

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA 08-373

PENNY HARRISON

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES and C.O., D.O., and  
P.O., MINOR CHILDREN

APPELLEES

**Opinion Delivered** SEPTEMBER 10, 2008

APPEAL FROM THE MADISON  
COUNTY CIRCUIT COURT,  
[NO. JV 2007-30]

HONORABLE STACEY  
ZIMMERMAN, JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellant Penny Harrison appeals from an order of the Washington County Circuit Court terminating her parental rights to her three children. She argues that there is insufficient evidence to support the circuit court's ruling. We affirm.

Harrison and Michael Ogden are the parents of the three children, C.O., born November 9, 1996; D.O., born August 14, 1995; and P.O., born November 12, 2001. It is unclear who the legal custodian was at the time this case arose. The children were in Ogden's care on May 2, 2007, when appellee Arkansas Department of Human Services (DHS) removed the children because of allegations that C.O. was being sexually abused by her father. An affidavit in support of DHS's petition for emergency custody stated that C.O. told the caseworker and a State Police investigator that her father made her place her hand upon his penis and masturbate him. The affidavit indicated that Harrison's whereabouts were

unknown at the time DHS exercised the hold on the children. DHS filed its petition on May 7, 2007, and an ex parte order granting emergency custody was entered the same day.

A probable-cause hearing was held on May 11, 2007, at which time the circuit court found probable cause for entry of the ex parte emergency order. The court noted that Harrison was late for the hearing, and it was concerned that Harrison was under the influence of illegal drugs. The probable-cause order required that Harrison refrain from using illegal drugs and to submit to random drug testing.

On June 15, 2007, the court held an adjudication hearing. The court found that the children were dependent-neglected as a result of sexual abuse by the father, environmental neglect by the father, and parental unfitness as to both parents. Harrison's visits were suspended because she had failed four random drug screens; had pending drug charges; and had missed two visits with C.O. In addition to previous orders, Harrison was ordered to submit to a psychological evaluation; participate in individual counseling; complete nine hours of parenting classes and demonstrate improved, appropriate parenting; and to have a hair follicle drug test.<sup>1</sup>

On August 3, 2007, a no-reunification-services hearing was held. The court found it was in the children's best interests that no reunification services be offered to Harrison because the children were subjected to aggravated circumstances. Specifically, the court found that the father had sexually abused C.O.; that both parents had subjected C.O. to extreme or repeated

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<sup>1</sup>This court recently affirmed the adjudication order. *Harrison v. Arkansas Dep't of Human Servs.*, No. CA07-950 (Ark. App. Mar. 5, 2008).

cruelty by failing to properly maintain C.O.'s hearing aids; and that there was little likelihood of successful reunification despite services being offered over the past seven years.

On August 3, 2007, a permanency-planning hearing was held. The court found that Harrison was not in compliance and that the court could not return the children to either parent. The court also changed the goal from reunification to termination of parental rights and adoption. The court found that Harrison had not complied with the case plan and court orders in that she did not have stable housing; had not cooperated with DHS; had not submitted to drug screens, including a hair follicle test, as ordered; had not begun individual counseling; had not completed parenting classes; had not obtained and maintained employment; had not maintained a clean, safe home; and had not demonstrated an ability to protect the children. The court also suspended all of Harrison's visitation with the children because she failed to submit four "clean" drug screens or the hair follicle test. The court went on to specifically order "no contact" between Harrison and the children due to concerns of illegal drug use and mental instability. The court stated that it might entertain a change in Harrison's visitation status after four clean random drug screens and a clean hair follicle test to be paid for by Harrison. The court placed custody of C.O. and D.O. with their grandmother. P.O. was placed with a paternal aunt and uncle.

On August 14, 2007, DHS filed its petition to terminate Harrison's parental rights. The department alleged that it was in the children's best interests to have parental rights terminated including consideration of the likelihood the children will be adopted and the potential for

harm to the children if they were returned to Harrison's custody. The sole ground for termination was that the children had been subjected to aggravated circumstances.

On December 7, 2007, the hearing on the termination petition was held. Denise Gibson, the DHS caseworker, was the sole witness. She testified that the department has been involved with the family since 2000 and has offered services, including transportation, referrals for housing and counseling, and psychological evaluations. She also stated that she did not believe that further services would help reunite the family. She recommended that Harrison's parental rights be terminated as being in the children's best interests because there was potential danger if the children were returned to Harrison. Specifically, she stated that Harrison did not have stable housing and was not employed. She also opined that the children were adoptable, adding that the foster family would consider adopting the children. On cross-examination, she said that the children would not have stability if the court did not terminate Harrison's rights and make a permanent placement with the current custodian because Harrison could attempt to regain custody and disrupt the children's lives. She also acknowledged that she had not worked out the details of a plan for the children to be adopted if Harrison's parental rights were terminated, other than to suggest that the children be adopted separately. On further cross-examination, Gibson testified that Harrison had not remained in contact with the department and lacked stable housing. She also said that Harrison never submitted to random drug tests or a hair follicle test.

The court ruled from the bench and terminated Harrison's parental rights. The court recounted the history of the case back to 2000. It found that it was in the children's best

interests to have parental rights terminated. The court found that Harrison had not complied with the court's orders by continuing to have contact with the children, by not submitting to random drug tests or hair follicle tests, and by failing to seek mental-health services. The court found as grounds for termination that the children had been adjudicated dependent/neglected and had continued out of the custody of the parents for more than twelve months and that despite a meaningful effort by DHS, the conditions that caused the removal had not been remedied; and that the children had been subjected to aggravated circumstances by both parents. This appeal followed.

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 proven 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).

Harrison first argues that the circuit court erred in terminating her parental rights when the children were in a less restrictive placement of permanent custody with relatives.

Arkansas Code Annotated section 9-27-338(c) (Repl. 2008) gives preference, after the return of the children to their parents, to the termination of parental rights, unless the children are being cared for by a relative and the termination is not in the children's best interest. Although the children are being cared for by relatives, termination of Harrison's parental rights is in the best interests of the children because it allows the children to be adopted, which would help establish permanency and is in the children's best interests.

Harrison's second point is that there was insufficient evidence that termination of Harrison's parental rights was in the children's best interests. She contends that the court made no finding that the children were likely to be adopted. In assessing the best interests of the children, the circuit court must *consider* the likelihood that the children will be adopted. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) (Repl. 2008). However, the fact that the court must consider the likelihood of adoption does not mean that such likelihood must be proved by clear and convincing evidence. *See McFarland v. Arkansas Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). Moreover, there was testimony that the children were adoptable and that the foster parents or other family members were willing to adopt the children. This indicated that DHS had a proper placement plan for the children. *See M. T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997). Harrison also argues that DHS has specific regulations regarding prospective adoptive homes. The argument is being raised for the first time on appeal and will not be considered. *See Myers v. Arkansas Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005).

Harrison next asserts that there was insufficient proof that the children would be harmed if they were returned to her custody because they were originally removed from Ogden's care. However, when the children were removed from Ogden's care, they were necessarily removed from her care as well. Moreover, the court was also not required to find that actual harm would result or to affirmatively identify a potential harm. *See Carroll v. Arkansas Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). The supreme court has directed that the harm analysis be conducted in broad terms, including the harm the child suffers from the lack of stability in a permanent home. *See Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001). Finally, the court's potential-harm inquiry is but one of many factors that a circuit court must consider in a best-interest analysis. *Id.* Here, there was testimony that Harrison did not have stable housing. This is a factor that will support termination of parental rights. *Carroll, supra.* We cannot say that the circuit court was clearly erroneous in finding that termination of Harrison's parental rights was in the children's best interests.

Finally, Harrison argues that the circuit court erred in finding grounds for termination. She specifically challenges both grounds found by the circuit court. Only one ground is necessary. *Albright v. Arkansas Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). We affirm on the basis that the circuit court found that she had subjected the children to "aggravated circumstances," as alleged by the department. Arkansas Code Annotated section 9-27-303(6)(A) (Repl. 2008) provides that the phrase "aggravated circumstances" means, in part, that "a child has been abandoned, chronically abused, subjected to extreme

or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]”

As noted above, aggravated circumstances exist when, among other things, a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. *Trout v. Arkansas Dep’t of Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004). That finding was more than sufficiently supported by the evidence. Harrison argues that the fact that the court found that services would not result in a successful reunification cannot be used because it was only four months between the time the children were removed and the order relieving DHS from providing services. However, this overlooks the fact that DHS had been involved with this family for seven years and provided services and still Harrison was unable to properly parent these children. *See Lewis v. Arkansas Dep’t of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005).

Affirmed.

GLADWIN and BIRD, JJ., agree.