

DIVISION I

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

CA06-185

OCTOBER 11, 2006

LAURA FARMER

APPELLANT

APPEAL FROM THE SHARP COUNTY  
CIRCUIT COURT  
[NO. JV 2004-122]

V.

HON. KEVIN KING,  
JUDGE

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES and S.B. and D.B.,  
minor children

AFFIRMED

APPELLEES

Appellant Laura Farmer appeals the order of the Sharp County Circuit Court terminating her parental rights with respect to her two minor children. Appellant's sole point on appeal is that the circuit court failed to comply with the mandate of Ark. Code Ann. § 9-27-316(h) by failing to adequately advise her of her right to be represented by counsel at all stages of the proceedings and the right to appointed counsel if indigent. We affirm.

Appellant is the mother of S.B., born September 3, 1988, and D.B., born December 4, 1990. On August 6, 2004, appellee Arkansas Department of Human Services (DHS) took appellant's two children into custody under a seventy-two hour hold because appellant had been arrested. DHS filed a petition for emergency custody alleging substantial risk of serious harm due to the incarceration, a lack of a proper care giver, and environmental neglect. A

probable cause hearing was held on August 10, 2004, at which time the trial court asked appellant if she wished to be represented by an attorney in this matter or whether she wanted to go ahead and proceed with the hearing that day. She agreed to proceed, but allegedly she was not advised at that first appearance that she had a right to be represented by counsel *at all stages* of the court proceedings and the right to appointed counsel if indigent.

The next time appellant asserts that she raised the issue of representation was not until the first review hearing on February 15, 2005. She asked the trial court what she needed to do to secure representation, at which time the trial court explained that funding for appointed counsel had been reduced. Appellant was told to wait until the next hearing, but that “in the event that there’s any possibility the child[ren] will be removed and left in the system or termination of parental rights” counsel would be appointed. There was apparently a period of time during which appellant failed to appear for various hearings and did not notify DHS of her whereabouts or residence. A permanency planning hearing was held on June 21, 2005, at which time the case goal was set for termination. DHS filed a petition for termination of parental rights on June 29, 2005.

At the termination hearing set for August 23, 2005, counsel for DHS and the attorney ad litem requested a continuance because appellant had not been appointed counsel, a situation which could become an appealable issue. Based upon conflict of interest concerns expressed by counsel for DHS and the attorney ad litem, counsel was appointed for appellant and an additional attorney was appointed to jointly represent the two fathers in the case. The

termination hearing was held on September 13, 2005, and the trial court entered an order terminating appellant's parental rights on November 4, 2005. Appellant filed a notice of appeal on November 23, 2005.

In cases involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, \_\_\_ S.W.3d \_\_\_ (2005); *Trout v. Ark. Dep't of Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004); *Kight v. Ark. Dep't of Human Servs.*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Mar. 8, 2006). This is because termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Camarillo-Cox, supra*. Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* Thus, parental rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. *Id.*

Arkansas Code Annotated section 9-27-341(b)(3) requires that an order terminating parental rights be based upon clear and convincing evidence. *See also Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Clear and convincing evidence is that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established. *Id.* It is well settled that 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.* In making this determination, we review the case *de novo*, but we 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. *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. *Id.*

Arkansas Code Annotated section 9-27-316(h) deals with a parent's right to counsel in this type situation:

(h)(1)(A) In all proceedings to remove custody from a parent or guardian or to terminate parental rights, the parent or guardian shall be advised in the dependency-neglect petition or the ex parte emergency order and the first appearance before the court of the right to be represented by counsel at all stages of the court proceedings and the right to appointed counsel if indigent.

(B) A court may appoint counsel for the parent or guardian from whom custody was removed in the ex parte emergency order.

(2)(A) Upon request by a parent or guardian from whom custody was removed and a determination by the court of indigence, the court shall appoint counsel for the parent or guardian from whom custody was removed in all circuit court proceedings to remove custody or terminate parental rights of a juvenile.

Appellant claims that the trial judge initially failed to advise her of her right to counsel in direct violation of the statute. Secondly, she claims that the trial judge misled her into believing that she would be appointed counsel at the hearing following the February 15, 2005 review hearing; however, the subject was not broached again until mentioned by counsel for DHS at the initially scheduled termination hearing. The trial judge still had not appointed counsel by the time the original termination hearing was scheduled, and it had to be

continued to rectify the situation. Even at that point, the trial judge was prompted by counsel for DHS and the attorney ad litem to appoint appellant counsel separate from that of the two fathers involved. She contends that the initial violation of the statute negatively impacted the entire process, and that the trial court's errors and attitude toward her were clearly erroneous and require a reversal of the termination.

Appellees assert that, because appellant failed to appeal from the earlier adjudication hearing in this matter, any error by the trial court was harmless and subsequently corrected when she was appointed an attorney for the termination hearing. *See Jefferson v. Ark. Dep't of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004) (finding that because the appellant failed to appeal the adjudication hearing, any errors from being denied counsel could not be considered with respect to that particular order and did not taint the remainder of the case where counsel was subsequently appointed).

The Arkansas Supreme Court has generally discussed the indigent parent's right to counsel as follows:

Whether due process requires the appointment of counsel in a particular parental-termination proceeding is a matter for the trial court to determine, subject to appellate review. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). Although it may be wise public policy for the States to adopt higher standards of protection for parents in dependency-neglect and termination proceedings, the threshold requirement for state courts in determining whether to appoint counsel to indigent parents in termination proceedings is fundamental fairness. *Id.*, 452 U.S. at 33-34. Consequently, according to the Supreme Court, there is no absolute due process right to counsel in all parental-termination proceedings. *Id.* Rather, it is an issue that must be addressed on a case-by-case basis. *Id.* The State of Arkansas has chosen to allow the appointment of counsel for indigent parents in all parental-termination proceedings. [Ark. Code

Ann. § 9-27-316(h) (Supp.1999). However, this is a State-conferred statutory right. The due process right to counsel arises only if the circumstances of each particular case indicate that fundamental fairness requires the appointment of counsel.

*Jefferson*, 356 Ark. at 652-653, 158 S.W.3d at 133 (2004)(quoting *Bearden v. Ark. Dep't of Human Servs.*, 344 Ark. 317, 324-25, 42 S.W.3d 397, 401-02 (2001)). Appellees point out that whether an indigent parent is entitled to the appointment of counsel is a question for the trial court, and must be analyzed with the focus on two major factors: (1) whether or not the case presented any specially troublesome points of law; and (2) whether or not the presence of counsel could have made a determinative difference. *Clark v. Ark. Dep't of Human Servs.*, 90 Ark. App. 446, \_\_\_ S.W.3d \_\_\_ (2005). Based upon our statutory language of Ark. Code Ann. § 9-27-316(h) and the interpretive case law, it is clear that appellant was entitled to counsel in this matter. The only remaining question is at what point appointment of counsel was required.

Appellees claim that because appellant failed to abstract the adjudication hearing or the termination hearing, there is no way for this court to tell whether or not she was prejudiced by not having an attorney at the earlier proceedings. Rule 4-2(a)(5) of the Rules of the Supreme Court and Court of Appeals provides in pertinent part that the appellant's abstract should consist of an impartial condensation, without comment or emphasis, of such material parts of the testimony of the witnesses and colloquies between court and counsel as are necessary to an understanding of all questions presented to the court for decision. Appellees point out that appellant not only failed to abstract the adjudication, she also failed

to appeal from the dependency-neglect decision therein. There are other interim hearings that she failed to abstract, and most importantly, she did not abstract the termination hearing. Her failure to do so, in addition to her lack of argument as to how she was prejudiced or that the outcome of the case would have been different if counsel had been appointed earlier, make it impossible for this court to reverse the trial court's decision.

We are authorized to go to the record to affirm a trial court's decision, *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995), and we do so in this instance. Our supreme court, in *Jefferson, supra*, considered whether the failure to provide counsel to the appellant during the adjudication proceeding permeated or tainted the remainder of the case so as to deprive the appellant of fundamental fairness in the subsequent proceedings. After reviewing the record in the instant case, we likewise conclude that the fundamental fairness of the proceedings leading up to the termination of appellant's parental rights was not jeopardized based on the trial court's failure to provide legal representation to appellant at the earlier hearings. We note that the order entered on August 23, 2005 appointed an attorney to represent appellant during the remaining proceedings and specifically stated that the trial court would not proceed with hearing evidence regarding the termination of appellant's parental rights without first providing her with the opportunity to be represented by counsel. Appellant was present and represented by an attorney at the October 18, 2005 hearing on DHS's petition to terminate her parental rights. In that hearing, all the evidence leading up to termination was revisited. Our supreme court has held that Ark. Code Ann. § 9-27-316(h)

confers a statutory right to the appointment of counsel for indigent parents in all parental-termination proceedings. *See Jefferson, supra*. While we do not advocate such a delay in the appointment of counsel, especially when specifically requested by a party, we hold that the trial court's delay constitutes harmless error in this case and the basic rights conferred under Ark. Code Ann. § 9-27-316(h) were met prior to the termination hearing.

Accordingly, we affirm.

Affirmed.

ROBBINS and BAKER, JJ., agree.