

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-1032

KENNETH JAMES CLARK
APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILDREN
APPELLEES

Opinion Delivered April 11, 2018

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. 66FJV-16-195]

HONORABLE ANNIE HENDRICKS,
JUDGE

AFFIRMED

N. MARK KLAPPENBACH, Judge

Kenneth Clark appeals the termination of his parental rights to his three children. He argues that termination was clearly erroneous due to the denial of due process and the lack of evidence to support the statutory grounds for termination. We affirm.

The Arkansas Department of Human Services (DHS) became involved with the family in March 2016 after the children's mother, Nicole Hollan, gave birth and admitted using drugs during her pregnancy. A protective-services case was opened. Hollan and Clark agreed to submit to random drug-and-alcohol screens, abstain from using drugs or alcohol while supervising the children, complete drug-and-alcohol assessments and follow the recommendations, and attend all of the children's medical appointments. Less than a month later on April 7, 2016, a caseworker visited the family's home and found it to be very dirty

and unsafe for the children, who were then ages five years, four years, and one month old. Additionally, Hollan tested positive for methamphetamine and marijuana, and Clark had an upcoming court date for three drug charges. One child had lice and it appeared that the children had not been bathed for some time. Clark arrived home and spoke with the caseworker before the children were taken away.

Clark appeared at the April 13, 2016 probable-cause hearing, and the court found that he is the legal father of the children. The court ordered both parents to comply with random drug screens, hair-follicle tests, and alcohol swabs and ordered DHS to arrange visitation and develop a case plan. Clark was again present at the June 1, 2016 adjudication hearing. The children were adjudicated dependent-neglected “due to the inadequate supervision and neglect of both parents due to the drug use and environmental issues.” The court’s order approved DHS’s case plan but made specific orders regarding only Hollan. Clark did not appear at the September 28, 2016 review hearing, where the court found that Hollan had partially complied. The court made no specific findings or orders as to Clark. A permanency-planning hearing was held on March 29, 2017, and Clark again did not appear. The court found that neither Hollan nor Clark had complied and that Clark had not visited the children. The court added the concurrent goal of termination of parental rights and adoption. DHS filed a petition to terminate both parents’ parental rights in May 2017, alleging four statutory grounds for termination. The parties appeared for a termination-of-parental-rights hearing on June 28, 2017. The court found that Clark had been served with the petition by certified mail but continued the hearing as to him after he requested he be

appointed an attorney. Hollan's rights were terminated following this hearing, and she is not a party to this appeal. Clark was subsequently appointed counsel and appeared for his termination hearing on July 26, 2017.

Clark testified at the termination hearing that he had remained incarcerated from April 2016 through January 2017, with the exception of two days in July 2016 when he was out on bond. In January 2017, he had been released to a halfway house, and he said he would remain there until September 2017. Sentencing orders introduced into evidence showed that Clark was on suspended sentences for two drug convictions and a domestic-battery conviction at the time this case began. Then in November 2016, he pleaded guilty to a total of eight drug offenses and was sentenced to four years' imprisonment and sixteen years' suspended imposition of sentence. Five of these offenses were committed on April 22, 2016, and July 16, 2016, after the children had come into care.

Family service worker Chelsea West testified that she had not known where Clark was incarcerated and had not had any communication with him while he was incarcerated or at the halfway house. West said that Clark had never contacted DHS to request visitation or services or to keep DHS informed of his whereabouts other than one letter he sent after having been served with the petition to terminate his parental rights.¹ Clark, however, testified that he had written a "petition" while in prison to try to visit the children and learn

¹The letter, dated May 23, 2017, was mailed to DHS and subsequently filed with the court. In the letter, Clark states that he has made changes in order to provide for his children and that he intends to comply with DHS requirements on completion of his reentry program.

their whereabouts. He said that he had sent his petition to DHS offices in Sebastian County. Since he had been at the halfway house, Clark said that he had called DHS offices “about seven times” but never received a return phone call. He said that he did not know who he had spoken to, that “all they did was put me on hold,” and that he had asked to speak with a “Ms. Patterson” because that was the last person he remembered. He also said that at some point during the case he had gone to DHS offices and talked to “the lady at the desk” but did not get visitation set up. Clark said that other than being in court, the only correspondence he received about the case after being transferred from Sebastian County was the petition to terminate his rights.

West testified that Clark had been made aware of the case plan at the adjudication hearing and had been ordered to comply with it. The case plan admitted into evidence had been filed of record on May 23, 2016, and noted that Clark was incarcerated on drug charges. It directed him to acquire a safe and stable home, appropriate income, and reliable transportation; to attend a drug-and-alcohol assessment and follow all recommendations; to submit to random drug screens; to attend parenting classes; to receive a psychological evaluation; and to resolve his criminal issues. The case plan further stated that DHS had been informed of multiple domestic-violence incidents and directed Clark to attend a domestic-violence assessment and classes. The case plan stated that while incarcerated, Clark should participate in any services offered by the facility to comply with the case plan and that upon his release, Clark was to contact DHS to update his contact information and receive services. West said that Clark had failed to submit proof that he had accomplished any of the

requirements of the case plan.

Clark said that DHS did not tell him what classes to take while he was incarcerated but he took them on his own. He introduced a letter from the Arkansas Department of Correction stating that he had completed parenting classes, and he testified that he had completed other classes at the halfway house and continued to go to drug-and-alcohol meetings.² Clark said that he had been working since May, had saved money to buy a car, and was looking at an apartment to rent when he left the halfway house. He claimed that he had cleaned his home and tested negative for drugs before the children were taken into care. He agreed that he had last seen his children the day they were taken into DHS custody—about fifteen months before—but claimed that it was in their best interest to be with him because he had changed and had never been given a chance.

West testified that the children would be at risk of psychological and physical harm if returned to Clark's custody. She based this on the fact that the oldest child had tested positive for methamphetamine and amphetamines, was in a therapeutic foster home, and was in therapy for trauma experienced in the home; the fact that Clark had not attempted to contact the children and had not spoken with them for the duration of the case; and the fact that Clark had continued to commit criminal offenses in April and July 2016 after the children had been brought into care. She testified that the children were adoptable and that termination was in their best interest.

²Clark testified that he had taken the parenting classes in prison before being released to the halfway house in January 2017; however, the letter of achievement from the Arkansas Department of Correction states that he completed parenting classes on February 21, 2017.

Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents. *Fredrick v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 104, 377 S.W.3d 306. DHS must prove by clear and convincing evidence that termination is in the child's best interest and that at least one statutory ground for termination exists. Ark. Code Ann. § 9-27-341(b)(3)(A) and (B) (Supp. 2017). 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. *Fredrick, supra*. When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is 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.* We review termination-of-parental-rights cases de novo. *Id.*

Clark first argues that it was error to terminate his parental rights because he was denied basic elements of due process—notice of what was necessary to maintain his parental rights and a meaningful opportunity to participate in the process. He claims that DHS failed to communicate with him, transport him from prison to hearings, provide him with the case plan and services, or provide him with court orders regarding his obligations. Clark contends that this is similar to the deprivation of basic due process that required reversal in *Tuck v. Arkansas Department of Human Services*, 103 Ark. App. 263, 288 S.W.3d 665 (2008).

We first note that Clark never raised below the issue of his absence from two hearings or the circuit court's failure to make certain orders regarding him. His attorney did argue that

DHS was required to contact Clark and to try to provide services in prison before it could seek termination of his rights, but he did not make a specific due-process argument. A party cannot change his or her argument on appeal and is bound by the scope of his or her arguments made to the circuit court. *Sills v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 9, 538 S.W.3d 249. Even in termination cases, we will not address arguments raised for the first time on appeal. *Id.*

Even if we did consider these arguments, the alleged failures here do not warrant reversal as in *Tuck*. In that case, the father, who was not incarcerated, was not made a party to the case until the termination hearing despite DHS's knowledge of him and his desire to participate in the case. Here, Clark was named as a defendant in compliance with Arkansas Code Annotated section 9-27-311 and was present at the probable-cause and adjudication hearings. The caseworker testified that Clark was informed of the case-plan requirements at the adjudication hearing. Although his incarceration was a barrier to some reunification efforts, Clark testified that he had, in fact, participated in services while incarcerated as contemplated in the case plan. Despite his knowledge of the case, the caseworker testified that Clark had failed to keep DHS informed of his whereabouts or to make further attempts to participate until he received the petition to terminate his rights. While Clark testified that he had contacted DHS, this was a matter for the circuit court's credibility determination. *Sills, supra*. Although we do not excuse a lack of effort on DHS's part, as we held on similar facts in *Sills*, we are not convinced that Clark was denied fundamentally fair procedures as discussed in *Tuck*.

Clark next challenges the statutory grounds for termination. He claims that the circuit court's finding that he subjected the children to aggravated circumstances by abandoning them pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(B)(ix) is clearly erroneous. The juvenile code defines abandonment to include the failure of a parent to support or maintain regular contact with a child without just cause. Ark. Code Ann. § 9-27-303(2)(a)(ii). Clark contends that he was unable to maintain contact with his children due to his incarceration and lack of contact from DHS, but he argues that this does not constitute abandonment under *Brinkley v. Arkansas Department of Human Services*, 2017 Ark. App. 625, 533 S.W.3d 639.

Brinkley was incarcerated when his children were taken into custody and remained incarcerated throughout the case without being transported to any hearings. Brinkley testified that he had been served with the emergency petition for custody, but thereafter he never received any orders, notices, or any type of communication from DHS or the court. This court held that the circuit court clearly erred in terminating Brinkley's rights on the basis of abandonment when, subsequent to receiving notice that an emergency hold of his children had been taken, Brinkley received "no assistance, guidance or even minimal contact from DHS as to what he needed to do to comply with the case plan or contact his children for over fifteen months." *Brinkley*, 2017 Ark. App. 625, at 11, 533 S.W.3d at 645.

We hold that *Brinkley* is distinguishable. Clark, unlike Brinkley, was present when his children were taken into DHS custody, he attended the first two hearings, and there was testimony that he was made aware of the case plan. Whereas Brinkley had a mere inkling that proceedings regarding his children had been initiated, Clark was aware that his children had

been placed in foster care and adjudicated dependent-neglected. Despite his knowledge of the proceedings, there is no proof of any contact with his children throughout the case either while he was incarcerated, while he was out on bond, after he had been released to the halfway house, or after he had returned to court for his originally scheduled termination hearing. There is no evidence that Clark took advantage of any opportunities to have contact with his children that would have been available to him in prison or in the halfway house. *See Wittig v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 502, 423 S.W.3d 143 (affirming termination on the ground that the children had lived outside the home of the parent for a period of twelve months, and the parent had willfully failed to maintain meaningful contact with the children). For example, there was no testimony that Clark had ever written letters to his children. While Clark testified that he did make contact with DHS concerning his children, the only proof of any such contact is a letter he sent at the eleventh hour after he had received the petition to terminate his parental rights. The caseworker testified that this was the only communication DHS had received from Clark. Although Clark disputed this, it was a matter of credibility for the court. *See Sills, supra*. We give great deference to the circuit court's decision as to credibility. *Posey v. Ark. Dep't of Health & Human Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007).

Based on this evidence, we hold that the circuit court did not clearly err in finding that Clark had abandoned his children. Because DHS is required to prove only one statutory ground for termination, it is unnecessary to address Clark's arguments regarding other grounds. *See Wittig, supra*. Clark does not challenge the circuit court's best-interest

determination. Therefore, we affirm the termination of Clark's parental rights.

Affirmed.

VIRDEN and GLOVER, JJ., agree.

Tabitha McNulty, Arkansas Public Defender Commission, for appellant.

Andrew Firth, Office of Chief Counsel, for appellee.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for minor children.