

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE K. BAKER

DIVISION IV

CA07-95

MICHELLE ULLOM

NOVEMBER 28, 2007

APPELLANT

v.

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. J-05-730-3]

STATE OF ARKANSAS

APPELLEE

HONORABLE STACEY A. ZIMMERMAN,
CIRCUIT JUDGE

AFFIRMED AS MODIFIED

Appellant Michelle Ullom asserts four points of error regarding the permanent placement of custody of two of her three children with their maternal grandmother.¹ The issues on appeal are as follows: (1) Whether the circuit court committed reversible error in failing to make requisite findings in its order awarding permanent custody of the minor children to the maternal grandmother; (2) Whether the circuit court committed reversible error in finding sufficient evidence to support its finding that Michelle Ullom was not in compliance with court orders and in awarding permanent custody of her minor children to the maternal grandmother; (3) Whether the circuit court committed reversible error in failing to find Michelle Ullom was unfit for purposes of awarding permanent custody of her minor children to the maternal grandmother; and (4) Whether the circuit court violated Michelle Ullom’s fundamental right as a parent to make decisions as to care, custody, and

¹Although at various times through the course of these proceedings appellant’s oldest child, Z. C., was included, the final order appealed from was for J. M. and H. M.

control of her minor children as protected by the Due Process Clause of the Fourteenth Amendment. For the reasons stated herein, we affirm as modified.

On November 1, 2006, appellant filed her notice of appeal from the court order entered on October 4, 2006. The order entered on October 4 appears to state that the court permanently placed custody of the minor children with their maternal grandmother, Vonda Cook; however, the trial court ordered continued drug testing on the mother and step-father, set visitation, and continued to assert jurisdiction over the parties with no further automatic reviews ordered.

Awarding permanent custody to a third party in a case arising from a Family in Need of Services (FINS) case is analogous to a permanent guardianship. *Robbins v. State*, 80 Ark. App. 204, 208, 92 S.W.3d 707, 710 (2002). Our supreme court recently explained the strong preference for reunification in situations commonly found in FINS cases in reversing the award of a permanent guardianship under the probate statute:

The circuit court's decision was based primarily upon the Martenses' testimony as to Devine's failures as a parent in providing a suitable home and proper care for Syris. While we give great deference to the circuit court's credibility determinations, we conclude that the circuit court clearly erred in finding Devine to be an unfit mother and removing Syris from her care. Specifically, the issues presented here are more akin to issues that typically arise in dependency-neglect cases. In such cases, our State's policy strongly favors reunification with the natural parents above all other alternatives for dependent-neglected juveniles. *See* Ark. Code Ann. §§ 9-27-102- 9-28-1003 (Repl.2002 & Supp.2007). Parents whose children are adjudicated dependent-neglected are generally offered family services and an opportunity to prove they have made improvements that are in keeping with their children's best interests. Additionally, parents who make improvements are, almost without exception, reunited with their children.

Devine v. Martens, ___ Ark. ___, ___, ___ S.W.3d ___, ___ (Sept. 27, 2007).

In reviewing the record in this case, it is clear that the trial court ordered the mother and step-father to submit to random drug screens at the direction of the FINS officer; however

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these random screenings were thwarted by the mother contacting the new FINS officer assigned in July only one time rather than once a month as ordered. It is also clear, from the trial court's continued orders of drug testing, that illicit drug use remained a concern. The failure in communication led to the lack of proof that the trial court sought to assure itself that the condition had in fact been remedied.

In *Devine* our supreme court stated that "it is not in a child's best interests to take custody from a natural parent who has rectified all issues relating to his or her fitness." The trial court's concern was that it was unable to verify whether the mother had remedied the illicit drug use. This lack of proof precluded her from finding that all issues relating to her fitness had been remedied and, conversely, prevented her from finding that the mother was unfit. The fact that the court entered a Rule 54(b) certification for purposes of appeal emphasizes that the trial court was well aware of the continuing nature of this case. The trial court continued to exercise its jurisdiction by directing ongoing drug testing to address its concerns, but did not set the case for automatic review hearings. This disposition is consistent with the trial court's allowing the mother to petition for review upon completion of sufficient drug testing to assure the court that the condition was in fact remedied.

Accordingly, we direct that the trial court's order be modified to reflect continued temporary custody with the grandmother, Vonda Cook, which will not be subject to automatic review absent petition for review by a party. Each of appellant's arguments on appeal are premised upon the trial court's apparent award of permanent custody. Our disposition of this case modified the trial court's order to reflect that there was no award of permanent custody; therefore, we need not consider her specific arguments.

Affirmed as modified.

MILLER, J., agrees.

MARSHALL, J., concurs.