

Cite as 2022 Ark. App. 513
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-255

NINA JOHNSON

APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN
SERVICES AND MINOR CHILD

APPELLEE

Opinion Delivered December 14, 2022

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72JV-20-593]

HONORABLE STACEY ZIMMERMAN,
JUDGE

AFFIRMED; MOTION TO WITHDRAW
GRANTED

STEPHANIE POTTER BARRETT, Judge

Nina Johnson appeals the Washington County Circuit Court’s January 13, 2017 order terminating her parental rights to her daughter, MC3, born September 11, 2020, arguing that the Arkansas Department of Human Services (DHS) failed to prove, by clear and convincing evidence, grounds for termination or that termination of her parental rights was in MC3’s best interest.¹ We affirm.

DHS filed a petition for emergency custody of MC3 on September 17, 2020. In an affidavit attached to the petition, family-service worker Kayla Skelton averred that Johnson tested positive for amphetamines and THC after MC3’s birth; Skelton responded to the hospital’s request for a DHS investigation; and Johnson told hospital personnel and Skelton that she

¹A companion case regarding MC1 and MC2 is also being handed down today. *Johnson v. Ark. Dep’t of Hum. Servs.*, 2022 Ark. App. 520, ___ S.W.3d ___.

wanted MC3 to be adopted, but she was unable to provide the names of the potential adoptive parents or to state a reason for the adoption. Johnson, who was homeless at the time of MC3's birth, refused to name MC3's father, saying only that he is "an evil man." Skelton learned Johnson has three other children who do not live with her; Johnson's oldest child, MC4, resided with his step-grandparents, who had joint custody with Johnson, but Skelton did not know where Johnson's other two children, MC1 and MC2, were living.² Johnson contacted Skelton to inquire if MC3 had been placed with the adoptive family; when she was told MC3 was with a foster family until more information was available, Johnson refused to provide the whereabouts of her other children, telling Skelton she would turn herself in and get help with her addiction as soon as she knew her children were taken care of and not separated. DHS exercised a seventy-two hour hold on MC3 on September 14 due to the fact that Johnson had tested positive for amphetamines and THC after delivering MC3, indicating prenatal exposure; Johnson had not provided information regarding the alleged adoptive parents or any legal documentation regarding an adoption; and Johnson refused to divulge the whereabouts of MC1 and MC2. An ex parte order of emergency custody granting DHS's petition was entered on the same day.

A probable-cause hearing was held on September 18. An order was entered on October 5 finding that probable cause existed to issue the ex parte order; it was in MC3's best interests to remain in DHS custody; and despite the offer of appropriate services, Johnson's continued drug use seriously impaired her ability to supervise, protect, and care for MC3. Johnson was ordered to cooperate with DHS and follow the case plan and court orders; keep DHS informed

²A prior DHS case had been closed in June 2020 due to the lack of cooperation on Johnson's part.

of her current address and phone number; refrain from using alcohol and illegal drugs; obtain and maintain stable housing and employment; maintain a clean, safe home; and demonstrate the ability to protect MC3 and keep her safe from harm.

The adjudication hearing was held on October 29 and December 4, 2020, and two adjudication orders were entered. In the first adjudication order, the circuit court ordered MC3 to remain in DHS custody, and Johnson received four hours of weekly supervised visitation on the finding that unsupervised visitation was not in MC3's best interest due to Johnson's illegal drug use and housing instability. The second adjudication order, entered after the December 4 hearing, adjudicated MC3 dependent-neglected on the basis of neglect and parental unfitness. The circuit court based its decision on the fact that Johnson had exposed MC3 prenatally to amphetamines and THC as well as Johnson's lack of adequate housing, as she remained homeless at the time of the second adjudication hearing. The goal of the case remained reunification. Supervised visitation was continued, and Johnson was ordered to submit to a drug-and-alcohol assessment, enter and complete a residential treatment facility for substance abuse, and submit to random drug screens.

A review hearing was held on April 15, 2021. In the order, entered on April 30, the circuit court continued custody of MC3 with DHS, finding that it was not in MC3's best interest to return her to Johnson's custody because Johnson had neither remedied her illegal drug use nor demonstrated sobriety. Reunification remained the goal, with a concurrent goal of adoption. While acknowledging Johnson had participated in counseling, visitation, and three days of inpatient-drug treatment, the circuit court also observed she had not completed inpatient-drug treatment, participated in parenting classes, submitted to drug screens,

maintained stable housing, maintained contact with DHS, or demonstrated the ability to protect MC3 and keep her safe from harm, concluding that Johnson had made only minimal progress toward alleviating or mitigating the causes for MC3's removal. Johnson was ordered to cooperate with DHS, follow the case plan and court orders, and apprise DHS of her current address and phone number; participate in individual and family counseling and follow all recommendations; refrain from using illegal drugs and alcohol; submit to a drug-and-alcohol assessment; enter and complete a residential treatment facility for substance abuse; submit to random drug screens as requested; obtain and maintain stable housing and employment; maintain a clean, safe home; and demonstrate the ability to protect MC3 and keep her safe from harm.

A permanency-planning hearing was held on August 19, 2021, and an order was entered on August 27 continuing MC3's custody with DHS and changing the goal of the case to adoption. The court found that Johnson had participated in some counseling, visitation, and three months of inpatient drug treatment before voluntarily leaving the program, but she had failed to complete inpatient drug treatment, to participate in parenting classes, to submit to drug screens, to maintain stable housing, to remain in contact with DHS, or to demonstrate the ability to keep MC3 safe from harm. The circuit court found that Johnson had not made measurable and sustainable progress toward completing court orders and the case-plan requirements, explaining that leaving long-term inpatient drug treatment because she was in drug court and had completed ninety days of treatment was not the spirit of what it had ordered because she needed at least a year-long, intense treatment program. Although noting Johnson had completed three months' inpatient treatment and had been sober for four months, the circuit court found

Johnson “has not had her act together throughout this case,” and her actions were not enough to show that she “will keep her act together,” commenting that MC1, MC3’s older sibling, had previously been in foster care due to Johnson’s illegal drug use, and even with a prior twenty-two month attempt at sobriety in drug court, the older children were back in the same place today due to Johnson’s lack of sobriety and her poor choices. The circuit court expressed its concerns that if MC3 was placed with Johnson, she could come back into care again if Johnson continued to make poor choices.

DHS filed a petition to terminate Johnson’s parental rights on November 12, 2021, asserting three grounds for termination: (1) MC3 had been adjudicated dependent-neglected and had continued out of Johnson’s custody for twelve months and, despite a meaningful effort by DHS to rehabilitate Johnson and correct the conditions that caused removal, the conditions had not been remedied; (2) other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrated placement of MC3 in Johnson’s custody was contrary to her health, safety, or welfare and that despite the offer of appropriate family services, Johnson had manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the circumstances that prevented placement of MC3 with her; and (3) Johnson had subjected MC3 to aggravated circumstances, as there was little likelihood that continued services would result in successful reunification. DHS further alleged that termination of Johnson’s parental rights was in MC3’s best interest. Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), (vii)(a) & (ix)(a)(3)(b)(i) (Supp. 2021).

After a hearing, the circuit court terminated Jonson’s parental rights on all three grounds in an order dated February 10, 2022, in which it expressed its particular concern with Johnson’s

departure from the inpatient drug-treatment program after three months and her failure to enter another intensive inpatient program, instead choosing to enter drug court despite the circuit court's specific order that she complete an intensive inpatient program. The circuit court's order noted Johnson's prior attempt at sobriety in drug court, at which time MC1 had been placed in foster care; and that Johnson has a history of poor choices, including allowing MC1 to be sexually assaulted and allowing MC2 to be exposed to methamphetamine. The circuit court found that Johnson had not only failed to complete inpatient treatment, but she had also failed to participate in parenting classes, submit to random drug screens, maintain stable housing, maintain contact with DHS, and demonstrate the ability to protect MC3 and keep her safe from harm. The circuit court concluded that it was in MC3's best interests for Johnson's parental rights to be terminated, finding she is adoptable and would be subjected to potential harm if returned to Johnson's custody due to Johnson's unwillingness to make meaningful and measurable progress toward reunification; failure to demonstrate an ability to protect MC3 from harm; failure to actively participate in intensive drug treatment; and her unwillingness/inability to maintain stable housing. The circuit court further remarked it had no confidence Johnson was not still using illegal drugs.

At the termination hearing, the parties agreed to incorporate the testimony from the companion case involving the termination of Johnson's parental rights to MC1 and MC2, which was held earlier in the day, into MC3's termination hearing. That testimony included Johnson's older children's prior involvement with DHS due to Johnson's illegal-drug use; her failed attempts to complete an inpatient drug-treatment program; her prior and current progress in drug court, including her relapse after completing the first round of drug court and the sanctions

Johnson would face if she tested positive for illegal drugs while she was a drug-court participant; her participation in an outpatient drug-treatment program; the steps she had taken to better her life situation for both her and her children, as well as the issues Johnson had failed to address; Johnson's history of drug use and poor romantic-partner decisions; and Johnson's progress over the last seven or eight months with her sobriety, although there was no guarantee that she would not relapse. A more detailed account of this testimony can be found in the companion termination case, *Johnson v. Arkansas Department of Human Services*, 2022 Ark. App. 520, ___ S.W.3d ___, also handed down today.

Testimony taken at MC3's termination hearing included that of family-service worker Hayley Miles, who testified that MC3 was adoptable given she is healthy and has no disabilities, and her foster family had expressed interest in adopting her. Miles explained that the potential harm in returning MC3 to Johnson's custody was a lack of stability in housing and employment, and a concern for the future due to Johnson's patterns regarding sobriety and romantic partners. MC3's foster mother testified that if the opportunity presented itself, her family would like to adopt MC3.

In terminating Johnson's parental rights on all three grounds alleged by DHS and based on the best interest of MC3, the circuit court noted that at the time of MC3's birth, Johnson was homeless and had exposed MC3 prenatally to amphetamines and THC; that Johnson had lived several different places since giving birth to MC3, had only lived in her current house for a week, and had been working her current job for only a couple of months, thus not showing a significant amount of stability in housing or employment; that Johnson had been arrested for possession of illegal drugs in February 2021, which led to a second stint in drug court; and that

she still had ten months to complete in drug court if she continued to make progress, or if she relapsed, she could be removed from drug court and sentenced to prison. While noting testimony that Johnson had made a great deal of progress and that relapse is part of recovery, the circuit court stated that placing one's children in and exposing them to dangerous conditions and situations is not a part of the recovery process. It pointed out that DHS had been providing Johnson a myriad of services since 2013, and was currently providing her the same services now, but that did not prevent her older children from going back into DHS care for a second time. The circuit court expressed its doubts that Johnson's sobriety was sustainable because past conduct is the best indicator of future conduct, and a prior twenty-two-month attempt at drug court did not keep Johnson from continuing to make poor choices after her older children had been returned to her.

We review termination-of-parental-rights cases de novo but will not reverse the circuit court's ruling unless its findings are clearly erroneous. *Jennings v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 429, 636 S.W.3d 119. 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 circuit court's opportunity to judge the credibility of the witnesses. *Id.*

Termination of parental rights is a two-step process that requires the circuit court to find at least one statutory ground for termination and to find that termination is in the juvenile's best interest. *Bobbitt v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 355. Both the statutory ground

and the best-interest finding must be proved by clear and convincing evidence. *Everly v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 528, 589 S.W.3d 425.

The circuit court found three statutory grounds for termination—“twelve month/failure to remedy, subsequent factors, and aggravated circumstances.” Johnson argues that DHS failed to prove any of the statutory grounds alleged. Proof of only one statutory ground is sufficient to terminate parental rights. *Barris v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 380.

Aggravated circumstances exist when “a determination has been or is made by a judge that there is little likelihood that services to the family will result in successful reunification[.]” Ark. Code Ann. § 9-27-303(6)(A) (Supp. 2021). Johnson points to the progress she made in the months prior to termination—negative drug screens, progress in the drug-court program, participation in individual and group counseling, and obtaining housing and employment—as proof that she was benefiting from services and could be successfully reunited with MC3. Although she acknowledges her prior DHS case with her older children and the fact that she had relapsed after completion of her first stint in drug court, she contends that it is speculative to presume that, after making substantial positive improvements and maintaining them for seven to eight months, there was little likelihood that further services would not result in reunification. We disagree. Progress toward, or even completion of the case plan, is not a bar to termination of parental rights. *Edgar v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 312, 522 S.W.3d 127. What matters is whether completion of the case plan achieved the intended result of making a parent capable of caring for her child; mere compliance with the directives of the court and DHS is not sufficient if the root cause of the problem was not adequately addressed. *Id.*

Here, Johnson had previously been offered all the services with her older children that were currently being offered to her again; while she initially regained custody of her older children in the earlier case and had completed twenty-two months in drug court, she still relapsed, and her older children were removed from her custody a second time. Furthermore, she had only lived in her current house for a week prior to the termination hearing, and she had only been working in her current job for approximately two months; the circuit court found this was not evidence of stable housing and employment. And even though she was ordered to enter and complete an inpatient drug-treatment program, Johnson left two inpatient-treatment centers on her own accord, and she never completed an inpatient program, despite being ordered to do so by the circuit court. Essentially, Johnson is asking this court to reweigh the evidence in her favor and to reach a result contrary to that of the circuit court; however, a circuit court does not commit reversible error by weighing the evidence differently than how appellant asks the evidence to be weighed. *Schultz v. Ark. Dep't of Hum. Servs.*, 2022 Ark. App. 175, 643 S.W.3d 856. We are not left with a definite and firm conviction that the circuit court clearly erred in finding DHS proved the aggravated circumstances ground.

Johnson also challenges the circuit court's finding that it was in MC3's best interest to terminate her parental rights. In making a "best interest" determination, a circuit court is required to consider two factors: (1) the likelihood the child will be adopted and (2) the potential harm to the child if custody is returned to the parent. *Everly*, supra. 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. *Id.* The potential-harm analysis is to be conducted in broad terms. *Id.*

Johnson does not contend MC3 is not adoptable—she argues DHS failed to prove MC3 would be subject to potential harm if returned to her custody. The circuit court is not required to find that actual harm would occur if the child was returned to the parent, nor is it required to affirmatively identify a potential harm. *Jennings*, supra. Evidence regarding potential harm must be viewed in a forward-looking manner and in broad terms; a parent’s past behavior is often a good indicator of future behavior. *Id.* Here, the circuit court had evidence before it that even though Johnson had successfully completed drug court once before, she had relapsed, and her older children were removed from her custody for a second time. While it is commendable that Johnson was working to maintain her sobriety and had done so for several months, the circuit court had concerns about her housing and employment stability, her ability to maintain her newly found sobriety, and her history of poor decisions regarding illegal drug use and romantic partners. Giving due deference to the circuit court’s credibility determinations, the determination that termination of Johnson’s parental rights was in MC3’s best interest is not clearly erroneous.

Affirmed.

GRUBER and MURPHY, JJ., agree.

Jennifer Oyler Olson, 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.