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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-1088

PATRICE BAKER APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	**Opinion Delivered** June 1, 2011 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. JV 2008-23] HONORABLE RALPH WILSON, JR., JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

Patrice Baker brings this appeal from the termination of her parental rights to her children, Z.B. (DOB 01/03/08), and D.B. (DOB 01/20/09).[1] On appeal, Baker argues that she was entitled to reasonable accommodation under the Americans with Disabilities Act and, because those accommodations were not provided, the termination of her parental rights was premature and erroneous.[2] Finding no error, we affirm.

[1]The court also terminated the parental rights of Robert Lee Phanamam, the putative father. Phanamam did not participate in any proceedings and is not a party to this appeal.

[2]This appeal was originally filed as a no-merit case pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004). We ordered rebriefing. *Baker v. Arkansas Department of Human Services*, 2011 Ark. App. 69.

While a minor, Patrice Baker was placed in the custody of DHS after she was neglected by her mother.[3] Baker gave birth to Z.B. in January 2008, when Baker was sixteen years old. On January 8, 2008, DHS filed a petition seeking emergency custody of Z.B. on the basis that he was a dependent child by virtue of the fact that Baker was a minor in the state's custody. An order for emergency custody was entered on the same day. The court later found probable cause for entry of the emergency order. The circuit court later found Z.B. was dependent because his mother was dependent-neglected.

During the course of the proceedings, Baker was given various tasks to complete as part of her case plan. Among these was the requirement that she obtain her GED. She was unable to pass the test necessary to gain admission to the GED program, and the court ultimately rescinded the requirement. It was also revealed that, while a minor, Baker received benefits for a disability, the nature and extent of which was never fully developed during the course of the proceedings below. These benefits ceased upon Baker's reaching her eighteenth birthday, and DHS made minimal efforts to assist in having the benefits restored after Baker reached her majority.

On January 20, 2009, Baker gave birth to a second child, a son, D.B. DHS did not immediately take D.B. into custody. On June 16, 2009, DHS took emergency custody of both Z.B. and D.B., based upon Baker not having suitable housing or clothing for the children. D.B. was later adjudicated as a dependent-neglected child.

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[3]The record does not disclose when Baker was placed in DHS's custody.

On December 14, 2009, DHS filed a motion to terminate reunification services, alleging that there was little likelihood that continued services to Baker would result in a successful reunification because Baker had not made significant progress since she turned eighteen despite services offered to her. Following a hearing, the circuit court granted the motion, finding that Baker had not substantially complied with the case plan or orders in that she had neither adequate income to support herself and her children nor appropriate housing.

DHS filed its petition seeking the termination of Baker's parental rights on March 3, 2010, alleging as grounds, *inter alia*, that Baker had subjected her children to aggravated circumstances, *see* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*), and that other factors and issues arose that demonstrated that return of the children to Baker's custody would be contrary to the children's health, safety, and welfare and that Baker had manifested the incapacity or indifference to remedy the subsequent issues. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(vii).

The termination hearing was held on June 3, 2010. After hearing the evidence, the circuit court ruled from the bench and granted the petition. The court found that the children were adoptable and that they faced potential harm if returned to Baker, and further, that DHS had proved by clear and convincing evidence that the children had been subjected to aggravated circumstances. The court's written order was entered on August 9, 2010. Baker timely filed a notice of appeal.

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. *J.T. v.*

Arkansas Department of Human Services, 329 Ark. 243, 947 S.W.2d 761 (1997). The circuit court found that DHS had proved the "aggravated circumstances" ground for termination. There are multiple ways to prove this ground. One definition of "aggravated circumstances" is that "a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification." *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(I). Such a determination was made in the court's February 25, 2010 order terminating reunification services. This type of aggravated circumstance can occur where a parent is not following through with offers of assistance; is not completing basic goals of the case plan, such as obtaining appropriate jobs and housing; and there is a lack of significant progress on the parent's part. *See Smith v. Arkansas Department of Health & Human Services*, 100 Ark. App. 74, 264 S.W.3d 559 (2007). Baker's actions in this case meet this test, and we cannot say that the circuit court clearly erred in relying on this ground to support termination of her parental rights.

This brings us to the second step of the analysis—the best interest of the children. In determining the best interest of the children, the court should consider factors such as the likelihood of adoption and the potential harm to the health and safety of a child if subjected to continuing contact with the parent. Ark. Code Ann. § 9-27-341(b)(3)(A)(i), (ii) (Repl. 2009). Parental rights will not be enforced to the detriment of the health and well being of the child. *J.T.*, *supra*. Here, there was undisputed testimony from the adoption specialist and the foster parent wanting to adopt the children as a sibling group, supporting the circuit

court's finding. This indicated that DHS had a proper permanency plan for the children. *See M.T. v. Arkansas Department of Human Services*, 58 Ark. App. 302, 952 S.W.2d 177 (1997).

The evidence also supports the circuit court's finding of potential harm. The court found that Baker had failed to maintain stable housing. A stable home is one of a child's most basic needs, *Latham v. Arkansas Department of Health & Human Services*, 99 Ark. App. 25, 256 S.W.3d 543 (2007), and the failure to secure safe and appropriate housing of one's own is contrary to the child's well being and best interest. *Carroll v. Arkansas Department of Human Services*, 85 Ark. App. 255, 148 S.W.3d 780 (2004).

Baker's attorneys have misinterpreted the significance of our rebriefing order in this case. When we deny a no-merit petition and order rebriefing, we are saying only that we believe that there is a nonfrivolous issue that should be more fully developed in adversarial form. Although attorneys are obligated to represent their clients zealously, they are also prohibited from presenting frivolous arguments on appeal. The no-merit procedure established in *Linker-Flores* is simply a mechanism to allow attorneys to resolve any ethical conundrum that may arise in cases where these ethical requirements conflict. Our denial of a *Linker-Flores* petition and order to submit an adversarial brief means nothing more than that we have discovered an issue that the petitioning attorney could advance without violating Arkansas Rule of Professional Conduct 3.1. There is, however, a great distinction between an appeal that we deem to be meritorious and one that is not so frivolous as to subject the attorney who advances it to discipline. An action is frivolous only when the attorney is unable

either to make a good-faith argument on the merits of the action taken or to support an action taken by a good-faith argument for the extension, modification, or reversal of existing law.

Here, the circuit court was fully aware that Baker was so mentally challenged that she could not qualify even to enter the course that would prepare her for a subsequent GED preparation course. The supreme court has generally treated termination proceedings in a manner analogous to criminal cases—the appointment of attorneys for defendant parents and the no-merit procedure, for example—and in criminal cases there are recognized exceptions to the contemporaneous-objection rule. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Because the right of a parent to raise a child is a fundamental one protected by the Due Process and Equal Protection Clauses, *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979), and the State adopts the role of *parens patriae* with respect to both children and the mentally deficient, *see Knight v. Deavers*, 259 Ark. 45, 531 S.W.2d 252 (1976); *Honor v. Yamuchi*, 307 Ark. 324, 820 S.W.2d 267 (1991), we think that a non-frivolous argument could have been made that the third exception listed in *Wicks v. State* should apply here—*i.e.*, that 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. *See Wicks*, 270 Ark. at 786, 606 S.W.2d at 369–70.

If accepted, this preservation argument would have permitted Baker's attorneys to argue the adequacy of the services provided to Baker pursuant to the Americans with Disabilities Act despite the lack of an objection below. However, Baker's attorneys do not

make that argument, but instead rely solely on our decisions in *Gilmore v. Arkansas Department of Health & Human Services*, 2010 Ark. App. 614, 379 S.W.3d 501; and *Ruble v. Arkansas Department of Health & Human Services*, 75 Ark. App. 321, 57 S.W.3d 233 (2001). *Gilmore* refused to address a due-process argument regarding special accommodations for the psychologically impaired because it was not raised below, and the *Ruble* court refused to address an argument based on the Americans with Disabilities Act, noting that the appellant in that case neither notified DHS that she was disabled nor identified what special services she required. In the absence of any attempt by Baker's attorneys to distinguish these precedents, we must affirm.

Affirmed.

VAUGHT, C.J., and WYNNE, J., agree.