Cite as 2018 Ark. App. 459

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-18-513

DEBORAH WHITE APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	**Opinion Delivered:** October 3, 2018 APPEAL FROM THE CONWAY COUNTY CIRCUIT COURT [NO. 15JV-16-89] HONORABLE TERRY SULLIVAN, JUDGE AFFIRMED

RITA W. GRUBER, Chief Judge

Deborah White appeals from the Conway County Circuit Court's order terminating her parental rights to her daughter RW, born June 2, 2011, and placing RW in the permanent custody of her father, Ricardo Martinez. On appeal, appellant contends that termination was not in RW's best interest and was in contravention of Arkansas Code Annotated section 9-27-341(a)(3) (Supp. 2017) because permanency was achieved in this case through placement with RW's father. We find no error and affirm the circuit court's order.

The case began on November 22, 2016, when the Arkansas Department of Human Services (DHS) took emergency custody of RW after police discovered appellant intoxicated and walking down the middle of the highway at night in the rain with RW. Appellant was arrested for public intoxication and endangering the welfare of a minor. A subsequent drug test at the Conway County jail was positive for THC. In an order entered

on January 27, 2017, the circuit court adjudicated RW dependent-neglected due to neglect and parental unfitness, inadequate supervision, and failure to protect. The court ordered appellant to submit to random drug screens; obtain and maintain stable and appropriate housing and employment; complete parenting classes; attend counseling; submit to a drug-and-alcohol assessment and complete any recommended treatment; submit to a psychological evaluation and comply with its recommendations; and attend NA/AA meetings twice each month. The goal was reunification with RW. The court also ordered Mr. Martinez to submit to random drug screens; submit to a drug-and-alcohol assessment and complete any recommended treatment; complete parenting classes; and pay $84 a week in child support.

In a review order entered on May 15, 2017, the court found that appellant had continued to test positive for THC and had been discharged from parenting classes for excessive absences. The court also expressed concern with appellant's "combativeness and argumentative nature" and ordered her to participate in anger-management classes. The court found that Mr. Martinez was complying with the case plan, actively participating in visits, and bonding with RW, but the court noted that he had tested positive for THC.

In July 2017, the court entered an order granting DHS's request to allow Mr. Martinez to have unsupervised weekend visitations. It found that he had been visiting with RW weekly, unsupervised; was gainfully employed; had maintained stable and appropriate housing; had actively and consistently participated in visitation; and had consistently tested negative for THC. A month later, after a review hearing on August 24, 2017, the court awarded temporary custody to Mr. Martinez. In the review order, the court also found that

appellant was unfit and that she could not protect RW's health and safety. The court found that appellant had not complied with the case plan and orders of the court, specifically finding that she had been unwilling to complete drug-treatment recommendations and that she remained "erratic" and "uncooperative" with DHS. The court relieved DHS of providing further services to appellant and changed the goal of the case to placement of RW in the permanent custody of Mr. Martinez.

On November 16, 2017, the court conducted a permanency-planning hearing, after which it found that it was no longer in RW's best interest to participate in visitation with appellant. The court's order set the goal as permanent custody with Mr. Martinez, and DHS filed a petition to terminate appellant's rights that same day.

On February 15, 2018, the court held a termination hearing. Michelle Mallett, the DHS worker assigned to the case, testified that it was in RW's best interest for appellant's parental rights to be terminated due to her erratic nature and instability. She testified that appellant had threatened to take RW and "run off with her" and opined that for RW to have safety and security with her father, there needed to be a legal severing of RW's relationship with appellant. Ms. Mallett described interactions with appellant as combative and said that she regularly became agitated with persons providing services, attorneys, therapists, and other authority figures. She testified that appellant had tested positive for THC a dozen times before DHS quit testing her because she refused to be screened. She said that appellant had never received a negative drug screen when tested. Appellant completed a drug-and-alcohol assessment, but she refused the recommended residential treatment. Ms. Mallett also stated that appellant was ordered to participate in counseling but

had been discharged by the therapist for noncompliance. According to Ms. Mallett, the therapist had also refused a subsequent request by DHS to work with appellant. Finally, she said that appellant never had unsupervised visitation with RW. Regarding Mr. Martinez, Ms. Mallett testified that he had completed the case plan as ordered and had changed jobs in order to be able to care for RW.

During Ms. Mallett's testimony, DHS introduced certified court orders from New Mexico concerning appellant's three older children, who had been living with their father in Santa Fe since June 2014. In an order entered on December 7, 2016, while this case was ongoing, the New Mexico court found the following:

> It appears that it is difficult for Mother to communicate with Father civilly regarding Father and the children. Father presented numerous text messages that were sent from Mother to Father that are derogatory in nature and border on violation of the Family Violence Protection Act. The text messages sent by Mother to Father also contain veiled threats regarding Mother's demise. In addition, the messages focus on Mother's concerns of having to pay Father child support.

On March 3, 2017, the New Mexico court entered an order of protection on behalf of appellant's children and their father against appellant. In the order, the court found that appellant had called to speak to the children on December 17, 2016, stating that she was not going to exercise her visitation. According to the court, "She called one child a little s*** and a little f*****," and she sent a text message that "everyone is going to die" and she was going to "kill" the father.

DHS then presented the testimony of Brandy Cochran, the DHS supervisor over appellant's case. Ms. Cochran said that she thought it was in RW's best interest for appellant's parental rights to be terminated despite RW's permanent placement with her legal father. She testified that appellant had demonstrated erratic behaviors and was hostile

to Mr. Martinez. She opined that in order for RW to have a safe, stable, and permanent life where appellant could not come back at some point and "take her away," termination was necessary and in RW's best interest. She also testified that if the plan for permanent custody with Mr. Martinez were not to occur, RW was adoptable.

Finally, the attorney ad litem recommended termination of appellant's parental rights in order to achieve stability for RW. She distinguished this case from those in which the court did not terminate a parent's rights when the child was placed with another parent by recognizing appellant's history of threatening her children and their father in New Mexico. She argued that a restraining order, such as the one used against appellant in New Mexico, would not be sufficient to protect RW who, with her father, lived in close proximity to appellant.

At the hearing, the circuit court agreed with DHS and the ad litem that termination of appellant's parental rights was in RW's best interest. The court also found that RW was adoptable if permanent custody with Mr. Martinez did not take place. The court noted that appellant had been "unremittingly hostile to virtually everyone involved in this case," particularly Mr. Martinez and DHS, and that she appeared mentally unstable but had refused counseling. The court recognized that it was unusual to place a child with one parent and then terminate the rights of the other parent, but it found that RW needed permanency, and given the particular facts in this case, it was in RW's best interest to terminate appellant's rights.

In its order entered on March 16, 2018, the court specifically found that RW needed permanency. It also reiterated its findings from the hearing regarding appellant's open and

consistent hostility. In addition to grounds, which have not been challenged on appeal, the court found by clear and convincing evidence that it was in RW's best interest to terminate appellant's parental rights, specifically finding that RW was adoptable, although noting that it was placing RW in the permanent custody of Mr. Martinez. The court also specifically found that RW would be subjected to potential harm because of appellant's mental instability and hostility if she were returned to appellant.

We review termination-of-parental-rights cases de novo. *Roland v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 333, at 3, 552 S.W.3d 443. At least one statutory ground must exist, in addition to a finding that it is in the child's best interest to terminate parental rights; these must be proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3)(A), (B) (Repl. 2015). In making a "best interest" determination, the circuit court is required to consider two factors: (1) the likelihood that the child will be adopted and (2) the potential of harm to the child if custody is returned to a parent. *Ware v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 480, at 6, 503 S.W.3d 874, 878. The potential harm to the child is a factor to be considered, but a specific potential harm does not have to be identified or proved by clear and convincing evidence. *Pine v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 781, at 11, 379 S.W.3d 703, 709. The potential-harm analysis is to be conducted in broad terms. *Id.* It is the "best interest" finding that must be supported by clear and convincing evidence. *Singleton v. Ark. Dep't of Human Servs.*, 2015 Ark. App. 455, at 5, 468 S.W.3d 809, 812. The inquiry on appeal is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *J.T. v. Ark. Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). Credibility determinations

are left to the circuit court, and we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Ross v. Ross*, 2010 Ark. App. 497, at 2.

Appellant first contends that terminating her rights is contrary to the policy expressed in Arkansas Code Annotated section 9-27-341(a)(3)—that is, to provide permanency in a child's life when "return to the family home" is contrary to the child's health, safety, or welfare. She argues that permanency was achieved by placing RW with her father; thus, that termination of her rights was not necessary and was contrary to the statute. We disagree that termination of appellant's parental rights in this case was contrary to section 9-27-341(a)(3). RW could not be returned to the "family home" from which she was removed because the court found returning RW to her home with appellant was, in fact, contrary to her health, safety, and welfare. And that section does not prohibit termination of only one parent's rights. *See Ross v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 660, 378 S.W.3d 253. Moreover, Arkansas Code Annotated section 9-27-341(c)(2)(B) specifically allows for the termination of one parent's rights if it is in the best interest of the child. Such a termination does not affect the relationship between the child and the other parent. Ark. Code Ann. § 9-27-341(c)(2)(A).

She argues next that termination was not in RW's best interest and that the considerations of adoptability and potential harm were legally inapplicable in this situation. Specifically, she admits that RW was "thriving" in her father's custody, that the purpose of the termination statute is permanency in the child's life, and that appellant's "personal issues" prevented return of RW to her custody, but she argues that because she was not "toxic" to

RW, termination was erroneous. She argues that the usual factors of potential harm and adoptability do not apply when the child is permanently placed with one parent. She compares her situation to the circumstances in *Caldwell v. Arkansas Department of Human Services*, 2010 Ark. App. 102, and *Lively v. Arkansas Department of Human Services*, 2015 Ark. App. 131, 456 S.W.3d 383. First, although a court certainly may consider evidence of toxicity in analyzing best interest, appellant cites no authority, and we know of none, that requires a court to find that a parent is "toxic" before it may terminate parental rights. Further, *Caldwell* and *Lively* do not support appellant's arguments. In both cases, this court held that termination of a father's parental rights was not in the children's best interest, in large part due to close relationships between the children and their paternal grandparents. In both *Caldwell* and *Lively*, the circuit court had determined that the paternal grandparents were the most stable influences in the children's lives. We held that termination of the father's rights in those cases endangered these significant, stabilizing relationships. *Caldwell*, 2010 Ark. App. 102, at 7; *Lively*, 2015 Ark. App. 131, at 8, 456 S.W.3d at 388.

In contrast, here, there was absolutely no evidence that the child had any relationship with a grandparent. Furthermore, the circuit court found that appellant's mental instability and unremitting hostility constituted potential harm and an impediment to permanency, the antithesis of a stabilizing relationship. The court specifically recognized appellant's threats to kill her children and their father in New Mexico and appellant's inability, due to her combativeness and hostility, to participate in court-ordered mediation in this case. Appellant argues that a few "isolated incidents" were insufficient to support the court's best-interest finding. The testimony of the DHS witnesses, the recommendation of the attorney ad litem,

and the court's review orders indicate that the incidents were not isolated and support the court's determination that appellant's behavior had been consistently erratic and hostile throughout the case. Moreover, we leave credibility determinations to the circuit court, and we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Ross*, 2010 Ark. App. 497, at 2.

Finally, appellant argues that the court erred in making an adoptability finding because RW did not need to be adopted to achieve permanency. We agree that it is unlikely RW will be adopted. The court recognized this but considered Ms. Cochran's testimony that if the plan for permanent custody with Mr. Martinez were not to occur, RW is adoptable. Adoptability is but one factor to be considered. *Hayes v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 21, at 3. Although the circuit court might have found that adoptability made no legal difference in this case—*see Haynes v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 28, at 2—it was not error for the court to consider adoptability, of which there was evidence through Ms. Cochran, and to determine that RW would be adoptable should the permanent-custody placement be unsuccessful. The circuit court analyzed RW's best interest based on the specific facts in this case. We hold that it did not clearly err in its finding.

Affirmed.

WHITEAKER and BROWN, JJ., agree.

Leah Lanford, 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 child.