ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-974

	Opinion Delivered JANUARY 28, 2009
HOLLY GOFORTH APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, EIGHTH DIVISION, [JJN2007-264]
V.	HONORABLE WILEY A. BRANTON, JR., JUDGE
ARKANSAS DEPARTMENT OF HEALTH and HUMAN SERVICES APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Holly Goforth appeals from an order entered June 4, 2008, which terminated her parental rights to C.T. (d/o/b 11/23/96), Ty.G. (d/o/b 7/11/00), and Tj.G. (d/o/b 1/13/03). For reversal, she argues that the trial court erred in failing to consider whether the oldest child would consent to being adopted, which she claims was required before finding that termination was in his best interest. Ms. Goforth also argues that the trial court erred in dismissing evidence of her progress and efforts to comply with the case plan while she was in prison. We find no error and affirm.

This case was opened in February 2007, when appellee ADHHS took emergency custody of the children due to excessive school absences of the two older children and the criminal history of Ms. Goforth. Ms. Goforth was given a drug screen on February 14, 2007, and tested positive for THC and cocaine. The trial court's order for emergency custody was

entered on February 15, 2007, and based on a stipulation by the parties, appellant's children were adjudicated dependent/neglected on April 18, 2008. Ms. Goforth tested positive for THC and methamphetamine at the adjudication hearing. The initial case goal was reunification, and the adjudication order required Ms. Goforth to submit to a psychological evaluation, submit to a drug and alcohol assessment, attend parenting classes, obtain stable housing and employment, submit to random drug screens, and undergo drug treatment.

The trial court entered a review order on September 6, 2007. In that order, the trial court found that Ms. Goforth was in substantial noncompliance with the court's previous orders. In particular, Ms. Goforth had failed to obtain a psychological evaluation, failed to attend parenting classes, and refused drug screens. Although the trial court found that Ms. Goforth had done nothing significant to improve the prospects of reunification, at that time reunification remained the case goal.

A permanency planning order was entered on January 8, 2008, wherein the trial court found that Ms. Goforth was currently incarcerated, was noncompliant with the court's orders, and remained unfit to be a parent. At that time, the case goal was changed from reunification to termination. The petition to terminate appellant's parental rights was filed on April 3, 2008, wherein ADHHS alleged that termination was in the best interest of the children, that the juveniles had been adjudicated dependent/neglected and had continued out of parental custody for twelve months, and that despite a meaningful effort by ADHHS, Ms. Goforth had not remedied the conditions that caused removal. The termination hearing was held on May 6, 2008.

Tammy Blount, a caseworker on this case since March 2007, testified at the termination hearing and recommended termination of appellant's parental rights. Ms. Blount testified that Ms. Goforth had missed her psychological evaluation as well as parenting classes. She further stated that Ms. Goforth had refused some of her drug screens and had been in and out of jail. Ms. Blount indicated that Ms. Goforth failed to comply with the provisions of the case plan during the periods when she was not incarcerated.

Ms. Blount testified that the children are adoptable. She indicated that when Ms. Goforth was out of jail, she did not maintain stable housing and lived on and off with her mother. Ms. Blount gave the opinion that the children need stability in their lives, and that it is in their best interest for parental rights to be terminated. Ms. Blount testified that she had not discussed termination of parental rights with the two younger children, but that she discussed it with eleven-year-old C.T. on the day before the termination hearing. During that conversation, C.T. became teary-eyed but did not say whether or not he wanted his mother's parental rights terminated.

Kasheena Walls, an adoption specialist assigned to the case, also testified. Ms. Walls stated that the children are adoptable, and that she ran a data-matching list for all three children and found eleven prospective families. Ms. Walls acknowledged that she had not talked with C.T. about consenting to being adopted.

Ms. Goforth testified on her own behalf. She stated that she was currently confined in the Arkansas Department of Correction, but that she was due to be released on May 29, 2008. Ms. Goforth admitted prior drug problems, which resulted in convictions and periods

of incarceration. She stated that she was convicted of maintaining a drug premises, drug possession, and intent to deliver. Due to her convictions and subsequent probation revocation, she was incarcerated from June 2007 through August 2007, and then from October 2007 through the date of the termination hearing.

Ms. Goforth testified that while in prison she attended drug treatment classes and signed up for parenting classes but was on a waiting list. Ms. Goforth maintained that during her incarceration, she has been rehabilitated through drug classes, spiritual growth, and self-determination. She stated that she is willing to comply with the trial court's orders upon her release, and asked for another chance to work toward reunification with her children.

In the order terminating appellant's parental rights, the trial court found that Ms. Goforth had done nothing of substance to remediate the conditions that caused removal. The trial court further found that the children are adoptable and deserve permanency, and that it is in their best interest to terminate parental rights. Ms. Goforth now appeals from that order.

Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2008) provides in relevant part:

> 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:
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> (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 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.

It is well settled that when the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Jones v. Arkansas Dep't of Human Servs.*, 361 Ark. 164, 205 S.W.3d 778 (2005). 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.* In matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000). While termination of parental rights is an extreme remedy in derogation of the natural rights of the parent, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999).

Ms. Goforth's first point on appeal is that the trial court erred in failing to consider whether the oldest child, eleven-year-old C.T., would consent to adoption. She cites Ark. Code Ann. § 9-9-206(a)(5) (Repl. 2008), which provides that a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by the minor, if more than ten years of age, unless the court in the best interest of the minor dispenses with the minor's consent. In the present case, Ms. Goforth notes that neither the

caseworker nor the adoption specialist knew whether C.T. would consent to an adoption. Ms. Goforth asserts that the trial court wholly ignored C.T.'s desires regarding adoption, and that its failure to consider this issue was clear error because such a finding was required in determining whether termination was in C.T.'s best interest. She cites *Swaffer v. Swaffer*, 309 Ark. 73, 827 S.W.2d 140 (1992), for the proposition that a court cannot automatically presume that adoption of an older child is always in that child's best interest, or that the child will consent.

Ms. Goforth failed to preserve her first argument raised in this appeal. This is because she failed to argue it to the trial court, either during the termination hearing or in a post-trial motion. We have long held that we will not consider arguments raised for the first time on appeal. *Arkansas Dep't of Health & Human Servs. v. Jones*, 97 Ark. App. 267, 248 S.W.3d 507 (2007).

Furthermore, even had the argument been properly raised, it lacks merit. Arkansas Code Annotated § 9-9-206(a)(5) only applies when a court is actually considering a specific petition to adopt a child, and thus it could not be known at the termination hearing whether or not C.T. would consent to such future adoptive placement. Moreover, the statute provides that even if the child does not consent, the trial court may nonetheless grant an adoption petition if it is in the best interest of the minor. In the present case there was ample evidence that C.T. and the two other children were adoptable. Moreover, 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

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). Given appellant's significant deficiencies in complying with the case plan, her history of drug abuse, and inability to provide a stable and suitable home, there was an abundance of evidence in addition to the adoptability of the children that demonstrated that termination was in their best interest. The trial court did not clearly err in so finding.

Ms. Goforth's remaining argument is that the trial court erred in failing to recognize the progress she made while in prison. Ms. Goforth asserts that she attended substance abuse education classes while in prison, and attempted to use every resource at her disposal to meet the requirements of the trial court. Ms. Goforth correctly asserts that in *Crawford v. Arkansas Department of Human Services.*, 330 Ark. 152, 951 S.W.2d 310 (1997), our supreme court held that although imprisonment imposes an unusual impediment to a normal parental relationship, it is not conclusive on the termination issue. Ms. Goforth contends that the trial court blatantly dismissed her efforts to comply simply because her progress was made in a prison setting, and that for this reason the order of termination should be reversed.

The record does not demonstrate that the trial court failed to consider this evidence as suggested by Ms. Goforth in her brief. The trial court's termination order recites:

> Ms. Goforth claims she has attended drug rehabilitation while in prison. The Court is not impressed with Ms. Goforth's receipt of prison services. Ms. Goforth, or any other inmate for that matter, is a captive audience who is likely compelled to attend these services to break the monotony of her incarceration. The more pertinent question inquiry is what happens upon release, when Ms. Goforth is out on the streets, what will she do then? The Court would be able to put more stock in Ms. Goforth's receipt of prison services if she would have availed herself of the opportunity to work with the Court when she was out of prison during the pendency

> of this case. There was a period between February 2007 and June 2007 when the mother could have participated in reunification services, but she failed to do so.

At the conclusion of the termination hearing, the trial court made similar statements concerning the prison services and also said, "I just can't put too much reliance on it. I would have put more stock in it if she had immediately and diligently tried to cooperate with the court orders." It is clear from the trial court's statements that it did not dismiss Ms. Goforth's testimony about prison services; rather, it gave her efforts while in prison little weight because during her periods of freedom she chose not to avail herself of services or cooperate with the court's orders. The weighing of such evidence was the duty of the trial court.

While appellant contends that termination of her parental rights was clearly erroneous under the circumstances of this case, we do not agree. As previously indicated, the decision that termination was in the best interest of the children was not clearly erroneous. Nor was there clear error in the trial court's determination that after more than one year had passed Ms. Goforth failed to remedy the conditions causing removal of the children, despite a meaningful effort by ADHHS. This conclusion was supported by appellant's multiple deficiencies in complying with the trial court's orders, including her inability to provide a stable and suitable home for the children, despite being afforded fifteen months to progress toward that goal.

Affirmed.

VAUGHT, C.J., and MARSHALL, J., agree.