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# ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-698

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| TIFFANY MCLEMORE<br>APPELLANT<br><br>V.<br><br>ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD<br>APPELLEES | Opinion Delivered: January 31, 2018<br><br>APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TENTH DIVISION<br>[NO. 60JV-16-839]<br><br>HONORABLE JOYCE WILLIAMS WARREN, JUDGE<br><br>AFFIRMED |

**BART F. VIRDEN, Judge**

The Pulaski County Circuit Court terminated the parental rights of appellant Tiffany McLemore to her child, L.S. (DOB: 8-16-2015).[1] McLemore argues on appeal that there was insufficient evidence of grounds to support termination and that the trial court erred in determining that termination was in L.S.'s best interest. We affirm.

I. *Procedural History*

[1]The parental rights of L.S.'s putative father, Floyd St. Clair, were also terminated, but he is not a party to this appeal.

On July 14, 2016, the Arkansas Department of Human Services (DHS) filed a petition for ex parte emergency custody and dependency-neglect as to L.S.[2] In an affidavit, family-service-worker specialist with DHS, Toni Hansberry, averred that DHS had first become involved with McLemore's family in September 2015 based on a report of maltreatment. An allegation of inadequate supervision and "substance misuse" was substantiated against McLemore. A hair-follicle test performed on L.S. indicated that she was positive for amphetamines, methamphetamine, and marijuana. McLemore admitted having used methamphetamine, Xanax, and Klonopin the week before the investigation. A protective-services case was opened, and DHS offered services, including worker visits to the home, random drug screens, individual counseling, referrals for parenting classes, a drug-and-alcohol assessment, and inpatient drug treatment.

Hansberry stated in her affidavit that McLemore had participated in individual counseling; however, McLemore had failed to attend parenting classes, had not gone to any AA/NA meetings, and had been unavailable for random drug screens on multiple occasions. On April 27, 2016, Hansberry discovered that McLemore had been admitted to Recovery Centers of Arkansas (RCA) and that L.S. had been living with her maternal grandfather. The grandfather was instructed by DHS caseworkers not to permit McLemore to take the child. On May 24, 2016, Hansberry went to visit the grandfather's home to

[2]DHS's petition also referenced L.S.'s older sibling, P.K. (DOB: 4-29-2009), but that child now resides with his great-aunt and is not a party to this appeal.

check on L.S. and learned that McLemore had been "kicked out" of rehab two weeks prior and had come and taken L.S.

Hansberry further averred that she had attempted to contact McLemore to no avail in that McLemore had moved three times without informing DHS of her whereabouts, had not returned phone calls, and had several warrants out for her arrest. Hansberry thus sought the trial court's assistance in exercising a hold on L.S. to ensure her safety, noting that McLemore's drug use and instability put L.S. at substantial risk of harm. The petition alleged that L.S. was dependent-neglected based on neglect and parental unfitness. L.S. was eventually located and removed from McLemore's custody between July 25 and July 28, 2016.

An ex parte order for emergency custody was entered, and the trial court later found that probable cause existed for issuance of the order based on McLemore's stipulation dated July 28, 2016. The stipulation provided that a protective-services case had been opened based on a true finding of inadequate supervision and substance misuse; that L.S. tested positive for drugs; that McLemore had been involuntarily discharged from inpatient drug treatment; and that the caseworker had not been able to locate McLemore to provide additional services.

On August 24, 2016, L.S. was adjudicated dependent-neglected due to parental unfitness based on a similar stipulation by McLemore, which was attached to the order. McLemore stipulated that a hair-follicle drug screen on October 2, 2015, had revealed that L.S. was positive for methamphetamine and marijuana; that a protective-services case had

been opened but that McLemore had failed to participate in services and failed to cooperate with DHS; and that McLemore had tested positive for methamphetamine, amphetamines, and methylenedioxymethamphetamine (MDMA or "ecstasy") on August 5, 2016. Another exhibit attached to the adjudication order was a lab follow-up from the results of L.S.'s October 2, 2015 drug screen. It was noted that the confirmation amount of methamphetamine was more than 360 times over the minimum amount needed to confirm the presence of methamphetamine—"so it was not a subtle exposure"—and that the marijuana level was eighteen times over the minimum cutoff level for confirmation testing.

In the adjudication order, McLemore was ordered to visit L.S. and to cooperate with DHS. She was also ordered to, among other things, submit to a drug-and-alcohol assessment; enter a residential-treatment program for substance abuse, complete the program, and follow any recommendations; submit to random drug screens; and attend AA/NA meetings at least three times a week.

A review order was entered on November 16, 2016, in which the trial court found that McLemore had not complied with the case plan and court orders because she had been incarcerated since August 24, 2016, and that DHS had made reasonable efforts to provide family services toward the case-plan goal of reunification. Another review order was entered on February 21, 2017, finding that McLemore had complied with the case plan and court orders to the extent possible due to her incarceration. Specifically, the trial court found that McLemore had appropriate visits with L.S., had participated in substance-abuse counseling, would soon begin parenting classes, and had started a program to obtain her

GED. The trial court noted, however, that McLemore had made no progress toward alleviating or mitigating what had caused L.S. to be removed from the home.

On February 2, 2017, DHS filed a petition for termination of parental rights, alleging three grounds under Ark. Code Ann. § 9-27-341(b)(3)(B) (Supp. 2017). After a continuation for good cause, a termination hearing was held on April 27 and May 8, 2017.

## II. *Hearing Testimony*

Brenda Keith, an adoption specialist, testified that she had identified 495 families interested in adopting a child with L.S.'s characteristics. She stated that L.S. is young, healthy, and does not have special needs. Keith testified that L.S.'s foster parents were interested in adopting her. She testified that she was aware that L.S. has a younger and an older sibling and that, while it is DHS's policy to make every effort to place siblings together, C.M. was on "a different track" because he had just been born in December 2016.

Toni Hansberry testified that L.S. had been removed from McLemore's custody on July 26, 2016, because DHS had an open case on the family and had not been successful in providing services to McLemore. Hansberry admitted that a case plan had not yet been approved in the protective-services case but asserted that McLemore had known that she was required to enter inpatient drug treatment because McLemore and both children in her custody when she had tested positive for drugs. Hansberry said that, despite having

tested positive for drugs, the children were nevertheless allowed to stay in McLemore's care. Hansberry explained that she had not been involved in that decision.

Hansberry stated she did not think that continuing to offer services to McLemore would result in reunification because DHS had offered her "an abundance of services" to keep the child from being placed in foster care, yet those services did not prevent L.S.'s removal from the home. She stated that McLemore had been arrested at L.S.'s adjudication hearing on outstanding warrants and had been incarcerated throughout the case. A sentencing order was introduced showing that McLemore's probation had been revoked and that she had been sentenced to two years' imprisonment for possession of drugs and paraphernalia. Hansberry testified that before McLemore's incarceration, McLemore had begun by being "a little cooperative" but then had "kind of slacked off."

Hansberry testified that McLemore had visited with L.S. and that she was aware that McLemore had been participating in services offered by the prison system. She stated that she had been unable to determine what those services were and whether McLemore had completed the services. Hansberry testified that L.S. could not be returned to McLemore's custody that day because McLemore was still in prison. She stated that, although she had been provided with an address where McLemore planned to live once she is released from prison, the home had not yet been studied. Hansberry testified that she had attempted to find a permanent custodian for L.S., including a fit and willing relative. She said that she had mailed notices to caregivers for L.S.'s siblings and that McLemore had provided her with a list of names. Hansberry said that she had mailed notices to those persons on the list

that she could find addresses for but had not heard back, that McLemore's sister had declined to get involved, and that she could not find contact information for others on the list.

Hansberry stated that there was not enough time for McLemore—assuming she would be released from prison in June—to demonstrate that she could obtain a safe and stable home, secure employment, and maintain sobriety. Hansberry stated that it was unreasonable to expect L.S. to wait another three months to see whether McLemore could "stabilize" because L.S. had not contributed to her mother's drug use, and before L.S. had entered DHS's custody, McLemore "had lots of time to get herself clean and be stable and parent her child, and that didn't occur." Hansberry said that L.S. had been waiting on McLemore to become stable for 591 days of the 618 days she had been alive.

Darnisha Chatman testified that she is McLemore's substance-abuse advisor at the Arkansas Department of Community Correction. She said that McLemore has group counseling for three to four hours a day and individual sessions every thirty days. Chatman stated that, whereas McLemore had been reserved in the beginning, she now participates and "seems to have gained enough knowledge to deal with her issues that she was having before." She said that McLemore had given birth to C.M. in December 2016 and that DHS had taken custody of him at that time. She said that McLemore had been devastated by C.M.'s removal and had begun doing extra work in February 2017.

Tiffany McLemore testified that she is currently incarcerated and that June 30, 2017, was her expected release date. She said that she had had no disciplinary problems

while in prison and that she had been sober since August 23, 2016. She said that there are substance-abuse programs available at the prison and that she was on step 4 of a twelve-step program. She stated that she cannot get an AA sponsor until she is released. McLemore testified that she had completed parenting classes and obtained her GED. She said that she had a plan in place for her transition "back into the world." She said that she plans to stay with her great-aunt and great-uncle and that she had secured a temporary job detailing cars. She also said that she plans to stay away from people who do drugs and places where drugs are present. McLemore asked that she be given more time to reunify with L.S.

On cross-examination, McLemore testified that she had been incarcerated due to her drug use and that L.S. had been placed in foster care due to her drug use. McLemore stated that DHS had worked with her for at least seven or eight months during the protective-services case and that, while she had felt that it was important to stop using drugs while L.S. was still in her custody, she did not feel a sense of urgency in participating in the current case plan. She stated, "I really didn't think [doing drugs] affected [the children] because I took very well care of my children." She also said, "I thought I was a good parent. I do not really think I was impaired when I was on drugs."

## III. *Termination Order*

Pursuant to Ark. Code Ann. § 9-27-341(b)(3), an order forever terminating parental rights shall be based on a finding by clear and convincing evidence that it is in the best interest of the juvenile, including consideration of the likelihood that the juvenile will be adopted if the termination petition is granted and 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). The order must also find by clear and convincing evidence one or more grounds. Ark. Code Ann. § 9-27-341(b)(3)(B).

The trial court granted DHS's petition, finding all three grounds as alleged in DHS's petition: Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)* (other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that the 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 those issues or rehabilitate the parent's circumstances, which prevent the placement of the juvenile in the custody of the parent); Ark. Code Ann. § 9-27-341(b)(3)(B)(viii) (the parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life); and Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)* & *(B)* ("aggravated circumstances" means, among other things, that a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification). The trial court also considered the potential harm that could result in returning custody of L.S. to McLemore and noted that L.S. is "very adoptable."

## IV. *Standard of Review*

We review termination-of-parental-rights cases de novo. *Williams v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 622. Grounds for termination of parental rights must be proved by clear and convincing evidence, which is that degree of proof that will produce in

the finder of fact a firm conviction of the allegation sought to be established. *Id.* The appellate inquiry is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Id.* 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, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005). On appellate review, this court gives a high degree of deference to the trial court, which is in a far superior position to observe the parties before it. *Id.* Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Friend v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 606, 344 S.W.3d 670.

## V. *Discussion*

The purpose of the termination-of-parental-rights statute, Ark. Code Ann. § 9-27-341(a)(3), is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time, as viewed from the juvenile's perspective. Even full compliance with the case plan is not determinative; the issue is whether the parent has become a stable,

safe parent able to care for his or her child. *Shaffer v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 208, 409 S.W.3d 182. In deciding whether to terminate the parental rights of a parent, the trial court has a duty to look at the entire picture of how that parent has discharged his or her duties as a parent. *Friend*, *supra*.

A. Grounds for Termination

Proof of only one statutory ground is sufficient to terminate parental rights. *Sharks v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 435, 502 S.W.3d 569. Although DHS and the attorney ad litem examined only the substantial-sentence ground in their briefs, we affirm the termination of parental rights on the aggravated-circumstances ground. We note that at the termination hearing, counsel for McLemore objected to any mention of the protective-services case as part of proving the aggravated-circumstances ground on the basis that it was irrelevant because reunification did not become the goal until after entry of the adjudication order. The trial court disagreed, saying that "you have to look at the whole picture" and that, while DHS could have pled the ground better, discussion of the services offered in the protective-services case was "fair game" and "has to come in" because it was part of the basis for the trial court's adjudication of L.S. as dependent-neglected.

On appeal, McLemore argues that DHS failed to prove the aggravated-circumstances ground. According to McLemore, the trial court erroneously relied on the caseworker's testimony regarding the protective-services case. She points out that the caseworker admitted that no valid case plan had been established in the protective-services case and that McLemore had not signed any documents advising her of DHS's goals or expectations.

Further, McLemore maintains that DHS had to prove that appropriate family services were offered in *this* case, not the protective-services case.

We note that McLemore's noncompliance with the protective-services case was part of her stipulations to the trial court's probable-cause finding and its adjudication of L.S. as dependent-neglected due to parental unfitness. Thus, we agree with the trial court that McLemore's prior noncompliance was relevant to whether there was little likelihood that further family services would result in successful reunification with L.S. In any event, McLemore's noncompliance with the protective-services case was not the only basis on which the trial court could have found that L.S. had been subjected to aggravated circumstances.

Contrary to McLemore's argument, the aggravated-circumstances ground does not require that DHS prove that meaningful services toward reunification were provided. *See, e.g.*, *Willis v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 559. Nevertheless, there must be more than a mere prediction or expectation on the part of the trial court that reunification services will not result in successful reunification. *Yarborough v. Ark. Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). The trial court heard testimony at the termination hearing about McLemore's substance-abuse counseling and her having achieved step four in a drug-treatment program while in prison. The trial court also heard testimony that McLemore expected to be released from prison within a month after the termination hearing. Despite having received drug counseling and drug treatment while incarcerated, McLemore testified at the termination hearing that she did not think her

drug use had affected her children or her ability to parent those children. Thus, we cannot say that the trial court clearly erred in terminating McLemore's parental rights to L.S. on the aggravated-circumstances ground based on its finding that there was little likelihood that further services would result in successful reunification. We also agree with the trial court that reunification with L.S. could not occur within a reasonable period of time from L.S.'s perspective and that L.S. needs permanency "now—not a year from now."

B. Best Interest

McLemore does not challenge the trial court's adoptability finding. She argues that the trial court's determination that potential harm could result from returning custody of L.S. to her was based on little more than speculation. In determining potential harm, the trial court may consider past behavior as a predictor of likely potential harm should the child be returned to the parent's care and custody. *Harbin v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 715, 451 S.W.3d 231. The trial court is not required to find that actual harm would result or to affirmatively identify a potential harm. *Id.* The potential-harm evidence must be viewed in a forward-looking manner and considered in broad terms. *Id.*

McLemore complains that DHS caseworkers did not do their jobs, that DHS rushed to terminate her rights instead of preserving the familial bonds, and that DHS could not use her noncompliance from the protective-services case to bolster the evidence in this case. McLemore also asserts that evidence of her progress in prison, her impending release, and her plans upon release were not properly considered by the trial court and that neither

DHS nor the trial court considered the effect that termination of her parental rights would have on L.S. as a sibling.

There is no indication that the trial court failed to consider any evidence or improperly considered any evidence, as discussed above. The trial court found that DHS had made reasonable efforts to provide services and ordered DHS to continue to explore possible placements with a permanent custodian. While McLemore states that DHS should not have sought to terminate her rights while still trying to find a relative placement for L.S., which would have avoided the necessity of terminating her rights, we note that Ark. Code Ann. § 9-27-338(c) lists permanency goals in order of preference and that permanent custody with a relative is listed *after* adoption. Ark. Code Ann. § 9-27-338(c)(6); *see also Helvey v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 418, 501 S.W.3d 398. Further, McLemore cites no authority for her claim that DHS could not seek to terminate her rights when it did.

Even if McLemore is released from prison when she expects, she would not be ready to take custody of L.S. There was testimony that McLemore had secured a home with relatives and a temporary job, but she has not demonstrated her sobriety. A child's need for permanency and stability may override a parent's request for additional time. *See Henderson v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 191, at 10, 377 S.W.3d 362, 386 (affirming trial court's determination that termination was in child's best interest when mother's drug rehabilitation was "still a work in progress"). We cannot say that the trial court clearly erred in determining that termination of McLemore's parental rights was in L.S.'s best interest.

Affirmed.

GLOVER and BROWN, JJ., agree.

*Tina Bowers Lee*, Arkansas Public Defender Commission, for appellant.

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