

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA09-232

RICHARD COLLIER

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered SEPTEMBER 9, 2009

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. JV 2007-780]HONORABLE VICKI SHAW COOK,
JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

In this dependency-neglect proceeding, appellant Richard Collier appeals from an order awarding permanent custody of his son X.C. to Cindy Collier. The order also restricted the visitation between Richard Collier and X.C., but provided that visitation may expand if recommended by X.C.'s therapist. Finally, the order directed that the case be closed. We affirm.

Collier apparently had custody of X.C. following a divorce from Cindy Collier. The present case began October 22, 2007, when DHS received a call that Collier was kicking X.C. There were also allegations that the child had suffered cuts, bruises, and welts. X.C. told the worker that he had been "whooped by daddy with a red ruler." During an interview with the worker, Collier admitted that he spanked X.C. with a ruler, but denied he had kicked or hit X.C. DHS exercised a seventy-two-hour hold on X.C. and filed its petition for

emergency custody on October 23, 2007. The circuit court granted DHS emergency custody by order entered on October 26, 2007. The court later found probable cause for entry of the emergency order. Collier's visitation was to be supervised by DHS.

The adjudication hearing was held on December 19, 2007, and the court found that X.C. was dependent/neglected as alleged. X.C. remained in DHS's custody, with the goal to be reunification. Both parents were ordered to follow the court's orders and the DHS case plan, obtain and maintain stable employment and housing, remain clean and sober, submit to random drug tests, complete parenting classes, submit to a psychological evaluation and follow the recommendations, and not to use corporal punishment on X.C. In addition, Collier was ordered to attend anger management classes.

On December 31, 2007, Collier filed a "Petition for Return of Custody," asserting that he had been X.C.'s primary care giver, that he had the facilities and resources to care for the child, and that it was in X.C.'s best interest to be returned to Collier's custody upon completion of the case plan.

On April 2, 2008, the circuit court held a review hearing and found that the mother had complied with the case plan, while Collier was found to have partially complied with the case plan. X.C. was placed with the mother on a sixty-day trial visit, while Collier's visitation continued to be restricted. However, the visitation could expand if both Collier's therapist and X.C.'s therapist recommended it. Collier was ordered to have no contact with X.C.'s mother. A separate order was also entered prohibiting Collier from having any contact with X.C.'s school, upon pain of immediate arrest.

An order was entered on June 4, 2008, finding that X.C. had a successful trial placement with his mother and awarding her temporary custody.

A second review hearing was held on July 23, 2008, when the court found that permanent custody of X.C. should be awarded to his mother. The court found that the mother had complied with the case plan, while Collier was found to have partially complied. Collier was ordered to attend counseling with X.C. when X.C.'s therapist recommended it. His visitation was to be restricted and supervised for two hours each week.

The permanency-planning hearing from which this appeal arises was held December 16, 2008. Cheryl Wardwell, X.C.'s mental-health therapist, testified that X.C. was very slow progressing in counseling due to his becoming physically agitated and being unable to concentrate or focus. Wardwell also stated that she did not have any concerns about X.C. being left in the custody of his mother. She recommended, however, that Collier's visitation with X.C. remain supervised and fairly structured, noting that X.C. had told her about times when Collier was aggressive and about the incident with the ruler. On cross-examination, Wardwell agreed that, if Collier were released by his counselor, he could attend counseling with herself and X.C. She volunteered to supervise visitation between X.C. and Collier.

Karen Kindig, who worked for the school X.C. formerly attended, testified that she did not have any concerns about Cindy Collier and her treatment of X.C. According to Kindig, X.C. voiced a couple of concerns about Collier but Kindig had never witnessed any interaction between the two. One of the statements indicated that Collier was mean to X.C.

Birkes Williams, Collier's therapist, testified that he and Collier were working on a

host of issues, including some related to anger, how to parent, and how to build relationships. According to Williams, Collier was not paranoid but did not really trust anyone. Williams was trying to help Collier understand that his negative thinking about others around X.C. could be very detrimental to X.C. and that if he had a healthy relationship with X.C., it could lead to a more positive outcome. Although Collier had not shown any explosive or anger episodes, Williams believed that he could benefit from more counseling on anger issues and how to appropriately resolve conflicts. According to Williams, Collier's distrust stemmed from the fact that he believes that the system is against him and wants his ex-wife to have custody of X.C. Williams said that he tried to get Collier to look at the allegations made and substantiated to see how the court was viewing the situation. On cross-examination, Williams said that he could counsel with both Collier and X.C. if the court believed it to be therapeutic. Williams was reluctant to do so if it would disrupt X.C.'s relationship with another counselor.

Jamie Moran, the DHS case worker assigned to the case, testified that the department was recommending that Collier's visitation be suspended until recommended by X.C.'s therapist. The previous visitation was not positive. According to Moran, X.C. "has blossomed" in his mother's care and was doing well in school. Moran said that Collier had complied with parts of the case plan and had not complied with other parts. Among the areas where Collier had not complied were completing parenting and anger-management classes.

Richard Collier testified that he has made progress in counseling and had completed anger management. He said that he would be willing to work with Cheryl Wardwell on

counseling. He also said that he was willing to work with Cindy Collier and do what is best for X.C.

The circuit court ruled from the bench and placed X.C. in the permanent custody of his mother. The court noted that the burden was on Collier to work with Cheryl Wardwell and follow her recommendations to obtain more visitation. The court also noted that Collier or another party would have to file a FINS petition in order for the court to retain jurisdiction. This appeal followed.

Because juvenile proceedings are equitable in nature, the standard of review on appeal is de novo. *Judkins v. Duvall*, 97 Ark. App. 260, 248 S.W.3d 492 (2007). However, we do not reverse the circuit court's findings of fact unless they are clearly erroneous. *Id.* We give due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.* This deference to the circuit court is even greater in cases involving child custody, as a heavier burden is placed on the circuit judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. *Id.*

We first note that Collier's attorney has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Ark. Sup. Ct. R. 4-3(k)(1). Counsel is proceeding under the false assumption that an order closing a dependency/neglect case with no visitation is tantamount to termination of that parent's parental rights. However, counsel cites no authority for that proposition. Moreover, an award of permanent custody is one of the outcomes of a

permanency-planning hearing authorized by Arkansas Code Annotated section 9-27-338(c). The circuit court clearly provided that Collier could obtain visitation if it was recommended by X.C.'s therapist. Counsel also assumes that the burden of proof is by clear and convincing evidence. That heightened burden only applies if Collier's parental rights were being terminated. *See* Ark. Code Ann. § 9-27-325(h)(2)(B), (C).

In the present case, the circuit court did not clearly err in placing X.C. in the custody of his mother. Less than fourteen months prior to the final hearing, Collier kicked X.C. and hit him with a ruler, leaving cuts and bruises. The evidence shows that X.C. has thrived while in his mother's care. The consensus of the recommendations was that Collier continue in therapy to learn how to deal with certain issues, including anger. There was testimony that Collier had not completed the anger-management classes. Those same recommendations also stated that it should be X.C.'s therapist who recommends whether Collier's visitation expands.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.