NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-1432

ANTOINETTE JONES AND ANTHONY MARTIN
APPELLANTS

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEES

Opinion Delivered May 27, 2009

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. JN 2007-1166]

HONORABLE WILEY A. BRANTON, JR., JUDGE

AFFIRMED; MOTION TO WITHDRAW GRANTED

COURTNEY HUDSON HENRY, Judge

Antoinette Jones and Anthony Martin appeal from an order of the Pulaski County Circuit Court terminating their parental rights to their three children: P.M., born on March 11, 2004; A.M., Jr., born on March 18, 2005; and A.M., born on March 18, 2005. Jones also appeals from the termination of her parental rights to A.T., whose date of birth was October 23, 2006, and whose father is Mario Oates. Jones's attorney has filed a motion to withdraw pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), asserting that there are no issues of arguable merit to support the appeal. Under the recent revision to Rule 6-9(i)(1) of the Arkansas Rules of the Supreme Court and Court of Appeals, counsel's motion is accompanied by an abstract, addendum, and brief stating that no adverse ruling was made at the termination hearing and explaining why there

is no meritorious ground for reversal, including a discussion of the sufficiency of the evidence to support the termination order. *See In re Rules of the Supreme Court and Court of Appeals, Rules 6-9 and 6-10*, 374 Ark. App'x __, __ S.W.3d __ (Sept. 25, 2008). The clerk of this court sent a copy of counsel's motion and brief to Jones informing her that she had the right to file pro se points for reversal. *See* Ark. Sup. Ct. R. 6-9(i)(3). Jones has filed a pro se list of points in response. We grant counsel's motion to withdraw and affirm the order terminating Jones's parental rights.

Martin argues for reversal that the trial court's decision regarding the best interest of the children and the grounds for termination is not supported by the evidence. Based on the standard of review and the applicable law, we must also affirm as to Martin.

Jones and the children were living with Oates on June 20, 2007, when DHS removed the children from the home. DHS obtained an ex parte order for emergency custody on the basis of an affidavit which disclosed that Oates was physically abusing eight-month-old A.T. The child had numerous bruises on his torso, arm, and face, along with adult bite marks on his stomach, thigh, and chin. According to the affidavit, Jones at first denied knowing anything about the child's injuries because she said Oates locked her in the bedroom while he was with A.T. She later said that she had planned to contact law enforcement that day, but she also stated that she did not call the police because her family advised against taking that course of action.

After a hearing on June 28, 2007, the court found probable cause and ordered appellants to submit to psychological evaluations and drug-and-alcohol screens. The

adjudication hearing was held on August 7, 2007. Finding the children to be dependent-neglected, the court ruled that Jones had failed to protect them and that, due to the extreme nature of A.T.'s injuries, there was clear and convincing evidence that the children had been subjected to aggravated circumstances. The trial court found that, in addition to bite marks and bruises, A.T.'s injuries included "buckle" fractures to both legs and two skull fractures. The court expressed concern about Jones's judgment because she had allowed Oates to use the children's social security money for himself. As a result, she failed to pay her bills and had to move into a motel. The court directed appellants to submit to psychological evaluations; to obtain and maintain stable housing and employment; to submit to random drug-and-alcohol screens; and to attend parenting classes. It ordered Jones to submit to a drug-and-alcohol assessment and to attend individual counseling. The court stated that visitation would be supervised and set the goal of this case as reunification.

At a review hearing held on December 4, 2007, Martin's psychological evaluation and Jones's drug-and-alcohol assessment were admitted into evidence. The court continued the goal of reunification but noted that Jones had not complied with the court orders and had failed to make any significant progress; that she had missed appointments for her psychological evaluation; that she had failed to attend counseling; and that she had tested positive for marijuana on multiple occasions. The court stated that, although Martin had made an effort to comply with court orders, his psychological evaluation revealed that he was unfit to be a parent because of his limited ability to function. The court ordered Jones to complete drug

treatment, preferably residential, and directed her to submit to a psychological evaluation and to obtain stable housing and employment.

At the permanency-planning hearing held on May 13, 2008, the court considered Jones's psychological evaluation and appellants' drug screens. In addition, the court reviewed reports from a drug-treatment program, therapists, and CASA. In his report of Jones's psychological evaluation, Dr. Paul Deyoub stated that Jones, who has a low IQ, is an unfit parent who placed her children in unstable and dangerous circumstances and failed to protect them from Oates. Dr. Deyoub considered Oates to be an "antisocial psychopath." The court changed the goal to termination of parental rights because Jones had not consistently participated in individual therapy; had continued to test positive for marijuana; did not have a stable place to live; and had an outstanding warrant for her arrest.

The court also quoted the following language from Martin's psychological evaluation by Dr. Deyoub:

> Anthony Martin is a 29-year old man, who is unemployed, living with his mother, and he is ill equipped to be the custodian of his three children. . . . These are three very young children, all 3 years and under, and I do not see that he has any ability to take care of them. He is the father of six children and is not able to provide for any of them. He has been in prison, he has a sporadic work history, and he is mentally retarded . . . . Mr. Martin has been unstable all of his life, he has been in several relationships, and is in and out of his children's lives. He is mentally retarded and he would not be a fit and proper custodian, parent or guardian of his three children. His test results are very significant for stress related problems and poor coping ability, especially on the parenting scales in which he described himself as inadequate in parenting. The CAP was tremendously elevated indicating instability as a parent. In fact, he is similar to known abusive parents who are unable to parent successfully. He has more characteristics with inadequate and chaotic than he does with the normal population. I do not see that he is stable or that he has ever been stable.

On July 21, 2008, DHS filed a petition for the termination of appellants' parental rights. The termination hearing was held on August 26, 2008. The family-service worker, Comera Farmer, testified that Jones did not yet have stable housing; that she did not know where Jones was currently living; and that Jones left her housekeeping job at Baptist Hospital without informing Ms. Farmer. After that, Ms. Farmer said that she had no valid phone number for Jones. She stated that Jones failed to complete an outpatient drug-treatment program because the facility discharged her for noncompliance. She subsequently referred Jones for inpatient treatment, but Jones failed to follow through. Additionally, she said that Jones consistently tested positive for marijuana since the beginning of the case. Ms. Farmer testified that Jones inconsistently attended parenting classes and individual therapy and did not utilize the intensive family services offered to her. After several missed appointments, she finally completed her psychological evaluation on January 28, 2008.

Ms. Farmer said that Martin completed parenting classes, finished his psychological evaluation on time, participated in individual therapy, and had negative drug screens. However, he did not have stable housing and lived with his mother, Veneria Watts. Ms. Farmer said that Martin had odd jobs "here and there" but had recently acquired a full-time job. She recommended that his rights be terminated based on Dr. Deyoub's opinion that Martin was not fit to be a parent. Ms. Farmer testified that Jones had asked that the children be placed with Ms. Watts, and Martin also agreed to his mother taking his three children. However, a home study of Ms. Watts's residence revealed problems.

Jones's therapist, Vicki Lawrence, testified that Jones, who was difficult to contact, did not show up for some appointments and had made only minimal progress. Dr. Deyoub testified that he had significant concerns about Jones's judgment and ability to be a parent, and he diagnosed her with depressive disorder, cannabis dependence, parent-child relationship problems, borderline intellectual functioning, and a personality disorder with inadequate and dependent tendencies. He also said that she had very significant test results, such as the abuse scores on the parenting scales. He stated that Jones has four children by two mentally-retarded individuals and that, when she began relations with Oates, he was a sixteen-year-old felon charged as an adult. Dr. Deyoub explained that Jones did not have a place to live; had very little family support; had minimal ability to protect her children; was abused by her boyfriend in an unstable living situation; misused the children's social security benefits; and resisted attempts from Ms. Watts to help her. He said that Jones has a very poor prognosis and is not a candidate for reunification. He noted that Jones used marijuana even after the children were removed from the home.

Dr. Deyoub stated that, based on his psychological evaluation of Martin and his life history, he did not think that Martin was a prospect for reunification. He explained that Martin is mentally retarded; that he is the father of six children with different women; and that he has been unable to take care of any of the children. He said that Martin's test results were significant for stress-related problems and poor coping ability. He noted that Martin, age twenty-nine, has never been independent and has lived with his mother or another woman all of his life. Dr. Deyoub said that Martin's scores on the parenting scales were so

significant that "it was almost as though Mr. Martin was making a case why he couldn't parent."

Dr. Deyoub also discussed his evaluation of Ms. Watts. His greatest concern about her ability to take care of the children was her equally low mental acuity. He noted that, like her son, she is fairly "low functioning." However, he said that Ms. Watts is unusual because, even though she has limited intellectual abilities, she has no mental illness and has always lived independently. He said that she had basically held two jobs in her adult life, which she had kept for a long period of time, and was working at the time of her evaluation. He said that, although her test scores revealed some problems on the parenting scales, they were only slightly elevated and nothing like her son's test scores. He added that her low mental ability caused him enough concern that, if the children were placed with her, Martin must not live in Ms. Watts's home.

Lynn Hemphill, a social worker, testified that he had provided therapy to Martin, who was depressed, on a weekly basis beginning May 17, 2008. The therapy ended two months later when Martin obtained a full-time job. Hemphill stated that, during therapy, Martin made some progress with stress management, social functioning, and controlling anxiety. He said that Martin focused on trying to obtain better employment and becoming a better parent. Hemphill stated that, when he last saw him on July 20, 2008, Martin was still living with his mother.

Kasheena Walls, an adoption specialist, testified that, even taking their developmental delays into account, the children were adoptable. She had matched them with nine families who might adopt them.

Jones admitted that she did not have stable housing and, for the past six weeks, had lived with a woman in Little Rock. Before that, she lived with her grandmother. She testified that she had been working in housekeeping at a nursing home after being laid off from Baptist Hospital, where she had worked for several months. She said she was approved for Section 8 housing and expected to find a home in about two weeks. She explained her failure to attend counseling as the result of her transportation problems but admitted that she rode a bus to work. She stated that she had stopped smoking marijuana but admitted that, if tested that day, she would likely test positive because she had smoked it within thirty days. She admitted that she had an outstanding warrant for traffic fines in North Little Rock. She said that she did not want her parental rights terminated but wanted Ms. Watts to take her children so she could get herself stable. At the conclusion of the hearing, Martin's attorney also asked that the children be placed with Ms. Watts.

In addressing the parties from the bench, the trial court said that it was in the children's best interest for appellants' parental rights to be terminated and added:

> My concern about Ms. Watts is the concern I have in every case. What happens if we place the kids with Ms. Watts and, because she's so marginal, she hits a bump in the road? She might call up Ms. Jones and say, I'm having a hard time. I think you've got your stuff together. Take the children back. That's certainly Ms. Jones's plan, and she stated on the stand she wanted them to go with Ms. Watts so she could get on her feet and then presumably get the children back.

On September 23, 2008, the trial court entered an order finding that termination was in the children's best interest. The order terminated appellants' parental rights on the grounds of aggravated circumstances, found at Arkansas Code Annotated section 9-27-341(b)(3)(B)(ix)(*a*)(*3*) (Repl. 2008), and the fact that the children remained out of the home

in excess of a year and, despite a meaningful effort by DHS to rehabilitate the parents so as to correct the conditions that caused removal, those conditions have not been remedied by the parents. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*). Appellants then pursued this appeal.

A heavy burden is placed upon a party seeking to terminate the parental relationship, and the facts warranting termination must be proven by clear and convincing evidence. *Strickland v. Ark. Dep't of Human Servs.*, 103 Ark. App. 193, __ S.W.3d __ (2008). The question this court must answer is whether the trial court clearly erred in finding that there was clear and convincing evidence of facts warranting the termination of parental rights. *Hall v. Ark. Dep't of Human Servs.*, 101 Ark. App. 417, 278 S.W.3d 609 (2008).

Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Dowdy v. Ark. Dep't of Human Servs.*, __ Ark. App. __, __ S.W.3d __ (Mar. 11, 2009). Pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(A)(i), an order terminating parental rights must be based on a finding that termination is in the child's best interest, which includes consideration of the likelihood that the juvenile will be adopted and the potential harm caused by returning custody of the child to the parents. The harm referred to in the termination statute is "potential" harm; the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. *Lee v. Ark. Dep't of Human Servs.*, 102 Ark. App. 337, __ S.W.3d __ (2008). In addition, the proof must establish at least one of several statutory grounds. Ark. Code Ann. § 9-27-341(b)(3)(B).

Antoinette Jones

In her pro se points for reversal, Jones admits her failings as a mother and states that she is no longer on drugs and has learned from her mistakes. She asks for another chance to parent her children. We find no reason to reverse. The evidence demonstrating that it would be contrary to the children's best interest to be returned to Jones also established the grounds for termination. Jones utterly failed to accomplish most of the important goals set for her. At the time of the termination hearing, Jones did have a job but had no home; tested positive for drugs; and had an outstanding warrant for her arrest. Dr. Deyoub testified that her prognosis was very poor. She admitted that she was not yet ready to take the children. It is apparent that Jones has not transformed herself from the kind of mother who permits her boyfriend to use her children's social security money and abuse her children; who fails to obtain medical care for them after such abuse; and who takes no steps to remove them from their chaotic and unsafe living situation.

In this case, the court also found that Jones had subjected a child to aggravated circumstances. The definition of "aggravated circumstances" includes a situation where a juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(*i*). The trial court based its finding of aggravated circumstances on evidence that Jones failed to protect her children from her live-in boyfriend, who was described by Dr. Deyoub as an antisocial psychopath. A parent has a duty to protect a child and can be considered unfit even though she did not directly cause her child's injury; a parent must take affirmative steps to protect her children from harm. *See Sparkman v. Ark. Dep't of Human Servs.*, 96 Ark. App. 363, 242 S.W.3d 282

(2006); *Todd v. Ark. Dep't of Human Servs.*, 85 Ark. App. 174, 151 S.W.3d 315 (2004); *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003); *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001); *Jones v. Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984). Jones's failure to follow the court orders and case plan revealed that she never truly took personal responsibility for placing her children in harm's way. A parent's failure to take such responsibility supports a finding that the behavior that caused the removal of the children has not been remedied. *See Sparkman*, *supra*.

After carefully considering the record, we find that counsel has complied with the requirements established by the Arkansas Supreme Court for no-merit termination cases and conclude that Jones's appeal is wholly without merit. Accordingly, we grant counsel's motion to withdraw and affirm the order terminating Jones's parental rights.

Anthony Martin

The ground on which the trial court relied in terminating Martin's parental rights is set forth in Arkansas Code Annotated section 9-27-341(b)(3)(B)(i)(*a*), that a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent 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. Martin argues that the sole basis for the trial court's decision was his low intellectual functioning, which was not sufficient to support termination. He admits that the children are adoptable but faults the trial court's finding that the children would be subject to potential harm if returned to his custody. He also challenges the sufficiency of the evidence supporting grounds for termination. Martin points out that he complied with the

case plan and court orders; maintained a relationship with his children; had negative drug tests; and participated in therapy. This is all true. We cannot, however, agree with his assertion that the only limitation on his ability to be a parent is his mild mental retardation like that of his mother. Although Martin correctly points out that his mother's mental acuity is equivalent or similar to his, we believe that the comparison stops there. Dr. Deyoub described Ms. Watts as adaptable and free of mental illness. He said that she had maintained stable employment and had lived independently all her life. Martin, however, has never lived independently and has always lived with his mother or another woman. At the age of twenty-nine, he has no home and obtained a full-time job only shortly before the termination hearing. Although he never married, he is the father of six children by three women and has never provided any material support for them. He served ten months of a five-year prison sentence for aggravated assault, possession of a firearm, and third-degree battery.

There is no question that Martin complied with part of the case plan. Nevertheless, a parent's rights may be terminated even though he is in partial compliance with the case plan. *Chase v. Ark. Dep't of Human Servs.*, 86 Ark. App. 237, 184 S.W.3d 453 (2004). Even full completion of a case plan is not determinative of defeating a petition to terminate parental rights. *Wright*, *supra*. What matters is whether completion of the case plan achieved the intended result of making the parent capable of caring for the child. *Id*.

DHS and the attorney ad litem suggest that DHS proved another ground for termination:

> 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.

Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(*a*). We agree that Dr. Deyoub's psychological evaluation of Martin during the progress of this case was "another factor." For purposes of this subdivision, "the inability or incapacity to remedy or rehabilitate includes, but is not limited to, mental illness, emotional illness, or mental deficiencies . . . ." Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(*c*). Dr. Deyoub described Martin as having elevated scores for "depression, narcissism, passive-aggressive, schizotypal, paranoia, and anxiety" and remarked that Martin acknowledged a "large number of symptoms and emotional problems." Dr. Deyoub's evaluation revealed that Martin has a significant degree of emotional distress, poor functioning, and the same personality traits that characterize abusive parents. Dr. Deyoub noted that Martin "did not seem to believe he has the wherewithal to be an effective parent." The report concluded: "I do not really foresee a time that he would be able to independently raise three young children." Martin's situation is similar to that presented in *Dowdy v. Arkansas Department of Human Services*, *supra*, where we once again recognized that parental inability or incapacity flowing from mental deficiency or mental illness may be grounds for termination.

We affirm the termination of Martin's parental rights.

Affirmed; motion to withdraw granted.

PITTMAN and MARSHALL, JJ., agree.