NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA 07-1029

TROY LINDEMOOD APPELLANT V. ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES APPELLEE	**Opinion Delivered** FEBRUARY 20, 2008 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, [NO. JV 2006-351] HONORABLE LARRY BOLING, JUDGE REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

On July 12, 2007, the Craighead County Circuit Court entered an order terminating the parental rights of appellant Troy Lindemood to his son C.S. In this appeal, Lindemood argues that the evidence was insufficient to support the termination of his parental rights. We reverse and remand for further proceedings.

C.S. was born on August 30, 2006. On September 1, 2006, appellee Arkansas Department of Health and Human Services (DHS) exercised a seventy-two-hour hold on C.S. when both C.S. and his mother tested positive for methamphetamine.[1] At the time of C.S.'s birth, Lindemood was incarcerated in Ohio. The circuit court granted an order for

[1]This court recently affirmed the termination of the mother's parental rights. *Sansom v. Arkansas Dep't of Health & Human Servs.*, No. CA07-600 (Ark. App. Oct. 31, 2007).

emergency custody and, later, found that there was probable cause for entry of the emergency order.

At an adjudication hearing held on October 5, 2006, the circuit court found that C.S. was dependent-neglected and set termination without reunification services as the goal of the case.

On March 22, 2007, DHS filed a motion seeking to terminate reunification services to both parents. As grounds, the motion alleged that C.S. had been subjected to aggravated circumstances and that there is little likelihood that the services would result is a successful reunification. Although the motion was originally set to be heard on April 12, 2007, the hearing, as to Lindemood, was continued. The continuance order also provided that Lindemood was to obtain a paternity test prior to the next hearing.

Also on March 22, 2007, DHS filed a petition to terminate parental rights as to both parents. The petition did not allege any specific grounds as to Lindemood. Lindemood responded to the petition by writing a series of letters directly to the circuit court. In those letters, he stated that he began serving a twenty-month sentence in Ohio in January 2006. He also explained that he only learned of C.S.'s birth in February 2007, acknowledged that he was C.S.'s putative father, and requested a chance to raise his son. He also requested a DNA test, at his expense, to establish his paternity. He advised the court that he was to be released to a halfway house on April 30, 2007. Lindemood also established contact with the maternal grandparents and with the DHS caseworker.

After a continuance, a combined hearing on the motion for no reunification services and the termination petition was held on July 12, 2007. Lindemood was unable to attend the hearing; however, his attorney made a motion for a continuance as to the termination hearing, arguing that the case should be continued until after Lindemood's scheduled release from the halfway house without restrictions on September 6, 2007, as well as to provide time for the establishment of Lindemood's paternity. Lindemood had no objection with proceeding on DHS's motion for no reunification services. The circuit court denied the motion for a continuance.

Amanda Clark, the DHS worker assigned to the case, was the sole witness at the hearing. She testified that Lindemood had not had any contact with C.S. She also indicated that there was a "99.99% likelihood" that C.S. would be adopted, in part because he was a healthy child less than one year of age. She was not aware of any support Lindemood may have provided. She opined that it would not be possible to reunify C.S. and Lindemood in a time frame consistent with C.S.'s best interests. On cross-examination, she acknowledged that C.S. was less than a year old and had been in DHS's custody for less than a year. She also indicated that the only steps Lindemood had taken was to request a DNA paternity test.

The circuit court ruled from the bench and granted both the petition for no reunification services and the petition for termination. The court found that Lindemood had had no contact with C.S. and had not established his paternity. The court also found that the sentence Lindemood received constituted a substantial part of C.S.'s life and that there was little likelihood of successful reunification. The court further found that "the parents" had

subjected C.S. to aggravating circumstances and that it was in C.S.'s best interests for the termination petition to be granted. An order memorializing these findings was entered on the same day, July 12, 2007. Lindemood filed a timely notice of appeal on July 26, 2007.

This court reviews termination of parental rights cases de novo. *Yarborough v. Arkansas Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). The grounds for termination of parental rights must be proven by clear and convincing evidence. *Id.* When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the circuit court to 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.* Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Kight v. Arkansas Dep't of Human Servs.*, 94 Ark. App. 400, 231 S.W.3d 103 (2006). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.*

The only issue before this court is whether there is sufficient evidence to support the circuit court's decision. The court found that DHS had proven two grounds for termination of Lindemood's parental rights: that "the parents" have subjected a juvenile to aggravated circumstances in that the juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made that there was little likelihood that services to the family would result in successful reunification, *see* Ark.

Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3) (Supp. 2007), and that Lindemood was sentenced to a period of time that constitutes a substantial period of the juvenile's life and is still subject to that sentence. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(viii). Finally, the circuit court found that no putative father had proven the existence of any significant contacts with C.S. We hold that the circuit court was clearly erroneous in each of these findings.

The petition for termination of parental rights made no allegation that Lindemood had done anything to harm C.S., nor was there any evidence to support such a finding because Lindemood was in an Ohio correctional facility at the time of C.S.'s birth and had been since January 2006. He was not responsible for the mother's using illegal drugs during her pregnancy or for drugs being in C.S.'s system when he was born. Nor can we say that Lindemood abandoned C.S. because Lindemood, from the time he learned of C.S.'s birth, has consistently expressed his desire that he be allowed to establish his paternity and be a parent to C.S. Therefore, the only possible basis for terminating Lindemood's parental rights under this ground is that the circuit court found that there was little likelihood that the provision of services to Lindemood would result in successful reunification.

Here, DHS did not provide any services to even attempt to reunify the family. Indeed, DHS's motion to be relieved from providing services to Lindemood was heard at the same time as the termination hearing. During the time between DHS filing its motion and the hearing, there is no evidence that DHS tried to determine what services Lindemood might need in order to gain custody of C.S. Therefore, the circuit court's finding that Lindemood

had subjected C.S. to aggravated circumstances based on a finding that there was little likelihood that services would result in successful reunification is clearly erroneous.

The second basis found by the circuit court was that Lindemood was serving a twenty-month criminal sentence in Ohio and that this period constituted a substantial period of C.S.'s life. Although imprisonment imposes an unusual impediment to a normal parental relationship, it is not conclusive on the termination issue. *See Crawford v. Arkansas Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Rather, in deciding whether to terminate the parental rights of a party, the circuit court has a duty to look at the entire picture of how that parent has discharged his duties as a parent, the substantial risk of serious harm the parent imposes, and whether or not the parent is unfit. *In re Adoption of K.M.C.*, 62 Ark. App. 95, 969 S.W.2d 197 (1998). Thus, the fact that a parent is incarcerated does not automatically preclude a finding that he is a fit parent, but neither does it toll his parental responsibilities. *See Malone v. Arkansas Dep't. of Human Servs.*, 71 Ark. App. 441, 30 S.W.3d 758 (2000); *Jones v. Arkansas Dep't of Human Servs.*, 70 Ark. App. 397, 19 S.W.3d 58 (2000).

It is important to note that Lindemood's incarceration began before he was even aware of C.S.'s birth. *Compare Johnson v. Arkansas Dep't of Human Servs.*, 78 Ark. App. 112, 121-22, 82 S.W.3d 183, 189 (2002). At the time of C.S.'s birth, Lindemood had approximately one year remaining on his sentence; at the time the termination order was entered, he had less than two months to serve. When this period is viewed in the context of the entire eighteen-year period of C.S.'s minority, it is not so substantial so as to preclude all attempts to reunify

Lindemood and C.S., especially when considering DHS's lack of offering services to Lindemood.

Because Lindemood had not established his paternity, he was required to prove that significant contacts existed with the child in order for his parental rights to attach. *See* Ark. Code Ann. § 9-27-341(c)(2)(A)(ii). We hold that Lindemood did everything he could, under the facts of this case, to seize upon the opportunity to parent as is required of unmarried fathers before their right to parent is entitled to due-process protection. *See Lehr v. Robertson*, 463 U.S. 248, 262 (1983); *Escobedo v. Nickita*, 365 Ark. 548, 231 S.W.3d 601 (2006). We must keep in mind that C.S. was an infant less than a year old at the time the court terminated Lindemood's parental rights, thereby making cards, letters, and gifts less significant than they would be to an older child. *Compare Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976). Lindemood contacted the DHS caseworker assigned to the case and apprised her of his progress towards release from custody in Ohio and requested help in establishing his paternity. He also contacted the maternal grandparents and friends of the mother. Finally, Lindemood contacted the circuit court to express his interest in his child and requested guidance about defending the termination petition.

DHS has failed to prove the existence of any grounds for the termination of Lindemood's parental rights. Therefore, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

GLADWIN and HEFFLEY, JJ., agree.