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

DIVISION IV

CA07-1299

MAY 28, 2008

JAMES WRIGHT and
DANA SCHOSSOW
APPELLANTS

v.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES
APPELLEE

AN APPEAL FROM GARLAND
COUNTY CIRCUIT COURT
[No. JV-06-477]

HONORABLE VICKI SHAW COOK,
JUDGE

AFFIRMED

This is a termination-of-parental-rights case involving appeals from the mother and the father of the child. We affirm the circuit court's decision to terminate both parents' parental rights.

I. Procedural history

On July 20, 2006, DHS filed a petition for emergency custody of S.C., born August 20, 2004, against appellant Dana Schossow, the child's mother, and the child's unknown legal or putative father, based on an affidavit of a DHS employee stating that S.C. was inadequately supervised by Ms. Schossow, who was eventually located at the Royal Vista Inn in Hot Springs. The DHS worker stated that, when she was called in for a drug test, Ms. Schossow tested positive for methamphetamines and amphetamines and that, due to her prior history with DHS since 2003, her lack of a permanent residence, and

the positive drug test, the employee believed S.C. to be in immediate danger and placed a seventy-two-hour hold on her. The court entered an order for emergency custody of S.C. on July 24, 2006.

By the time of the probable-cause hearing on July 26, 2006, appellant James Wright had been identified as S.C.'s putative father. At that time, he was in prison for second-degree murder, serving a sentence of twelve years. In fact, S.C. was conceived at the prison when Ms. Schossow bribed a guard to leave her and Mr. Wright alone long enough for a forbidden tryst. Based on the DHS worker's recommendation, the court refused to let him see S.C. while he was in prison. Although he was not present at the probable-cause hearing, his attorney was. Ms. Schossow and her attorney were also present. That day, the court entered an order of probable cause directing Ms. Schossow to remain clean and sober; to seek inpatient treatment; and to remain in weekly contact with her caseworker, attorney, and CASA volunteer (if appointed). The court ordered Mr. Wright to pay weekly child support of $34 but held the obligation in abeyance until after his release from prison. Mr. Wright wrote the court on July 27, 2006, stating that he intended to be involved in S.C.'s life; that he wanted visitation; and that, upon his release from prison, he intended to seek guardianship of her. He asked for the court's help in maintaining contact with S.C.

An adjudication hearing was held on August 24, 2006, which both parents and their attorneys attended. That day, the court entered an order adjudicating S.C. to be dependent-neglected, noting that DHS had been involved with an ongoing FINS action beginning in 2004 and that a referral with true findings against Ms. Schossow had been

active with DHS since 2003. The court set the case goal as reunification and approved DHS's case plan. The court held that Ms. Schossow could have supervised visitation at the DHS office if her drug screens were negative. The court ordered her to contact her caseworker on a weekly basis; to follow all the court's orders and the case plan; to cooperate with the caseworker; to remain clean and sober at all times; to promptly submit to random drug testing; to seek inpatient treatment; to attend ninety meetings in ninety days of NA/AA until entering inpatient drug treatment; and to submit proof of stable housing and income. The court ordered DNA testing for Mr. Wright.

A review hearing was held on November 15, 2006, at which both appellants were present with their attorneys. The court continued the case goal to be reunification and found that Ms. Schossow had "somewhat complied" with the case plan and the court's orders. The court restated its previous orders to her and continued her supervised visitation. The court stated that Mr. Wright would receive no visitation until he was released from prison. It also found that Mr. Wright is S.C.'s father and directed him to have no contact with the child's foster mother.

Following a hearing, the trial court entered an order on March 8, 2007, finding that Ms. Schossow had partially complied with the case plan and court orders; that Mr. Wright had completed parenting classes but remained incarcerated; and that the case goal would remain reunification. The court ordered appellants to prove to the court, the caseworker, and the attorney ad litem that they had followed the court's orders and case plan; cooperated with the caseworkers; remained clean and sober at all times; submitted to random drug testing; obtained and maintained stable housing and employment; and

viewed the "Clock Is Ticking" video. The court held that Ms. Schossow could have supervised visitation on weekends at Potter's Clay (an inpatient drug treatment program) after she had remained there a minimum of fourteen days.

A permanency-planning hearing was held on June 13, 2007, at which appellants appeared with their attorneys. The court found that DHS had made reasonable efforts to deliver reunification services; that Ms. Schossow had failed to comply with the case plan and the court's orders; and that Mr. Wright had completed parenting classes but remained incarcerated. The court suspended Ms. Schossow's visitation with S.C. It found clear and convincing evidence that appellants had failed to follow the case plan; to maintain contact with the caseworker; to enter and complete the treatment program at Potter's Clay; to maintain stable housing and stable employment; to complete a psychological evaluation; to prove clean, random drug screens; or to comply with the respiratory and special needs of the child. The court scheduled a termination hearing.

DHS filed a petition for termination of parental rights against appellants on July 2, 2007, alleging that Ms. Schossow had failed to follow all of the court's orders or comply with the case plan; that Mr. Wright had completed parenting classes but remained incarcerated; that neither parent had proven stable housing and employment; that neither parent had provided significant support in accordance with their means nor made meaningful contact with S.C.; and that Ms. Schossow continued to use illegal drugs. It also alleged that, subsequent to the filing of the original petition, other factors or issues arose demonstrating that return of the child to the parental home was contrary to her health, safety, and welfare and that, despite the offer of appropriate family services, the parents had

manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate their circumstances which prevented return of the child to the parental home. In response, Mr. Wright pointed out that DHS had provided no reunification services to him.

The termination hearing was held on September 24, 2007, and both parents were present with their attorneys. Tamara Stricklin, a social-service aide, testified that she had been unable to contact Ms. Schossow for numerous drug screens between March 2007 and June 2007. Crystalle Jones, the primary family-service worker, testified that, after Ms. Schossow left her inpatient program in March 2007, she tested positive for cocaine on April 18, 2007. She said that Ms. Schossow was then ordered to attend an inpatient program at Potter's Clay, to which Ms. Jones referred her; however, she refused to do so because she wanted to get a house and a job. Ms. Jones also stated that Ms. Schossow had not obtained stable housing. She said that Ms. Schossow had worked at the Fountain Lake Nursing Home for four or five months, less than the six months considered by DHS to reflect stability. Ms. Jones also testified that DHS had not been able to administer all of the drug tests to Ms. Schossow because of her failure to consistently provide telephone numbers where she could be reached. Ms. Jones stated that Ms. Schossow had not verified her completion of an inpatient treatment program since the one she finished in March 2007; her payment of child support; or that she had quit smoking because of S.C.'s respiratory problems. She said that Ms. Schossow had kept in touch with her "pretty well" but had lived in at least six places during this proceeding and had recently married a man with a criminal history without first telling DHS that they were involved. Ms. Jones stated

that DHS offered no reunification services to Mr. Wright because he would not be leaving prison in the reunification time frame. She did not know when he would be released.

Mr. Wright testified that, in prison, he had completed the pre-release, drug-and-alcohol, anger-resolution, anti-drug, parenting, life-skills, and "Freedom from Bitterness" programs. He said that all of his drug tests had been negative and that he had been clean and sober for five years. He stated that, before S.C. was taken into custody, Ms. Schossow brought her to see him approximately every other weekend; that he sent her letters; that he had visited Ms. Schossow's house when he was on furlough; that he had held S.C. and taken her shopping; and that he had sent Ms. Schossow money he earned on work-release for S.C.'s support.

On September 28, 2007, the court entered an order terminating appellants' parental rights to S.C., stating that DHS had proven by clear and convincing evidence that, according to Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*), the special-needs child, who was diagnosed as having failure to thrive with severe speech delays, had remained out of either parental home for more than twelve months. The court stated:

> [T]hat mother, immediately prior to the Permanency Planning hearing hearing [sic] attempted to cure her case plan deficits; however, any such attempts to cure need not considered [sic] by this Court; that mother failed to remain in contact with the DCFS caseworker; consequently, no stability on her part could be documented as a result; that mother failed to prove she was clean and sober, failed to cooperate with DCFS caseworker, failed to follow all of this Court's orders and to comply with the ADHS case plan, tested positive for cocaine/crack on 4/18/07, and she has failed since that time to remain in contact with DCFS caseworker, prove a stable home, or to submit to Court-ordered inpatient drug treatment for the second time; that father has completed parenting and anger management classes while in prison but remains incarcerated and is serving a 15-year sentence for second-degree murder; that throughout this time, the parents have not proven stable-housing and stable employment, and they have not provided significant support in accordance with

> their means nor maintained meaningful contact with this juvenile; that mother continued to use illegal drugs as of her 4/18/07 drug test, although other unsuccessful attempts were made to have her submit to random drug testing throughout this case . . . .

The circuit court also found that, subsequent to the filing of the original emergency petition, other factors or issues arose that demonstrated that return of the child to the parental home was contrary to her health, safety, and welfare and that, despite the offer of reasonable services, appellants had manifested the incapacity or indifference to remedy the subsequent issues or factors or to rehabilitate their circumstances that prevented her return to the parental home. The court added that incarceration of a parent would not toll the parent's obligation to the child. Appellants then pursued this appeal.

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. 2008) 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, 201 S.W.3d 391 (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, 217 S.W.3d 788 (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).

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Ullom v. Ark. Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000). Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Id.* Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Crawford v. Ark. Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). 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. *J.T. v. Ark. Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997).

III. Mr. Wright's argument

Mr. Wright points out that the DHS worker did not know the length of his sentence or whether he would be eligible for parole. He states that, at the time of the termination hearing in September 2007, he was scheduled for a parole hearing in sixty days and release in December. He stresses that, even though he was offered no services by DHS, he participated in the parenting, drug-and-alcohol, anger-management, and life-skills programs offered by the department of corrections. Mr. Wright does not dispute that

S.C. was out of his custody for more than twelve months. He contends, however, that it was unreasonable for the trial court to base its decision on his failure to maintain contact with or to support S.C. when it denied him the opportunity to see her or to communicate with her foster mother, which, given her young age, would be the only practical way to contact her. He also points out that he was incarcerated nearby in Malvern and that the court held his obligation to pay child support in abeyance until his release from the department of corrections.

The relevant portions of Ark. Code Ann. § 9-27-341(b) (Repl. 2008) provide:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
>
> (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and
>
> (B) Of one (1) or more of the following grounds:
>
> (i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.
>
> (b) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(i)(a) of this section immediately precede the filing of the petition for termination of parental rights or that it be for twelve (12) consecutive months;
>
> (ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant

> material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.
>
> (b) To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home.
>
> (c) Material support consists of either financial contributions or food, shelter, clothing, or other necessities when the contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction.
>
> . . . .
>
> (viii) The parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life . . . .

Although imprisonment imposes an unusual impediment to a normal parental relationship, it is not conclusive on the issue of termination. *Crawford v. Ark. Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Nevertheless, a parent's imprisonment does not toll his responsibilities toward his children. *Malone v. Ark. Dep't of Human Servs.*, 71 Ark. App. 441, 30 S.W.3d 758 (2000). Tolling a parent's obligations to comply with reunification orders while he is in jail would be contrary to the goal of the juvenile code to provide permanency for the children. *Id.* The appropriate inquiry where a parent has been ordered to comply with a court's reunification orders and is incarcerated is whether the parent utilized those resources available to maintain a close relationship with the children. *Id.*

We recognize Mr. Wright's attempts to be a part of S.C.'s life and his completion of the self-improvement programs in prison as evidence of his good-faith desire to be a parent to her. Nevertheless, at the time of the termination hearing, he had no stable employment or home and it was still uncertain when he would be released from prison. He admitted at the

hearing that it would take another year for him to provide a stable home for S.C. Thus, when the circuit court was faced with this decision, there was no evidence that S.C. could be placed in Mr. Wright's care within a reasonable period of time viewed from her perspective. Because he could not give S.C. one of her most basic needs—a stable home—we find no error in the circuit court's decision to terminate his parental rights. *See* Ark. Code Ann. § 9-27-341(a)(3) (Repl. 2008).

IV. Ms. Schossow's argument

Ms. Schossow argues that the trial court erred in placing the burden of proof on her instead of on DHS by stating in its order that she failed to prove that she was clean and sober or that she had a stable home or employment. She correctly points out that the party seeking termination carries the heavy burden of proving by clear and convincing evidence that parental rights should be terminated. *Cobbs v. Ark. Dep't of Human Servs.*, 87 Ark. App. 188, 189 S.W.3d 487 (2004). We do not, however, agree that the circuit court actually placed the burden of proof on Ms. Schossow. The court's order expressly stated that DHS had proven its case by clear and convincing evidence. As explained below, DHS satisfied its heavy burden of proof.

Ms. Schossow next argues that the trial court erred in finding grounds for termination because she completed inpatient drug treatment in March 2007; obtained a job in May 2007, where she was still working at the time of the hearing; had consistently tested clean for drugs except for one time in April 2007; had stayed "pretty well in contact" with her caseworker; and had completed parenting classes. She also notes that the CASA report introduced at the permanency-planning hearing recommended that she be given more time. Further, she argues

that the court had not *ordered* her to complete a second inpatient drug program after she tested positive in April; she states that the caseworker had simply *suggested* that she do so. Ms. Schossow testified that she chose not to complete that second program because she wanted to get a job (as ordered by the court), which she did.

Regardless of whether the court ordered Ms. Schossow to complete a second drug program, it was undisputed that she tested positive for cocaine after leaving a drug-treatment program. The trial court could, therefore, determine that her treatment was not successful and that she had not done whatever it took to overcome her drug problem. Additionally, Ms. Schossow lived in at least six places during this proceeding; did not fully cooperate with DHS's attempts to administer drug tests to her; and worked for only four or five months. The evidence, therefore, clearly demonstrated that, despite DHS's efforts to rehabilitate Ms. Schossow, she did not correct the conditions that caused S.C. to be removed from her care.

Affirmed.

PITTMAN, C.J., and VAUGHT, J., agree.