ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-868

	Opinion Delivered DECEMBER 31, 2008
ROSA MARIE GILBERT APPELLANT	APPEAL FROM THE MARION COUNTY CIRCUIT COURT, [NO. JV2006-55]
V.	HONORABLE GARY B. ISBELL, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Rosa Gilbert brings this appeal from the order of the Marion County Circuit Court terminating her parental rights to her son, S.E., born July 27, 1996. She argues that the circuit court erred in finding that there was sufficient evidence to support termination of her parental rights as being in S.E.'s best interest. We affirm.

S.E. came into the custody of the Department of Human Services (DHS) on December 16, 2006, after his release from a psychiatric behavioral hospital. According to the affidavit filed in support of DHS's petition for emergency custody, S.E., Gilbert, and Gilbert's husband had all presented at a hospital emergency room on December 7, 2006, verbally stating that they were suicidal. While at the hospital, Gilbert was alleged to have been seen instructing S.E. on the proper method to cut his wrists and to report that he was suicidal like Gilbert and her husband. S.E. was later transferred to the psychiatric hospital. He had been

hospitalized in February 2006 for a prior attempt to commit suicide. Gilbert was noted as having her own mental problems, including being diagnosed with bi-polar disorder, schizophrenia, depression, having seizures, and being hospitalized in March 2006 for four days. DHS first became involved with the family at the time of Gilbert's hospitalization. An emergency order granting DHS custody was entered on December 13, 2006. Probable cause for S.E.'s removal was later found.

An adjudication hearing was held in connection with the probable-cause hearing. The court found that S.E. was dependent-neglected. The court established a goal of reunification. Gilbert was ordered to cooperate with DHS and participate in the development of the case plan and to submit to a psychological evaluation to determine whether she presented a danger to herself because of her mental state.

A review hearing was held on May 9, 2007. The circuit court continued custody of S.E. with DHS. The court approved the case plan and found that the case was moving towards an appropriate permanency plan for S.E. Gilbert was allowed visitation at the discretion of S.E.'s therapist.

The goal of the case plan was changed to termination of parental rights at a February 15, 2008, fifteen-month permanency-planning hearing. Reunification was maintained as a concurrent goal. The court allowed visitation between S.E. and Gilbert, with the possibility that it would be expanded. Both Gilbert and S.E. were ordered to attend counseling and follow the recommendations. DHS was ordered to continue to provide reunification services.

On March 19, 2008, DHS filed a petition seeking to terminate Gilbert's parental rights, alleging three grounds for termination, including that S.E. had been adjudicated dependent-neglected and remained out of the home for twelve months without the conditions that caused removal being corrected. In response, Gilbert denied the material allegations of the petition. In a motion to dismiss the termination petition, she also raised the issue of whether DHS had made reasonable accommodations under the Americans with Disabilities Act (ADA) to assist her in reunification with her son.

The termination hearing was held on April 18, 2008. S.E. testified that he was no longer afraid of Chuck Gilbert, his step-father, choking him. He said that had occurred when everyone was talking about committing suicide. He wanted to go home to his parents.

Tammy Zulpo, S.E.'s special-education teacher, testified that S.E. was very anxious, especially about storms, when he was first enrolled but had improved. The improvements included S.E. going from a pre-primer reading level to first-grade level. Zulpo said that S.E. was almost at the second-grade reading level. She also said that S.E.'s anxiety increased on the days he visited with Gilbert and it affected his school work. She also said that S.E was no longer hearing voices.

Kerri Vollmer testified that she was a social worker providing mental-health services to S.E. She described S.E. as having made great progress on his anxiety and impulse control. His developmental levels, mental and physical, were more like a six-year-old's than an eleven-year-old's. She said that his depression was almost non-existent. According to Vollmer, Gilbert had made minimal progress in family therapy because they were always

covering the same topics. She predicted that it would be another year before S.E. would be discharged from her program. Vollmer's recommendation was that S.E. be provided with a stable home environment and she did not believe that Gilbert could provide such a home. She said that there were no barriers to S.E.'s being adopted. On cross-examination, she acknowledged that there had been no efforts to place S.E. in an adoptive foster home.

Dianne Martaus testified that she had been Gilbert's therapist since 2006. Her diagnosis of Gilbert was bi-polar disorder, post-traumatic stress disorder, and borderline personality disorder. She said that Gilbert had advanced in therapy and now realized that she needed to take her mental stability seriously because it was putting S.E. at risk. According to Martaus, Gilbert was minimally capable of complying with the case plan and that DHS did not set Gilbert up to fail. She said that Gilbert needed continued support and could make good judgments when mentally stable. She believed that Gilbert had moved in a positive direction even though it was not always consistent and not always in all areas at the same time. She believed that S.E. needed permanency. She also did not know if Gilbert and her husband could, together, provide for S.E. because of his needs and the stress that would put on Gilbert and her husband.

Heather Fendley, the DHS case worker, testified that the department's first contact with the family occurred in April 2006 when Gilbert asked that S.E. be placed in care so that she could work on her mental-health issues. S.E. was returned to Gilbert in June 2006, before reentering DHS's custody in December 2006. She said that safety issues were addressed with the help of Gilbert's counselor and that knives were removed from the home.

However, she also said that Gilbert did not realize that it was just knives that were dangerous to S.E. She also pointed out that S.E. did not react well when around his family. Fendley said that there were problems with environmental and personal-hygiene issues that Gilbert and her husband needed to address.

Fendley said that Gilbert had not demonstrated that she understands S.E.'s needs. She said it was as if Gilbert would parrot whatever she (Fendley) was focusing on at the time without any independent thoughts of her own. Neither Gilbert nor her husband were motivated to take care of their own needs. She said that, after "an incredible amount of progress," Gilbert had regressed after the case goal was changed. Fendley's recommendation was that Gilbert's parental rights be terminated. She also believed that S.E. could be adopted and that there were no barriers for adoption.

Rosa Gilbert testified that she and her husband had lived in their home for six years and that it was "child-proofed" so that S.E. could not harm himself. She said that she receives SSI benefits because she is bi-polar and suffers from post-traumatic stress syndrome. She believed that she had done all that DHS had required of her in the case plan. She said she has good skills to cope with stress, anxiety, and depression. She also reported having a support system. She understood that S.E. would require constant supervision. The only thing she could think of to ask of DHS was for more time to reunify with S.E. She said that she and her husband had both learned to control their anger.

The court ruled from the bench and terminated Gilbert's parental rights. The court found one ground for termination– that S.E. had been adjudicated dependent-neglected,

remained out of the home for more than twelve months and that the conditions leading to removal had not been corrected. The court also found that there was no evidence that Gilbert qualified under the ADA. The court also found that DHS made reasonable accommodations. The court's written order was entered on May 14, 2008. This appeal followed.

We review 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).

Gilbert argues one point on appeal: that the circuit court erred in finding sufficient evidence to support termination of her parental rights as being in her son's best interest. She divides the argument into two parts, addressing whether there was sufficient proof of the likelihood of S.E.'s being adopted, as well as whether there was potential harm to S.E.

Her first argument is that there was insufficient proof of the likelihood that S.E. would be adopted because there was no evidence that DHS was actively seeking an adoption

placement for him or that adoptive families had been identified. She contends that the testimony on this point was "speculative." Arkansas Code Annotated section 9-27-341(b)(3)(A)(i) (Repl. 2008) requires consideration of the "*likelihood* that the juvenile will be adopted if the termination petition is granted." (Emphasis supplied.) There is no requirement that every factor considered be established by clear and convincing evidence; rather, after consideration of all factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *McFarland v. Arkansas Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005).

The statute requires an assessment of the probability that potential adoptive parents will select this particular child. Satisfying this statutory element necessarily requires a consideration of a variety of factors that will pertain to the particular child. It also requires of the circuit court a judgment of where the juvenile falls on the spectrum of likelihood of adoption. Obviously, an older child like S.E. with more challenging characteristics such as mental health and emotional problems would be less likely to be adopted. However, the professionals working with S.E. and his family testified that they believed it would not be hard for S.E. to be adopted. Kerri Vollmer noted that S.E. would need to continue therapy and that potential adoptive parents would have to be aware of this. The fact that DHS had not yet placed S.E. in an adoptive foster home did not lessen the likelihood that he would eventually be adopted. The circuit court found this evidence to be sufficient to establish that there was a likelihood that S.E. would be adopted, and we cannot say that this finding is clearly erroneous.

Gilbert next argues that the court erred in finding that S.E. would be at risk of potential harm if he were returned to her custody. The plain language of section 9-27-341 provides that the court must find by clear and convincing evidence that termination is in the children's best interests, giving *consideration* to the risk of potential harm. *Carroll v. Arkansas Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). The risk of potential harm is but one factor for the court to consider in its analysis. *Id.* As noted above, there is no requirement that every factor considered be established by clear and convincing evidence. *McFarland*, *supra*. Furthermore, 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). Here, there is no estimate as to when Gilbert could be stable enough to care for S.E. Kerri Vollmer testified that S.E. needed permanency that Gilbert could not provide. Dianne Martaus, the licensed clinical social worker of Gilbert, also testified that S.E. needed permanency. There was also testimony that, although Gilbert had removed all knives from the home, she still left other sharp instruments such as scissors in the open without thinking that they could be as harmful as a knife. Therefore, the finding of potential harm to S.E. was not clearly erroneous.

Although at the conclusion of the termination hearing the circuit court stated that Gilbert had not provided any psychiatric or other medical evidence that would identify her as being qualified for accommodations under the ADA, we note that the record before us included an extensive psychological evaluation that concluded with the summary that Gilbert

was in the mildly retarded to borderline range of intelligence, that she had episodes of significant depression, and that she had been diagnosed with both bipolar disorder and schizophrenia. Moreover, Gilbert was receiving SSI benefits which are based her being disabled. Therefore, the circuit court was in error about there being no evidence that Gilbert was qualified under the ADA.

However, that does not end the inquiry. Gilbert's reliance on Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(b) for her argument that DHS was required to give her more time to correct the conditions that led to S.E.'s removal is misplaced. The circuit court made an alternative finding that, even if Gilbert were qualified under the ADA, DHS still provided her with reasonable accommodations in the form of various services such as a mental evaluation, therapists, and prescribed medication for her mental illness, as well as access to family therapy, parenting classes, and various other casework services. These services were held to be reasonable accommodations within the meaning of the ADA. *See J.T.*, *supra*. Moreover, the court in *J.T.* held that a parent's rights under the ADA must be subordinated to the protected rights of the child because of the statutory mandate that all juvenile proceedings be viewed in terms of what is in the child's best interest.

As for her plea for more time, Gilbert has had two years from the time DHS first became involved with the family because she could not care for S.E. due to her mental stability. She has made some progress; however, she is still not in a position to care for S.E. There was also testimony that, when Gilbert was given an opportunity to show that she could parent S.E., he reacted very negatively. The goal of the case plan was for Gilbert to be

able to care for S.E., and a parent's rights may be terminated regardless of their compliance (or lack thereof) with a case plan. *Wright v. Arkansas Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003).

Affirmed.

HART and BAKER, JJ., agree.