

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-686

BRANDY DUNCAN

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES & MINOR CHILD

APPELLEES

Opinion Delivered January 16, 2013

APPEAL FROM THE
WASHINGTON COUNTY
CIRCUIT COURT

[J10-912-3]

HONORABLE STACEY
ZIMMERMAN, JUDGE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

DAVID M. GLOVER, Judge

By order entered June 6, 2012, the Washington County Circuit Court terminated Brandy Duncan's parental rights to her daughter, V.M., born on August 16, 2010.¹ Pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(i), Duncan's attorney has filed a no-merit brief asserting that there are no issues that would support a meritorious appeal and a motion requesting to be relieved as counsel. The clerk of this court attempted to provide Duncan with copies of her counsel's motion and brief and to notify Duncan of her right to file pro se points of appeal, but the certified packet, which was sent to the

¹The termination order also terminated the rights of V.M.'s putative father, Lucas Myler; the termination of Myler's parental rights are not the subject of this appeal.



Cite as 2013 Ark. App. 13

address provided by the attorney in the certificate of service in the motion to be relieved, was returned to the clerk's office marked "not deliverable as addressed, unable to forward."

This case began on November 20, 2010, when Duncan was found unconscious outside her apartment and under the influence of drugs. Three-month-old V.M. had been left alone inside the apartment, and gas from a stove was filling the apartment. Earlier that day, Duncan and her boyfriend, Lucas Myler, were involved in a disturbance that led to Myler being taken to jail on domestic-battery charges. Blood was found throughout the apartment, and broken glass was strewn in the bedroom. Duncan was arrested on possession of a controlled substance and endangering the welfare of a minor. An order for emergency custody was entered on November 22, 2010. On December 2, 2010, a probable-cause order was entered, in which Duncan was given one hour of supervised visitation twice a week, and Myler was denied visitation due to the trial court's issuance of a no-contact order between Myler and V.M. On February 8, 2011, an order was entered adjudicating V.M. dependent-neglected and ordering that V.M. was to have no contact with either Duncan or Myler.

On May 16, 2011, a review order was filed in which the trial court found that Duncan had been compliant with court orders and the case plan and was making progress toward reunification. In the order, Duncan was awarded one hour of supervised visitation three times per week, but Myler was not awarded any visitation. On September 22, 2011, another review order was filed in which the trial court found that Duncan had continued



Cite as 2013 Ark. App. 13

to be compliant and continued to make progress toward reunification, and her visitation was modified to unsupervised visitation, but the no-contact order was continued between Myler and V.M.

On September 30, 2011, the trial court issued an order to show cause due to allegations that Myler had been living with Duncan and that Duncan had lied to the court about her and V.M.'s contact with Myler. However, this show-cause order was not addressed at the November 15, 2011 permanency-planning hearing because another judge filled in for the trial court at that time. The permanency-planning order found that Duncan was continuing to make progress toward reunification, but it ordered Duncan's visitation to be supervised. The order also provided that if visitation went well the Department of Human Services (DHS) was authorized to allow Duncan unsupervised four-hour visitations twice a week beginning six weeks before the fifteen-month permanency-planning hearing, as long as she addressed her relationship with Myler in counseling.

On January 26, 2012, a second show-cause order was issued directing Duncan to appear in court to answer the allegations that she was living with Myler and had lied to the trial court about not having contact with Myler. On the same day, a second order was filed that allowed continued unsupervised visitation with V.M. for Duncan but continued the no-contact order between Myler and both Duncan and V.M.



Cite as 2013 Ark. App. 13

In a February 15, 2012 permanency-planning order, the trial court found that Duncan had complied with the court orders and case plan and continued to make progress toward reunification. Therefore, the trial court granted a thirty-day trial placement with Duncan with the stipulation that Duncan and V.M. have no contact with Myler.

Then, Myler was arrested at Duncan's residence in February 2012. As a result, in a permanency-planning order filed on March 29, 2012, the trial court found that Duncan had not complied with court orders and the case plan because she had not demonstrated an ability to protect V.M. and keep her safe from harm nor had she resolved her unhealthy relationship with Myler. Accordingly, the trial court ordered Duncan's visitation to be supervised again. Further, the trial court found that V.M. could not be safely returned to Duncan's home; that Duncan had lied about her contact with Myler; that Duncan's testimony that Myler was not living in her home was not credible; and that Duncan had not shown an ability to keep V.M. safe from harm due to her relationship with Myler and her choices. Finally, the trial court set a termination-of-parental-rights hearing for May 18, 2012.

On April 24, 2012, DHS filed its petition for termination of both Duncan's and Myler's parental rights. DHS alleged two bases for termination of Duncan's parental rights—Arkansas Code Annotated section 9-27-341(b)(3)(B)(i) (juvenile had been adjudicated dependent-neglected, had continued out of the home for twelve months, and, despite a meaningful effort by DHS, the conditions that caused removal had not been



Cite as 2013 Ark. App. 13

remedied by the parent) and Arkansas Code Annotated section 9-27-341(b)(3)(B)(vii) (other factors arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that the return of the juvenile to the home is contrary to the juvenile's health, safety, or welfare, and that, despite the offer of appropriate services, the parent had manifested the incapacity or indifference to rehabilitate the circumstances preventing the return of the juvenile to the home).

At the termination hearing, Myler testified that he had been living with Duncan from March 2011 until he was arrested in February 2012, and that he knew that he was in violation of the trial court's no-contact orders. In an order filed on June 6, 2012, the trial court found that it was in V.M.'s best interest that Duncan's parental rights be terminated, and it terminated those rights on both bases alleged in the petition for termination.

In *Myers v. Arkansas Department of Human Services*, 2011 Ark. 182, at 15–16, 380 S.W.3d 906, 915, our supreme court set forth the standard of review in appeals concerning the termination of parental rights:

Our standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2009) requires an order terminating parental rights to be based upon clear and convincing evidence. 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. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was 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



Cite as 2013 Ark. App. 13

firm conviction that a mistake has been made. *Id.* Such cases are reviewed de novo on appeal. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). However, we do give a high degree of deference to the trial court, as it is in a far superior position to observe the parties before it and judge the credibility of the witnesses. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

In order to terminate parental rights, a trial 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) (Repl. 2009). Additionally, the trial court must find by clear and convincing evidence that one or more statutory grounds for termination exists. Ark. Code Ann. §9-27-341(b)(3)(B).

Here, in finding that it was in V.M.'s best interest for Duncan's parental rights to be terminated, the trial court was presented with unrefuted testimony from the caseworker that V.M. was a sweet, social, almost two-year-old child who was progressing well, was developmentally on track, and had no medical needs. It was the caseworker's opinion that V.M. was very adoptable. The trial court addressed the potential of harm to V.M. by Duncan's actions of lying to the court about her continued involvement with Myler and allowing him to see V.M. despite orders forbidding such contact and Duncan's demonstration that she was unable to place V.M. above her "twisted and dysfunctional" relationship with Myler. Both grounds relied upon by the trial court for termination were proved by clear and convincing evidence. Although it appeared that Duncan was making significant progress in regaining custody of V.M. (even gaining a thirty-day trial placement of V.M. in her home), the lies that Duncan had been feeding the trial court became



Cite as 2013 Ark. App. 13

apparent in February 2012 when Myler was arrested at Duncan's residence, despite the no-contact orders forbidding Myler from having contact with either Duncan or V.M. due to the history of domestic violence between Myler and Duncan. It became clear to the trial court that Duncan was still in a relationship with Myler throughout the proceedings and that she was allowing Myler to be with V.M. in violation of the no-contact orders (a fact confirmed by Myler at the termination hearing). Due to the volatile nature of Duncan and Myler's relationship in the past, including domestic abuse, and Duncan's continual lies throughout the pendency of the proceedings about her continued relationship with Myler, the trial court was convinced that, after more than fifteen months into the case, Duncan was still unable to demonstrate that she could make decisions that would protect her child. These findings support both bases that the trial court found for termination of parental rights.

In addition to the sufficiency of the evidence, there were two rulings that were adverse to Duncan at the termination hearing. During the testimony of the DHS caseworker, counsel for DHS asked if she believed that Myler had continued to have contact with V.M. despite the trial court's no-contact orders. Duncan's counsel objected, and the trial court overruled the objection, stating that the caseworker could say what she believed. The caseworker then testified that she believed that Myler was living with Duncan and therefore had contact with V.M. Rule 701 of the Arkansas Rules of Evidence provides that a lay witness may testify to opinions or inferences that are



Cite as 2013 Ark. App. 13

“rationally based on the perception of the witness.” Here, the caseworker believed that Myler was living with Duncan during the time of the no-contact order between Myler and V.M. because Myler was arrested at Duncan’s house in February 2012. Her opinion was rationally based on her perception. In any event, Myler later testified that he was in fact living with Duncan in violation of the no-contact order, so the caseworker’s testimony was merely cumulative in light of that testimony.

The other adverse ruling noted by Duncan’s counsel occurred during the questioning of Myler, when the trial court sua sponte admonished Duncan’s counsel not to ask Myler a question that had already been answered. Rule 611(a) of the Arkansas Rules of Evidence provides that the court “shall exercise reasonable control” over the interrogation of witnesses and the presentation of evidence to make it effective for the ascertainment of the truth, to avoid needless consumption of time, and to protect witnesses from harassment or undue embarrassment. Here, Myler had previously testified that he had not informed DHS that he was living with Duncan because he had an outstanding warrant for failure to appear; when Duncan’s counsel again questioned Myler as to why he did not contact DHS, the trial court stated that he had already answered that question. Thus, this was simply the trial court exercising control over its courtroom and moving the testimony along to information that had not already been disclosed.

After carefully examining the record and the brief presented to us, we hold that counsel has complied with the requirements established by the Arkansas Supreme Court



Cite as 2013 Ark. App. 13

for no-merit appeals in termination cases, and we conclude that the appeal is wholly without merit. Accordingly, counsel's motion to withdraw is granted and the order terminating Duncan's parental rights is affirmed.

Affirmed; motion to be relieved granted.

GLADWIN, C.J., and VAUGHT, J., agree.

Deborah R. Sallings, Arkansas Public Defender Commission, for appellant.

No response.