

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA12-912

OBED FIGUEROA

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES

APPELLEE

Opinion Delivered FEBRUARY 13, 2013

APPEAL FROM THE LONOKE  
COUNTY CIRCUIT COURT  
[NO. JV2012-167]

HONORABLE BARBARA ELMORE,  
JUDGE

REVERSED AND DISMISSED

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## BILL H. WALMSLEY, Judge

Appellant Obed Figueroa appeals from the Lonoke County Circuit Court's adjudication order finding his sons, O.F. (DOB: 6-28-2005) and J.F. (DOB: 5-24-2007), dependent-neglected. On appeal, Figueroa argues that the trial court's adjudication order fails to set forth sufficient findings of fact. Alternatively, Figueroa contends that there was insufficient evidence to support a finding that his sons were dependent-neglected and that they should not have been removed from his custody and placed in foster care. We agree with Figueroa's second argument, and therefore reverse and dismiss.

On July 13, 2012, the Arkansas Department of Human Services (DHS) filed a petition for emergency custody and dependency-neglect supported by the affidavit of family-service worker Stacey Johnson. DHS had received an allegation of child maltreatment in connection with the boys' mother's filing for an order of protection in February 2012. The report alleging maltreatment indicated that there was "a concern with [Figueroa's] drinking history."



According to Johnson's affidavit, the boys' mother committed suicide by hanging herself on July 6, 2012. Johnson reported statements made by the boys in separate interviews conducted on July 10. J.F. said that his father had slapped him on his face and head with his hand. J.F. then showed the interviewer a cut on his hand. J.F. initially said that someone had cut his hand, then he said that he did not remember what happened to his hand, and finally he said that his father had made him bleed. J.F. said that his father threw a knife and that "it" was not an accident. According to O.F., his father had cut J.F.'s hand with a knife.

The trial court entered an ex parte order for emergency custody of O.F. and J.F. and later found that there was probable cause to retain the boys in DHS's custody. An adjudication hearing was held on August 14, 2012.

Patty Hibbs, an investigator with the Arkansas State Police Crimes Against Children division, testified that Figueroa told her that his sister-in-law initiated DHS's involvement with the family by making false allegations because she wanted to take the children to Japan and he would not allow it. Hibbs testified that the result of her investigation was that DHS's allegation that the boys had cuts, bruises, and welts was true, given that J.F. had a cut on his hand.

Stacey Johnson testified that both boys indicated that Figueroa had cut J.F.'s hand but that "Daddy put a Band-Aid on [J.F.'s hand] and made everything okay."

Robin Smith, a forensic interviewer, testified that O.F. claimed that Figueroa had cut J.F.'s hand but acknowledged that he did not see Figueroa cut it. J.F. initially told her that "My dad or something cut [my hand]," but then he changed the story and said that the knife



was on the carpet and that he thought that a bug had cut his hand.

Figueroa testified that he was a tech sergeant in the United States Air Force. He stated that he and his wife had reconciled subsequent to the filing for a protective order and prior to her death. Figueroa testified that J.F.'s hand was cut on the day his wife hanged herself. Figueroa had used a knife to cut his wife down and afterwards did not know what had happened to the knife. He stated that he did not cut his son's hand. Figueroa testified that he had received mental-health treatment at Bridgeway because his superiors were concerned about how he was coping with his wife's death and his sons being taken away and that he had sought counseling for himself and the boys before DHS became involved. Prior to his wife's suicide, Figueroa attended alcohol counseling and took anger-management and parenting classes. After the boys were removed from his custody, Figueroa was ordered by the court to obtain a drug-and-alcohol assessment, and Little Rock Outreach determined that Figueroa did not need any treatment for substance abuse.

At the conclusion of the hearing, the trial court found that the allegations in DHS's petition were substantiated by a preponderance of the evidence and that the children were neglected. Counsel for DHS asked: "And, your Honor, just to make the order [as] specific as possible, do you have specific findings on the dependency neglect?" The judge answered: "Yes, I do. Inadequate supervision and physical abuse."

When the court orders a dependent-neglected juvenile removed from a parent's custody, the court shall specifically find in the initial order of removal whether it is contrary to the welfare of the juvenile to remain at home, whether removal is necessary to protect the



health and safety of the juvenile, and whether removal is in the best interest of the juvenile. Ark. Code Ann. § 9-27-328(b)(1) (Repl. 2009). Within sixty days of removal, the court must find which family services were made available prior to removal, what efforts were made to provide services relevant to the family's needs, why those efforts did not prevent removal, and whether those efforts were reasonable. Ark. Code Ann. § 9-27-328(b)(2). In all instances of removal of a juvenile from the home of his parent, the court shall set forth in a written order evidence supporting the decision to remove, facts regarding the need for removal, and the findings required by this section. Ark. Code Ann. § 9-27-328(e)(1).

According to Ark. Code Ann. § 9-27-303(18)(A) (Supp. 2011), a dependent-neglected juvenile is one who is at substantial risk of serious harm as a result of abuse or neglect. Ark. Code Ann. § 9-27-303(18)(A)(ii), (v). The relevant portions of section 9-27-303(3)(A) provide that "abuse" means intentionally or knowingly and without justifiable cause cutting a child resulting in physical injury and intentionally or knowingly, with or without physical injury, striking a child six years of age or younger on the face or head. Ark. Code Ann. § 9-27-303(3)(A)(vi)(a), (vii)(a). The applicable portion of section 9-27-303(36)(A)(vii) provides that "neglect" includes failure to appropriately supervise the juvenile that results in the juvenile's being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.

In dependency-neglect cases, the standard of review on appeal is *de novo*, but we do not reverse the trial judge's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Lipscomb v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 257.



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. *Id.*

After reviewing the entire record, we are convinced that the trial judge clearly erred in adjudicating Figueroa's boys dependent-neglected and removing them from their father's custody. The evidence does not support the trial court's finding of inadequate supervision. The mother's suicide was a traumatic event for both Figueroa and his children, and it is understandable that Figueroa lost track of the knife after he cut his wife's body down.

As for physical abuse relating to the cut on J.F.'s hand, the evidence indicates that, during the chaos following the mother's suicide, J.F.'s hand was cut by the knife. The boys' accounts, however, do not clearly establish that Figueroa caused the cut on J.F.'s hand. O.F. did not see his father cut J.F.'s hand; J.F.'s story about how he was cut kept changing throughout the interview; and Figueroa denied cutting the boy's hand. In any event, the cut was obviously superficial because the only treatment was the application of a Band-Aid. Although Figueroa's slapping J.F. on the face or head with his hand *could* support a finding of physical abuse, there was no indication whether the act was knowing or intentional or whether it occurred on more than one occasion. In *Johnson v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 244, 413 S.W.3d 549, this court held that there was no basis for a finding of dependency-neglect where the allegation involved a single, non-injurious "popping" of the child's head with the palm of the parent's hand.

Under these circumstances, we are left with a definite and firm conviction that the trial



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court made a mistake in determining that O.F. and J.F. were at substantial risk of serious harm in Figueroa's care. Because we reverse the trial court's dependency-neglect adjudication on sufficiency grounds, we need not address Figueroa's argument concerning the trial court's failure to make specific findings. *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997) (declining to address sufficiency arguments because statute of limitations clearly barred claim).

Reversed and dismissed.

GLADWIN, C.J., and PITTMAN, J., agree.

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