DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA06-124

OCTOBER 25, 2006

BERTHA HILLIS, CUSTODIAL PARENT OF B.M.S.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE POPE COUNTY CIRCUIT COURT
[NO. JV2005-141]

HON. KENNETH DAVID COKER JR., JUDGE

AFFIRMED

Appellant Bertha Hillis[1] appeals from an order of the Pope County Circuit Court finding her daughter, B.M.H., to be a member of a family in need of services (hereafter sometimes referred to as FINS) because B.M.H engaged in inappropriate sexual conduct in the presence of her younger stepsisters. Appellant's sole contention on appeal is that there was insufficient evidence to find B.M.H. to be a member of a family in need of services. We affirm.

On June 20, 2005, the State of Arkansas filed a petition alleging that B.M.H. was a member of a family in need of services pursuant to Ark. Code Ann. § 9-27-303 because she engaged in "inappropriate sexual activity with a four year old female and a five year old

[1] Although the pleadings refer to Bertha Hillis, custodial parent of B.M.H., and Scott Hillis, non-custodial parent of B.M.H., as parties to this action, the notice of appeal recites that Bertha Hillis, custodial parent, is the sole appellant.

female." B.M.H.'s response generally denied the allegations and requested that the petition be dismissed.

At a hearing held on July 11, 2005, Jamie Hillis testified that she was B.M.H.'s stepmother and that she had two children of her own, H.A. and B.A., who were five years old and four years old, respectively. Jamie explained that on the weekend of April 16, 2005, B.M.H. came to visit, and H.A. and B.A. were allowed to "go camping" with B.M.H. on adjacent property owned by Jamie and her husband Scott, B.M.H.'s father. According to Jamie, the children slept in tents and sleeping bags and were asleep by 7:00 or 8:00 p.m. She said that B.M.H. had a "good relationship" with the younger children and they were "like sisters."

Jamie testified that the younger girls came in the next morning and told her "what happened." She said that she had not allowed B.M.H. to visit since then, and that she had noticed changes in H.A.'s and B.A.'s behavior, such as an incident where the two girls were blowing water onto each other's bottoms in the bathtub.

H.A. testified that, when the girls went camping, they played the "ghost game" which involved "licking [their] pee pee[s]." H.A. said that B.M.H. wanted to play the game and that she (H.A.) and B.A. took their panties off because B.M.H. told them to do so. H.A. also said that B.M.H. touched her and B.A. on the "pee pee." H.A. testified that she and her sister B.A. also touched B.M.H. on the "pee pee" with their tongues.

On cross-examination, H.A. claimed that she could not remember whether her sister touched her in a bad way, or whether she touched B.M.H. in a bad way. She also said that she did not remember B.M.H. telling B.A. to play the game and that B.M.H. did not make her or B.A. do anything.

B.A. also testified at the hearing. She said that she, B.M.H., and H.A. played the "ghost game" while they were camping. B.A. explained that their clothes were off during the game and that B.M.H. licked the younger girls' "pee pee[s]." B.A. also said that, at B.M.H.'s request, the younger girls licked B.M.H.'s "pee pee" and licked each other's "pee pee." B.A. said that the next morning the girls went to tell their mother what had happened and they had not seen B.M.H. since.

On cross-examination, B.A. denied that B.M.H. touched her or H.A. with her finger. B.A. said that B.M.H. did not force her or H.A. to do anything that they did not want to do, and that they loved B.M.H. B.A. also said that she could not remember B.M.H. telling her to play the game, whether B.M.H. was there, or whether she or her sister had inappropriately touched B.M.H. or each other. B.A. said that she could not remember "anything."

B.M.H. then testified on her own behalf, stating that she was thirteen years old, lived with her mother, and had previously visited her father. She denied touching her stepsisters in any sexual way and said that she had never been in juvenile court before. She claimed that she had a good relationship with her stepsisters. She also said that her stepmother, Jamie, would walk around the house "without any clothes on" when she (B.M.H.) would visit and that B.A. and H.A. were present when this happened. B.M.H. claimed that the younger girls wanted to go camping with her on the weekend of April 16, 2005, and she denied ever hearing of the "ghost game" until the girls mentioned it in their depositions.

B.M.H. said that, while they were camping, they played games and told stories and were asleep around 9:00 p.m. According to B.M.H., they got up the next morning, went back to the house for breakfast, and the girls ran into their mother's room to tell her that B.M.H. had made them "lick their pee pees and touch their butts and lick their butts . . . ." B.M.H.

said that she denied these allegations when Jamie questioned her about them. She also said that she did not like Jamie but would not do anything to hurt her or the girls.

Rickey Farris testified that he was married to B.A.'s and H.A.'s paternal grandmother and that he had observed the girls engaging in "unusual" or "inappropriate" behavior when he was around them. He described an incident in which H.A. "reached over and grabbed [his] private and went to laughing real big." He said that he immediately removed her hand and questioned her about whether someone was allowing her to do that, to which she responded, "Not my daddy Scott."

Aaron Hillis testified that he was B.M.H.'s brother and that he had also observed B.A. and H.A. engaging in inappropriate behavior. He said that while he was taking a shower at his father's and Jamie's house, the girls would come in, open the door, grab him in the crotch area, and "laugh and carry on like it was some joke." He said that he complained about it to Jamie, but she did nothing to make them stop.

Carroll and Yvonne Hannah, B.M.H's maternal grandparents, each testified that they had helped in raising B.M.H. and that she was an honest person who had never acted out any sexual behavior.

Appellant testified that she was B.M.H.'s mother and that B.M.H. had never acted out in any sexual way. Appellant also said that B.M.H. had never been accused of anything similar and that this behavior was "not at all consistent" with her daughter's character.

On October 14, 2005, the trial court issued a letter opinion, stating as follows:

> The Court has reviewed the testimony presented at the adjudication hearing, along with the other evidence submitted, including the depositions of [B.A.] and [H.A.].
>
> While the Court noted some inconsistencies between the depositions and the testimony given by [B.A.] and [H.A.], and even inconsistencies within the depositions themselves, the Court found the testimony given in Court by [B.A.] and [H.A.] to be very credible. The Court is basing this opinion in part on the demeanor presented by

each of the girls while testifying. Each girl presented herself as being very sure of her answers and the Court was left with the abiding impression that the testimony being given by each of the girls was truthful.

Additionally the Court is not aware of any prejudice [H.A.] or [B.A.] would have against [B.M.H.]. In fact, each of these girls testified and stated in their depositions that they loved [B.M.H.]. These children having nothing at stake in this proceeding, and, in fact, testified that they themselves had participated in these sexual activities which they characterized as "bad" in their depositions.

The testimony of [B.A.] and [H.A.] was supported by the testimony of Jamie Hillis who testified that [B.A.], and particularly [H.A.], began exhibiting emotional problems since this incident which were not seen before, and that these girls, who are presently four and five years of age, are now seeing a counselor for these problems. Ms. Hillis further testified that approximately two weeks after this incident she caught [H.A.] blowing water onto [B.A.]'s buttocks from approximately one to two inches away. These young girls participating in an activity such as this lends support to the testimony they gave in Court.

While there were some inconsistencies in the testimony and depositions as noted above involving which specific sexual acts were performed and by whom on whom, based on the testimony and other evidence presented, the Court finds that the State of Arkansas has proven by a preponderance of the evidence that at the very least, [B.M.H.] encouraged these two girls who were ages four and three years [sic] at the time to play the "Ghost Game" which involved licking the genitals of others, and that there was sexual activity of some type that took place involving these girls as a result of this game being played while [B.M.H.] was present and watching the girls. The Court finds that this constitutes [B.M.H.] engaging in inappropriate sexual activity with these girls.

Based on the above findings, the Court finds by a preponderance of the evidence that the allegations contained in the State's petition are true and that [B.M.H.] is a member of a family in need of services.

Appellant filed a notice of appeal on October 14, 2005. She also filed a motion for new trial on October 19, 2005, claiming that Ark. Code Ann. § 9-27-303(23) did not apply to the conduct alleged by the State. The new-trial motion specifically alleged that the statute "applies only to a habitual or persistent pattern of behavior, or to runaways," and that any other construction of the statute would fail to provide adequate notice of which conduct was subject to recourse by the State. The motion also alleged that the decision of the court was

clearly against the preponderance of the evidence because of H.A.'s and B.A.'s inconsistent testimony.

During a hearing on the new-trial motion on November 3, 2005, the trial court ruled upon appellant's argument that the statute required habitual, persistent behavior, stating as follows:

> As far as the first argument goes, the Court does not agree that subsection 23 as a definition, requires habitual, persistent behavior under all circumstances. It only requires that regarding school attendance and disobedience to parents, guardians, custodians. So I don't think it's required that the State show habitual conduct in incidents other than those specifically mentioned in the statute as being required. . . . Family services are provided in order to prevent a juvenile from being removed from a parent. Implement [sic] a permanent plan of rehabilitation of the juvenile. I think the Court should look at the definition of family services when interpreting subsection 23 and what a family in need of services is. I think the Court should look at that, subsection 24 as family service's guidance in interpreting subsection 23. The statute, when combined with the specific allegations contained in the petition gave the Respondents adequate notice of what was being alleged. So I'm going to deny the motion for a new trial on the first argument.

The court also denied the motion on the second argument, finding that B.M.H.'s testimony was not credible and that the other witnesses who testified as to B.M.H.'s good character were not present on the night of the alleged incident with her stepsisters.

Arkansas Code Annotated section 9-27-303(23) (Supp. 2003) defines a "family in need of services" as any family whose juvenile evidences behavior that includes, but is not limited to, the following:

1. Being habitually and without justification absent from school while subject to compulsory school attendance;

2. Being habitually disobedient to the reasonable and lawful commands of his or her parent, guardian, or custodian; or

3. Having absented himself or herself from the juvenile's home without sufficient cause, permission, or justification[.]

On appeal, appellant contends that there was insufficient evidence to find B.M.H. to be a member of a family in need of services. She offers two arguments to support this contention.

Challenge to State's Allegations

Appellant first argues that the State "did not allege nor seek to prove the existence of any behavior which is consistent with any of the guidance contained in [Ark. Code Ann. § 9-27-303(23) (Supp. 2003)]." She claims that this statute only allows the State to intervene when there is "the existence of a habitual pattern of behavior to which the family has not been able to respond, and which is harmful to the juvenile and his family." She also asserts that, in this case, the State relied only on an isolated incident, which is not part of any type of pattern and which has not been repeated, nor preceded by any similar behavior, pointing out that B.M.H. had never been the subject of any prior complaint.

To support her assertions, appellant attempts to distinguish *Byler v. State*, 306 Ark. 37, 810 S.W.2d 941 (1991), in which our supreme court held that burglary and criminal mischief committed by a six-year-old properly resulted in a FINS adjudication, although it was not one of three concepts listed in the applicable statute. Appellant claims that, unlike in *Byler*, the State could have filed a delinquency petition in this case (instead of a FINS petition) because B.M.H. was over the age of ten years, but chose not to do so in order to "take advantage of the lower burden of proof."

The State counters that appellant's challenge to the State's allegations is essentially an assertion that the State failed to state a claim upon which relief can be granted. The State argues that, because appellant failed to raise this assertion in the required manner, this argument is waived.

The Arkansas Rules of Civil Procedure apply here. *See* Ark. Code Ann. § 9-27-325(f) (Supp. 2003). In *Perrodin v. Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85, 87 (1995), our supreme court explained the significance of Rule 12(b)(6) of the Arkansas Rules of Civil Procedure:

> Arkansas is a state which requires fact pleading. ARCP Rule 8(a)(1). The pleader must set forth more than mere conclusions. *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). A pleading is subject to dismissal if it fails to state facts upon which relief can be granted. ARCP Rule 12(b)(6). A pleading is also deficient if it fails to set forth facts pertaining to an essential element of the cause of action. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

In this case, appellant's argument that the statute did not apply to the conduct alleged by the State was merely another way to say that the State failed to set forth facts pertaining to an essential element of the cause of action under Ark. R. Civ. P. 12(b)(6). This argument was waived, however, because appellant did not comply with the requirements of Ark. R. Civ. P. 12(h)(2) that a defense based on Ark. R. Civ. P. 12(b)(6) be filed in a responsive pleading, by separate motion for judgment on the pleadings, or at trial on the merits. We therefore need not address this argument on appeal. Even were we to address the argument, in light of *Byler*, *supra*, and our supreme court's broad interpretation of the statute, we would affirm on this point.

Challenge to Sufficiency of the Evidence to Support Trial Court's Findings

Appellant also asserts that the findings of the trial court were clearly erroneous because B.A.'s and H.A.'s testimony was "so contradictory and confusing," and because the girls testified that they loved B.M.H. and were not afraid in the tent. To support this assertion, appellant points to the testimony of several other witnesses who testified to B.M.H.'s good character.

Although this case is reviewed de novo, we will not set aside findings of fact by the trial court unless they are clearly erroneous, and we give deference to the trial court to

determine the credibility of the witnesses. *See Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). We affirm on this point, because credibility was a matter for the trial judge, who was free to believe the younger girls' testimony despite the inconsistencies.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.