

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-774

JOHN HAYNES

APPELLANT

v.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered January 13, 2010

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT,
[NO. JV-2008-12-3]

HONORABLE KIRK JOHNSON,
JUDGE

REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

John Haynes appeals from an order of the Miller County Circuit Court terminating his parental rights to his two sons, A.H. and L.H. He raises two points: (1) the complete lack of evidence regarding the adoptability of his two sons fatally undermines the trial court's "best interest" analysis, and (2) the trial court erred in terminating his parental rights where he had made significant and measurable progress for four months preceding the termination hearing. We find merit in his first point and reverse and remand.

In reviewing the trial court's evaluation of the evidence in termination-of-parental-rights proceedings, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Ark. Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction regarding the allegation sought to be established. *Id.* In resolving the



Cite as 2010 Ark. App. 28

clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Beeson v. Ark. Dep't of Human Servs.*, 37 Ark. App. 12, 823 S.W.2d 912 (1992).

Citing *Conn v. Arkansas Department of Human Services*, 79 Ark. App. 195, 85 S.W.3d 558 (2002), Haynes asserts that the trial court's best-interest analysis was clearly erroneous because the trial court heard "absolutely no evidence at all regarding the likelihood of the children's adoptability," which is a statutory factor that the trial court was required to consider. We agree.

The plain wording of Arkansas Code Annotated section 9-27-341 (Repl. 2008), makes consideration of the likelihood that the child will be adopted mandatory. It states in pertinent part:

(b)(3)An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued to be out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

....

(ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in



accordance with the parent's means or to maintain meaningful contact with the juvenile.

....

(iii) The presumptive legal father is not the biological father of the juvenile and the welfare of the juvenile can best be served by terminating the parental rights of the presumptive legal father;

(iv) A parent has abandoned the juvenile;

(v)(a) A parent has executed consent to termination of parental rights or adoption of the juvenile, subject to the court's approval.

....

(vi)(a) The court has found the juvenile or a sibling dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, any of which was perpetrated by the juvenile's parent or parents or step-parent or step-parents.

(vii)(a) 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.

....

(viii) The parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life; or

(ix)(a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

(1) Have committed murder or manslaughter of any juvenile or to have aided or abetted, attempted, conspired, or solicited to commit the murder or manslaughter;

(2) Have committed a felony battery that results in serious bodily injury to any juvenile or to have aided or abetted, attempted, conspired, or solicited to commit felony battery that results in serious bodily injury to any juvenile;

(3)(A) Have subjected any juvenile to aggravated circumstances.

....

(4) Have had his or her parental rights involuntarily terminated as to a sibling of the child; or

(5) Have abandoned an infant, as defined at § 9-27-303(2).

In its termination order, while the trial court made findings concerning the "other grounds" listed in section 9-27-341(b)(3)(B), it merely stated that it was "contrary to the



Cite as 2010 Ark. App. 28

children's best interests . . . to return them to the custody of [Haynes]" and then directed ADHS to "develop a case plan with the goal of adoption." The record shows no consideration by the circuit court of adoptability as part of its best-interest analysis. Indeed, no evidence of adoptability of the children was introduced at the hearing. We reject ADHS's argument that we find sufficient evidence of adoptability in testimony suggesting that the minor children were persevering in their foster home, which ADHS contends shows "the juveniles could integrate into another home and become part of a different family."

The governing statute requires consideration of adoptability as part of the best-interest analysis. Consideration requires evidence, *Conn*, or at least some finding by the trial court that other aspects of the best-interest analysis so favor termination that the absence of proof on adoptability makes no legal difference. We therefore reverse and remand.

Reversed and remanded.

VAUGHT, C.J., and ROBBINS, J., agree.