DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA05-670

NOVEMBER 1, 2006

APPEAL FROM THE STONE COUNTY JUVENILE DIVISION CIRCUIT COURT [NO. JV 2002-44]

HON. STEPHEN CHOATE, JUDGE

AFFIRMED

CRYSTAL MOORE

APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES and T.M., minor child

APPELLEES

Appellant Crystal Moore appeals from the decision of the Juvenile Division of Stone County Circuit Court to terminate her parental rights. Appellant contends that the trial court erred in terminating her parental rights as set forth in her four points on appeal. We do not reach the merits of three points because they were not properly preserved for this court's review. We affirm the trial court's decision to terminate appellant's parental rights, holding that the trial court had sufficient evidence before it.

I. Facts

Appellant, born June 2, 1986, delivered a child, T.M., on March 1, 2000. Both appellant and T.M., along with appellant's sister, were placed in DHS custody by an

emergency order dated June 27, 2002, due to the sexual abuse of appellant and her sister. The three minors were adjudicated dependent-neglected by order of August 5, 2002. At that time, the trial court ordered that the minors remain in foster care, with the goal of the case to be reunification with appellant's mother, Angelia Simmerman. Eventually, appellant, T.M., and appellant's sister were each placed in separate foster homes. A permanency planning hearing was held May 27, 2003, and the goal of the case remained reunification for appellant's child, but independence for appellant. At the review hearing on July 21, 2003, the trial court held that the goal continued to be reunification for T.M., but independence for both appellant and her sister. The order further contained a provision that allowed appellant supervised visitation with her child in the child's foster home.

On October 31, 2003, appellant fled DHS foster care and remained on "run-status" until after her eighteenth birthday, June 2, 2004. At the review hearing held December 17, 2003, DHS requested and the trial court ordered that the goal of the case plan be changed to the concurrent goals of reunification and adoption for T.M. Although she did not appear, appellant was appointed counsel at this hearing. At the review hearing on February 17, 2004, the trial court found that the children should remain in DHS custody. Appellant's goal continued to be independence, and T.M.'s goal remained reunification and adoption.

While on "run-status", appellant did not comply with her case plan, nor did she visit with T.M. or attend counseling or therapy. On June 30, 2004, appellant attended the termination of parental rights hearing where the trial court found that parental rights should

be terminated. Appellant appeals from the order filed July 15, 2004, which terminated her parental rights and granted DHS the power to consent to the adoption of T.M.

II. Standard of review

The standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2003) requires an order terminating parental rights to be based upon clear and convincing evidence. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, __ S.W.3d __ (2005). 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. *E.g.*, *Lewis v. Ark. Dep't of Human Servs.,* 364 Ark. 243, __ S.W.3d __ (2005). 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 trial court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Id*. 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. *Gregg v. Ark. Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). Such cases are reviewed de novo on appeal. *Wade v. Ark. Dep't of Human Servs*., 337 Ark. 353, 990 S.W.2d 509 (1999). However, appellate courts do give a high degree of deference to the trial court, as it is in a far superior position to observe the

parties before it and judge the credibility of the witnesses. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

III. Preservation of issues at lower court level

Appellant's first three points on appeal were not properly preserved for this court's review. First, appellant argues that contrary to Ark. Code Ann. § 9-27-341(a)(2) (Supp. 2005), which provides that the termination of parental rights statute "shall be used only in cases in which the department is attempting to clear a juvenile for permanent placement," in this case, DHS was not attempting to clear T.M. for a permanent placement. However, this issue was not presented to the trial court. In *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992), the Arkansas Supreme Court was asked to review a constitutional issue that was made for the first time on appeal. The court held that failure to raise an issue at the lower court level is fatal to the court's consideration at the appellate level.

Second, appellant claims that each of the hearings held with the exception of the final two dealt with her as a juvenile, not as a parent. Accordingly, appellant, who was a child when these proceedings began, was not afforded the notice or rights to which parents in dependency-neglect cases are entitled. However, appellant should have obtained a ruling from the trial court in order to preserve any issues of lack of notice. *E.g., Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, __ S.W.3d __ (2005).

Third, appellant argues that as a matter of public policy, children who are in appellant's position ought to be allowed one year from the time the foster child/parent leaves

foster care to show that they are capable of being a good parent to their child. Again, because the public-policy argument is being made for the first time on appeal, this court cannot consider it. *Anderson, supra*. Further, appellant has cited no case law in support of her public-policy claim. The Arkansas Supreme Court stated in *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999), that assignments of error unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent without further research that the point is well taken.

IV. Sufficiency of the evidence

Appellant claims that the trial court's decision was clearly erroneous because the evidence presented showed that she was trying to make a better home and life for her child. She argues that finding a job and a home after such a difficult life and while on the run from foster care was an accomplishment. Most importantly, appellant claims that the testimony of T.M.'s therapist in recommending that T.M. remain in therapeutic foster care for at least another year and that T.M. not be adopted for at least another year makes the trial court's finding clearly erroneous.

DHS argues that the termination order should be affirmed because appellant failed to maintain meaningful contact with her daughter for the eight months she was on "run-status." In essence, DHS claims that appellant abandoned her child. Abandonment is a separate ground for termination of parental rights. Ark. Code Ann. § 9-27-303(2) (Repl. 2003). DHS argues that under both the abandonment statute and the statute that allows a parent's rights

to be terminated if the child has been in foster care for twelve months without meaningful contact from the parent, the trial court should be affirmed. Ark. Code Ann. § 9-27-341(b)(2).

Further, DHS argues that the evidence proved that appellant was not a fit and proper parent and was unlikely to become one in a reasonable amount of time. The record shows that her home was not safe and that she could not maintain a stable residence or job. She could not follow simple rules at school or in a foster home. She quit school when she left foster care and had not received her GED. She admitted at the termination hearing that she could not take care of her child at that time but that it was possible she would be able to "in a year or so." One foster parent testified that appellant would leave T.M. in wet underwear for hours, and if T.M. wet the bed, appellant would not change the sheets for days. The foster parent testified, "From what I observed of Moore's parenting skills in the last eighteen months, I don't believe Moore can parent T.M."

At the termination hearing, T.M.'s therapist testified that it would not be healthy for T.M. to be reunited with appellant anytime soon. The therapist believed it would be upsetting and detrimental to T.M. if T.M. were to have visits with appellant. The therapist stated that T.M. needed permanency immediately, and that T.M. was adoptable.

In support of DHS's position, T.M.'s attorney ad litem points to the testimony of appellant's former foster parent who claimed that appellant hid the sleeping drug Ambien under T.M.'s pillow where T.M. could have reached it. Further, the ad litem testified that appellant would put cigarettes out between the mattress and box spring on which she and

T.M. slept. Also, the ad litem claimed that when appellant disciplined her child, she did it by screaming at her, smacking her on the shoulders, or popping her in the face.

Based upon the evidence presented and giving deference to the trial court as our standard of review requires, the record is sufficient to affirm the trial court's decision to terminate appellant's parental rights.

Affirmed.

BIRD, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I agree that this case must be affirmed because a number of appellant Crystal Moore's arguments raised on appeal are not preserved for our review. However, I must agree with Moore that her treatment by appellee Arkansas Department of Human Services (DHS) in this proceeding was outrageous, given her status as a juvenile in their care and custody at all pertinent times prior to the final termination hearing. The most egregious conduct is the procurement by DHS of three orders that purport to change Moore's status retroactively from a juvenile to a party defendant, filed while she was still a minor, apparently in order to expedite termination of her parental rights without following proper procedures or affording her due process.

The petition to terminate Moore's parental rights in this 2002 case was filed on December 19, 2003, after she had fled from DHS custody and while she was still seventeen years of age. A response was filed on Moore's behalf by counsel who had been appointed for her just days earlier on or about December 15, 2003, due to her run-away status. On January 30, DHS caused to be entered the following three orders: "Corrected and Substituted Probable Cause Order," "Corrected and Substituted Adjudication Order," and "Corrected and Substituted Order for Emergency

Custody." None of these orders bear the preparing attorney's signature but all were apparently prepared by DHS, signed ex parte by the trial court on December 27, 2004, and filed three days later. All purport to be effective on the June and July 2002 dates of the original three orders. The original "Order for Emergency Custody" and the substituted and "corrected" order are set forth in pertinent part, and reflect the motive for DHS's action:

ORDER FOR EMERGENCY CUSTODY

> On this 26th day of June 2002, the above entitled cause of action comes on to be heard ex parte.
>
> * * *
>
> 2. There is probable cause to believe that the juvenile is dependent-neglected and it is contrary to the welfare of the juvenile to remain with the present custodian and immediate removal of the juvenile from the present custodian is necessary to protect the health and safety of said juvenile from immediate danger notwithstanding available services designed for their removal, or to prevent removal of the juvenile from the State of Arkansas.

CORRECTED AND SUBSTITUTED
ORDER FOR EMERGENCY CUSTODY

> On this 26th day of June, 2002, the above entitled cause of action comes on to be heard ex parte.
>
> * * *
>
> 2. There is probable cause to believe that all three juveniles are dependent neglected and that it is contrary to the welfare of the juveniles, C and A.M., to remain with the present custodian, Angelia Simmerman and *that it is contrary to the welfare of the juvenile, T.M., to remain in the custody of the present custodian, C.M.* Immediate removal of the juveniles from the present custodians is necessary to protect the health and safety of said juveniles from immediate danger notwithstanding available services designed to prevent their removal or to prevent removal. (Emphasis added.)

The "corrected" orders were all filed while Moore was still a juvenile and under DHS authority.

The affidavit attached to the original petition for emergency custody had alleged that DHS had been involved with the family since 1998, that the case has opened due to a true finding on a

sexual abuse assessment, and that Moore and her sister were afraid to return home because of fear of being sexually abused again in the home. The petition did not include any allegations that Moore's daughter had been abused or neglected by Moore or anyone else. The original order refers to Moore as a juvenile and not as a minor parent. The original adjudication order contains no findings specifically against Moore, while the corrected and substituted adjudication order purports to make specific findings against Moore. Moreover, evidence in the case reflects that Moore was placed in the same home as her minor daughter at the inception of the case, and for the majority of the proceedings. Thus, the substituted emergency custody order is untruthful. There is no evidence in the record to reflect that these substituted orders were ever sent to Moore's newly-appointed attorney. However, Moore's termination hearing was held in June 2004, some five months after the entering of these orders, and I can find no objection raised to the trial court about the irregular proceeding at that time. This court will not consider arguments made for the first time on appeal. *Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, ____ S.W.3d ____ (2005). I must reluctantly agree that this case must be affirmed.