ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA 07-699

December 5, 2007

MARCOS LANDAVERDE APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. JV-2005-1108-3]
V.	HONORABLE STACEY ZIMMERMAN, JUDGE
ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES APPELLEE	AFFIRMED

Appellant, Marcos Landaverde, appeals the order of the Washington County Circuit Court that terminated his rights to his son, G.L., born November 19, 2004, after the court found appellant was not the legal father of G.L. and had taken no steps to establish paternity. On appeal, appellant raises three arguments: (1) his due process rights were violated when he was not given notice of the first four hearings in this case; (2) he was improperly denied his right to assistance of counsel; (3) there was not clear and convincing evidence to support the termination of his parental rights. We find no error and affirm.

On October 18, 2005, the Department of Health and Human Services (DHHS) received a report of allegations of physical abuse and threat of harm upon G.L. by appellant.

DHHS workers visited Auralina Perez at Northwest Medical Center in Springdale, Arkansas, along with her children S.F. and G.L. Mrs. Perez is married to Wilmer Figueroa, who is S.F.'s biological father. Appellant is the putative father of G.L. G.L. had no visible injuries, but Perez had sustained a broken eye socket and sinus cavity and had a severe black eye. When asked how she was hurt, Perez stated that appellant had hit her because she was protecting their son, G.L., from appellant, who had kicked G.L. DHHS placed Perez and the children at the Salvation Army in Fayetteville to wait until there was an opening at a local women's shelter.

On November 2, 2005, a protective service case was opened on the family to offer services and to ensure the health and safety of the children. Perez left the Salvation Army on November 9 to reside with a friend in Springdale, and after obtaining the family's new address from S.F.'s school, DHHS workers visited the new address and found that Perez was living with appellant. At that time, DHHS exercised a seventy-two hour emergency hold on the children. In the petition for emergency custody filed December 19, 2005, appellant was listed as the putative father of G.L.

An adjudication hearing was held on January 4, 2006, at which the court found that the children were dependent/neglected due to abuse and parental unfitness. According to the adjudication order, Perez was the only person served with notice of the proceedings. Perez was allowed supervised visitation with the children, but appellant was to have no contact with the children. A review hearing was held April 5, 2006, and the court found that Perez had completed some parenting classes and attended some counseling, but still had unstable

housing. The goal of the case remained reunification with a concurrent goal of adoption. Appellant did not appear at either the adjudication hearing or the April 5 review hearing.

Appellant was in attendance, however, for the next review hearing, held August 30, 2006. At that hearing, the court found that Perez was not in compliance with the court orders, in that she had not maintained contact with DHHS and had not exercised visitation with the children. The court also indicated that she continued to live with appellant, who had physically abused her. Perez was ordered to obtain and maintain employment; maintain safe, clean, and stable housing; and attend counseling. While noting that appellant had not established paternity, the court ordered appellant to complete twelve hours of parenting classes, cooperate with DHHS, and undergo an anger-management assessment.

A permanency planning hearing was held on November 30, 2006, and extended into December. At that hearing, the court found that both Perez and appellant had been untruthful and had not complied with the case plan, and the permanency goal was changed to adoption. At the termination hearing held March 16, 2007, the court heard testimony from DHHS worker Molly Mashburn, who recommended terminating the parental rights of both Perez and appellant and placing custody of the children with Figueroa, the legal father of both children. Perez testified that the injuries she had sustained in October 2005 were the result of an accident, not abuse by appellant, although she did admit that appellant had been convicted of domestic battery as a result of the incident. She also testified that appellant had been arrested again in April 2006 and convicted of disorderly conduct after arguing with her. She testified that there had been no more incidents of domestic abuse, and that while she was

still married to Figueroa, she had lived with appellant for the past four years and continued to do so.

DHHS introduced affidavits of service for Perez and appellant, as well as all the previous court orders entered in the case, and then rested its case. After hearing directed verdict motions from both Figueroa and appellant, the court ruled that the State had made a prima facie showing as to appellant and that appellant was properly served and had proper notice of the termination hearing by being personally served with a summons and a petition for termination of parental rights.

Appellant then testified and explained that he had commenced attending the court proceedings in this case on August 30, 2006, because he was interested in getting the children back. He testified that he had done everything the court asked of him, including attending parenting and anger management classes. Appellant testified that his relationship with Perez had improved greatly and that they had matured as a couple. He asked that the children be returned to him and Perez. Appellant admitted he was only the putative father of G.L. and had taken no steps to establish paternity, stating, "He's my son. I don't have any doubts. I don't need to take any steps." When asked why he had not appeared in court until August 2006, eight months after G.L. was taken into DHHS custody, appellant explained, "I always asked Aurelina if it was necessary for me to appear or if I had to take any steps to get the kids back. And she said that it was not necessary for me to appear in court and that she would do everything." Appellant stated that Perez had been hurt in October 2005 after he pushed her and she fell during an argument, but he denied ever kicking G.L.

In its ruling, the court found that with respect to appellant, he was not the legal father to S.F. or G.L. and had no legal rights to G.L. Perez had G.L. while married to Figueroa, she is still married to Figueroa, and appellant had taken no steps to establish paternity. The court also found appellant's explanation of Perez's injury "totally unbelievable," noting that while appellant claimed it was an accident, he pled guilty to domestic battery. The court found it was in the best interest of the children to terminate "all rights that Mr. Landaverde might have claimed," and the goal of the case remained reunification with Figueroa.[1] Appellant then filed a timely notice of appeal to this court.

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. *Johnson v. Ark. Dep't of Human Servs*., 78 Ark. App. 112, 82 S.W.3d 183 (2002). The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Ark. Dep't of Human Servs.,* 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial

[1] Perez's parental rights were also terminated as to both children; however, she is not a party to this appeal.

judge's personal observations. *Ullom v. Ark. Dep't of Human Servs.,* 340 Ark. 615, 12 S.W.3d 204 (2000).

For his first point on appeal, appellant argues that he was denied due process in that he was not given notice or an opportunity to be heard until the case against him had already been developed through four hearings, namely the ex parte emergency hearing, the probable cause hearing, the adjudication hearing, and the first review hearing. Appellant also argues he did not receive notice of the termination hearing until four days before the hearing date. Appellant argues that as a putative father whose rights were at stake, he should have been a party to the case from the beginning. However, appellant's arguments in this regard were never raised to the trial court below, and even in a case involving termination of parental rights in which constitutional issues are argued, we will not consider arguments made for the first time on appeal. *Myers v. Ark. Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005). Also, with regard to appellant's argument concerning untimely notice of the termination hearing, we note that DHHS introduced an affidavit of service for appellant, evidencing his notice of the termination hearing, without objection by appellant, and the trial court found that appellant had been properly served, again without objection by appellant.

For his second point on appeal, appellant argues that he was improperly denied his right to counsel at the early stages of the case, and this denial was not cured by the appointment of counsel on his behalf for the final two hearings. However, appellant failed to raise this argument to the trial court below, and we therefore find it is not preserved for our review. *Myers, supra*. Furthermore, we note that while Ark. Code Ann. § 9-27-316(h)

(Supp. 2005) provides that a parent or guardian may be appointed counsel by the court, the statute makes no such provision for a putative parent.

For his third point on appeal, appellant argues that there was not clear and convincing evidence supporting the decision to terminate his parental rights. As a subpoint under this argument, appellant first argues that the trial court erred in determining that he was not the natural father of G.L. Appellant contends that the trial court's conclusion that he had no legal rights to G.L. was premised only on the testimony of Figueroa and Perez that they were still married, and any presumption of legitimacy was rebutted by appellant's own testimony that he is G.L.'s father. Appellant argues that the evidence presented should have been sufficient to prompt the trial court to order genetic testing pursuant to Ark. Code Ann. § 16-43-901 (Repl. 1999) to determine G.L.'s biological father. But section 16-43-901 refers to genetic testing in the context of a proceeding to establish paternity, and there is no evidence that appellant ever filed a petition to establish paternity. The trial court was under no obligation to sua sponte order genetic testing when appellant had made no effort to establish his rights as G.L.'s putative father.

As his second subpoint, appellant argues that there was insufficient evidence to show that he had failed to remedy the conditions that caused the children's removal. However, the trial court found, both in its permanency planning order filed December 20, 2006, and its termination order filed April 2, 2007, that appellant was not truthful about the domestic abuse that had occurred and continued to deny the abuse that caused the children to come into DHHS custody. In its ruling from the bench, the court stated that appellant had done

nothing to resolve the domestic-abuse cycle other than go to anger-management classes, citing another domestic dispute that had occurred between Perez and appellant after G.L. had been taken into custody. As stated above, we give due regard to the opportunity of the trial court to judge the credibility of witnesses and give great weight to the trial judge's personal observations. We find that the trial court's ruling in this regard was not clearly erroneous and affirm the termination of appellant's parental rights.

Affirmed.

GLOVER and BAKER, JJ., agree.