

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA 11-656

AMANDA FAAS

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered November 2, 2011

APPEAL FROM THE CLARK
COUNTY CIRCUIT COURT
[NO. JV-09-124]HONORABLE ROBERT
MCCALLUM, JUDGE

APPEAL DISMISSED

DOUG MARTIN, Judge

The Clark County Circuit Court terminated appellant Amanda Faas's parental rights to her daughter A.F., born December 22, 2008. Faas appeals from the trial court's order entered on April 1, 2011. We dismiss the appeal because Faas failed to appeal from an earlier order terminating her parental rights based on her consent, and the trial court's attempt to set aside the order six months later was invalid, as the trial court lacked jurisdiction.

On June 1, 2009, the Arkansas Department of Human Services (DHS) filed a petition for emergency custody, alleging that A.F. was dependent-neglected. The petition was supported by the affidavit of DHS family-service worker, Kristi Robinson. On May 30, 2009, Faas left A.F., at that time only five months old, and Faas's boyfriend's three-year-old daughter, A.W., unattended in a vehicle with its engine running, while Faas went into a retail store. It was unknown how long the children were left unattended. A.W.'s biological mother saw her unattended child in Faas's vehicle, removed her child from Faas's vehicle, and left

with her child without confronting or otherwise notifying Faas that she was taking A.W. When Faas returned to her vehicle, she saw that A.W. was missing and began searching for the child. Faas and several of her friends searched for A.W. for two hours before the child was reported missing to the police. Faas was charged with two counts of child endangerment.

On July 22, 2009, the trial court adjudicated A.F. dependent-neglected and noted that the goal of the case was reunification. Faas was ordered to complete parenting classes, receive counseling, submit to random drug screens, complete a drug-and-alcohol assessment, and submit to a psychological evaluation. Faas was further ordered to follow the recommendations of her counselors. Other services were subsequently provided to Faas, including both inpatient and outpatient drug treatment. The stated goal of the case continued to be reunification until May 25, 2010. In a permanency-planning order, the trial court determined that it was in A.F.'s best interest that Faas's parental rights be terminated, and the goal of the case was changed to adoption. DHS filed a petition for termination of Faas's parental rights on June 16, 2010.

Following a hearing on July 12, 2010,¹ the trial court entered an order on July 20, 2010, indicating that Faas "consented to termination of her parental rights, on the record, before the Court, which the Court approved."² Faas, who was represented by counsel since the outset of this case, did not appeal from the trial court's termination order.

¹No transcript of the hearing appears in the record on appeal.

²The trial court also terminated the parental rights of A.F.'s father, Brett Burkes; however, Burkes is not a party to this appeal.

On September 29, 2010, DHS moved to set aside the termination order entered July 20, 2010, on the basis that DHS had erred in gaining Faas's "consent to waiving her parental rights or consenting to her child being adopted." Citing Arkansas Code Annotated sections 9-9-208 and 9-9-209, DHS alleged that Faas failed to execute a written consent and Faas was not told she had the right to withdraw her consent within ten days. Relying on Arkansas Rule of Civil Procedure 60(a), DHS requested that a hearing be held prior to the expiration of ninety days; that Faas's oral waiver of parental rights be set aside; and that she execute another waiver in writing in compliance with the statutory requirements. Alternatively, DHS requested that a hearing be held to determine whether Faas's parental rights should be involuntarily terminated.

Faas did not respond to DHS's motion to set aside until December 16, 2010. In her answer, Faas admitted the allegation in paragraph 3 of DHS's motion, which provides, "Amanda Faas waived her parental rights on the record, which the Court accepted, and made the goal adoption." Faas's answer also contains her request that DHS be ordered to continue to provide services to her in an effort to reunify her with A.F.

A hearing was held on DHS's motion on January 10, 2011, and the trial judge subsequently signed an "Agreed Order to Set Aside Termination of Parental Rights Order As To The Mother Filed on July 20, 2010."³ The trial court indicated in its order that it was

³The order erroneously refers to a "Motion to Dismiss For Failure to Obtain Service," but that particular motion was filed by DHS on October 27, 2010, with respect to A.F.'s foster parents and was granted on November 1, 2010. Regardless of this error, it is clear that the trial court's January 20, 2011 order pertained to DHS's "Motion to Set Aside Order" filed on September 29, 2010.

granting DHS's motion "by agreement of the parties and in the interest of fundamental fairness."

On January 19, 2011, DHS filed a second petition for termination of Faas's parental rights. Also, on this date, the trial court entered a permanency-planning order, noting that it had set aside the previous termination-of-parental-rights order as to Faas. The trial court found that it was contrary to A.F.'s welfare to return to the custody of her mother and that it was in A.F.'s best interest for the goal of the case to be adoption. A termination hearing was scheduled for March 14, 2011. No further services were provided to Faas by DHS.

The trial court granted DHS's second petition for termination of Faas's parental rights to A.F. on April 1, 2011, finding by clear and convincing evidence that termination of Faas's parental rights was in the best interest of A.F.; that there was "a very good likelihood" that A.F. would be adopted; and that return of A.F. to Faas could be harmful to A.F.'s health and safety. The trial court also based its decision on three statutory grounds, including (1) that A.F. was adjudicated dependent-neglected and continued out of Faas's custody for twelve months and that, despite a meaningful effort by DHS to rehabilitate Faas and correct the conditions that caused removal, those conditions had not been remedied; (2) that other factors arose since the adjudication that demonstrated that the return of A.F. to Faas is contrary to the child's health, safety, or welfare and that, despite the offer of appropriate family services, Faas had manifested the incapacity or indifference to remedy the factors; and (3) that Faas had subjected A.F. to aggravated circumstances, meaning that there is little likelihood that services to the family would result in successful reunification. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a),

(vii)(a), and (ix)(a)(3) (Supp. 2011). On April 20, 2011, Faas filed a notice of appeal with respect to the April 1, 2011 order.

Arkansas Supreme Court Rule 6-9(a)(1)(C) (2011) provides that termination of parental rights may be appealed from dependency-neglect proceedings, and subpart (b)(1) states that the notice of appeal shall be filed within twenty-one days following entry of the circuit court's order. Faas did not appeal from the termination order entered on July 20, 2010. Obviously, Faas failed to appeal within twenty-one days of its entry. Thus, Faas's current appeal must be dismissed.

Further, we note that, in moving to set aside the July 20, 2010 order, DHS cited specific statutes governing consent to adoption; however, Arkansas Code Annotated section 9-9-207 provides circumstances under which consent to adoption is not required. Pursuant to Ark. Code Ann. § 9-9-207(a)(5) (Repl. 2009), consent to adoption is not required of a parent whose parental rights have been terminated by order of court under section 9-9-220 or section 9-27-341. With respect to the July 20, 2010 order, Faas's parental rights were implicitly terminated in connection with Arkansas Code Annotated section 9-27-341(b)(3)(B)(v)(a) (Repl. 2009), which provides, as a possible ground for termination, "a parent has executed consent to termination of parental rights or adoption of the juvenile, subject to the court's approval." The statute further provides that, if the consent is executed under oath by a person authorized to administer the oath, the parent is not required to execute the consent in the presence of the court unless required by federal law or regulations. Ark. Code Ann. § 9-27-341(b)(3)(B)(v)(b) (Repl. 2009). There is no dispute, given Faas's

admission in her answer to DHS's motion to set aside, that Faas in fact consented to termination of her parental rights in open court and that her consent was approved by the court. The original termination was effective in that Faas complied with the statutory requirements for consent to termination of her parental rights. The statutory requirements for consent under the Juvenile Code are separate and distinct from consent under the Adoption Code. In *Childress v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 322, 307 S.W.3d 50, this court held that Ark. Code Ann. § 9-9-206(a)(5), which requires a minor of a certain age to consent to a "particular adoption," does not apply to termination proceedings in dependency-neglect cases. This court reasoned in *Childress* that section 9-9-206(a)(5) is utilized only where the circuit court is considering a specific petition for the adoption of a child. "Thus, a consent to adoption is not a necessary element of proof when a court is considering the termination of parental rights." *Childress*, 2009 Ark. App. at 6, 307 S.W.3d at 54. The same rationale applies here; therefore, there was no need for DHS to seek to set aside the July 20, 2010 termination order based on perceived deficiencies.

Nevertheless, the trial court attempted to set aside its termination order six months after it was entered. Arkansas Rule of Civil Procedure 60(a) (2011) provides that, to correct errors or mistakes or to prevent a miscarriage of justice, the court may modify or vacate an order within ninety days of its having been filed with the clerk. The trial court, however, did not act on DHS's petition to set aside the July 20, 2010 termination order until well beyond the ninety-day period. Although the trial court purported to set aside the July 20, 2010 termination order on January 19, 2011, the court was without jurisdiction to do so. Our

supreme court has repeatedly held that a trial court loses jurisdiction to set aside an order pursuant to Rule 60(a) if it does not do so within ninety days of the original order. *Jordan v. Circuit Court of Lee County*, 366 Ark. 326, 235 S.W.3d 487 (2006).

There is an exception to Ark. R. Civ. P. 60(a) for correction of clerical mistakes, which may be made at any time pursuant to Rule 60(b); however, the trial court did not seek to set aside its termination order to correct a clerical mistake. Also, Rule 60(c) lists grounds for setting aside a judgment after ninety days, none of which apply here. *See Jordan, supra* (if none of the exceptions apply, the court cannot act outside the ninety-day period and any attempt to do so is invalid). We hold that the trial court had no jurisdiction to set aside the termination order entered on July 20, 2010, “by agreement of the parties and in the interest of fundamental fairness.” The trial court’s attempt to set aside its original termination order and the actions taken thereafter, up to and including the second termination of Faas’s parental rights, were invalid.

Accordingly, Faas’s appeal is dismissed because Faas failed to appeal from the termination of her parental rights by consent in the order dated July 20, 2010, and the trial court’s attempt to set aside its order was invalid because the court lacked jurisdiction to do so.

Appeal dismissed.

VAUGHT, C.J., and GLADWIN, J., agree.