NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-933

MICHAEL HODGES &
SHERRI HODGES (DECEASED)
APPELLANTS

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES
APPELLEES

Opinion Delivered February 4, 2009

APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, [NO. JV2008-0045]

HONORABLE CINDY THYER, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Michael Hodges and Sherri Hodges (deceased) appeal the May 30, 2008 order of the Craighead County Circuit Court terminating their parental rights in their daughter T.H., who was born on January 14, 2008.[1] Their sole point on appeal is that the evidence was insufficient to support the termination. The Hodgeses present two arguments in support of this point: that the complete lack of evidence supporting the likelihood of adoptability undermines the circuit court's best-interest analysis; and that, because no services were provided, the court erred in finding that the Arkansas Department of Human Services (DHS) made reasonable efforts to reunite the family.

On February 7, 2008, DHS received information from Jonesboro police that Mrs.

[1]The notice of appeal was filed in the names of both Michael and Sherri Hodges before her death: therefore, we hereinafter refer to "appellants" in the plural form.

Hodges was missing from the family home and that Mr. Hodges was worried because she had mental problems and was not on her medication. The police report stated that Mr. Hodges was at home and appeared to have mental problems, and that the infant T.H. was observed "lying in the floor with a pit bull."

A DHS family service worker visited the family's apartment the following day and found Mrs. Hodges sitting outside, smoking a cigarette. Her hair was "very matted and tangled," and she appeared to be "very unconcerned." The worker observed T.H. asleep in her car seat. Mr. Hodges stated that everything was "okay"; that the pit bull, then chained to a tree, was for the baby's protection; and that the couple had no other children. Mr. Hodges admitted that he suffered from anxiety attacks, and he appeared to be "very anxious." Upon returning to DHS, the family service worker conducted a CHRIS search and discovered eight "true findings" of abuse and neglect against the parents. The family service worker confirmed that another child of the parents had been placed in a seventy-two hour hold in 2005 due to Mr. Hodges's being in jail and Mrs. Hodges's inability to care for the child, that in 2007 this child had been adopted, and that Mrs. Hodges no longer had physical custody of two other children who were hers. DHS decided to take an emergency hold on T.H. and, with the assistance of police, went to the apartment. Mr. Hodges seized and held T.H. so tightly that her feet turned purple, and he told officers that there was "going to be a fight." He surrendered T.H. about an hour and a half after a hostage negotiator and other law enforcement officers arrived.

On February 12, 2008, the circuit court entered an emergency order placing custody

of T.H. with DHS upon a finding that immediate removal from the parents was necessary to protect her health and safety from immediate danger. The court found it necessary in a February 15, 2008 probable cause order to continue custody with DHS because the emergency conditions necessitating removal continued, and an adjudication hearing was scheduled. The court adjudicated T.H. dependent-neglected and custody was continued in DHS by an adjudication order of March 27, 2008: the order established a goal of reunification, approved a case plan developed by DHS, and established a concurrent plan for relative placement or adoption. DHS subsequently filed a petition to terminate the parents' rights and a motion to be relieved of providing reunification services.

On May 30, 2008, the circuit court conducted a hearing on both the termination-of-parental-rights petition and the motion to be relieved of providing reunification services. Testimony was given by Mr. Hodges and by Brandi Lace, DHS's county supervisor. Lace testified that she had been involved in a previous case with the parents in Poinsett County where the services offered to the family had been unsuccessful. She said that the offered services there were for such things as visitation, parenting, random drug screens, worker contacts, transportation, case management, appropriate referrals, and a psychological evaluation. Lace testified that not "a lot of services" had been provided in the present case, which she said had been a hostile situation in the very beginning, and that she could think of no other services that could have been offered in Craighead County that would have been of use. She stated DHS's position that nothing had changed that would make services work more successfully in the present case than in the past. She further testified:

> The child is very young at this point. If the court were to grant the termination of parental rights, I do not believe that I would have any difficulty finding a permanent placement for the child in the form of an adoption. . . . I would describe the likelihood that this child could be adopted as very likely.

Certified copies of two orders from the Poinsett County Circuit Court, file-marked July 27, 2006, were introduced into evidence without objection: the first terminated reunification services to Mr. and Mrs. Hodges after DHS had made reasonable efforts to provide services, and the second terminated their parental rights with regard to a sibling of T.H.

Upon considering all the evidence presented at the hearing, the Craighead County Circuit Court granted DHS's motion to be relieved of providing reunification services and granted its termination-of-parental-rights petition. The motion to be relieved was granted upon the court's findings that there was little likelihood that services would successfully result in reunification of T.H. with the parents, and that DHS had made reasonable efforts to provide reunification services. The court found that termination of parental rights was in the best interests of T.H. based upon a high likelihood that she would be adopted if the petition were granted and upon a great risk of potential harm to her health and safety were she returned to the parents' custody. Additionally, the court found that the parents' rights had been involuntarily terminated as to a sibling of T.H., and that she had been subjected to aggravated circumstances in that there was little likelihood that services to the family would result in successful reunification of T.H. with the parents. The appeal now before us arises from the order terminating parental rights, entered in written form on May 30, 2008.

An order terminating parental rights must be based upon a finding by clear and convincing evidence that termination of a parent's rights is in the best interest of the children, considering the likelihood that the children will be adopted if parental rights are terminated and the potential harm caused by returning the children to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A) (Supp. 2008). The court must also find that termination is warranted pursuant to one of the grounds outlined in section 9-27-341(b)(3)(B). *Albright v. Arkansas Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). Statutory grounds for termination include that the parent is found by the court to have "subjected any juvenile to aggravated circumstances" or to have "had his or her parental rights involuntarily terminated as to a sibling of the child." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)*(a)(3)(A)* and *(4)*. "Aggravated circumstances" means under subsection *(3)(B)(i)* that "[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."

Standard of Review

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 circuit court's finding was clearly erroneous. *Posey v. Arkansas Dep't of Health and Human Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). 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 committed. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 356, 990 S.W.2d

509, 511 (1999). Termination-of-parental-rights cases are reviewed de novo on appeal but will be reversed only on grounds properly argued by the appellant. *Id.*; *see, e.g.*, *Country Gentleman, Inc. v. Harkey*, 263 Ark. 580, 569 S.W.2d 649 (1978). Because the circuit judge is in a far superior position to observe the parties, the appellate court gives a high degree of deference to the circuit court with regard to testimonial evidence. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 215, 40 S.W.3d 286, 292–93 (2001).

Sufficiency of the Evidence

Appellants contend that there was insufficient evidence supporting the circuit court's findings of a high likelihood that T.H. would be adopted and that DHS made reasonable efforts to provide services to reunite the family. Appellants first argue that the absence of an appropriate permanency placement plan "wholly precluded" the court from even considering the termination petition. They assert that a complete lack of evidence supporting the likelihood of adoptability demonstrated the lack of an appropriate permanency plan and undermined the circuit court's best-interest analysis. Appellants characterize the only testimony regarding the likelihood of adoptability, given by Brandi Lace, as "pure speculation" at best and "erroneous" at worst.

When seeking termination of parental rights, DHS must only be "attempting to clear a juvenile for permanent placement." Ark. Code Ann. § 9-27-341(a)(2). The circuit court "may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile," and a parent's rights may be terminated if the circuit court finds by clear and convincing evidence that termination is in the

best interest of the juvenile. Ark. Code Ann. § 9-7-341(b)(1)(A) and (3)(A). When determining the juvenile's best interest, the court shall consider the likelihood that the juvenile will be adopted if the termination petition is granted and the potential harm caused if she is returned to the custody of the parents. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) and (ii).

Termination of parental rights shall be based on a finding by clear and convincing evidence that it is in the best interest of the child, including consideration of such factors as the likelihood of adoption of the child. Ark. Code Ann. § 9-27-341(b)(3). Adoptability is but one factor to consider in the overall termination of parental rights: there is no requirement that every factor be established by clear and convincing evidence but that, 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).

Here, the court found a high likelihood that T.H. would be adopted and that there would be a great risk of potential harm to her if she were returned to the custody of the parents, the two factors to be considered in determining the best interest of the juvenile under Ark. Code Ann. § 9-27-341(b)(3)(A). Appellants challenge only the sufficiency of the evidence to support the circuit court's findings of a high likelihood that T.H. would be adopted.

There was sufficient evidence that termination was in T.H.'s best interest and that DHS had an appropriate permanency plan of adoption. Appellants failed to object to the admission of Lace's testimony that there was a high likelihood of adoptability: accordingly, they have

waived any objection to its speculative nature, her lack of qualifications, or any erroneous basis for her opinion. *See New Empire Ins. Co. v. Taylor*, 235 Ark. 758, 764–65, 362 S.W.2d 4, 8 (1962) (concluding that, if a party fails to object to incompetent evidence, it becomes a part of the evidence that can support a finding); *see also Cobb v. Arkansas Dep't of Human Servs.*, 87 Ark. App. 188, 189 S.W.3d 487 (2004) (affirming a termination of parental rights where the caseworker believed the children could be adopted and appellant challenged the sufficiency of the evidence regarding an appropriate permanency plan). After expressly considering the factors mandated by the statute, the court concluded that termination of parental rights was in T.H.'s best interest. We cannot say that this finding was clearly erroneous.

Appellants also challenge the sufficiency of the evidence to support the circuit court's finding that DHS made reasonable efforts to provide services to reunite the family. Citing Ark. Code Ann. § 9-27-338, appellants assert that the finding of reasonable efforts was clearly erroneous because DHS failed to provide services to reunify the family. That statute requires a circuit court at a permanency planning hearing to enter a permanency planning goal in accordance with the best interest of the juvenile, but it precludes the court from authorizing a termination plan if the court finds that DHS failed to provide services to the family. Ark. Code Ann. § 9-27-338(c). Subsection (b)(2), however, states that the section shall not be construed to prevent DHS from filing a termination petition at any time prior to a permanency planning hearing, and our termination-of-parental rights statute specifies that a permanency planning hearing is not a prerequisite to the filing of a petition to terminate parental rights or as a prerequisite to the court's considering a petition to terminate parental rights. Ark. Code

Ann. § 9-27-341(b)(1)(B). Thus, there were no permanency-planning-hearing requirements in the DHS action to terminate parental rights.

Finally, appellants do not challenge the circuit court's findings that their parental rights had been involuntarily terminated as to a sibling of T.H., and that she had been subjected to aggravated circumstances in that there was little likelihood that services to the family would result in successful reunification of T.H. with appellants. These statutory grounds for termination of parental rights under Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3) and (4) do not require that DHS make reasonable efforts to reunite the family. Furthermore, DHS had already provided this family with reunification services that failed to successfully reunify them with T.H.'s sibling, and appellants' parental rights in the sibling were ultimately terminated. Appellants' challenge to the sufficiency of the evidence regarding the provision of reunification services is without merit.

Affirmed.

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