

Cite as 2023 Ark. App. 339
ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-711

STEPHANIE WATTS

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILD

APPELLEES

Opinion Delivered May 31, 2023

APPEAL FROM THE CLARK COUNTY
CIRCUIT COURT
[NO. 10JV-21-80]

HONORABLE BLAKE BATSON,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

WENDY SCHOLTENS WOOD, Judge

Stephanie Watts appeals the Clark County Circuit Court’s order terminating her parental rights to her daughter, Minor Child (MC), born on May 24, 2021.¹ Watts’s attorney seeks to be relieved as appellate counsel and has filed a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(j) (2022). We affirm and grant counsel’s motion to withdraw.

¹This case is the companion to *Watts v. Arkansas Department of Human Services*, 2023 Ark. App. 334, also decided today, in which Watts has appealed the termination of her parental rights to three of her sons, Minor Child 1 (MC1), born October 9, 2019, Minor Child 2 (MC2) born June 24, 2018, and Minor Child 3 (MC3) born February 12, 2013. The children have another sibling, born April 2, 2008, who has been in the permanent custody of his maternal grandmother, Sheila Morgan, since 2010.

On June 16, 2021, the Arkansas Department of Human Services (DHS) filed a petition for emergency custody and dependency-neglect against Watts and MC's putative father, Franklin Williams, after placing a seventy-two-hour hold on MC on June 12. In an affidavit attached to the petition, DHS representative LaRoyce Browning stated that she received a call at 4:00 a.m. on June 12, informing her that Watts had been arrested for public intoxication, disorderly conduct, and resisting arrest after an altercation with Williams. Browning stated that three-week-old MC had been with Watts during the altercation; Watts and Williams were both intoxicated; Williams fled before the police arrived; and Watts left MC with a relative who had inadequate space to care for her. Browning also noted the ongoing foster-care case involving MC's siblings, who had been removed from Watts's custody eight months earlier, when Watts fled from police, leaving the children behind.²

In an order entered on August 31, MC was adjudicated dependent-neglected due to parental unfitness. The circuit court found that DHS had been involved with the family since September 21, 2020, and had provided services and referrals, but the services did not prevent removal because Watts's continued relationship with Williams placed MC at serious risk. The court found that Watts and Williams have a history of domestic violence and that, despite a no-contact order between them, Watts had fought with Williams at his relative's

²Police had been conducting a welfare check based on reports that Watts had pushed her one-year-old child down, and in the process, they discovered she had an outstanding felony warrant. On the pretense of changing one of the children in the back room, Watts fled through a broken window, leaving two of the children near the broken glass. The children were removed, and Watts was charged with two counts of child endangerment and fleeing.

home, prompting Watts's arrest and MC's removal. The goal of the case was set as reunification with a concurrent goal of relative placement. Watts was ordered to complete all services in the case plan and follow all recommendations of those services, maintain adequate housing, allow entry of DHS into her home upon request, maintain employment, and abide by all the court's orders.

The first review hearing was scheduled on December 13, 2021, at the same time as a review hearing in the companion case involving MC's siblings.³ On agreement of the parties, the court continued the hearing in both cases to February 7, 2022. In January 2022, DHS filed a motion to terminate reunification services, alleging that MC had been subjected to aggravated circumstances because there was little likelihood that continued services for Watts would result in successful reunification. In support of the motion, DHS alleged that (1) MC had been removed from the home because she was present during a physical fight between Watts and Williams in June 2021 while they were intoxicated and subject to a no-contact order; (2) the no-contact order had been issued on December 11, 2020, in a criminal case in which Williams was charged with committing domestic battery against Watts on November 28, 2020, while she was pregnant with MC; (3) Watts continued to maintain contact with Williams despite the no-contact order and the pending domestic-battery case; (4) Watts had not progressed in the ongoing dependency-neglect cases, as evidenced by her treatment of

³Although MC was born during the pendency of the companion case and her dependency-neglect case was filed separately, the cases overlapped in terms of services and recommendations, and the circuit court held joint review and termination hearings.

the children during visitation; and (5) although Watts had completed a psychological evaluation, she had been discharged from individual counseling for missing appointments and was not seeing a psychiatrist or taking medication, which the psychological evaluation had recommended as a prerequisite for reunification with her children.

At the review hearing on February 7, the court received evidence and testimony on the motion to terminate reunification services, but the parties agreed to defer the ruling on the motion until the next scheduled hearing on March 7. The purpose of the deferral was to give Watts an additional month to initiate psychiatric services at Ouachita Behavioral Health in compliance with the recommendation from her previous psychological evaluation by Dr. George DeRoeck.

Dr. DeRoeck had opined that Watts's capacity to be involved in the independent care of her children is minimal due to issues with medication compliance, the accuracy of her diagnoses, and the heightened volatility in her interpersonal relationships. He diagnosed Watts with antisocial and borderline personality traits and opined that she suffers from schizoaffective disorder-bipolar type or schizophrenic spectrum disorder. To determine Watts's proper diagnosis, he recommended that she undergo psychiatric assessment and stabilization on medication for four to six months before reunification with her children could be considered as a viable goal in the dependency-neglect case.

Watts did not undergo the psychiatric assessment, and she did not appear at the March 7 hearing. The circuit court found that she was absent without excuse. It terminated reunification services, finding that DHS had proved by clear and convincing evidence that

there was little likelihood that services would result in successful reunification. The circuit court cited the fact that Watts had continued contact with Williams despite the no-contact order and the ongoing domestic-battery case, she had been discharged from individual counseling for missed appointments, and she had failed to contact Ouachita Behavioral Health to schedule the necessary psychiatric appointment, which was the reason the termination motion had been held in abeyance.

On April 11, the circuit court entered a permanency-planning order changing the goal to adoption. The court found that Watts had not made significant and measurable progress toward reunification, and the safety concerns that prevented placement of MC with Watts included her continued failure to obtain psychiatric care, despite the recommendations in the psychological evaluation, and her recent history of a recurring violent relationship with Williams.

On May 24, DHS filed a petition alleging that it was in MC's best interest to terminate Watts's parental rights.⁴ DHS alleged two statutory grounds: subsequent factors, Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a) (Supp. 2021); and aggravated circumstances, Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a).⁵

⁴The petition also named Williams as MC's putative father, but the circuit court found that his rights as a putative father did not attach because he failed to prove paternity or significant contacts. The court dismissed him from the case, and he is not a party to this appeal.

⁵DHS also filed a petition to terminate Watts's parental rights in the companion case involving MC1, MC2, and MC3. On agreement of the parties, the circuit court received evidence and testimony on both termination petitions in a joint hearing.

At the termination hearing on August 1, Watts testified that she had no transportation, no driver's license, and no job but had worked for a little over a month in April at KFC, and before that she had last worked at Tyson when she was pregnant with MC. She was looking for employment, but only part time because she was seven months pregnant. Her only income was \$775 a month in SSI benefits.

She said she was on parole and still faced charges in the criminal case that was filed against her when MC was removed. She thought she had failed to appear for hearings in that case and was behind in paying fines that were imposed in the child-endangerment case that was brought when MC's siblings were removed. She also thought she was behind in paying her parole fees, and she had not checked in with her parole officer since April.

She said that since the end of May or the beginning of June 2022, she had a home in Camden, but it had been vacant for six months, and she had not permitted DHS to assess it because it had not been convenient for her and she had not moved into the home. She said she previously had another home in Camden, but she did not stay there because she did not like to be alone. For that reason, she stayed with Williams's cousin, Adrianna Johnson.

Watts admitted that she had been the victim of domestic violence by Williams more than once and that a no-contact order had been issued in the criminal case in which Williams had been charged with committing domestic battery against Watts while she was pregnant with MC. She also acknowledged the altercation she had with Williams in violation of the no-contact order on the day that MC was removed from her custody. She had tried to get the no-contact order and the charges dropped, contending that Williams had not attacked

her. She further admitted that she and Williams had been arrested in January 2022, when police were called to her apartment in Arkadelphia. Police found Williams hiding in a closet and Watts was wearing no clothes. She said that she did not know what happened during that incident but denied that it involved violence.

Watts acknowledged that, following her psychological evaluation in February 2021, Dr. DeRoeck recommended that she undergo a psychiatric evaluation. She said that she had attempted to get the psychiatric evaluation in July 2021, but she had not gotten the right type of evaluation. In December 2021, DHS gave her the last page of the report from Dr. DeRoeck's February 2021 evaluation, which contained his explicit recommendations for psychiatric care. She knew at that time that she still needed a psychiatric evaluation, and she subsequently delayed scheduling an appointment for it even after it had been discussed at the hearing on February 7, 2022. She said that she learned sometime in May that she would have to transfer her counseling chart from Arkadelphia to Camden before Medicaid would cover psychiatric care in Camden, and she closed her chart in Arkadelphia in May. Watts testified that she had undergone a psychiatric evaluation on July 26, just days before the termination hearing on August 1, but she had no documentation showing that she had undergone the evaluation and no results, and she said she had not been prescribed any medication following the evaluation.

Regina Moore testified that she had been Watts's secondary caseworker, starting in June 2022, after Watts had moved to Camden. Moore said that she had called Watts to assess her home, and Watts eventually returned Moore's call but said she did not feel like

allowing an assessment and would allow it the next day. Moore could not reach or find Watts the next day. When she went to Adrianna Johnson's house, she was told Watts was no longer staying there because Johnson would not permit Williams to stay there with Watts. Moore also testified that it was not until late July that Watts first asked her about where she could get a psychiatric evaluation in Camden.

LaRoyce Browning testified that she had worked on Watts's cases since the first one was opened in 2020. Browning stated that Watts had participated in or completed nearly all of the case plan; however, Browning believed that Watts's untreated and unmedicated psychological issues may be the cause of her instability in housing, transportation, and income; poor decision making in parenting and visitation; and issues with law enforcement. She said Watts had never moved beyond supervised visitation because her interactions with the children and her behavior presented safety concerns. She could think of no further service that had not been offered or recommended that could provide a different outcome than termination. Browning further testified that she was concerned with Watts's criminal proceedings and the barrier they posed to reunification.

Browning testified that Watts was present at the February 7 hearing in which the attorneys discussed Dr. DeRoeck's recommendations for a psychiatric evaluation and treatment and that Watts needed to get psychiatric care as soon as possible. Following the hearing, Browning coordinated with Ouachita Behavioral Health (OBH) to get a psychiatric evaluation scheduled for Watts. OBH contacted Watts on March 2 to schedule her intake appointment, but Watts hung up on the caller. When the OBH representative tried to call

Watts back, Watts did not answer. OBH then mailed Watts a letter instructing her to schedule her intake appointment, but she never responded.

Browning testified that before her move to Camden, Watts had stable housing in Arkadelphia for six months. She then moved to Camden, and Browning said there was a risk of harm if the children were returned to Watts's custody because the condition of her home and the safety net for the children was unknown, and there was a concern, based on Watts's interactions with her children during visitation, that there would be a risk of violence if they were returned to her. Browning testified that the children were doing well in their placements. The oldest child, MC3, was in a relative placement with his paternal grandmother. The three younger children, including MC, were in the same foster home, and all four of the siblings had been able to maintain contact through visitation.

The final witness was Sandra Marfoglio-Hinton, an adoption specialist for DHS, who testified that the children are adoptable. She said she found four possible adoptive homes for all the children and twenty-eight possible homes for the younger three children, including MC. She thought the current placements for the children were interested in adopting them, and she said there were no factors that would impede their adoption.

At the close of the hearing, Watts's counsel asked the court to defer its ruling on termination until the results of Watts's recent evaluation were known. Counsel asked that, if the results warranted it, Watts be given a four-to-six-month period to determine if she can maintain medication as recommended by Dr. DeRoeck's report. The circuit court orally denied the request, stating that it had been provided no evidence to support Watts's

position, and it granted the petition to terminate her parental rights. On August 15, 2022, the circuit court entered its written order terminating Watts's parental rights to MC on the grounds of subsequent factors, aggravating circumstances, and failure to remedy. The court also found that termination was in the best interest of MC. This appeal followed.

As previously stated, Watts's attorney has filed a motion to withdraw, arguing that the appeal has no merit. Counsel's motion is accompanied by a brief that lists all rulings adverse to her client and explains why each ruling does not present a meritorious ground for reversal. The clerk of this court mailed copies of the brief and motion to Watts, informing her of her right to file pro se points for reversal. She did not file pro se points in this appeal.

The first adverse ruling discussed by Watts's attorney is the circuit court's termination decision. This court reviews termination-of-parental-rights cases de novo. *Lloyd v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 461, at 7, 655 S.W.3d 534, 540. Termination requires a finding of at least one statutory ground and a finding that termination is in the child's best interest. *Id.* at 8, 655 S.W.3d at 540. Arkansas Code Annotated section 9-27-341(b)(3) requires a circuit court's order terminating parental rights to be based on clear and convincing evidence. *Lloyd*, 2022 Ark. App. 461, at 8, 655 S.W.3d at 540. Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Baker v. Ark. Dep't of Hum. Servs.*, 340 Ark. 42, 48, 8 S.W.3d 499, 503 (2000). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the circuit court's finding was clearly erroneous. *Payne v. Ark. Dep't of Hum. Servs.*, 2013 Ark. 284,

at 3. 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.* This court gives a high level of deference to the circuit court because it is in a superior position to observe the parties before it and to judge the credibility of the witnesses and the weight of the evidence. *Id.*

Watts's counsel argues that there is no merit to an appeal of the circuit court's finding that other factors or issues arose after the filing of the original petition that demonstrate placement of MC in Watts's custody is contrary to her health, safety, or welfare, and that despite the offer of appropriate family services, Watts has manifested the incapacity or indifference to remedy those factors. The circuit court found that the subsequent factors were Watts's lack of stable housing, employment, and transportation and her failure to demonstrate compliance with the recommendation of Dr. DeRoeck that she obtain psychiatric assessment and medication as a prerequisite to reunification.

We have consistently recognized that a failure to comply with the case plan and court orders is sufficient evidence of factors arising after removal and can demonstrate risk of harm and a parent's incapacity or indifference. *Gonzalez v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 425, at 9, 555 S.W.3d 915, 920. The circuit court ordered Watts to follow all recommendations made in the services provided in the case plan; to maintain safe, suitable, and adequate housing; to allow entry of DHS into her home upon request; to maintain employment; and to follow all the court's orders.

Watts testified that she remained unemployed at the time of the termination hearing and had not been gainfully employed for more than a month since she was pregnant with MC. Although she had maintained stable housing for six months in Arkadelphia, she moved to Camden during the dependency-neglect case, sometime around April 2022. She said she initially had her own home in Camden but did not stay there because she did not like to be alone and because the landlord had not made necessary repairs. She lived instead in the apartment of Adrianna Johnson, Williams's cousin, but in a conversation with Watts's secondary caseworker in Camden, Adrianna indicated that Watts had decided to move out of Adrianna's apartment because she would not permit Williams to be there with Watts. Watts said she was moving into her sister's home, but she was not staying there, she had previously reported that it needed repairs, and she had been unwilling to allow DHS to visit the home for assessment. Browning testified that Watts's instability in housing following her move to Camden posed a risk of harm to MC and her siblings. This court has repeatedly held that a stable home is one of a child's most basic needs and the failure to maintain stable housing may demonstrate indifference or incapacity supporting the subsequent-factors ground for termination. *Nault v. Ark. Dep't of Hum. Servs.*, 2023 Ark. App. 84, at 6; *Younger v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 138, at 9, 643 S.W.3d 487, 493. A parent's instability in housing and employment is a sufficient basis for a finding of the subsequent-factors ground. *Gonzalez*, 2018 Ark. App. 425, at 9, 555 S.W.3d at 920.

Watts further failed to comply with the psychiatric recommendation that Dr. DeRoek and the circuit court's orders deemed to be crucial if reunification was to be the

goal in Watts's case. Watts said she attempted, but failed, to get a psychiatric evaluation in July 2021. She was given a copy of Dr. DeRoeck's psychiatric recommendation in December 2021, and she knew at that time that she was not in compliance and needed to secure the recommended care. At the review hearing in February 2022, she still had not complied and was informed that the court would give her one additional month to arrange for the psychiatric services, which would require an additional four to six months of treatment. She was notified that her caseworker had made arrangements for the psychiatric services at OBH, but when that facility called Watts to schedule her intake appointment, Watts hung up on the caller and would not answer subsequent calls. Watts then failed to appear at the hearing in March and present evidence demonstrating her compliance. It was not until July that Watts asked her secondary caseworker, Moore, where she could get a psychiatric evaluation in Camden. Watts did not dispute these facts at the termination hearing, and although she contended that just days before the termination hearing she finally had obtained what she thought was a psychiatric evaluation, she had no proof that she had done so.

Although Watts completed many of the services offered, she has never been in full compliance with the case plan and court orders. This court has consistently held that eleventh-hour attempts to comply with recommendations of psychological assessments and court orders do not outweigh prior noncompliance and need not be credited by the circuit court. *Nault*, 2023 Ark. App. 84, at 6; *Sharks v. Ark. Dep't of Hum. Servs.*, 2016 Ark. App. 435, at 13, 502 S.W.3d 569, 578; *Lazaravage v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 29, at 11-12, 541 S.W.3d 450, 456-57. On this record, the circuit court did not clearly err in

finding that other factors arose that demonstrate MC remains at risk if returned to Watts and that Watts is indifferent to, or incapable of, remedying those factors. Accordingly, we hold that there is no merit to an appeal of this finding.

Watts's counsel also argues that there is no merit to an appeal of the circuit court's best-interest findings. When making the best-interest finding, a circuit court is required to consider the likelihood of adoptability and the potential harm to the health and safety of the child that would be caused by returning her to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A). Potential harm is viewed in broad terms and in a forward-looking manner. *Myers v. Ark. Dep't of Hum. Servs.*, 2023 Ark. App. 46, at 17, 660 S.W.3d 357, 369. In determining potential harm, the circuit court may consider past behavior as a predictor of the potential for harm if the child is returned to the parent. *Furnish v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 511, at 14, 529 S.W.3d 684, 692.

Watts's counsel points out that both Browning and Marfoglio-Hinton testified that MC is adoptable, which this court has held is sufficient to support an adoptability finding by the circuit court. *Cole v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 121, at 6-7, 543 S.W.3d 540, 544. Watts's counsel also asserts that the evidence demonstrates that MC would be subjected to potential harm if returned to Watts. The circuit court found potential harm based on Watts's instability in housing and employment and her failure to comply with Dr. DeRoeck's recommendations for psychiatric care.

Watts was involved in the dependency-neglect case involving her sons before MC was born. She underwent her evaluation with Dr. DeRoeck while she was pregnant with MC,

and he opined that Watts's capacity to be involved in the independent care of her children, including then unborn MC, is minimal. He noted several limiting factors, including Watts's heightened volatility in her interpersonal relationships. Both Dr. DeRoeck and the court required that Watts obtain psychiatric treatment and stabilization on medication as a prerequisite to custody of MC, and Watts failed to comply with this essential requirement. Browning testified that, despite her participation in all services offered, Watts still posed a risk of harm to her children and had never moved beyond supervised visitation due to her interactions with the children and her behavior. She further testified that Watts's instability in housing, transportation, income, choices in parenting and visitation, and her issues with law enforcement were likely related to her unmedicated psychological issues.

We have held that a parent's persistent instability and failure to comply with the case plan and court orders is sufficient evidence of potential harm. *Gonzalez*, 2018 Ark. App. 425, at 12, 555 S.W.3d at 921; *Bell v. Ark. Dep't of Hum. Servs.*, 2016 Ark. App. 446, at 12, 503 S.W.3d 112, 119. On this record, we hold that the circuit court did not clearly err in finding that termination was in MC's best interest, and this point provides no nonfrivolous basis for an appeal.

Counsel identifies one other ruling that was adverse to Watts: her request that the court hold its termination ruling in abeyance pending the results of the psychiatric evaluation that Watts said she had obtained just days before the hearing. The court ruled that it had been presented with no evidence that Watts had obtained a psychiatric evaluation. A parent's efforts to comply as termination becomes more imminent will not outweigh other evidence

that demonstrates a failure to comply and to remedy the barriers to reunification. *Gonzalez*, 2018 Ark. App. 425, at 9–10, 555 S.W.3d at 920–21. As noted, a parent’s past behavior is often a good indicator of future behavior. *Shaffer v. Ark. Dep’t of Hum. Servs.*, 2016 Ark. App. 208, at 4–5, 489 S.W.3d 182, 185–86. Further, a child’s need for permanency and stability may override a parent’s request for more time to see if she can change her past behavior. *Id.* at 5–6, 489 S.W.3d at 185. We hold that the circuit court did not err by denying Watts’s request for more time, and this point presents no basis for an appeal.

From our review of the entire record and the brief presented by Watts’s counsel, we conclude that an appeal would be wholly frivolous in this case. Therefore, we affirm the order terminating Watts’s parental rights to MC and grant counsel’s motion to withdraw.

Affirmed; motion to withdraw granted.

BARRETT and THYER, JJ., agree.

Pamela Fisk, for appellant.

One brief only.