ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-184

	Opinion Delivered JUNE 17, 2009
JENNIFER REYNOLDS AND RAYMOND REYNOLDS APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, [NO. J2007-668-D/N] HONORABLE JAY T. FINCH, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

This is a termination-of-parental rights appeal brought by Jennifer Reynolds and Raymond Reynolds. On November 19, 2008, the Benton County Circuit Court terminated their parental rights to their three daughters, L.R., born December 21, 2001; A.R., born October 9, 2005; and S.R., born June 22, 2007; and their son, D.R., born January 23, 2003, for environmental neglect and physical abuse. Appellants' attorney has filed a motion to withdraw pursuant to *Linker-Flores v. Arkansas Dep't of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), asserting that there are no issues of arguable merit to support the appeal. Under the recent revision to Rule 6-9(i)(1) of the Arkansas Rules of the Supreme Court and Court of Appeals, counsel's motion is accompanied by an abstract, addendum, and brief listing all adverse rulings that were made at the termination hearing and explaining why there is no meritorious ground for reversal, including a discussion of the sufficiency of the

evidence to support the termination order. *See In re Rules of the Supreme Court and Court of Appeals, Rules 6-9 and 6-10*, 374 Ark. App'x __, __ S.W.3d __ (Sept. 25, 2008). The clerk of this court sent a copy of counsel's motion and brief to appellants at the address their attorney provided in the certificate of service in the motion, informing them that they had the right to file *pro se* points for reversal. *See* Ark. Sup. Ct. R. 6-9(i)(3). The envelopes were returned to the clerk's office as undeliverable. We affirm the termination of appellants' parental rights.

This proceeding is the third case that DHS has opened with this family. In 2002, DHS opened a protective-services case for L.R. because of environmental concerns. DHS closed the case because appellants moved and DHS could not locate them. DHS opened a dependency-neglect case for L.R. and D.R. in 2003 because appellants had failed to properly care for them. The allegations were that there were bruises on L.R.'s legs; the family was being evicted from a motel; the children had no clean clothes; and Jennifer withheld a bottle from D.R. when he was hungry. The children stayed in foster care for eleven months and were returned to appellants. That case was closed in December 2004.

DHS removed the three older children on June 23, 2007, after receiving two reports of physical abuse and neglect, when they were staying with their maternal grandparents while Jennifer was in the hospital giving birth to S.R. Their grandmother noticed bruising and scabs on L.R.'s buttocks and bruises on her legs. D.R. had similar injuries, and A.R. also had some bruises. The children's bruises were various colors, including red, purple, and yellow. L.R.

told her grandmother that her parents had caused the bruises; that her father had hit her on the face and with a shoe; and that she was afraid of her father. The grandmother also reported that she had heard Jennifer threaten to beat the children's "asses." All of the children were dirty and had a foul odor. DHS also took custody of S.R. when she was about a week old.

Raymond met with the Gravette Police Department on June 23, 2007, and admitted that, on June 21, 2007, he had spanked the children with a one-half-inch stick. He expressed surprise that the bruises were so dark and attributed their severity to his strength. On June 25, 2007, DHS met with appellants. Both admitted spanking the children with switches and bruising their legs, but denied that they had caused the bruises on L.R. and D.R.'s buttocks. DHS filed a petition for emergency custody on June 26, 2007. The court granted the motion that day. After a hearing on July 5, 2007, the court found probable cause to warrant the children's removal and approved supervised visitation.

After an adjudication hearing on August 7, 2007, the court found the children to be dependent-neglected. The court found that the children's injuries were not accidental and occurred when they were in appellants' custody; that the children were in the exclusive care of their father for three hours the day before the allegations were made; and that the court could not exclude either parent as the cause of the children's injuries. The court found that appellants had subjected the children to extreme or repeated cruelty and set reunification as the goal. It ordered Jennifer to attend individual counseling and follow the

recommendations, and directed both appellants to attend at least fifteen hours of parenting classes; to submit to psychological evaluations and follow recommendations; to take all prescribed medications; to submit to random drug tests; to comply with educational services, including obtaining GEDs; to comply with homemaker services; to complete anger-management assessments and follow recommendations; to maintain safe, stable, and appropriate housing; to maintain full-time employment; and to pay $40 per week in child support.[1]

A review hearing was held on January 11, 2008. The court continued the children's custody with DHS; kept reunification as the goal; and found that DHS had made reasonable efforts to provide reunification services to appellants. The court stated that appellants had maintained stable housing, completed their psychological evaluations, participated in counseling and parenting classes, attended regular visitation, and maintained stable employment; they had not, however, paid child support as ordered.[2]

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[1] Because of additional allegations of sexual abuse, DHS filed a petition to fast-track this case and to terminate appellants' parental rights on December 13, 2007. The next day, appellants entered into a mediation agreement providing that they would submit to psychological evaluations, continue L.R.'s counseling, and inform the counselor of any possible sexual abuse. Because of insufficient evidence of sexual abuse, DHS filed a motion on February 20, 2008, to withdraw the petition for termination. The court granted the motion.

[2] Appellants did make some child support payments. Raymond's paycheck was garnished for about six months, and while he was incarcerated, Jennifer made several payments on her own.

The parties entered into a mediation agreement that was approved by the court on April 2, 2008. Appellants agreed to begin family therapy if L.R.'s therapist recommended it; to work with the DHS homemaker; to take an anger-management assessment and follow the recommendations; to continue to take parenting classes focused on child discipline; to work toward unsupervised visitation; to take IQ tests; and, if L.R. was diagnosed with any mental health issue, to find a support group. Jennifer also agreed to work toward a GED.

After a permanency-planning hearing on May 21, 2008, the court found that DHS had made reasonable efforts and changed the goal to termination. It found that both appellants had failed to acknowledge any fault in causing the children's physical injuries; that they had failed to pay child support as ordered; that they had failed to attend the first two scheduled psychological evaluations; that, although they had visited regularly, they were routinely late; and that, although they had maintained stable housing, it was inappropriate for the children. The court also found that Raymond, but not Jennifer, had maintained stable employment. The court noted the children's regression after being returned to appellants in 2004 and found that their improvement during this proceeding was significant. It stated, "L.R. was originally thought to be autistic and it now appears as though her delays are attributable to gross neglect in the parents' home . . . ."

DHS filed a second petition to terminate appellants' parental rights on May 22, 2008. The termination hearing was held on October 22, 2008. Jennifer, Raymond, Shauna

McPherson (the children's foster mother), and Elisabeth Bostian (the DHS supervisor of this case) testified.

The court entered a sixty-six-page order terminating appellants' parental rights on November 19, 2008. It found that DHS had proven four grounds by clear and convincing evidence — the children's having been out of the home for twelve months without the conditions that caused removal being remedied; appellants' willful failure to provide significant material support or maintain meaningful contact with the children; subsequent "other factors" that appellants had manifested the incapacity or indifference to remedy; and aggravated circumstances, specifically, that there was little likelihood that continued services would result in successful reunification. Appellants filed a timely notice of appeal.

Appellants' attorney states that the evidence supports all of the trial court's findings except for the "other factors that arose subsequent to the filing of the original petition" ground set forth in Arkansas Code Annotated section 9-27-341(b)(3)(B)(vii)(*a*) (Repl. 2008). We agree. The trial court based this aspect of its decision on the fact that the three older children made significant progress with their developmental, mental, and emotional problems after they were taken into custody in 2007 and provided special services. Counsel for appellants correctly states, however, that appellants did not have the chance to remedy these issues because the children remained in foster care throughout this case.

Standard of review

A heavy burden is placed upon a party seeking to terminate the parental relationship, and the facts warranting termination must be proven by clear and convincing evidence. *Strickland v. Ark. Dep't of Human Servs*., 103 Ark. App. 193, __ S.W.3d __ (2008). The question we must answer is whether the trial court clearly erred in finding that there was clear and convincing evidence of facts warranting the termination of parental rights. *Hall v. Ark. Dep't of Human Servs*., 101 Ark. App. 417, 278 S.W.3d 609 (2008). 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. *Dowdy v. Ark. Dep't of Human Servs*., 2009 Ark. App. 180, 2009 WL 613537. Pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(A) (Repl. 2008), an order terminating parental rights must be based on a finding that termination is in the child's best interest, which includes consideration of the likelihood that the juvenile will be adopted and the potential harm caused by returning custody of the child to the parents. 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 v. Ark. Dep't of Human Servs*., 102 Ark. App. 337, __ S.W.3d __ (2008). In addition, the proof must establish at least one of several statutory grounds. Ark. Code Ann. § 9-27-341(b)(3)(B) (Repl. 2008).

Best interest

DHS presented evidence that all four of the children, who are thriving in their placement with their foster family, are likely to be adopted together. Because adoptability was established through the testimony of Ms. Bostian, a family service worker, there was no requirement that potential harm to the children be proven. *See McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). Even if adoptability had not been established, the evidence would support a finding that returning the children to appellants held potential harm. When the three oldest children entered foster care in 2007, they had many problems. L.R., who was thought to be autistic, transformed into a child who could make eye contact with others. She significantly improved her test scores and was no longer diagnosed as autistic. When A.R. entered foster care, she was not yet two years old, but was described by her foster mother as "unemotional," "vacant," and "a little zombie." At the time of the termination hearing, she was a "very happy" child with no need of special services. D.R. was very aggressive at first, but after his time in the custody of DHS, he was described as a "loving" child with no aggression.

The circuit court considered the children's dramatic improvement while in foster care since 2007 especially compelling in light of this family's long-standing problems. Their progress demonstrated that the issues that caused the protective-services case to be opened in 2002 and the two older children to be placed in foster care in 2003 have not been remedied. In 2007, as in 2002, appellants were not properly caring for their children and did not have an appropriate or stable home for them. As in 2003, one or both of the appellants

physically abused the children. At the termination hearing, appellants admitted that they were not yet able to take care of the children and did not know when they would be; that they had such severe money problems that they could not afford Happy Meals for the children or gas to get to the last scheduled visitation; that Raymond still owed $1600 in fines related to his guilty plea to battery of the children; that they did not have any daycare plans in place during their work shifts; and that they moved from a three-bedroom to a one-bedroom apartment, which was all that they could afford because of their poor financial situation. Jennifer still did not have a driver's license.

We hold that the trial court did not clearly err in finding that termination was in the children's best interests. Based on the history of this case and appellants' ongoing problems that necessitated multiple interventions by DHS and removal of the children from their home for various periods of time, we agree that the likelihood of further intervention will disrupt any permanency in the children's lives and will result in their continuing placement in foster care indefinitely.

Grounds

The trial court found that the children have been adjudicated by the court to be dependent-neglected and have continued out of the custody of the parents for twelve months and, despite a meaningful effort by the department to rehabilitate the parents and correct the conditions that caused removal, those conditions have not been remedied by the parents. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*). L.R. and D.R. were in foster care for a total of

twenty-seven months (eleven months in the 2003 case and sixteen months in this case). A.R. and S.R. spent sixteen months out of appellants' care. In spite of the many reunification services offered appellants by DHS, appellants acknowledged that they were not yet in a position to take care of the children and did not know when they would be ready. DHS, therefore, proved this ground.

The trial court also found that appellants had wilfully failed to provide significant material support. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ii)(*a*). Appellants were ordered to pay $40 per week in child support, beginning no later than August 17, 2007. Jennifer provided six money orders to prove that she paid $325, but offered no proof of paying anything after February 2008. Raymond stated that, for the six months he worked at Tyson, his paycheck had been garnished, and that Jennifer had paid around $400 while he was incarcerated. He explained that they had not paid any support lately because they did not have the money. There was evidence, however, that Raymond and Jennifer received $500 paychecks twice a month from their current employer. We cannot, therefore, say that the trial court erred in finding this ground established.

The court further found that appellants had subjected the children to aggravated circumstances, and we cannot say that it erred in doing so. The statutory definition of "aggravated circumstances" includes "[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*). The trial court found that appellants had subjected the children to extreme or repeated cruelty and that there was little likelihood that services to the family would result in successful reunification, given the services that had been provided appellants, their gross neglect of the children, and their lack of sustainable progress.

The court also based this finding on appellants' refusal to acknowledge their responsibility for bruises to the children's buttocks. A parent's failure to take such responsibility supports a finding that the behavior that caused the removal of the children has not been remedied. *See Sparkman v. Ark. Dep't of Human Servs*., 96 Ark. App. 363, 242 S.W.3d 282 (2006). A parent has a duty to protect her children and must take affirmative steps to protect them from harm; she can be found to be unfit even though she did not directly injure them. *See id.*; *Todd v. Ark. Dep't of Human Servs*., 85 Ark. App. 174, 151 S.W.3d 315 (2004); *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003); *Brewer v. Ark. Dep't of Human Servs*., 71 Ark. App. 364, 43 S.W.3d 196 (2001); *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984).

It is true that appellants partially complied with the case plan and court orders. Nevertheless, there was little evidence that they corrected the underlying problems that led to the children's abuse and neglect. A parent's rights may be terminated even though he or she is in partial compliance with the case plan. *Chase v. Ark. Dep't of Human Servs.*, 86 Ark. App. 237, 184 S.W.3d 453 (2004). Even full completion of a case plan is not determinative

of defeating a petition to terminate parental rights. *Wright*, *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*. By their own admission, appellants are not yet capable of caring for their children.

Rulings adverse to appellants

Counsel for appellants discusses three rulings adverse to appellants. (1) Appellants moved for new trial counsel at the beginning of the hearing. They said that she had ignored them, "went totally against" them, and tried to convince them to voluntarily consent to termination. DHS and the guardian ad litem objected. The trial court denied this motion, stating:

> Well, I don't think at this late date I can just simply say Ms. Scritchfield is off the case, and give you a new attorney who would have to then catch up with more than a year's worth of time. Further, it is often the case that a client who hears from a lawyer things they don't want to hear, begins to think that that lawyer is not representing their best interest. I cannot imagine Ms. Scritchfield being disloyal to you as her clients. She may have to give you advice, or say things to you, or make suggestions to you about how the case goes, that she thinks is in your best interest, and you don't want to hear that. I don't think that is a misrepresentation, as you have suggested. I have to deny your motion, both for the reasons I've articulated, and because if I was to continue this case at this late date, your children would languish longer in foster care, and I think we need to get the facts out on the table, and let me make a decision about this case.

In light of the motion's untimeliness, we see no error in this ruling. To grant a continuance at that time would have unjustifiably lengthened the children's stay in foster care.

(2) The trial court sustained an objection by DHS to a question by Jennifer's counsel asking Jennifer if she thought she would have seen a counselor within thirty days of the

children's removal if she had waited on DHS to secure one for her. (Jennifer had already testified that she had begun seeing a counselor on her own within thirty days.) DHS objected to this question as speculation. Counsel for appellants states that there was no prejudice to appellants by this ruling. She is correct.

(3) On the basis of relevance, appellants' counsel objected to a question asked of Jennifer by counsel for DHS as to whether DHS helped her with an application to Car Works. The trial court overruled the objection and allowed DHS to ask if Jennifer recalled the extensive services that had been offered appellants in the 2003 case. Jennifer responded that DHS had provided daycare vouchers, intensive family services, HUD housing referrals, parenting classes, family counseling, and lice treatment. We see no error in this ruling because appellants' failure to make enough progress since DHS first provided services to them years ago was highly relevant to whether they ever would be able to provide a safe and stable home for the children.

We hold that counsel has complied with the requirements established by the Arkansas Supreme Court for no-merit termination cases and that appellants' appeal is wholly without merit.

Affirmed.

ROBBINS and BAKER, JJ., agree.