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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-18-677

JULIE STRICKLAND APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD APPELLEES	**Opinion Delivered:** December 12, 2018 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. 66FJV-16-96] HONORABLE ANNIE HENDRICKS, JUDGE AFFIRMED

BART F. VIRDEN, Judge

The Sebastian County Circuit Court terminated appellant Julie Strickland's parental rights to her daughter, C.H. (DOB: 9-10-2002).[1] She argues that the trial court erred in finding that termination of her parental rights was in C.H.'s best interest because, due to C.H.'s advanced age, adoption is "not a logical means to a permanent or healthy end for C.H." We find no error and affirm.

I. *Procedural History*

On February 24, 2016, the Arkansas Department of Human Services (DHS) filed a petition for emergency custody and dependency-neglect with respect to then thirteen-year-old C.H. In an affidavit attached to the petition, a DHS employee alleged that on February

[1]C.H.'s father, Timothy Hickey, consented to the termination of his parental rights.

21, 2016, DHS had been contacted by the Fort Smith Police Department after finding C.H. in a parked car with a man in his forties around 2:10 a.m. Strickland was called to the scene. She described the man as a family friend and said that she had sent C.H. to stay with the man because Strickland's husband, Jason, had beaten her while he was intoxicated a couple of days ago. Strickland was aware that the man charged with caring for C.H. had no residence. Strickland was subsequently arrested on an outstanding warrant. She stated that C.H.'s father was not involved in C.H.'s life. Because C.H. had no caregiver, a seventy-two-hour hold was taken on her.

The trial court entered an ex parte order for emergency custody and later found probable cause that the emergency conditions that necessitated C.H.'s removal from Strickland's custody continued to exist. The trial court adjudicated C.H. dependent-neglected due to neglect by Strickland caused by her inadequate supervision and her arrest and established the goal of reunification.

In a review order entered September 23, 2016, the trial court continued the goal of reunification and found that DHS had made reasonable efforts to provide services to the family and that Strickland had not completed any services. The trial court also noted that C.H. had been hospitalized after suffering a seizure but that Strickland had not visited her.

In a permanency-planning order entered March 28, 2017, the trial court set the goal as reunification with a concurrent goal of adoption and termination of parental rights. The trial court found that DHS had made reasonable efforts to provide services to the family but that Strickland had failed to participate in counseling and domestic-violence classes and had not submitted to a psychological evaluation and hair-follicle drug testing. The trial court

also noted that Strickland had no home and no transportation and that "she is again separating from her husband." The trial court found that Strickland had completed parenting classes and had visited C.H.

In a fifteen-month review order entered June 5, 2017, the trial court found that Strickland had no home, no employment or income, and no transportation; she had failed to participate in counseling and domestic-violence classes; she had not submitted to hair-follicle drug testing; and she had sporadically visited the juvenile. She had, however, completed CJS (comprehensive juvenile services) parenting classes and had submitted to a psychological evaluation. The trial court relieved DHS of providing further services to Strickland unless she appeared at the DHS office and requested services. The trial court set concurrent goals of APPLA (Another Planned Permanent Living Arrangement) and permanent custody with a relative. On June 23, 2017, DHS filed a motion to modify visits on the basis that Strickland had been inappropriate by asking C.H. for money and to provide her with items to sell.

On November 17, 2017, DHS filed a petition for termination of parental rights, alleging grounds under Ark. Code Ann. § 9-27-341(b)(3)(B) (Supp. 2017): (i)*(a)* (twelve-month failure to remedy); (ii)*(a)* (willful failure to provide significant material support or to maintain meaningful contact with the juvenile); (vii)*(a)* (other subsequent factors); and (ix)*(a)(3)* (aggravated circumstances: little likelihood that services will result in successful reunification).

Another review order was entered November 21, 2017, in which the trial court found that Strickland had an apartment but was not employed and had no income; she did

not have a driver's license; she had not appeared for two hair-follicle drug tests; she had failed to participate in counseling; she had failed to participate in domestic-violence and anger-management classes; and she had sporadically visited C.H.

II. *Termination Hearing*

A termination hearing was held on February 23, 2018. Julie Strickland was asked about the day that C.H. was taken into DHS custody. She testified that she had allowed C.H. to go and stay at a friend's house because things had gotten "heated" between her and her husband, that her former friend Eric Foshey had not complied with her instructions to take C.H. to her friend's house, that she did not know Foshey was homeless but may have told DHS that he had no residence, and that she was not aware that Foshey had supplied C.H. with marijuana.

Strickland testified that she had been living with her husband and C.H. when the case began and that she had then lived with a friend, at a women's shelter, with her adult daughter and grandchild, and by herself in a HUD apartment for two months. She said that she is still married to Jason but had filed for divorce and had gotten a protective order against him about a week and a half before the hearing. Strickland admitted that they had a history of domestic violence.

Strickland said that she had never had any kind of drug problem but that she had taken pain pills that did not belong to her. She said that she had forgotten to go to her appointments for hair-follicle drug testing. She testified that she did a drug-and-alcohol assessment and that outpatient drug treatment had been recommended. She said, however, that she had not gotten a chance to participate in that drug treatment because she had been

arrested. She testified that she had not had a job throughout the case and did not have her own transportation. She explained that her driver's license had been suspended a year ago for driving without insurance. Strickland stated that she had completed parenting classes, that she had gotten a psychological evaluation, and that she had been participating in individual counseling but had not completed it.

Strickland testified that C.H. has "some pretty severe epilepsy" and admitted that she had not visited C.H. in the hospital after she had suffered a seizure because she did not have transportation. She said that she learned days later that DHS would have provided transportation and that she contacted DHS to make arrangements, but no one had ever gotten back to her. Strickland later testified that she did not remember admitting at a staffing that she had not called DHS for five days after learning that C.H. was in the hospital.

Strickland testified that since the case was opened, she had been arrested for shoplifting. She stated that she is currently incarcerated on a 2007 theft conviction for which her probation had been revoked for failing to make payments and missing court. She said that she had been sentenced to three years' imprisonment followed by a seven-year suspended sentence. Strickland stated that she thought she would be getting out of prison next month. She said that she needs six months after she is released from prison to get C.H. back. Strickland said that C.H. wants to come home and that it is in C.H.'s best interest to be with her family.

Shannon Kelleher, a court-appointed special advocate (CASA), testified that C.H. was starting her junior year of high school and that her sexual behavior was concerning. She said that Strickland had an appropriate home for about two months but had not made any

attempt to get a job. She stated that C.H.'s mother, sister, and father had let her down and that C.H. needs to be able to move on. Kelleher testified that she did not think it was in C.H.'s best interest to wait six more months.

Cheryl Deaton, a DHS supervisor, testified that Strickland had not complied with the case plan and court orders. She said that the relationship between Strickland and C.H. was "not a typical mother/daughter relationship" and that C.H. was "over-sexualized." Deaton stated that there had been a few other fifteen-year-old children with epilepsy or other similar needs who have been adopted but that some had also aged out of the system. She stated that C.H. had been in care for two years and needed stability. She further testified that she believes C.H. is adoptable and that, in fact, her current placement is interested in adopting her. Deaton said,

> [C.H.] is a very creative, wonderful young lady. I've had opportunities to sit and talk with [C.H.] There's people that love her and are interested in her, and I think that she deserves an opportunity in life to go and see how far she can go.
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> . . . .
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> [C.H.] keeps a hope open that her family is going to step up and do what they need to do, and time and time again that's not been the case. It's not fair to her. It's not. She deserves the opportunity to have a better life.

Kathy Sallee, C.H.'s therapist at Western Arkansas Counseling and Guidance Center, testified that she had been seeing C.H. for over a year and that there had been progress and "then there's been non-progress, going backwards a few steps." She said that C.H. had been open to the possibility of adoption but "then things changed." Sallee stated that she was unable to give a recommendation about Strickland but that it seemed like she had an unhealthy relationship with C.H. and that there were "not a lot of boundaries there." She

later said that C.H. needs stability and that, "especially considering her sexualized behaviors," it was not safe for C.H. to be placed back with an unstable parent who had not addressed domestic-violence issues. She said that C.H. had written a letter as part of her therapy. She said that C.H. likes to be heard. Sallee stated that C.H. writes a lot and that it is sometimes easier for her to write down how she feels than to talk about it. She said, "It was [C.H.'s] intention that the Court hear her through this letter." The following are excerpts from C.H.'s letter:

> I've been going through all of this for almost 2 years or more. Plain & simple. I'm tired of being in care. I want back with my family[.] I'm not trying to say no to Becca's but from the second I was taken, all I've wanted was to be back with my family no matter what. I honestly don't and could care less about what any of you think of my family, especially my mother. We may not have had a ton of money or whatever like some people, but she always made sure that my siblings and I were taken care of first no matter what. She loves us with everything she's got. We have never been abused or neglected. She has and never will put any of us in harm[']s way. Yes, she may have screwed up sometimes but who doesn't? Seriously.
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> If I could show you all in any way how deeply I feel, how strong & pure my love and protection for my family is, those of you with a heart wouldn't even question if I should be with my family or not. They are about as important to me as God, Jesus, and the Bible are to Christians.
>
> They are mine and nobody will ever have the power to take my mother or anybody else I care about away from me.
>
> . . . .
>
> Any and all mistakes I have made in the past and may make in the future have nothing to do with my mother or my family. I made these mistakes on my own, by my own will without any outside force. It doesn't matter what any of you say or think because that is the plain, simple, pure truth, undiluted by your thought & actions.
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> . . . .
>
> What little precious time I have on Earth, especially as a teenager, with the ones I love [is] slowly but surely being taken away. I don't want that though being

> in care did teach me a few things & gave me some new people to love. I just don't know anymore. It's hard and unnecessary[.] I know that some kids don't want to [go] home or are scared to. But if you haven't figured it out yet, I am not even close to being one of those kids.

III. *Trial Court's Order*

The trial court terminated Strickland's parental rights on grounds including twelve-month failure to remedy, other subsequent factors, and aggravated circumstances. The trial court made the following best-interest finding:[2]

> The court finds that (A) the juveniles [sic] are adoptable. The Court specifically finds that adoption is likely due to the personality of the juveniles [sic]. There are no physical, mental or educational issues that would impede adoption. The Court finds that (B) the juvenile would be at substantial risk of serious emotional, mental and physical harm if returned to the parents due to the parent's failing to remedy the situation that brought the juveniles [sic] into care. The parents have not complied with their case plan, have not completed drug treatment, not had counseling, and their drug issues and criminal activity is severe. The juvenile would be in great risk of harm if returned to the custody of the parent. The Court further finds the risk of harm is so great, as to outweigh any potential issues of adoptability.

IV. *Standard of Review*

We review termination-of-parental-rights cases de novo. *Hall v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 4. An order forever terminating parental rights must be based on a finding by clear and convincing evidence that termination is in the child's best interest. Ark. Code Ann. § 9-27-341(b)(3)(A). The trial court must consider the likelihood that the child

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[2]Strickland's counsel asserts that C.H. was "prohibited" from attending the hearing and "[i]ndeed, the court's failure to ensure [C.H.'s] attendance, given her desire to express to the court her strong opinions about the case and about her life, warrants a reversal as it seriously calls into question whether the court could make a valid 'best interest' finding without C.H.'s participation." No objection was raised below. *Edwards v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 37, 480 S.W.3d 215 (declining to consider on appeal an argument not raised below). Moreover, C.H.'s therapist suggested that C.H. preferred to be heard through her letter.

will be adopted if the parent's rights are terminated and the potential harm that could be caused if the child is returned to a parent. *Id*. The trial court must also find by clear and convincing evidence one or more grounds for termination. *Id*. When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding is clearly erroneous. *McGaugh v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 485, 505 S.W.3d 227. 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 resolving the clearly erroneous question, we defer to the trial court because of its superior opportunity to observe the parties and judge the credibility of witnesses. *Id*.

V. *Discussion*

Strickland does not challenge the grounds for termination. Instead, she argues that termination was not in C.H.'s best interest. Specifically, she argues that the evidence of adoptability was insufficient, that the trial court erred in finding that adoptability made no legal difference, that statistics show that adoption is not in C.H.'s best interest, and that the goal of adoption for C.H. does not fulfill the Juvenile Code's purpose of providing permanency. Strickland relies on two cases in which this court reversed a trial court's best-interest finding: *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. Neither case, however, is on point because C.H. does not already have a permanent, stable home with a parent, and there was evidence that her current placement wants to adopt her.

Adoptability is not an essential element of proof in a termination case. *McDaniel v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 263. It is but one factor to be considered when making a best-interest determination. *McNeer v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 512, 529 S.W.3d 269. While the likelihood of adoption must be considered by the trial court, that factor is not required to be established by clear and convincing evidence. *Fisher v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 693, 542 S.W.3d 168. A caseworker's testimony that a child is adoptable is sufficient to support an adoptability finding. *Id.*

There was sufficient evidence from which the trial court could consider the likelihood that C.H. will be adopted. Deaton testified that C.H. is adoptable and that her current placement is interested in adopting her. Sallee testified that C.H. had been open to the possibility of adoption but that things had changed. She did not elaborate on what had changed C.H.'s mind. In C.H.'s letter, she said that, although she wanted to be back with her family, she "wasn't saying no to Becca's." Rebecca Wells is C.H.'s foster mother. In the order terminating Strickland's parental rights, it is clear that the trial court considered the likelihood of C.H.'s adoption. The trial court said that C.H. has a good personality and that she has no physical, mental, or emotional barriers to adoption. We cannot say that the trial court clearly erred in its best-interest finding.

Strickland also argues that the trial court erred in finding that adoptability made no legal difference. In *Haynes v. Arkansas Department of Human Services*, 2010 Ark. App. 28, this court said that "[c]onsideration [of the likelihood of adoption] requires evidence, . . . or at least some finding by the trial court that other aspects of the best-interest analysis so favor termination that the absence of proof on adoptability makes no legal difference." *Id.* at 4.

We disagree with Strickland's contention that the trial court found that adoptability made no legal difference. Indeed, the trial court specifically found that C.H. is adoptable. It then alternatively noted that, even if there were potential adoptability issues, it was not in C.H.'s best interest to be returned to Strickland's custody because the risk of harm was so great.

Strickland further contends that termination was not in C.H.'s best interest because the chances that she will age out of the system are just too great. Deaton testified that some teenagers with problems get adopted, while others age out of the system, and that "the number that is greater is probably aged out." Strickland points to both a study conducted by the legislature and statistics from DHS's Division of Children and Family Services (DCFS). Specifically, she cites the legislature's study raising concerns about the high number of terminations involving teenagers and the risk of their aging out of the system as legal orphans. She also cites DCFS's statistics showing that adoption for teenagers like C.H. should be recommended only in dire circumstances. Strickland failed to raise this study and these statistics below, so we do not address them for the first time on appeal. *See, e.g.*, *Fisher*, *supra* (refusing to consider a 2017 DHS report on foster care and adoption because it was not entered into evidence).

Finally, Strickland asserts that the goal of adoption does not meet the purpose of the Juvenile Code to provide permanency for C.H. and that APPLA is the more appropriate goal, would better serve C.H.'s needs, and would keep the family intact. APPLA is a goal to be set at a permanency-planning hearing, and this case is now at the appeal stage from the termination of parental rights. With that said, the trial court did set APPLA as a concurrent goal at the fifteen-month review hearing, but C.H. was only fifteen years old at

the time. APPLA is available only if the child is sixteen years of age or older. Ark. Code Ann. § 9-27-338(c)(7)(B)(ii). Besides, adoption and termination of parental rights is favored before APPLA in terms of permanency-planning goals. Ark. Code Ann. § 9-27-338(c)(4) & (7). Here, there is a foster family that wants to adopt C.H., which would provide her permanency in accordance with the Code's purpose. *See* Ark. Code Ann. § 9-27-341(a)(3) ("The intent of this section [termination of parental rights] is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective."). Strickland states that adoption, as opposed to APPLA, will prevent C.H. from gaining access to resources for independent living, but she did not raise or develop this argument below; therefore, we do not consider it. *Edwards*, *supra*.

Affirmed.

ABRAMSON and HIXSON, JJ., agree.

Leah Lanford, Arkansas Public Defender Commission, for appellant.

Ellen K. Howard, Office of Chief Counsel, for appellee.

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