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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-388

B.H.1, A MINOR APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND B.H.2, A MINOR APPELLEES	**Opinion Delivered** September 26, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. JV-09-501] HONORABLE MARK HEWETT, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

The circuit court terminated B.H.1's (appellant) parental rights to her minor child, B.H.2 (daughter). On appeal, appellant argues that (1) the trial court erred by not appointing her an attorney ad litem and (2) termination was not proved to be in the daughter's best interest. We affirm the circuit court.

This case first arose on July 6, 2009, when the Department of Human Services (DHS) removed both appellant and her daughter from Trey Hodges's home due to medical neglect, failure to protect, and inadequate housing. Hodges is appellant's father. At the time of removal, appellant was thirteen years old and her daughter was less than one month old. The circuit court signed the emergency order that same day and entered a probable cause order on July 9, 2009. In its adjudication order, the circuit court found the daughter dependent because her mother, the appellant, was a minor and in foster care. The court ordered a case

plan goal of reunification and ordered appellant to provide the login names and passwords to her social networking sites. She was also ordered to purge all information from those sites and to cease posting on them. In a July 13, 2010 permanency planning order, the circuit court ruled that the case plan goal continued to be reunification. The court also ordered appellant and her daughter to meet with an independent therapist, who could observe them interacting together. A second permanency planning order continued the case plan of reunification. However, on October 10, 2011, DHS filed a petition to terminate appellant's parental rights, alleging the following ground:

> That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

Ark. Code Ann. § 9-27-341(b)(3)(B)(vii) (Supp. 2011).

At the termination hearing on February 3, 2012, the circuit court terminated appellant's parental rights. Appellant testified at the termination hearing that she had recently been staying overnight with an older male friend of her father's. According to appellant, the two were just friends. She did confirm, however, that she posted a picture of the two of them on Facebook. Appellant also testified that she was working at Taco Bell but not attending school. Appellant also described her temporary foster placement with Maura Frasier. At Frasier's, appellant was placed with her daughter. According to appellant, Frasier made her attend school and follow the house rules. Yet, appellant still made poor grades in school and

"refused to cooperate and . . . was easily offended by [Frasier] asking me to do simple tasks around the house." Finally, after an incident with Frasier that necessitated a call to the police, appellant testified that she was admitted to Vista Health Services, a residential treatment facility, for psychiatric treatment. Appellant confirmed that she got into an altercation and choked another juvenile during her stay at Vista.

Laura Case, the DHS case worker assigned to the daughter, also testified that appellant was defiant and aggressive toward her peers and foster mother. According to Case, appellant's behavior presented a risk of harm to the daughter because of her inability to obey rules. Maura Frasier also testified. She stated that, during appellant's temporary placement at her home, appellant was verbally aggressive and, when appellant became angry, she would "pick up [the daughter] or go and get her from where she was and hold her while she yelled at me, and I felt that was a dangerous situation for [the daughter] to be in."

At the conclusion of the testimony, the trial court terminated appellant's parental rights, finding as grounds both aggravating circumstances[1] and "other factors" as alleged in the petition to terminate. The court also found that it was in the daughter's best interest to terminate appellant's parental rights. This appeal follows.

Appellant's first argument that she was not appointed an attorney ad litem is not preserved for review because it was not raised below, a fact appellant admits. However,

[1]Under the Juvenile Code, aggravating circumstances includes the following: "A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, 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." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix) (Supp. 2011).

appellant argues that the failure of the circuit court to appoint an ad litem is an exception to the contemporaneous-objection rule. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In *Wicks*, our supreme court noted a number of exceptions to the contemporaneous-objection rule, including the one appellant references, which states no objection is required to preserve an issue for appeal where the error is so flagrant and egregious that the trial court should, on its own motion, have taken steps to remedy it. *Id.*; *see also Baker v. Arkansas Dep't of Human Servs.*, 2011 Ark. App. 400.

We note that a statutory right to an attorney ad litem exists: "The court shall appoint an attorney ad litem . . . when a dependency-neglect petition is filed or when an emergency ex parte order is entered in a dependency-neglect case, whichever occurs earlier." Ark. Code Ann. § 9-27-316(f)(1) (Supp. 2011). However, even if we were to find that a *Wicks* exception applies, there is nothing in the record to suggest that appellant was not appointed an attorney ad litem. Clearly, appellant was placed both in foster care and a treatment facility; apparently those placements occurred in a dependency-neglect case. Yet the dependency-neglect case before us concerns the daughter, not the appellant. So it is the daughter, rather than appellant, who is entitled to an ad litem. Whether appellant was provided an attorney ad litem in her separate dependency-neglect case is not part of the record and is not an issue that is properly before this court. As such, it cannot form the basis of a *Wicks* exception. Therefore, we find that counsel's failure to preserve the argument below is not overcome by a *Wicks* exception to the contemporaneous-objection rule.

Next, appellant argues that the circuit court erred in finding that it was in the daughter's best interest for her mother's parental rights to be terminated. This court reviews termination of parental rights cases de novo. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Grounds for termination of parental rights must be proved by clear and convincing evidence. *M.T. v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 302, 952 S.W.2d 177 (1997). When the burden of proving a disputed fact is by "clear and convincing evidence," the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial 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. *Dinkins*, *supra*. Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *M.T.*, *supra*.

The termination of parental rights is a two-step process that requires the circuit court to find that the parent is unfit and that termination is in the best interest of the child. *L.W. v. Arkansas Dep't of Human Servs.*, 2011 Ark. App. 44, ___ S.W.3d ___. The first step requires proof of one or more of the statutory grounds for termination. Ark. Code. Ann. § 9-27-341(b)(3)(B) (Supp. 2011). The second step requires consideration of whether the termination of parental rights is in the juvenile's best interest. Ark. Code Ann. § 9-27-

341(b)(3)(A) (Supp. 2011). Whether termination is in the juvenile's best interest includes the following:

> (i) the likelihood that the juvenile will be adopted if the termination petition is granted; and
> (ii) the potential harm, specifically addressing the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents.

Ark. Code Ann. § 9-27-341(b)(3)(A)(i)–(ii) (Supp. 2011). The court, however, does not have to determine that every factor considered be established by clear and convincing evidence; instead, after considering all of the factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *L.W.*, *supra*.

Here, the circuit court found two grounds for termination: (1) that the mother has subjected the juvenile to aggravating circumstances and (2) "other factors." *See* Ark. Code Ann § 9-27-341(3)(B)(vii), (ix). Appellant does not challenge grounds for termination, and we therefore do not address whether those findings were clearly erroneous. Instead, appellant argues that termination was not proved to be in the best interest of the daughter due to insufficient evidence. The circuit court found that the daughter was readily adoptable, and the appellant does not challenge this finding. Our review, therefore, is limited to the potential harm. The harm referred to in the termination statute is "potential" harm; the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. *L.W.*, *supra*. The potential-harm evidence, moreover, must be viewed in a forward-looking manner and considered in broad terms. *Id*.

In this case the circuit court considered the testimony from Maura Frasier who testified that the appellant was verbally aggressive, refused to comply with the house rules, and became so unruly that the Frasier had to call the police. Frasier also testified that the appellant refused to complete her school work. Further, according to Frasier, when appellant was upset she would grab her daughter and begin screaming. Appellant also failed to complete her trial placement with her daughter because she would not cooperate with DHS. After appellant was removed from Fraiser's home and sent to a residential treatment center, she admitted to fighting another juvenile who, appellant said, "ending up making me so mad so I choked him [sic]." The circuit court also specifically found that appellant failed to comply with the court's orders to attend school and eliminate any social networking profiles. A failure to comply with court orders can indicate potential harm. *L.W.*, *supra*. It is clear that appellant's aggressive and oppositional behavior could potentially harm the health and safety of the daughter if the daughter were ever returned to appellant. In considering all these facts, the trial court did not clearly err in finding by clear and convincing evidence that it was in the daughter's best interest to terminate the appellant's parental rights.

Affirmed.

HOOFMAN and BROWN, JJ., agree.

Janet Lawrence, for appellant.

Tabitha B. McNulty, Office of Chief Counsel, for appellee.

Jo Ellen Carson, attorney ad litem for minor child B.H.2.