termination against Benson except the abandonment ground, which it dismissed, and that it was in T.M.'s best interest for Benson's parental rights to be terminated.

At the termination hearing, Treasure Golden, the DHS caseworker, testified she was asking the circuit court to terminate Benson's parental rights because Benson had been incarcerated not only the entire time T.M. had been in foster care, but even before T.M. entered foster care; Benson had no contact with T.M. during the case; Benson had been unable to participate in any court-ordered services; Benson was still incarcerated at the time of the termination hearing; T.M. needed permanency and a stable life; the circuit court had made a finding of aggravated circumstances; there had been a previous involuntary

termination of Benson's parental rights to another child; and Benson had been sentenced in a criminal proceeding for a period of time that constituted a substantial period of T.M.'s life. Golden said T.M., who was two at the time of the termination hearing, was doing well and was playing with other children more. Golden stated she had had no correspondence with Benson other than court hearings and a letter from Benson's attorney.

Angela Brown, an adoption specialist, testified that based on T.M.'s race, age, and medical history, he is adoptable. She stated there were 585 matches to families interested in adopting a child with the same or similar characteristics to T.M.

Benson testified on her own behalf, stating she had been incarcerated in the Drew County Jail from June to October 2016 and in the McPherson Unit since October 2016, serving a six-year sentence on a probation revocation based on the underlying charge of prescription fraud. Benson stated she anticipated her release date to be May 22, 2017; she had plans to parole to the Phoenix Recovery Center in Little Rock upon her release; she had received her GED while incarcerated; and she planned to enroll in cosmetology school when she was released. Benson, who admitted she had a substance-abuse problem, testified she had graduated the previous day from the prison's substance-abuse treatment program and had been awarded the most-improved-client award; she had also completed parenting and anger-management classes while incarcerated. Benson admitted her parental rights to A.M. had been terminated due to her drug issues; that T.M., who was born in March 2015, had last lived with her prior to her arrest in June 2016; and that T.M. has already waited for almost a year for her to get on her feet. Benson explained she could stay at Phoenix

Recovery Center for up to 90 days and was allowed to have T.M. with her during that time (although she provided no documentation of that). She guaranteed to the court that in 90 days, she would be on her feet and ready to parent T.M. with "no problems." However, she was unsure how much money she anticipated making to support T.M. after that 90-day period, although she asserted it would be more than a minimum-wage job.

In announcing its decision to terminate Benson's parental rights, the circuit court stated it took judicial notice of the Chicot County proceedings in which Benson's parental rights to A.M. were involuntarily terminated (not voluntarily terminated, as previously asserted by Benson) on several grounds due to drug-related issues. The circuit court noted Benson had remained incarcerated during the dependency-neglect proceedings and was therefore unavailable as a placement, and she was going to need additional time after she was released to establish some stability, which it did not have much hope of Benson accomplishing. The circuit court reiterated the finding of aggravated circumstances it had made at the permanency-planning hearing, again finding it unlikely further reunification services for Benson would result in a successful reunification within a reasonable period of time as measured from T.M.'s perspective and consistent with his developmental needs. While the circuit court noted Benson's argument that she had availed herself of services while she was in prison, it placed little weight on these services, as she was in custody in a highly structured setting and was not free to make many of her own choices; the circuit court pointed out that when Benson had been out in the free world, she had drug issues for which she had now been incarcerated for a substantial period of T.M.'s life. The circuit

court stated T.M. needed permanency; he is highly likely to be adopted; T.M. would be at risk of harm and instability if returned to Benson's care; there would be a continuing risk of drug exposure; and, even if so inclined, it would be impossible for the circuit court to give T.M. to Benson at this time because she was still incarcerated.

Sufficiency of Evidence

Termination of parental rights is a two-step process requiring a determination that the parent is unfit and that termination is in the best interest of the children. *Norton v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 285. The first step requires proof of one or more statutory grounds for termination; the second step, the best-interest analysis, includes consideration of the likelihood the juveniles will be adopted and of the potential harm caused by returning custody of the children to the parent. *Id.* Each step requires proof by clear and convincing evidence, which is the degree of proof that will produce in the finder of fact a firm conviction regarding the allegation sought to be established. *Id.*

Appellate courts review termination-of-parental-rights cases de novo, and our inquiry on appeal is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Wallace v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 376, 524 S.W.3d 439. 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.* In resolving the clearly erroneous question, a high degree of deference is given to the circuit court, as it is in a far

superior position to observe the parties before it and to judge the credibility of witnesses. *Id.*

Benson concedes there was sufficient evidence to support the grounds for termination; her sole argument on appeal concerns the circuit court's finding it was in T.M.'s best interest to terminate her parental rights. Benson makes no argument T.M. is not adoptable—she specifically only argues the circuit court erred in finding T.M. would suffer potential harm if returned to her custody.

In assessing the potential-harm factor, the circuit court is not required to find actual harm would result if the child was returned to the parent or to affirmatively identify a potential harm. *Krecker v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 537, 530 S.W.3d 393. Potential harm includes the harm a child suffers from the lack of the stability the child would otherwise receive in a permanent home. *Knight v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 602, 533 S.W.3d 592. Potential harm must be viewed in a forward-looking manner and in broad terms; the risk for potential harm is but a factor for the circuit court to consider in its analysis. *Porter v. Arkansas Dep't of Human Servs.*, 2013 Ark. App. 299, 427 S.W.3d 738. Potential harm is not an element of the cause of action and does not need to be established by clear and convincing evidence; rather, after considering both adoptability and potential harm, the circuit court must find by clear and convincing evidence that termination of parental rights is in the child's best interest. *Jacobs v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 586, 532 S.W.3d 627.

Benson argues the evidence failed to demonstrate she posed a potential danger to T.M., because she did not cause T.M.'s removal, she was making progress, and her release from prison was imminent. She contends she had a "concrete plan" for her life after her release, and all she needed was an additional 90 days after her release from prison. She argues the prior termination of her parental rights and her incarceration, are insufficient, standing alone, to prove termination of her parental rights was in T.M.'s best interest. We disagree.

Benson argues, citing *Goodwin v. Arkansas Department of Human Services*, 2014 Ark. App. 599, 445 S.W.3d 547, and *Conn v. Arkansas Department of Human Services*, 79 Ark. App. 195, 85 S.W.3d 558 (2002), that the fact parental rights to one child have been involuntarily terminated does not require that parental rights to all subsequent children be automatically terminated. Her reliance on these cases is misplaced, as both are clearly distinguishable from the facts of her case.

In *Goodwin*, the mother appealed the adjudication of her daughter M.G. as dependent-neglected, arguing in part that DHS had offered no evidence that her other children (M.G.'s siblings of whom she had lost custody) were ever subjected to a substantial risk of serious harm. Our court *affirmed* the adjudication, holding that the fact Goodwin's parental rights to one child had been terminated; that on separate occasions, both Arkansas and Ohio had taken another child into custody; and that Goodwin did not have custody of any of her children was sufficient to affirm the adjudication, and that a

dependency-neglect case would give Goodwin an opportunity, under supervision, to demonstrate whether she could potentially raise M.G.

In *Conn*, our court reversed and remanded an order terminating the appellants' parental rights. In that case, no testimony was taken at the termination hearing, and the circuit court terminated parental rights based on the stipulation that the parents' parental rights to another child had previously been terminated. Our court reversed and remanded, holding no evidence was presented to support a finding it was in the child's best interest for parental rights to be terminated.

Here, not only had Benson previously had her parental rights involuntarily terminated to another child, there was also evidence presented at the termination hearing that T.M. would be subjected to potential harm if returned to her custody. It was impossible to return T.M. to Benson on the day of the termination hearing, as she was still incarcerated at that time, and she had been incarcerated since before T.M. had been taken into DHS custody. While Benson testified about the programs she had completed while incarcerated, including graduation from a substance-abuse treatment program the day before the termination hearing, the circuit court did not place much weight on these services, as she was not free to make many of her own choices in prison. The circuit court was not required to believe Benson's assertions that her life would be different this time after she is released from prison. Furthermore, while Benson claimed she had a "concrete plan" for her life after she is released, she was unable to provide the circuit court with any real details, including, how much money she anticipated making after she is released. The

circuit court stated it had little hope that Benson would establish any stability. This evidence supports the circuit court's finding it was in T.M.'s best interest for Benson's parental rights to be terminated.

Benson also points out that her case proceeded at an accelerated speed and that she was never given an opportunity to reunify with T.M. despite the progress she had made while she was incarcerated. She argues, citing Arkansas Code Annotated sections 9-27-338 and -359 (Supp. 2017), that by statute, she should have been given fifteen months before termination proceedings were instituted. She is incorrect.

Arkansas Code Annotated section 9-27-338 concerns permanency-planning hearings, and section 9-27-359 discusses fifteen-month review hearings. Neither statute requires a parent to be given at least fifteen months to improve their situations and parenting abilities. We note that Benson was afforded approximately nineteen months to improve her parenting skills—to no avail—in the Chicot County dependency-neglect proceedings before her parental rights to A.M. were involuntarily terminated. Benson's prior conduct is a good indicator of future conduct. While it is permissible to allow fifteen months (or more) in some cases, it is not a requirement.

Affirmed.

GRUBER, C.J., and HARRISON, J., agree.

Tabitha McNulty, Arkansas Public Defender Commission, for appellant.

Anna Imbeau, Office of Chief Counsel, for appellee.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for minor child.