ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 11-534

	Opinion Delivered September 28, 2011
SUSAN STEWART APPELLANT V. ARKANSAS DEP'T OF HUMAN SERVICES and MINOR CHILDREN APPELLEES	APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT NO. JV2010-48 HONORABLE LARRY W. CHANDLER AFFIRMED, MOTION TO WITHDRAW GRANTED.

WAYMOND M. BROWN, Judge

This is an appeal from the termination of appellant Susan Stewart's parental rights to her children, K.K. (born July 26, 1997) and S.S. (born May 27, 2002). Stewart's attorney has filed a motion to withdraw as counsel and a no-merit brief asserting that there are no non-frivolous issues that could arguably support an appeal. The clerk of this court mailed a copy of counsel's motion and brief to Stewart, who has not filed any pro se points of appeal. We affirm the order terminating Stewart's parental rights and grant counsel's motion to withdraw.

Factual Background

In November 2006, the Arkansas Department of Human Services took emergency custody of K.K. and S.S. According to the affidavit attached to the petition for emergency custody, Stewart and the children were homeless and living in a car in front of a relative's house. The DHS worker who executed the affidavit observed that the children's clothes were

dirty and ill-fitting, they appeared to have not bathed in some time, K.K. had not been attending school for two months, and K.K. reported that Stewart "smoked drugs in a pipe" in front of him and S.S. "all the time." The circuit court adjudicated the children dependent-neglected and placed them in the custody of Connie Doherty, a relative. The court directed DHS to develop an appropriate case plan with a goal of reunification. In April 2007, the court found that Stewart had not complied with the case plans or court orders in that she had failed to submit to drug testing, attend parenting classes, obtain stable housing, or attend counseling. Mrs. Doherty and her husband were granted permanent custody.

In February 2009, Stewart filed a motion to return custody of K.K. and S.S. to her. After successful visitation, the circuit court granted the change of custody on August 25, 2009. However, on July 14, 2010, DHS again took emergency custody of K.K. and S.S. when Stewart was arrested for multiple counts of delivery of a controlled substance. Sheriff's deputies executed a search warrant on Stewart's home and found drug paraphernalia that included suspected crack pipes, metal spoons with suspected cocaine residue, and used syringes with cocaine residue and blood. Additionally, Stewart was suspected of selling pain medication that had been prescribed to S.S., who was suffering from a benign brain tumor. K.K. and S.S. were adjudicated dependent-neglected and DHS was directed to develop an appropriate case plan, with the ultimate goal of reunification. The circuit court noted in its adjudication order that Stewart was out on bond but was living in a halfway house that could not accommodate K.K. and S.S., and that Stewart admitted there was no custodian for the children. The court placed K.K. and S.S. back with the Dohertys.

At a review hearing on January 19, 2011, the court found that returning custody to Stewart was contrary to the welfare of K.K. and S.S. and that it was in the best interests of the children to continue custody with the Dohertys. The court also found that DHS had made reasonable efforts to provide family services and to finalize a permanency plan for the children, in line with the continuing goal of reunification, but that Stewart had only "somewhat complied" with the case plan by submitting to random drug testing yet failing to obtain stable housing or employment.

Also on January 19, 2011, the attorney ad litem for K.K. and S.S. filed a petition to terminate the parental rights of Stewart and the children's fathers.[1] The court scheduled a termination hearing for February 16, 2011 and granted the petition on March 1, 2011. On March 16, 2011, the circuit court determined that Stewart was indigent for the purposes of appeal.

Legal Standard

The intent of termination of parental rights (TPR) is to provide permanency in a juvenile's life in all instances in which their return to the family home is contrary to their health, safety, or welfare, and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's

[1] The fathers are not parties to this appeal.

perspective.[2] The circuit court may consider a TPR petition if the court finds that there is an appropriate permanency placement plan for the juvenile.[3]

To enter a TPR order, there must be a finding by clear and convincing evidence that it is in the best interests of the juvenile, including consideration of the following factors: (1) the likelihood that the juvenile will be adopted if the TPR petition is granted, and (2) 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.[4] In addition, the court must find that one of several grounds for termination has been proved by clear and convincing evidence, including the following grounds:

> That a juvenile has been adjudicated dependent-neglected and has continued to be out of the parent's custody for twelve 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.
>
> 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.[5]

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[2] Ark. Code Ann. § 9-27-341(a)(3).

[3] Ark. Code Ann. § 9-27-341(b)(1)(A).

[4] Ark. Code Ann. § 9-27-341(b)(3)(A).

[5] Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) and (vii)(a).

Termination of parental rights is an extreme remedy, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child.[6] Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established.[7]

Appointed counsel for an indigent parent on a first appeal from a TPR order may petition this court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal.[8] This court reviews a decision to terminate parental rights de novo but will not reverse the circuit court's findings unless they are clearly erroneous, giving due regard to the court's opportunity to judge the credibility of the witnesses.[9] 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.[10]

Discussion

In granting the TPR petition, the circuit court found that several of the statutory grounds set forth in Ark. Code Ann. § 9-27-341(b)(3)(B) had been proved by clear and convincing evidence, including:

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[6] *Tenny v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 360, 383 S.W.3d 876.

[7] *Id.*

[8] *Linker-Flores v. Ark. Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004).

[9] *Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006).

[10] *Gregg v. Ark. Dep't of Human Servs.*, 58 Ark. App. 337, 953 S.W.2d 183 (1997).

> Pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), K.K. and S.S. had been adjudicated dependent-neglected and had been out of Stewart's custody for twelve months and, despite a meaningful effort by DHS to rehabilitate Stewart and correct the conditions that caused the removal, those conditions had not been remedied.
>
> Pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a), other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the children to Stewart's custody is contrary to the children's health, safety, or welfare and that, despite the offer of appropriate family services, Stewart manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate her circumstances that prevent return of the juvenile to her custody.

Only one of the grounds outlined in Ark. Code Ann. § 9-27-341(b)(3)(B) need be proved,[11] but the record supports the trial court's finding of clear and convincing evidence to establish at least the two grounds listed above. Within five months of having the children returned in August 2009, Stewart was arrested for sixteen felony counts of forgery, and three months after that, she was charged with six felony drug charges, including selling pain medication prescribed for her ill daughter. In both cases, she was charged as a habitual offender. Stewart was not employed, the children could not live at the halfway house she entered after being released from jail, and the center would require her to reside there until August 23, 2011, a month after the permanency date in the DHS case. At the time of the TPR hearing, Stewart testified that the only hope of resolving her criminal charges was a settlement offer of forty years' imprisonment in the ADC,[12] and K.K. and S.S. had been out

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[11] *Lee v. Ark. Dep't of Human Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008).

[12] In a letter filed with this court on July 5, 2011, Stewart stated that she had received a sentence of twenty years but expects to serve three to five years of that sentence. Who advised her of that and whether it is true are not in the record. As of the date of this opinion, Stewart is still incarcerated.

of her custody for a total of nearly four years.[13] In addition, as of February 18, 2011, Stewart had requested and received six continuances of her criminal trial.

Under these circumstances, there was clear and convincing evidence that reunification with Stewart could not be accomplished in a reasonable period of time as viewed from the juvenile's perspective. In addition, in light of the Dohertys' previous custody of K.K. and S.S. and their testimony that they wished to adopt the children, there was evidence that K.K. and S.S. could be adopted if parental rights were terminated. The evidence and record do not demonstrate that the circuit court's findings were clearly erroneous, and appellant's counsel is correct that the there were no adverse rulings that would create issues supporting an appeal. We affirm the termination of Stewart's parental rights and grant the motion of her counsel to withdraw.

Affirmed; motion to withdraw granted.

VAUGHT, C.J., and HOOFMAN, J., agree.

Deborah R. Sallings, Ark. Pub. Defender Comm'n, for appellant.

No response.

[13] Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(b) does not require the time to be consecutive or to immediately precede termination.