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ARKANSAS COURT OF APPEALS

DIVISIONS II AND III
No. CA12-232

LACEY CRENSHAW APPELLANT V. MANCEL E. CRENSHAW AND DONNA J. CRENSHAW APPELLEES	**Opinion Delivered** December 12, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. PR-2009-75-G] HONORABLE ANNIE HENDRICKS, JUDGE REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

This is an appeal from the trial court's dismissal in favor of the appellee paternal grandparents in an action by the appellant mother to terminate a guardianship held by those paternal grandparents over the mother's minor child. The trial court granted appellees' motion for a "directed verdict" at the close of appellant's case, finding that appellant had presented no evidence regarding the best interest of the child. Appellant argues that the trial court erred in so finding. We agree, and we reverse.

In a nonjury trial, a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving to dismiss. Ark. R. Civ. P. 50(a). When a party moves for a "directed verdict," or dismissal in a nonjury trial, it is the duty of the trial court to consider whether the claimant's evidence, given its strongest probative force, presents a prima facie case. *Sisson v. Sisson*, 2012 Ark. App. 385, 421 S.W.3d 312. When reviewing

the grant of a motion to dismiss, we view the evidence in the light most favorable to the nonmoving party, giving the proof presented its highest probative value and taking into account all reasonable inferences deducible therefrom, and will affirm if there is no substantial evidence to support a jury verdict. *Id.* If, however, the evidence is such that fair-minded persons might reach different conclusions, a fact question exists and the dismissal will be reversed. *Id.*

Applying that standard of review to the present case, the record shows that the appellant mother had never been adjudicated unfit; she had instead voluntarily agreed to the guardianship in September 2009 because she and her husband had been abusing drugs and needed time to work on eliminating that behavior. After about two and one-half years, appellant moved to terminate the guardianship over the child, then almost five years old. Appellant asserted that the need for the guardianship no longer existed because she had overcome her drug problems and had, for over one year, tested drug-free while maintaining gainful employment and being promoted to a managerial position. She also stated that she was a qualified Certified Nurse's Assistant trained to care for persons with severe medical problems and special needs, and that she was certain that she was able to provide adequate care for the child's Rett Syndrome. Finally, she testified that the appellee guardians had been interfering with her parental relationship with her child by placing unreasonable limitations on visitation, refusing to share medical information or to permit appellant to be involved in

the medical care of her child, and directly discouraging involvement.[1] Nevertheless, the trial court stopped the trial by dismissing appellant's case on grounds that appellant had failed to meet her burden of presenting evidence sufficient to show that termination of the guardianship was in the best interest of the child. This appeal followed.

For reversal, appellant contends that the trial court erred in dismissing her petition because she met her burden of proof by demonstrating that the guardianship was no longer necessary, and that this, together with the evidence that she was a qualified and suitable parent, should have been considered as prima facie evidence that terminating the guardianship would be in the child's best interest. We agree.

Arkansas Code Annotated section 28-65-401(b)(3) (Repl. 2012) provides for termination of a guardianship if, for any reason, "the guardianship is no longer necessary or for the best interest of the ward." Prior cases have held that it was necessary to show both that the parent was fit and that termination of the guardianship was in the child's best interest. *E.g.*, *Smith v. Thomas*, 100 Ark. App. 195, 266 S.W.3d 226 (2007).[2] Appellant argues on appeal that the trial court erred in failing to consider the parent-child relationship in determining the best interest of the child, asserting in her brief that "Arkansas law clearly makes a presumption that children are more likely better off when they are raised by a

[1]When appellant told appellee Mancel Crenshaw that she would like to have more involvement with her child, Mr. Crenshaw told her to "find a hobby."

[2]Subsequent to the filing of the present case, the Arkansas Supreme Court clarified in *In re Guardianship of S.H.*, 2012 Ark. 245, 409 S.W.3d 307, how Ark. Code Ann. § 28-65-401(b)(3) (Repl. 2012) should properly be applied. Although our decision is in accord with that holding, the parties do not cite it, and we do not rely on it in reaching our decision.

biological parent." Appellant is correct. The Arkansas Supreme Court has held that a fit parent is presumed to be acting in a child's best interest. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002).[3] In light of that presumption, the diligent effort by appellant to become drug-free, the evidence of appellant's medical training, and the evidence of the appellee guardians' interference with the parent-child relationship, we hold that the proof presented in the present case to show that it was in the child's best interest to terminate the guardianship was sufficient to withstand a motion for a directed verdict or dismissal.

Reversed and remanded.

ROBBINS, GLOVER, MARTIN, and HOOFMAN, JJ., agree.

ABRAMSON, J., concurs.

RAYMOND R. ABRAMSON, Judge, concurring. I agree with the majority that, under our standard of review, appellant Lacy Crenshaw presented sufficient evidence to survive a motion for directed verdict or dismissal. I write separately to make two points.

First, in reversing the trial court's decision, the majority opinion cites *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), for the proposition that a fit parent is presumed to be acting in a child's best interest and that the circuit court erred by failing to take that

[3]The concurrence asserts that appellant's entitlement to the benefit of the presumption that she is acting in the best interest of her child is not preserved because appellant did not present that argument to the trial court. However, appellant's argument on appeal goes to sufficiency, and one need not challenge evidentiary sufficiency at trial in order to raise it on appeal from a civil bench trial. *Jackson v. Pitts*, 93 Ark. App. 466, 220 S.W.3d 265 (2005). Even in a *jury* trial, the party with the burden of proof need not move for a directed verdict to challenge on appeal the sufficiency of the evidence supporting a jury verdict adverse to that party. Ark. R. Civ. P. 50(e).

consideration into account. However, Lacey never raised that specific argument to the trial court, and, indeed, she does not even cite *Linder* in her brief before this court. This court has consistently held that we are unable to decide issues not ruled on by the lower court. *Smith v. State*, 363 Ark. 456, 215 S.W.3d 626 (2005). Moreover, we do not address arguments made for the first time on appeal, *Sweeden v. Farmers Ins. Group,* 71 Ark. App. 381, 30 S.W.3d 783 (2000), and our appellate courts have been resolute in stating that we will not make a party's argument for that party or raise an issue sua sponte, unless it involves the circuit court's subject-matter jurisdiction. *Sullivan v. State*, 2012 Ark. 178; *Norman v. Alexander*, 2011 Ark. App. 327. The citation to *Linder* notwithstanding, on appeal, we must give Lacey's testimony that she is capable of taking care of her child its strongest probative value because her petition was dismissed directly after she presented her case. Therefore, I agree that we should reverse the circuit court on this point because, even absent the *Linder* presumption, Lacey made a prima facie showing that the guardianship should be set aside.

Second, had appellees not moved for a directed verdict or dismissal, and instead presented a case, or simply rested, the outcome of this appeal would likely have been different. In that scenario, we would only reverse if the court's decision was clearly erroneous. *Seymour v. Biehslich*, 371 Ark. 359, 266 S.W.3d 722 (2007). Attorneys representing guardians who oppose the termination of the guardianship should therefore be wary when moving for dismissal or a "directed verdict" because, on appeal, the circuit court's decision to grant that motion will be given less deference than if the court ruled on the merits.

James Randall McGinnis, for appellant.

Jones, Jackson & Moll, PLC, by: *Kathryn A. Stocks*, for appellees.