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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-23-220

BAILEY COTHRAN

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILDREN

APPELLEES

Opinion Delivered October 4, 2023

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. 63JV-22-334]

HONORABLE ROBERT
HERZFELD, JUDGE

AFFIRMED

N. MARK KLAPPENBACH, Judge

Bailey Cothran appeals two orders entered by the Saline County Circuit Court: an order adjudicating three of her children dependent-neglected and an order granting permanent custody of one child to the child's father. We affirm.

Cothran's five-month-old child (MC4) was admitted to Arkansas Children's Hospital on September 27, 2022, for a cough, runny nose, congestion, and fever caused by rhinovirus and enterovirus.¹ MC4 was monitored for forty-eight hours and had no fever after being admitted. Despite frequent assurances that MC4 was doing well, Cothran persistently reported to hospital personnel her concerns that MC4 may have meningitis, HIV, herpes,

¹This was at least the third hospital admission for MC4, who in August had been diagnosed with a urinary tract infection, RSV, rhinovirus, and enterovirus. When she was admitted on September 27, MC4 was still testing positive for rhinovirus and enterovirus.

sepsis, or toxic-shock syndrome. Cothran reported symptoms such as swelling and rashes that were not present on examination of MC4. Cothran also told hospital personnel that she herself was very ill and may be suffering from the same conditions as MC4. As documented in MC4's hospital records, one doctor reported that Cothran's speech was "pressured and erratic"; that she often jumped between descriptions of herself, MC4, and a sibling; and that Cothran demanded tests be done. Hospital staff was concerned about Cothran's mental and emotional stability, but she was providing appropriate care for MC4 at the time.

MC4 was discharged from the hospital on September 29 with instructions to follow up with her pediatrician in a few days. Instead, Cothran immediately took MC4 to her pediatrician's office, where MC4 was determined to have a fever and an elevated white blood cell count. At the pediatrician's direction, Cothran then returned to the hospital with MC4. At the hospital, Cothran reported that MC4 had tested positive for COVID-19 at the pediatrician's office, but hospital staff later spoke with the pediatrician, Dr. Anthony Elias, and learned that MC4 had not been tested for COVID-19. MC4's father, Anthony McClain, told hospital staff that Cothran was using Suboxone and that Cothran had told him that MC4 was dying. Due to Cothran's providing false medical information and describing symptoms that were not true on objective assessment, hospital staff was concerned that her mental and behavioral state posed a significant risk to MC4's health and welfare and made a report to the child-abuse hotline.

Cothran was interviewed by a family-service worker and admitted having taken Suboxone once a few weeks before and said that she obtained it through a clinic. Cothran tested positive for methamphetamine on a drug screen but denied having used it and opted to challenge the results. She claimed that she and MC4 were, in fact, positive for COVID-19 on the basis of the results of rapid tests she performed before returning to the hospital. The Arkansas Department of Human Services (DHS) exercised an emergency seventy-two-hour hold on MC4. DHS did not take custody of Cothran's three older children (MC1, MC2, and MC3) because they were in the care of relatives. DHS filed a petition for dependency-neglect alleging that all four children were dependent-neglected due to neglect and parental unfitness. The circuit court entered an ex parte emergency order placing MC4 in the legal custody of DHS and prohibiting Cothran from removing the other children from their current physical custodians.

An adjudication hearing was held on December 5, 2022. At the outset of the hearing, the court granted DHS's motion to dismiss the case as to both MC3 and MC3's father because the father had obtained legal custody. Dr. Karen Farst, who was certified as an expert in child-abuse pediatrics and general pediatrics, testified that she was contacted by MC4's care team during her latest hospital stay due to the concerns about Cothran's behavior. She testified that after MC4's discharge, she spoke with MC4's pediatrician, Dr. Elias, who expressed concern about Cothran's behavior and informed her that he had advised Cothran to return to the hospital due to concerns about MC4's safety. Dr. Farst testified that Cothran had provided false medical information when she reported that MC4

had tested positive for COVID-19 at the pediatrician's office, and this made it impossible to trust anything Cothran reported regarding MC4.² Dr. Farst testified that Cothran's "flight of ideas" and "delusion as far as seeing things on [MC4] that other people weren't seeing was strongly suggestive that she had a mental-health crisis that was causing her behavior."

Dr. Elias testified that when he examined MC4 on September 29, MC4 "looked pretty good" despite having a fever and an elevated white blood cell count. He testified that Cothran had a lot of different concerns about MC4 that did not appear on examination. He recommended that they return to the hospital because MC4 was still ill, and Cothran looked tired, overwhelmed, and frazzled. Dr. Elias denied thinking that Cothran was a threat to MC4 but acknowledged being "worried about everybody."

Cothran testified that she never insisted MC4 was suffering from any specific illness; rather, she simply inquired about various viruses to which MC4 had been exposed. She denied telling McClain that MC4 was dying. She said that she went to see Dr. Elias for reassurance that MC4 was well enough to go home. Cothran admitted that she had told the hospital that MC4 had tested positive for COVID-19 at the pediatrician's office but claimed that she meant to refer to the rapid tests she conducted. Cothran asserted that her anxieties and misstatements were attributable to a concussion she had suffered on September 22. Her primary-care doctor confirmed that she had been diagnosed with a concussion. Cothran testified that she had taken Suboxone once about a week before MC4's removal instead of

²MC4 tested negative for COVID-19 upon being readmitted to the hospital.

taking pain medication that was offered to her for her concussion. She admitted that at the probable-cause hearing, she had testified that she got Suboxone from her doctor, but she actually got it from a family member.

McClain testified that MC4 had been in his care since she was removed by DHS on September 30. He said that since that time, she had not been ill other than an ear infection. He claimed that since MC4 was born, Cothran had always thought something was wrong with her. McClain said that he had found three or four packages of Suboxone in Cothran's makeup bag while MC4 was in the hospital, and he found empty Adderall capsules in MC4's diaper bag. McClain wanted custody of MC4 and said that he was employed, MC4 was in day care, and he had the support of his family.

Caseworker Christine McNair testified that the conditions at the time of removal still existed. Cothran had visited MC4 three times and had missed one visit. McNair said that Cothran believed MC4 had been sick since she left the hospital. She said that Cothran had completed a drug-and-alcohol assessment, and six group sessions had been recommended. Cothran's challenged drug screen was negative for methamphetamine, but her prescription drug Adderall was "higher than the limit." McNair noted that Cothran had failed to reveal in her drug assessment that she had used Suboxone or her Adderall use. Cothran had also been referred for a psychological evaluation. McNair had no concerns with McClain or his fitness for custody.

The circuit court adjudicated MC1, MC2, and MC4 dependent-neglected based on parental unfitness. The court found that Cothran was an unreliable narrator of medical

history for MC4 while speaking to medical personnel, and she provided unreliable testimony regarding her substance abuse without a prescription. The court found that her actions put the children at substantial risk of serious harm. The court found that McClain was a noncustodial parent who did not contribute to the dependency-neglect of MC4, and he is fit for custody of her. Accordingly, the court found that MC4 was no longer in need of DHS services and was dismissed from the case. The court found that ten-year-old MC1 and five-year-old MC2 were, however, in need of services. The court ordered that they would remain in the legal custody of Cothran, but to protect them from harm, Cothran was ordered not to remove them from their physical custodians and to have contact with them only as authorized by the court. The goal of the case was established as reunification with Cothran. In a separate order for permanent custody, the court awarded McClain permanent custody of MC4 on finding that to be in her best interest, and it ordered that Cothran would have reasonable visitation at McClain's discretion.

Adjudication hearings are held to determine whether the allegations in a petition are substantiated by the proof. Ark. Code Ann. § 9-27-327(a)(1)(A) (Supp. 2023). Dependency-neglect allegations must be proved by a preponderance of the evidence. Ark. Code Ann. § 9-27-325(h) (Supp. 2023). In dependency-neglect cases, the standard of review on appeal is *de novo*, but we do not reverse the circuit court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Ward v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 376, 553 S.W.3d 761. 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 reviewing a dependency-neglect adjudication, we defer to the circuit court’s evaluation of the credibility of the witnesses. *Id.*

The focus of an adjudication hearing is on the child, not the parent; at this stage of a proceeding, the Juvenile Code is concerned with whether the child is dependent-neglected. *Id.* Arkansas Code Annotated section 9-27-303(17)(A) (Supp. 2023) defines a “dependent-neglected juvenile” as any juvenile who is at substantial risk of serious harm as a result of certain acts or omissions to the juvenile, a sibling, or another juvenile, including parental unfitness.

Cothran contends that the evidence does not support the court’s dependency-neglect finding as to any of the children. She argues that the evidence revealed that MC4 had been hospitalized four times in her seven months of life, and while Cothran may have been emotional and overwhelmed, her behavior was no different than any other single mother caring for an infant that continues to be sick. She asserts that her concussion explains any irregular behavior, and she notes that the hospital deemed it safe to discharge MC4 into her care on September 29. She argues that the mere possibility of some unarticulated risk is insufficient evidence.

Although the hospital did deem it safe to discharge MC4 into Cothran’s care initially, despite well-documented concerns for her mental health and stability, other factors arose after the discharge. Along with Cothran’s unwillingness to accept doctors’ reassurances regarding MC4’s health, Cothran provided inaccurate information to the hospital upon her return and provided inaccurate information to MC4’s father. She also admitted using

Suboxone without a prescription, and there was evidence that she was misusing her Adderall prescription. We have said that illegal drug use by a parent makes the parent unfit. *Hilburn v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 420, at 4, 558 S.W.3d 885, 888. Whether Cothran's behavior was attributable to drug use, a mental-health crisis, or a concussion, doctors were concerned that she would not provide proper care and supervision for her child. See *Clary v. Ark. Dep't of Hum. Servs.*, 2014 Ark. App. 338 (holding that emotional instability was one factor supporting a finding of parental unfitness). We conclude that the finding of parental unfitness was not clearly erroneous.

Regarding MC1 and MC2, Cothran briefly argues that no evidence supports a finding of parental unfitness as to them because the only evidence about them was that they were safe in the physical custody of relatives. While there was no evidence regarding any actions Cothran had taken toward those children, we hold that the evidence of mental-health instability and drug use similarly placed them at risk of harm. See *Eason v. Ark. Dep't of Hum. Servs.*, 2012 Ark. App. 507, at 9, 423 S.W.3d 138, 143 (holding that the abuse or neglect of one sibling can establish that another sibling is at substantial risk of serious harm, even though there is no reason to think the other sibling has also been actually abused or neglected).

Last, Cothran briefly argues that the circuit court erred in awarding permanent custody of MC4 to McClain because there was no evidence to demonstrate that permanent custody was in her best interest as opposed to temporary custody or some other disposition. When a court finds that a child is dependent-neglected, the court shall determine whether a

noncustodial parent contributed to the dependency-neglect and whether the noncustodial parent is a fit parent for purposes of custody or family time. Ark. Code Ann. § 9-27-327(a)(1)(B)(i). The court may transfer temporary custody or permanent custody to the noncustodial parent after a review of evidence and a finding that it is in the best interest of the juvenile to transfer custody. Ark. Code Ann. § 9-27-327(a)(1)(B)(iv)(a). The circuit court heard evidence to support its finding that awarding custody to McClain was in MC4's best interest, and Cothran makes no specific challenge to this finding. Instead, she makes a conclusory argument that more evidence was necessary to support a finding that permanent custody was preferable to temporary custody, but she has cited no authority for this argument. We hold that Cothran has failed to establish that the court's award of custody was clearly erroneous.

Affirmed.

HARRISON, C.J., and BROWN, J., agree.

Eden Law Firm, by: Kimberly Eden, for appellant.

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

Dana McClain, attorney ad litem for minor children.