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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-21-625

LEAH PHILLIPS
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES AND MINOR CHILD
APPELLEES

Opinion Delivered May 25, 2022

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT
[NO. 26JV-19-295]

HONORABLE LYNN WILLIAMS, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Appellant Leah Phillips appeals from a decision of the Garland County Circuit Court terminating her parental rights to CM. She contends on appeal that there was insufficient evidence to support the court's finding of statutory grounds for termination. We affirm.

This case began on October 20, 2019, when the Arkansas Department for Human Services (DHS) exercised a seventy-two-hour hold on CM, born February 20, 2018. On October 22, 2019, DHS filed a petition for dependency-neglect, which alleged that CM was at a substantial risk of serious harm as a result of neglect and parental unfitness, specifically inadequate supervision and parental drug use. In an affidavit in support of the petition, a family-service worker stated that DHS had previously exercised a seventy-two-hour hold on September 12, 2019, after appellant was arrested due to intoxication. According to local law enforcement, appellant, who appeared intoxicated, was belligerent

and "out of control" and not paying attention when CM ran through a gas station wearing only a diaper. A protective-services case was opened, and the hold on CM was released when appellant was released from jail and agreed to participate in services. Then on October 20, 2019, a Pulaski County Division of Children and Family Services (DCFS) employee informed Garland County DCFS that appellant and Carlos Maldonado had been arrested at Maldonado's Little Rock residence for public intoxication and domestic battery.

An ex parte order for emergency custody was entered on October 22, 2019, and a probable-cause hearing was held on October 24. In an October 30 order, the circuit court held that probable cause existed at the time the emergency order was entered and continued to exist such that CM should remain in DHS custody. An adjudication hearing took place on December 4, and appellant stipulated to the adjudication. The circuit court entered an adjudication order on January 3, 2020, finding that appellant is a parent for purposes of the juvenile code because she is CM's biological mother, and CM was dependent-neglected as a result of neglect and parental unfitness. In regard to neglect, the court found that appellant's alcohol use, frequent fighting with Maldonado, and related arrest led to her failure to appropriately supervise CM, which resulted in CM's being placed in inappropriate circumstances and dangerous conditions.[1] The goal of the case was set as reunification with a concurrent goal of relative or fictive-kin placement. The court ordered appellant to complete a drug-and-alcohol assessment and follow any recommendation; to participate in

[1]The petition for dependency-neglect provided that Maldonado had been identified as a putative father. In the adjudication order, the court found that Maldonado had not presented evidence proving that he had established significant contacts with CM and no putative parent rights had attached. Based on our review of this record, there was no finding by the circuit court of anyone being a legal father or putative father.

individual therapy; to submit to a psychological evaluation and follow any recommendation; to submit to random drug-and-alcohol screens; to attend all scheduled visitation; to complete parenting education; to obtain and maintain a safe, suitable, and appropriate home for herself and CM; to maintain an environment free from illegal substances; to obtain and maintain adequate income to support herself and CM; to cooperate with DHS and the CASA; to demonstrate stability and the ability to provide for the health, safety, and welfare of CM; and to maintain consistent contact with DHS.

Three review hearings took place. A review order was entered on February 28, 2020, finding that CM should remain in DHS custody because appellant was unfit, and CM's health and safety could not be protected if returned to appellant. Concerns remained about appellant's ability to supervise CM, her substance abuse, and her emotional stability. The court continued the goal of reunification and set a concurrent goal of adoption, guardianship, or permanent custody. The court found that appellant had partially complied with the case plan and court orders but had demonstrated minimal progress. Although appellant had completed the psychological evaluation and drug-and-alcohol assessment and was participating in visitation, parenting classes, and counseling, the court found that appellant lacked stable and appropriate housing, income, and employment and had not followed through with the recommendations of the drug-and-alcohol assessment for inpatient-drug treatment. The court found that appellant had not benefited from the services because she failed to participate in the recommended substance-abuse treatment.

In a second review order entered May 15, the court held that appellant had not complied with the court orders and case plan. The order provided that appellant had

completed fifteen of twenty parenting classes and participated in counseling. The court found that appellant had arrived at visitation intoxicated on three occasions, one of which resulted in an arrest for public intoxication. In addition, the court noted that appellant missed the first intake appointment for a drug-rehabilitation program, arrived intoxicated at the second intake appointment to the extent a detox program was recommended, and then failed to appear for the detox program. Appellant continued to lack stable and appropriate housing or sufficient income to support herself and CM. The court found that appellant had made little to no progress toward the case plan. The court continued the goal of reunification and set a concurrent goal of adoption, guardianship, or permanent custody.

In the third review order entered August 5, 2020, the court continued the prior goals. The court found that appellant had partially complied with the case plan and court orders, noting that appellant was participating in counseling, visitation, and alcohol-abuse treatment but had not completed parenting classes. Appellant also continued to lack stable housing and sufficient income. The court noted appellant was unemployed and living with a grandparent. The court found that appellant had demonstrated minimal progress toward the goal of the case plan.

Three permanency-planning hearings also took place. In the first permanency-planning order entered October 27, 2020, the court found that appellant was in compliance with the case plan and court orders, noting that she had made "significant and measurable" progress and worked "diligently" toward reunification. The court found appellant had completed inpatient-alcohol treatment and was participating in counseling, visitation, and parenting classes. Appellant had recently acquired housing and claimed it was appropriate,

although DHS had not yet visited the home. Appellant, however, continued to lack sufficient income to support herself and CM. The court continued the goal of reunification and established a concurrent goal of relative or fictive-kin placement.

After the second permanency-planning hearing in January 2021, the court entered a permanency-planning order on January 29. The court again found that appellant was complying with the case plan and court orders, making "significant and measurable progress" toward achieving the goals of the case plan, and "diligently" working toward reunification. At this point, appellant had completed parenting classes, had maintained adequate housing, and was participating in weekly "AA" meetings. She also submitted to random drug-and-alcohol screens, and although she tested negative for drugs, she occasionally tested positive for alcohol during the day. The court noted the most recent result from January 20, which was 0.04% BAC at 2:30 p.m. The court continued the previous goals.

A third permanency-planning hearing took place in June after multiple continuances.[2] In the June 8 order, the court changed the goal of the case to adoption, finding that appellant had been partially complaint with the case plan but had not made sustained and measurable progress toward reunification. The court found that appellant completed the offered services but continued to abuse alcohol and to have contact with Maldonado, which resulted in domestic-violence situations.

[2]Appellant's May 5 motion for continuance indicates that appellant had been "booked" in the Garland County Detention Center that day.

On July 2, DHS filed a termination petition alleging the three statutory grounds, which included twelve months failure to remedy regarding a custodial parent, twelve months failure to remedy regarding a noncustodial parent, and failure to provide significant material support. Three witness testified at the September 13 termination hearing—Jamie Moran (DHS supervisor), Katelynn Cottrell (DHS adoption specialist), and appellant.

Jamie Moran testified that a hold was originally placed on CM because appellant had been arrested for being intoxicated but that the hold was released when appellant got out of jail. Moran said that three weeks later, appellant was arrested again for being intoxicated and fighting with her boyfriend (Maldonado). Moran stated that appellant had not had any trial placements with CM but had four-hour visitations on Fridays and had been mostly consistent. Moran explained that appellant had completed inpatient-drug treatment but then relapsed. She said that appellant's most recent arrest had been in June 2021, and although appellant had been offered a longer inpatient-treatment program, appellant declined because she did not want to lose her housing. Moran testified that DHS sought to terminate because the case had been open for two years and the situation remained the same, explaining that appellant had recently been arrested for public intoxication and remains with her boyfriend with whom domestic abuse had been reported.

Moran testified on cross-examination that since the last hearing, Maldonado had been at appellant's home twice during DHS home visits and had been seen dropping her off on one occasion at visitation. Although no trial placement had been offered, Moran agreed that appellant had been given unsupervised overnight visits with CM that ceased because she had several positive alcohol screens, including a positive hair-follicle test. Moran

acknowledged that the majority of appellant's alcohol screens had been negative, and a subsequent hair-follicle test had not been given. Moran stated that the safety concern for CM was appellant's alcohol use as well as domestic violence associated with Maldonado's being in and out of the home. On redirect, Moran stated that appellant's parental rights to other children had been terminated due to her alcohol use.

Katelynn Cottrell, the adoption specialist, testified that she identified seventy-five potential adoptive homes for CM.

Appellant testified that she had lived in her current home for a year and two months. She admitted that she had relapsed after attending rehab but chose not to go again due to fear that she would lose her housing. Appellant said that she discussed this with her caseworker, who also did not want her to lose her housing and told her just to attend her regular meetings. Appellant testified that there had been two meetings a week for about three months. These included a "Celebrate Recovery" meeting followed by a support-group meeting for women. Appellant said she last had a drink in May or June. In regard to Maldonado, appellant testified that she had "gotten rid of him" and does not talk to him unless he calls her cell phone. She told him that they cannot be around each other and explained that she would not get CM back if he was in or around her home.

On cross-examination, appellant testified that although she began going to alcohol recovery meetings before her relapse, she began going weekly after the relapse. In regard to her most recent arrest, she said it was for "domestic and public intox" but that it was dismissed. She was unsure if there was a separate domestic-violence charge but thought it was just one charge. When asked about seeing Maldonado, she stated that the last time she

saw him was when the caseworker showed up at her home when Maldonado was there repairing a wall. In regard to Moran's testimony that Maldonado was seen dropping her off at visitation a few weeks before the termination hearing, appellant stated that the person was actually her great uncle, who looks nothing like Maldonado.

At the conclusion of the hearing, the circuit court acknowledged there had been a great deal of progress but that the case had been opened for two years and appellant had not resolved the situation that brought CM into DHS custody. The court elaborated that appellant was still involved with Maldonado and having problems with alcohol, with appellant being arrested for public intoxication as late as June 2021. The court noted that appellant rejected the offer to go into a second inpatient-treatment program "to keep her home, but not to keep her child."

The court entered a termination order on October 4. The statutory ground relied on by the circuit court was noncustodial failure to remedy. Appellant filed a timely notice of appeal from the October 4 termination order.

A circuit court's order terminating parental rights must be based on findings proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2021). Clear and convincing evidence is defined as that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Posey v. Ark. Dep't of Health & Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). On appeal, the appellate court reviews termination-of-parental-rights cases de novo but 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 court to judge the credibility of witnesses. *Id.*

In order to terminate parental rights, a circuit court must find by clear and convincing evidence that termination is in the best interest of the juvenile, taking into consideration (1) the likelihood that the juvenile will be adopted if the termination petition is granted; and (2) the potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii). The order terminating parental rights must also be based on a showing by clear and convincing evidence of one or more of the grounds for termination listed in section 9-27-341(b)(3)(B). However, only one ground must be proved to support termination. *Reid v. Ark. Dep't of Hum. Servs.*, 2011 Ark. 187, 380 S.W.3d 918.

The intent behind the termination-of-parental-rights statute is to provide permanency in a child's life when it is not possible to return the child to the family home because it is contrary to the child's health, safety, or welfare, and a return to the family home cannot be accomplished in a reasonable period of time as viewed from the child's perspective. Ark. Code Ann. § 9-27-341(a)(3). Even full compliance with the case plan is not determinative; the issue is whether the parent has become a stable, safe parent able to care for his or her child. *Cobb v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 85, 512 S.W.3d 694. Moreover, a child's need for permanency and stability may override a parent's request for additional time to improve the parent's circumstances. *Id.* Finally, a parent's past behavior is often a good indicator of future behavior. *Id.*

Appellant does not contest the circuit court's finding that termination was in CM's best interest. She argues only that that there was insufficient evidence to support the statutory ground that the court relied on to terminate her parental rights. Appellant acknowledges that in our de novo review, we may affirm the trial court's termination if other grounds that were alleged in the petition for termination were proved. *Fenstermacher v. Ark. Dep't of Hum. Servs.*, 2013 Ark. App. 88, 426 S.W.3d 483. However, she argues that there was insufficient evidence to support any of the grounds pleaded by DHS.

The three statutory grounds pleaded by DHS in support of its termination petition included (1) that a juvenile has been adjudicated by the court to be dependent-neglected and has continued to be 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; (2) that a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home of the noncustodial parent for twelve months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that prevented the child from safely being placed in the parent's home, the conditions have not been remedied by the parent; and (3) the juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile. See Ark. Code Ann. § 9-27-341(b)(3)(b)(i)*(a)*, (b)(3)(B)(i)*(b)*, (b)(3)(b)(ii).

At the close of DHS's case, appellant moved for directed verdict on the ground of failure to provide significant material support, which was granted by the circuit court. The

remaining two grounds included the custodial and noncustodial failure to remedy. It is undisputed in this case as that CM was in appellant's custody at the time of removal. However, the noncustodial ground is the statutory ground relied on by the court in its termination order. As a result, the statutory ground related to a noncustodial parent cannot support termination in this case. The only remaining ground is the custodial parent's failure to remedy, and appellant argues that the evidence is insufficient to support this ground.

This particular ground requires that (1) the child be adjudicated dependent-neglected, (2) the child be out of the custody of the parent for twelve months, and (3) the parent failed to remedy the conditions that caused the child's removal. *Hollinger v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 458, 529 S.W.3d 242.

In the termination order, the circuit court found that the conditions that prevented CM from being safely placed in appellant's custody had not been remedied, specifically, that appellant continues to abuse alcohol and to associate with Maldonado.

In regard to Maldonado, appellant argues that she had separated from him and was actively taking classes on domestic violence. She recognizes that the DHS supervisor claims to have seen Maldonado dropping her off at visitation but argues that she explained the supervisor was mistaken. She also claimed that the last time she saw him was when the supervisor visited her home, and he was there repairing a hole in her wall.

As for her alcohol use, appellant contends that alcoholism is a disease and something that is never cured, referencing internet publications by Alcoholics Anonymous. She argues that during the case, the circuit court found that she had made significant and measurable progress toward reunification and even reached the point that appellant was given overnight

visitation with CM. Although appellant also acknowledged her relapse and admitted having had a drink as late as May or June 2021, she argues that she had been sober for at least three months prior to the termination hearing. She points to the fact that she had periods of sobriety throughout the case and had been participating in classes to further her recovery.

Appellant cites *Rhine v. Arkansas Department of Human Services*, 2011 Ark. App. 649, at 8, 386 S.W.3d 577, 581, for the proposition that "isolated and minor incidents of noncompliance" do not necessitate a termination of parental rights. In *Rhine*, this court reversed a termination order where Rhine had two minor alcohol-related incidents that were in violation of court orders and his parole. One involved Rhine's having four or five friends to his home to watch a football game on television while his child was not home, and then going out during the evening (which included a five-hour weather delay) to buy a twelve pack of beer. As for the other incident, Rhine rode with a friend to pick up Rhine's child from day care, and his friend went through a drive-through liquor store. We held that these two incidents did not necessitate termination, noting that there was no evidence presented that Rhine was ever intoxicated or in actual risk of his parole being revoked. At the time of the termination hearing, Rhine had only six months left on his parole; Rhine and his brother testified that Rhine had not consumed alcohol since the child had been returned to DHS custody, and DHS offered no evidence to the contrary; and despite the concerns, the circuit court never ordered services to address an alcohol issue.

Appellant also cites *Kight v. Arkansas Department of Human Services*, 87 Ark. App. 230, 189 S.W.3d 498 (2004). In *Kight*, we reversed a termination order where Kight had remained sober for six months prior to the termination hearing. After Kight's relapse, she

entered a six-month residential-treatment program. In addition, we noted that the circuit court' termination decision had been influenced by the false belief that the case had been open for eighteen months, but one child had only been out of the home for a year. We also noted that the circuit court had also based its decision, in part, on a belief that Kight was involved with a man who was using drugs. We held that the belief was speculative and did not meet the clear and convincing standard of proof, noting that while the representative from the drug-treatment center had testified that this man had visited Kight at the center, it did not interfere with her responsibilities, and she was able to remain focused on her sobriety. There was also evidence that appellant was given weekend passes where she would stay with the man, but Kight had passed every drug test upon her return.

Both of these cases are distinguishable. Unlike the situation in *Rhine*, appellant's relapse was not minor. Appellant admitted to last drinking in May or June and that she was arrested in June for public intoxication. In this case, CM was initially taken into DHS custody as a result of appellant's being arrested for public intoxication. And, unlike the circumstances in *Kight*, appellant declined inpatient treatment after her last relapse because she feared losing her housing, and CM had been out of the home for two years at the time of the termination hearing, as opposed to one year.

Inasmuch as appellant argues that alcoholism is a disease that can never be cured and references internet sources in support thereof, she failed to raise this before the trial court. As a result, the argument is not preserved for appellate review. *See, e.g.*, *Strickland v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 608, 567 S.W.3d 870 (refusing to consider a legislative study concerning DCFS statistics that raised concerns about the high number of terminations

involving teenagers and the risk of aging out of the system as orphans because appellant failed to rase the study and statistics below). Appellant's remaining arguments are simply an attempt to ask this court to reweigh the evidence and assess credibility differently than the circuit court. It is well settled that we will not reweigh the evidence on appeal, and credibility determinations are left to the circuit court. *Arazola v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 109, 573 S.W.3d 35. On this record, we cannot say the circuit court's decision was clearly erroneous.

Affirmed.

WHITEAKER and HIXSON, JJ., agree.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for appellant.

Ellen K. Howard, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

Dana McClain, attorney ad litem for minor child.