NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-34

	Opinion Delivered April 29, 2009
ASHLEY FORTENBERRY APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. JV 2008-60]
V.	HONORABLE DAVID CLARK, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	AFFIRMED

WAYMOND M. BROWN, Judge

Ashley Fortenberry, a resident of Mississippi, appeals from the termination of her parental rights to her daughter, C.F., born March 19, 2007, by the Faulkner County Circuit Court. She challenges the sufficiency of the evidence to support the trial court's findings as to the child's best interests and grounds (aggravated circumstances). We affirm the trial court's decision.

This case began with the death of C.F.'s two-year-old sister, O.M., on February 4, 2008, while the girls, Fortenberry, and her husband, Shawn Fortenberry, were visiting relatives in Arkansas. DHS filed a petition for emergency custody of C.F. on the basis of the following affidavit:

> On February 4, 2008 the on call worker received a call from the State Police asking for a safety response, Stating that there was a 2 year old child who died on her way

> to Children's Hospital. The 2 year old, [O.M.] who resided with her parents Shawn Fortenberry and Ashley Moore, sister C.F., were visiting their uncle James Fortenberry in Vilonia. [O.M.] was covered in bruises on her abdomen, face and forehead and just about everywhere, old and new bruises. [O.M.'s] heart stop beating on the way to Children's Hospital she was pronounced dead upon her arrival. The safety response was requested for the 10 month old sibling C.F. (3/19/07).

Shawn was arrested for O.M.'s murder and taken to jail. The circuit court granted DHS's emergency petition and set a probable-cause hearing on February 12, 2008. The parties stipulated that probable cause existed at the time the hold was placed on C.F., and reserved the issue of the truth of the allegations for the adjudication hearing. The court directed DHS to contact the Department of Human Services in Mississippi about accepting this case. The Mississippi agency declined to do so.

Fortenberry appeared with her attorney at the adjudication hearing. In the resulting order entered on June 20, 2008, the court made the following findings:

> 4. . . . That the juvenile was subject to abuse and Neglect as defined in the Arkansas Juvenile Code. Based on the testimony of the medical examiner, Dr. Kokes, and the autopsy report there were at least two specific instances of physical abuse to the sibling, [O.M.]. There was an earlier injury to the abdomen and an acute head injury which was the cause of death of the sibling, [O.M.]. These injuries were found to be non-accidental injuries. The parents took no steps to alleviate or mitigate the injuries cause by these traumas, in that they did not take the juvenile to the hospital, doctor, or any other treatment after the first injury to the abdomen. Bruising on the sibling would have been clearly visible to the parents. The parents did not remove the juvenile from an environment that may have caused such harm. The Court finds that even excluding the testimony of the medical examiner and the autopsy report, that the testimony of Dr. Skinner supports the finding of abuse and neglect. Dr. Skinner also discussed two episodes of trauma that occurred to the body, specifically the head and abdomen, as well as the fact that bruising on the sibling was clearly visible. Based on his testimony alone, the Court could find that the parents inflicted the injuries and knew about the injuries or that the parents should have known about the injuries. This conclusion is heightened by the fact that the parents never called 911 or asked for assistance in getting to the hospital; they just drove despite not having knowledge of the hospital location.

> The Court finds that the testimony of James Fortenberry and Jessica Soto was conflicting. The Court finds that James Fortenberry had zero credibility in his testimony. Even if there is truth to the story of the hole in the floor and that [O.M.] fell through that hole, the parent's remedy was to put a children's walker over the hole. The Court could find inadequate supervision based on this information. The testimony of Louis Ross was that the mom slapped the child in the mouth and told her she was going to beat her. This testimony again supports a finding of abuse.
>
> 5. The Court makes a finding Aggravated Circumstances as to both of the parents. The Court finds that they acted in concert to cause the injuries to the juvenile's sibling or that they did not take steps to prevent the injuries and protect the juvenile knowing that someone was causing the injuries. These injuries resulted in the death of the juvenile's sibling.

The court set concurrent goals of reunification and adoption.

DHS filed a petition for termination of both parents' parental rights on August 6, 2008, with aggravated circumstances listed as one of the grounds. Shawn consented to termination and is not a party to this appeal.

At the termination hearing held on September 23, 2008, the DHS caseworker, Sharon Shields, and the CASA advocate, Carol Gagle, testified for DHS. Fortenberry testified on her own behalf. The trial court entered an order terminating Fortenberry's parental rights on October 16, 2008, making the following written findings:

> 4. The Court finds it to be contrary to the child's best interests, health and safety, and welfare to return her to the parental care and custody of her parents and further finds that the Department of Human Services has proven by clear and convincing evidence that by order entered of record on June 20, 2008 this court found aggravated circumstances exist as to both parents specifically "that they acted in concert to cause the injuries to the juvenile's sibling or that they did not take steps to prevent the injuries and protect the juvenile knowing that someone was causing the injuries. These injuries resulted in the death of the juvenile's sibling." The court further finds that Ashley Fortenberry shows only sadness and no remorse regarding the death of one of her children and the taking into state custody of the child who is the subject of this action. She has refused to take any personal responsibility for the events

> that resulted in the filing of the dependency neglect action and although she seems now to blame her husband for the death of the juvenile's sibling (her child) she has not filed for divorce or taken any legal steps to separate herself from him. The finding of aggravated circumstances is sufficient ground for termination and the other findings set out above are sufficient to find that the return to the mother of the juvenile would pose a serious risk of serious harm or death to the juvenile.

On appeal, Fortenberry disputes the sufficiency of the evidence as to best interests and grounds for termination. She argues that the circuit court's finding from the bench that C.F. was adoptable was inadequate because it was not reduced to writing. We disagree. Arkansas Code Annotated § 9-27-341(b)(3) (Repl. 2008) requires the termination decision to be "based upon a finding by clear and convincing evidence" that termination "is in the child's best interest," and that the child's likelihood of adoption and the potential harm of return to the parent be considered. The statute does not, however, state that the "adoptability" finding must be in writing. At the conclusion of the trial, the circuit court stated that the child was adoptable, so it clearly complied with the statute.

Further, DHS presented sufficient evidence that C.F. was adoptable and that her return to Fortenberry would subject her to a high level of potential harm. The termination statute does not require DHS to prove by clear and convincing evidence that the child is adoptable and that there would be potential harm in returning her to the parent; rather, the court must consider those factors. *Davis v. Ark. Dep't of Health & Human Servs.*, 98 Ark. App. 275, 254 S.W.3d 762 (2007). After consideration of all factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *See Jones-Lee v. Ark. Dep't of Human Servs.*, __ Ark. App. __, __ S.W.3d __ (Mar. 4, 2009); *Lee v. Ark. Dep't of Human*

Servs., 102 Ark. App. 337, __ S.W.3d __ (2008); *McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005).

Ms. Shields testified that, given C.F.'s young age, the likelihood of her being adopted was "very high," even though she has some developmental delays. Although Ms. Shields is not an adoption specialist and admitted that she had not "run [C.F.] through the system" to find potential adoptive parents, her five years' experience as a family-service worker qualified her to make that recommendation. The termination statute does not require that an adoption specialist testify at the termination hearing or that the process of permanent placement be concluded by then.

Additionally, the harm referred to in the termination statute is "potential" harm; the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. *Lee, supra.* The harm analysis is to be conducted in broad terms. *Id.* The evidence discussed below, which demonstrated that C.F.'s return to Fortenberry would subject her to potential harm, also supported grounds for termination.

In challenging the trial court's finding of aggravated circumstances, Fortenberry asserts that she has "learned a hard lesson by losing her older daughter," and that she is now "ready and able to parent and protect . . . C.F. . . . ." She points out that she completed parenting classes; that she regularly attended counseling, including therapy directed to the issue of domestic violence; that she faithfully attended visitation with C.F.; and that she secured a job, which she would begin upon her return to Mississippi. There is no question that Fortenberry did take several actions to improve her situation. Nevertheless, even full completion of a case

plan may not defeat a petition to terminate parental rights. *Lee, supra*. What matters is whether completion of the case plan achieved the intended result of making the parent capable of caring for the child. *Id*. As explained below, the evidence clearly demonstrated that Fortenberry is not yet capable of caring for C.F.

Fortenberry also asserts that there was no evidence that aggravated circumstances were present and that the court's findings did not conform with the statutory requirements of aggravated circumstances. This argument lacks merit. In addition to finding that termination of parental rights was in C.F.'s best interest, the court also had to find that DHS proved one of the statutory grounds listed in Ark. Code Ann. § 9-27-341(b)(3)(B). In this case, the court found that Fortenberry had subjected a child to aggravated circumstances. The definition of "aggravated circumstances" includes "(i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. . . ." *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(*i*).

We hold that DHS established that Fortenberry had subjected C.F.'s sibling to extreme or repeated cruelty, and that the trial court's finding of aggravated circumstances in the adjudication order, from which she took no appeal, adequately satisfied the requirements of the termination statute. Fortenberry places unwarranted importance on the facts that, at the time of the hearing, she had not lost custody of her infant son, who was born during this proceeding, and that she had not been arrested in connection with O.M.'s death. These facts are insignificant in light of the evidence indicating that Fortenberry either inflicted O.M.'s

injuries or allowed her husband to inflict them and that she admitted to the police that she had whipped O.M. for misbehaving. The fact that Fortenberry had not been charged in connection with O.M.'s death is irrelevant in light of the undisputed evidence that, when O.M. died of her head injury, she was covered in fresh and older bruises, of which Fortenberry should have been aware. In a case such as this, we are reminded of the following quote from *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 6, 115 S.W.3d 332, 335 (2003):

> Appellant is badly mistaken in her belief that her parental rights cannot be terminated because she complied with the case plan and did not personally injure her child. She had a far greater duty to the child than she recognizes. It is not enough for her to refrain from personally harming the child; instead, it is her duty to take affirmative steps to *protect* the child from harm.

In *Wright,* we relied upon the following quote from *Jones v. Jones*, 13 Ark. App. 102, 108, 680 S.W.2d 118, 121 (1984) (citations omitted):

> The rights of parents are not proprietary and are subject to their related duty to care for and protect the child and the law secures their preferential rights only so long as they discharge their obligations. . . . The unfitness for which this preferential right to custody may be forfeited can result from a parental failure to discharge any of the correlated duties of parenthood. In [*State v. Grisby*, 38 Ark. 406 (1882)], it was stated that this preference for natural parents is based on a presumption that they will take care of their children, bring them up properly and treat them with kindness and affection, and when that presumption has been dissipated chancery will interfere and place the child where those parental duties will be discharged by another.

In *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 368, 43 S.W.3d 196, 199 (2001), we rejected a similar argument:

> We do not reach appellant's argument that ADHS failed to establish any abuse to Logan. Section 9-27-303(15)(a) explicitly states that a dependent-neglected child is one at risk of serious harm from an unfit parent. Parental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. Such

> a construction of the law would fly in the face of the General Assembly's expressed purpose of protecting dependent-neglected children and making those children's health and safety the juvenile code's paramount concern. To require Logan to suffer the same fate as his older sister before obtaining the protection of the state would be tragic and cruel.

Ms. Shields testified that she believed that it was in C.F.'s best interest that Fortenberry's parental rights be terminated, based upon the following: it was unknown whether she or Shawn, or both, had caused the injuries to O.M.; she had not accepted any responsibility for, or acknowledged the "horrendous" nature of, what had happened to O.M.; she had shown no emotion or remorse about O.M.'s death; and Ms. Shields had seen Fortenberry react to C.F.'s behavior with "a spark of anger" during visitation. Ms. Gagle also recommended that Fortenberry's parental rights be terminated because of her failure to protect O.M.

Fortenberry testified that, although Shawn was mean to her, she had no idea that he would ever be mean to the children, and that she had no idea what was happening to O.M. She said: "I saw the bruises on her but kids get bruises all the time." When the trial court asked her directly what had happened to O.M., she responded: "I'm not sure." Although Fortenberry testified that she was remorseful, she could not explain to the trial court *why* she was remorseful. She said that she was sad because her daughter had been taken away, and she missed her. However, when the trial court asked "Do you understand what the word remorse means?" she replied, "I guess not." She also said that she had instructed her attorney to file for divorce from Shawn, but admitted that it had not yet been filed.

Whether Fortenberry killed O.M., or helped Shawn kill her, or simply allowed him to kill the child, we hold that Fortenberry is an unfit parent and that the trial court reached the right decision in severing her parental bonds with C.F.

Affirmed.

GLOVER and HENRY, JJ., agree.