ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DIVISION II

CA05-390

March 15, 2006

BRANDY HALTON
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEE

APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT [JV-2004-185]

HONORABLE STEPHEN CHOATE, CIRCUIT JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Brandy Halton appeals an order of the Cleburne County Circuit Court that adjudicated her eighteen-month-old daughter, R.J., born on March 26, 2003, dependent-neglected. On appeal, she argues that the trial court clearly erred in finding that the Arkansas Department of Human Services (DHS) established by a preponderance of the evidence that R.J. was dependent-neglected. We affirm the decision of the trial court.

In *Brewer v. Department of Human Services*, 71 Ark. App. 364, 367-68, 43 S.W.3d 196, 199 (2000), this court held:

> The juvenile code requires proof by a preponderance of the evidence in dependency-neglect proceedings. We review a chancellor's findings of fact *de novo*, and will not set them aside unless they are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. A finding is clearly erroneous when, although there is evidence to support the finding, after reviewing all of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.

(Citations omitted.)

In this case, a petition for emergency custody of R.J. was filed by DHS on October 29, 2004. In support of its petition for emergency custody, DHS attached an affidavit from Johnnelle Switzer, a DHS employee, stating that the trial court held a FINS hearing on October 27, 2004, on the basis that there was not an appropriate care giver for R.J. The affidavit further stated that Christine Halton, the maternal grandmother, and Lewis Moiser, the maternal great-grandfather, had been caring for R.J., but that Christine Halton was currently incarcerated in the Cleburne County Jail and that Lewis Moiser could not care for R.J. due to his work schedule; that according to interviews with relatives and a juvenile probation officer, appellant had never been R.J.'s care giver and would not be appropriate; that the location of R.J.'s father was unknown; and that the location of R.J. was currently unknown. An order for emergency custody was entered on the same day, placing custody of R.J. with DHS; appointing an attorney *ad litem* for R.J.; and setting the probable-cause hearing for November 4, 2004, and the adjudication hearing for November 17, 2004.

At the November 4 probable-cause hearing, appellant was not present, but the trial court appointed her counsel in its order. At this hearing, no sworn testimony was taken, but the trial judge had a conversation on the record with appellant's mother, Christine Halton. During this conversation, Christine told the trial court that R.J. was with Teresa Begley, Christine's current or former same-sex partner; that Christine did not want appellant to have R.J. because appellant was using drugs; but that appellant was trying to stop using drugs. When the prosecutor pointed out that appellant, who had legal custody of R.J., was addicted to drugs, Christine said that appellant had never had R.J. and had never been a part of R.J.'s life. Christine said that she had allowed appellant and her

boyfriend to stay with her previously, and she also professed that she was no longer "doing drugs" because it was hurting "the kids" and her "grandbaby." After this "discussion," the trial judge found that probable cause existed and continued the custody of R.J. in DHS.

The adjudication hearing was held on November 17. Nicole Chaberson, a caseworker for DHS, testified that appellant did not show any interest in R.J. for six days after R.J. was taken into custody. Chaberson said that she had performed a home-study on Moiser's house for a seventeen-year-old girl, but with all of the people who were living there, there did not appear to be adequate space for R.J.

Appellant was called by DHS in its case in chief at the adjudication hearing. She testified that she was eighteen years old and that she had been off drugs for about six months. She said that she was bipolar, but that she was not on any medications because she was pregnant again. She testified that on October 27, she was staying with her friend, Heather Harding; that R.J. was staying at her grandfather's house with Teresa Begley; and that R.J. was in her grandfather's custody, although he "did not have any papers" stating that he had legal custody of R.J. Appellant said that the reason R.J. was in her grandfather's custody was because she was staying at Heather's house about ten minutes away from her grandfather's house and she was looking for a job. However, appellant also testified that she had brain surgery in February 2004, and that she chose to live at Heather's house because it was more relaxed and quiet, and she felt more comfortable there. Appellant said that she could not financially take care of R.J. at the time and that she knew her grandfather and Begley would take care of her. Appellant first stated that she visited her daughter every day, then she changed that to every two days or so, and

then she said that she "visited regularly, as much as [she] could." Appellant said that she could not care for R.J. because she did not have a job, but she later testified that she had a job but quit after five or six weeks to move back and try to find work closer to home.

Appellant testified that when she moved in with Heather, that Heather fed her and provided for her, and that Heather was also willing to feed R.J.; however, appellant did not want to take R.J. out of her grandfather's home because R.J. was so attached to Moiser, Begley, and Christine Halton. Appellant said that R.J. was also bonded to her, but not to any surroundings other than Moiser's home.

Appellant learned that her mother had been incarcerated on October 27, but she did not go to her grandfather's house until October 31, even though it was only ten minutes away from Heather's house by her own estimation. Appellant disputed the assertion in the affidavit that she was not R.J.'s care giver, stating that she had been with R.J. for her "whole life" except from February 2004 until October 2004; however, that period of time was eight months out of the eighteen months of R.J.'s life. Appellant also disputed Chaberson's testimony that she did not call about R.J. after DHS picked her up, stating that she had called every day except Veteran's Day and the week of the adjudication hearing.

Appellant admitted that she had not been the best mother, and that she had made mistakes and bad decisions. She said that she regretted "not being there" for a few months, and that she knew that was a bad decision. Appellant said that she had enrolled in Cross Roads Alternative School; that she had checked into counseling; and that she wanted to take some parenting classes. She said that Begley would keep R.J. while she was in school.

Appellant admitted that she had used drugs in the past, including methamphetamine, but she said that she was "through with that." She said that she needed to stay away from people who were her friends when she was using drugs. She said that it took a long time for her to become stable, that she had learned from her mistakes, and that she wanted to be in R.J.'s life and not leave again.

Appellant explained that she was pregnant again, but the father of that baby was not R.J.'s father. She said that she and the father of the baby that she was currently carrying were not together, and that the only relationship they had was as the parents of their unborn child.

Appellant also explained that her mother met Begley while in prison, where Begley was a guard at the time her mother was incarcerated. Appellant said that while Begley was a lesbian, that did not bother her because Begley took good care of R.J. and did not discuss her sexual preference with R.J. or any of the family.

Appellant's grandfather, Lewis Moiser, and Begley both testified on appellant's behalf, stating basically that they would do whatever was necessary for R.J. to be returned to Moiser's home. Nicole Chaberson, the DHS case worker, also testified again, stating that she did not know if it would be appropriate for R.J. to be in Moiser's home because of the number of people living there at the time, but she said that she did not know of any previous neglect problems in the home with regard to R.J. Chaberson said that she would have recommended a FINS petition so that Moiser could get custody of R.J. rather than the seventy-two-hour hold that was placed on R.J.

At the close of the adjudication hearing, the trial court adjudicated R.J. dependent/neglected; placed joint custody of R.J. with Moiser and Begley; and ordered

appellant to finish her educational program, to take parenting classes, to not use drugs, and to get involved in mental-health counseling.

Arkansas Code Annotated subsection 9-27-303(18)(A) (Supp. 2005) defines "dependent-neglected juvenile":

> (18)(A) "Dependent-neglected juvenile" means any juvenile who is at substantial risk of serious harm as a result of:
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> (i) Abandonment;
> (ii) Abuse;
> (iii) Sexual abuse;
> (iv) Sexual exploitation;
> (v) Neglect;
> (vi) Parental unfitness to the juvenile, a sibling, or another juvenile; or
> (vii) Being present in a dwelling or structure during the manufacturing of methamphetamine with the knowledge of his or her parent, guardian, or custodian.

For our purposes, subsection (36)(A) of section 9-27-303 defines "neglect" with regard to juvenile proceedings:

> (36)(A) *"Neglect" means those acts or omissions of a parent*, guardian, custodian, foster parent, or any person who is entrusted with the juvenile's care by a parent, custodian, guardian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, *or any person legally responsible under state law* for the juvenile's welfare, which constitute:
>
> (i) Failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused;
> (ii) Failure or refusal to provide the necessary food, clothing, shelter, and education required by law, excluding failure to follow an individualized education program, or medical treatment necessary for the juvenile's well-being, except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered;
> (iii) Failure to take reasonable action to protect the juvenile from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known;
> (iv) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile, including failure to provide a shelter that does not pose a risk to the health or safety of the juvenile;
> (v) *Failure to provide for the juvenile's care and maintenance, proper or necessary support*, or medical, surgical, or other necessary care;

(vi) *Failure, although able, to assume responsibility for the care and custody of the juvenile or to participate in a plan to assume the responsibility*; or
(vii) Failure to appropriately supervise the juvenile that results in the juvenile's being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.

(Emphasis added.)

Appellant first contends that the "conversation" between her mother and the trial judge at the probable-cause hearing, in which Christine admitted doing drugs and told the court that appellant was doing drugs and was trying to quit, cannot be used against her because it was not sworn testimony. We agree that this unsworn conversation cannot form the basis for adjudicating R.J. dependent/neglected. However, we hold that there was other subsequent sworn evidence that does support the trial court's finding of dependent/neglect.

Appellant points out that under Ark. Code Ann. § 9-27-303 (17)(B) (Supp. 2005), a child cannot be considered to be a dependent juvenile if the parent or guardian is incarcerated but has an appropriate relative or friend who is willing or able to provide care for the child. She argues that "surely this logic applies in a situation where a parent has not even incarcerated [sic]. If a parent is not available, or for some reason not able to properly provide care for her child, or even just simply removes herself from the equation for a period of time, that parent is not required by law to seek the State's, or even the Court's permission to leave the child with an appropriate caretaker."

We are unpersuaded by appellant's tenuous argument. Appellant was not incarcerated, and her reasons for leaving R.J. were self-imposed and self-serving. While R.J. seemingly was being cared for in an appropriate manner by appellant's grandfather and by her mother's present or former girlfriend, appellant was the person who had legal

custody of R.J. and who bore the legal responsibility for R.J.'s care and welfare. Appellant had, however, basically abdicated that responsibility for almost half of R.J.'s young life to persons who were not R.J.'s legal custodians and had no legal responsibility for R.J.'s welfare. Appellant argues that she left R.J. with people she knew would take care of her while she tried to get her life together; however, at the time of the adjudication hearing, appellant had done very little, if anything, to get her life affairs in order. She was pregnant again by another man; she had quit the only job she had since leaving R.J. at her grandfather's house after only five or six weeks of working; and she was not currently working or in school, although she testified that she intended to return to school. While there were other options that could have been pursued in this matter, *i.e.*, Moiser or Begley could have petitioned for guardianship of R.J., we are not left with a definite and firm conviction that the trial court erred in finding R.J. dependent-neglected.

Affirmed.

BIRD and CRABTREE, JJ., agree.