

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-13-961

AMBER TONEY

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES and MINOR
CHILDREN

APPELLEES

Opinion Delivered February 12, 2014

APPEAL FROM THE CONWAY
COUNTY CIRCUIT COURT
[NO. JV-11-97]

HONORABLE TERRY SULLIVAN,
JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

Amber Toney appeals the termination of her parental rights to her five children, T.T., A.T.1, V.T., A.T.2, and K.H.¹ She argues that insufficient evidence supports the statutory grounds for termination alleged in the petition and that the court based its termination order on a ground not alleged in the petition. We affirm the termination of Toney's parental rights.

The Department of Human Services (DHS) has been involved with the Toney family, off and on, since 2004. The latest involvement began on 28 October 2011, when the children were taken into DHS's custody after it received a report of sexual abuse of one

¹K.H. has a different father than the other children; both fathers' parental rights were also terminated as to these children, but the fathers are not parties in this appeal.

sibling by another sibling.² Specifically, it was alleged that A.T.1, then seven years old, had sexually abused six-year-old T.T. DHS had also received a report of cuts, welts, and bruises on eight-year-old V.T., allegedly caused by Toney's then-boyfriend, Daks Phillips. DHS exercised a seventy-two-hour hold on the children, and a petition for emergency custody and dependency-neglect was filed on 31 October 2011. This petition was granted, and in December 2011 the children were adjudicated dependent-neglected due to abuse and neglect. At that time, the goal of the case was reunification.

A review order entered in March 2012 indicates that Toney was participating in counseling and exercising visitation, but she was unemployed and had recently moved. The order noted that Toney had made "minimal progress" toward alleviating or mitigating the causes of the juveniles' removal from the home or complying with the case plan. The next review order, in early July 2012, recited that Toney still had not maintained stable housing, having recently been evicted from an apartment in Conway, but she had been receiving counseling and attending parenting classes. Again, "minimal progress" was noted.

In early November 2012, the court entered a permanency planning order that continued the goal of the case as reunification with Toney. The court noted that Toney had

complied with most of the court orders and the case plan. Specifically, the mother has obtained work stability, completed parenting, participated in counseling, and has participated in regular visitation. The mother had obtained stable housing before recently being evicted from her apartment. She has made

²A total of eight children were taken into custody on 25 October 2011. J.L. and D.L., children of Toney and Dwayne Lockett, were placed with their paternal grandparents and were not parties to the present termination order; the eighth child, A.H., is not Toney's biological child.

much progress towards alleviating or mitigating the causes of the juveniles' removal from the home and/or completing the court orders and requirements of the case plan.

On 25 January 2013 the goal of the case was changed to termination of parental rights, citing Toney's failure to obtain stable and appropriate housing and her recent arrest. DHS filed a petition for termination of parental rights on 22 May 2013, and named the following grounds for termination: (1) the juveniles have been adjudicated dependent-neglected and have continued to be out of the custody of the parents for twelve months and, despite meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parents; (2) the court has found the juvenile or a sibling dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, any of which was perpetrated by the juvenile's parent or parents or stepparent or parents. Ark. Code Ann. § 9-27-341(b)(3)(B)(i) and (vi) (Supp. 2011).³

The court held a termination hearing on 10 July 2013. Cynthia Thompson, the family service worker assigned to the case, testified that Toney had issues with procuring stable housing and employment throughout the case. Thompson explained that Toney had recently moved in with her cousin and her cousin's boyfriend and that she had started a new job two days before the hearing. Thompson explained that Toney had eight different residences throughout the case and that her newest residence was not appropriate for the children

³Abandonment was also cited as a ground for termination, but only as to Allen Powell, K.H.'s father.

because it was too small. She agreed that a “big issue” in the case was the concern that Toney put her relationships with the men in her life ahead of her children. Thompson testified that Toney had completed some requirements of the case plan, such as a psychological evaluation and some counseling, and that she did visit the children. Thompson also explained that Toney had been arrested but that she was now on a payment plan for the fines that she owes. Thompson said that Toney had been cooperative but that she had not made significant progress that would warrant making a recommendation of reunification. She explained that the children had been out of their parents’ custody since October 2011, giving Toney more than enough time to comply with the case plan.

On cross-examination, Thompson testified that the children were initially removed because of the bruising on V.T. and the sexual acting out by A.T.1. She said that she did not know if Toney had caused the bruising or if the children had seen Toney engage in any sexual acts, but it concerned her (Thompson) that Toney was unaware of the injuries to V.T. or that the children were being exposed to sexual behavior in some way. She explained that Toney was not in compliance with the case plan because she had no stability, housing- or employment-wise, and because she had relationships with men that were not in the best interest of the children. Specifically, Thompson explained that within the past few months, Toney’s latest boyfriend had physically and sexually abused her. Thompson also clarified that Toney had been in jail for thirty days due to failure to pay fines.

Lisa Lucero, a family therapist for Treatment Homes, testified that T.T. and V.T. were in their program and were making progress. She testified that she counseled Toney and the

children and that Toney “takes little to no responsibility for the kids being in care or gives them support of their feelings while being in care, or the reasons of being in care.” Lucero was concerned about Toney’s past relationships and her ability to care for the children. She agreed that a “major problem” was a lack of stability for the children.

Ayisha Miller, Toney’s therapist, testified that she began working with Toney in November 2012 but that Toney had become more involved in counseling since her release from jail in March 2013. Miller explained that Toney had recently made a lot of progress, especially in the area of relationships with men. According to Miller, Toney had “spent a lot of time in session reviewing those relationships and how they were negative influences in her life and for her children.”

Monica Spencer, an adoption specialist with DHS, testified that although the children did have some behavior problems, it was her opinion that the children were “very much adoptable.”

Toney testified and acknowledged that a “big issue” in the case had been her inappropriate relationships with men. She testified that she now recognized that those relationships were inappropriate for the children and that she would not enter a relationship like that again. She admitted that she had lived in several different residences over the past year and a half and that her current residence was not big enough for her children. She explained that she planned to save money and get a bigger place. She stated that she was going to counseling, that she was trying, and that she deserved a chance to get her kids. She agreed that, because the case had been going on for almost two years, her efforts may appear

to be too little, too late.

Only one of the children testified at the hearing. Fifteen-year-old K.H. testified that he was living at Methodist Group Home in Magnolia. He stated that he liked it but that he would prefer to “get out of that system.” When asked what he would like to tell the judge, K.H. said that he did not think any adolescent should have his rights completely terminated from his parents, and that everyone makes mistakes, but that he would be okay with the decision to terminate if that is what the judge decided. He stated that he knew that his mother loved him but he did not want to live with her at that time. He said that if his parents’ rights were terminated, he would prefer to be adopted.

In its bench ruling, the court made the following findings with regard to Toney:

[S]he’s not been stable. She’s had numerous inappropriate relationships with men where she’s been physically, sexually abused. She’s had eight placements or eight homes since the pendency of this case. She was in jail for 30 days since the last hearing. I know she loves her children very much. . . . But these children need permanency. Neither Mr. Toney or Ms. Toney are in a position right now where they could—they could take these children. And I don’t know how long it would take. It’s been a year and a half and even before that we’ve had DHS involvement. And these children do need permanency. They’re highly adoptable and the parents are just not making—Ms. Toney’s just got a new job, and she’s always worked on and off, when she’s not had problems with men and other home issues.

But I do find that these children need stability and I find by clear and convincing evidence it would be in the best interest for there to be termination of parental rights.

The order terminating Toney’s parental rights, entered 1 August 2013, gave the following reasons for termination:

The juveniles . . . have continued out of the care and custody of the parents . . . for well over twelve (12) months, despite more than meaningful efforts by the Department; that the Court has seen no effort from the parents to

participate in the case plan and correct the conditions which led [to] the juveniles coming into care[;] that despite being given another opportunity to do so, the parents have failed to maintain significant contacts with the juveniles throughout the case, and have clearly abandoned the juveniles.

Toney appealed this order.

A circuit court's order that terminates parental rights must be based on findings proven by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2011); *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Clear and convincing evidence is proof that will produce in the fact-finder a firm conviction on the allegation sought to be established. *Dinkins, supra*. On appeal, we will not reverse the circuit court's ruling unless its findings are clearly erroneous. *Id.* 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 made. *Id.* In determining whether a finding is clearly erroneous, an appellate court gives due deference to the opportunity of the circuit judge to assess the witnesses' credibility. *Id.*

On appeal, Toney notes that she is not contesting the court's best-interest finding, but instead argues that there was insufficient evidence to support the grounds for termination. Toney correctly states that DHS alleged two grounds for termination against her and that the court relied on only one of those in its order, the "failure to remedy" ground found in § 9-27-341(b)(3)(B)(i). Toney argues that the court erred in finding that there was clear and convincing evidence to support this basis for termination.

Toney explains that the children were removed for two reasons: bruising on one child and sexual acting-out by another child. In its petition, DHS alleged that Toney had failed to

correct the conditions that caused the removal:

Despite the reasonable efforts made by the Department, the parents have failed to correct the conditions that caused removal and they remain an inappropriate placement for the juveniles. Specifically, the parents, Amber Toney and Cedric Virgil Toney, are not stable at this time, in that they have no stable home. The mother makes inappropriate relationship choices. . . . Therefore, the Department has determined that the situations which caused the removal have not been remedied.

To reiterate the court’s ruling, it found that there had been “no effort from the parents to participate in the case plan and correct the conditions which led [to] the juveniles coming into care that despite being given another opportunity to do so.”

Toney argues that the factors cited by DHS and the court to support this ground have no relevance to the two issues that caused the children to be removed and do not demonstrate how she failed to remedy these two conditions. Toney argues that the factors cited by DHS and the court would support a different ground for termination—the “subsequent factors” ground found in § 9-27-341(b)(3)(B)(vii)—but that ground was not pled by DHS in its petition for termination. Toney correctly cites *Jackson v. Arkansas Department of Human Services*, 2013 Ark. App. 411, 429 S.W.3d 276, for the proposition that termination cannot be based on a ground not alleged in the petition. She argues that this court has no choice but to reverse the termination order.

DHS argues that the court’s failure-to-remedy finding was not clearly erroneous. According to DHS, the children were removed due to abuse and neglect, and this abuse and neglect was caused by “Toney’s choice of abusive men for romantic partners.” The evidence

presented at the hearing showed that one boyfriend, Daks Phillips, had most likely caused the severe bruising on V.T. After Phillips, Toney dated Eric Wright, who physically and sexually abused Toney according to her own testimony. Yet Toney continued to date Wright until the goal of the case was changed to adoption.

The specific conditions that prompted removal were abuse and neglect, but the underlying cause of these conditions was a lack of stability. Thompson, the family service worker, repeatedly testified to this. While the court's own review orders belie its conclusion that there was "no effort" on Toney's part to participate in the case plan, there was sufficient evidence presented to support a finding that Toney had still not remedied the underlying lack of stability. Stated differently, we are not left with a definite and firm conviction that a mistake has been committed. So we affirm the order terminating Toney's parental rights.

Affirmed.

WYNNE and GLOVER, JJ., agree.

Leah Lanford, Arkansas Public Defender Commission, for appellant.

Tabitha B. McNulty, County Legal Operations, and *Chrestman Group, PLLC*, by: *Keith L. Chrestman*, for appellees.