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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-23-703

DAYNA CHEATER AND DAVID
CHEATER

APPELLANTS

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES AND MINOR
CHILD

APPELLEES

Opinion Delivered March 13, 2024

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. 66FJV-22-300]

HONORABLE SHANNON L. BLATT,
JUDGE

REMANDED

BART F. VIRDEN, Judge

Appellants Dayna and David Cheater appeal from the Sebastian County Circuit Court’s order terminating reunification services with respect to a minor child (MC), who was in their temporary custody. Among other things, the Cheaters argue that the trial court erred by applying the wrong standard of proof. We remand for the trial court to consider whether there is clear and convincing evidence to support its findings.

On August 11, 2022, the Arkansas Department of Human Services (DHS) filed an emergency petition for “less than custody” with respect to MC (born June 2019), who had been abandoned by his biological mother, Vera Bishop, in 2020. The affidavit attached to the petition stated that, three days before MC’s first birthday, Bishop left him with Dayna, a

family friend. On September 7, the trial court placed MC in the temporary custody of Dayna and David.

Shortly thereafter, acting on a petition for emergency custody filed by DHS, the trial court removed MC from the Cheaters' temporary custody. The trial court, however, ordered the Cheaters to participate in the case plan, and they were offered reunification services. Approximately six months later, the trial court determined that the Cheaters were not complying with the case plan, and DHS moved to terminate reunification services on the ground that there is little likelihood of successful reunification, i.e., aggravated circumstances.

Following a hearing, the trial court entered its order granting DHS's motion.¹ In its order terminating reunification services, the trial court made several findings to support the ground of aggravated circumstances; in doing so, the trial court expressly stated in the order that its findings had been made by a preponderance of the evidence. Preponderance of the evidence means evidence of greater convincing force and implies an overbalancing in weight. *Ray Baxter, P.A. v. Baxter*, 2012 Ark. App. 251, 413 S.W.3d 561.

An order terminating reunification services, however, must be based on a finding of clear and convincing evidence that the termination of reunification services is in the child's best interest and that at least one ground for termination exists. Ark. Code Ann. § 9-27-

¹As required by Ark. R. Sup. Ct. 6-9(a)(1)(B), the trial court attached a certificate pursuant to Ark. R. Civ. P. 54(b) stating that there is no just reason to delay entry of a final judgment.

365(c) (Repl. 2020). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Johnson v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 296, 667 S.W.3d 582.

On appeal, both Dayna and David argue that the trial court erred in applying a lesser burden of proof in making its decision—preponderance of the evidence—instead of clear and convincing evidence as required by section 9-27-365(c).² DHS concedes this point. We agree that the trial court applied the wrong standard in terminating reunification services to the Cheaters. Although our standard of review is de novo, see *Hardy v. Arkansas Department of Human Services*, 2009 Ark. App. 751, 351 S.W.3d 182, the trial court is in a better position to render factual findings than an appellate court, and this is particularly true in cases involving child custody. *Daniel v. Daniel*, 244 Ark. 899, 428 S.W.2d 73 (1968). We therefore remand for the trial court to reconsider the evidence and apply the proper burden of proof.

Remanded.

ABRAMSON and THYER, JJ., agree.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*, for separate appellant Dayna Cheater.

Tabitha McNulty, Arkansas Commission for Parent Counsel, for separate appellant David Cheater.

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

Dana McClain, attorney ad litem for minor child.

²Dayna and David also argue that the trial court erred in not making a “required” best-interest finding under the proper burden of proof.