ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE DIVISION I

CA 06-798

MAXINE MCINTOSH

March 7, 2007

APPELLANT

V.

APPEAL FROM THE UNION COUNTY CIRCUIT COURT
[NO. JV-2004-120-3]

ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES

HONORABLE EDWIN A. KEATON, JUDGE

APPELLEE

AFFIRMED

SARAH J. HEFFLEY, Judge

Maxine McIntosh appeals the termination of her parental rights in her four daughters. For reversal, she contends that the trial court's findings are clearly erroneous. We disagree and affirm.

Arkansas Code Annotated section 9-27-341(b)(3) (Supp. 2005) provides that an order terminating parental rights shall be based upon a finding by clear and convincing evidence (A) that it is in the best interest of the juvenile; and (B) of one or more of the following grounds: (ix)(a) the parent is found by a court of competent jurisdiction, including the juvenile division of circuit court; (3) to have subjected the child to aggravated circumstances; or (4) have had her parental rights involuntarily terminated as to a sibling

of the child. The term "aggravated circumstances" means a child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. Ark. Code Ann. § 9-27-341(b)(ix)(a)(3)(B)(I) (Supp. 2005).

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Benedict v. Arkansas Dep't of Human Services,* ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 1, 2006). Thus, there is a heavy burden placed on the party seeking to terminate the relationship. *Ullom v. Arkansas Dep't of Human Services,* 340 Ark. 615, 12 S.W.3d 204 (2000). However, parental rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. *Camarillo-Cox v. Arkansas Dep't of Human Services,* 360 Ark. 340, 201 S.W.3d 391 (2005).

The facts warranting termination must be proven by clear and convincing evidence. *Baker v. Arkansas Dep't of Human Services,* 340 Ark. 42, 8 S.W.3d 499 (2000). In reviewing the trial court's evaluation of the evidence, we will not reverse unless the trial court's finding of clear and convincing evidence is 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. *Dinkins v. Arkansas Dep't of Human Services,* 344 Ark. 207, 40 S.W.3d 286 (2001). In

resolving the clearly erroneous question, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Camarillo-Cox v. Arkansas Dep't of Human Services, supra.* In matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Ullom v. Arkansas Dep't of Human Services, supra.*

Appellant is the mother of DH1 (DOB 9-27-94); OH (DOB 4-6-96); SH (DOB 2-11-98); and DH2 (DOB 3-9-99). Appellee, the Arkansas Department of Health and Human Services (DHHS), took the girls into emergency custody on September 27, 2004, based on the allegation that Eddie Maywether, appellant's live-in boyfriend of four years, had sexually abused DH1. A probable-cause order was entered on October 21, 2004. Appellant waived an adjudication hearing, and the disposition hearing was held on November 24, 2004, at which time the trial court considered DHHS's petition to be relieved of providing reunification services because of aggravated circumstances.

Disposition Hearing

At the disposition hearing, Tim Matthews, an officer with the Union County Sheriff's Department, stated that he was tasked with investigating a complaint made by a school counselor that DH1 was being sexually abused. He met with appellant at her home late in the afternoon on September 27, 2004. Appellant told Officer Matthews that she began having suspicions about the abuse on Labor Day, when she returned to her bedroom that morning and saw DH1 reclining on top of Mr. Mayweather. Though they were fully

clothed, appellant said that "it didn't look right." Appellant stated that she confronted Mayweather, but he said he did not mean anything by it and that, if he touched DH1, it was accidental. Appellant told Officer Matthews that she had reported her suspicions to the school counselor and had asked the counselor to speak to the children because they would not open up to her.

Officer Matthews also spoke with DH1 that afternoon. She indicated to him that Mayweather had used baby oil when he assaulted her. Mayweather testified that, when he told appellant what the child had said, appellant dropped her head and cried, as if her beliefs had come true. As confirmation of what the child had said, appellant told Officer Matthews that she had found Mayweather's boxer shorts in the den, as well as baby oil. Matthews relayed what he had learned to a state police officer, who advised appellant that she had the option of either going with the children to a shelter, or having the children placed in the custody of DHHS. Matthews said appellant became angry because she did not want to go to a shelter, nor did she want the children to be taken. Matthews testified that appellant finally told him to "take the kids." He felt that appellant was more concerned about Mayweather taking her possessions, should she leave home, than she was about the children's welfare.

Teri Stevens conducts child maltreatment investigations as an assessment unit worker for Union County. She was called the night of September 27 to devise a safety plan for the children. As she was en route, she spoke with appellant on the telephone and told

her that she should go with the children to a shelter because it was not safe to stay in the home. She said appellant refused to leave home, because she was enrolled in courses on the internet and could not miss a day of class. Appellant hung up the phone when Stevens commented that the children were more important than a class. Stevens spoke with appellant a second time, and appellant told her that she did not want to leave her furniture. Appellant also said to Stevens that Mayweather could not get back into the house because he did not have a key and that she did not believe that he was coming back home. Appellant hung up on Stevens again when Stevens strongly advised appellant that staying in the home with the children was not a safe plan. Stevens testified that in this last conversation she explained to appellant that getting DHHS involved initiated a court process and that she would not get the children back immediately if she allowed them to be taken into custody. Stevens said that appellant exclaimed, "Forget it. Just come and get them." Stevens said she was left with the impression appellant was unwilling to protect the children.

Mona Williams is a counselor at Parkers Chapel where the girls attended school. She testified that appellant called her seven or eight times between August and September 27, 2004. Ms. Williams said appellant was concerned that Mayweather was having inappropriate contact with the girls and that appellant wanted her to call the abuse hot line. Appellant also wanted her to speak with the girls because they would not speak with her. Appellant sent Ms. Williams an email on September 11, 2004, which stated:

> I need help with the issue that has happened with my child, please call the authorities for us as soon as possible. I live on their [sic] land and in the Mayweather property and I was told not to say anything because my children and myself will be homeless if I call. I did see Eddie Mayweather laying on the bed in our bedroom with[DH1] laying on top of him. Eddie has been to prison for rape for which I was told by his son's grandmother. She told me because he raped her sister. I don't know for sure if he has molested any of my children but please help us as soon as possible. I do have a house full of furniture and Eddie has some type of pink card where he has to register with the police where ever he moves and we have been here sense [sic] November 2003 and he has not registered at all. I am in a mess because I know he has that card and he won't say what this card is for. Please help us, Thank You (after this we will be homeless and we have no family or friends out here we were brought out here by him.

During the course of their conversations, Ms. Williams advised appellant on three different occasions to go to a shelter with the children. Appellant told her that she did not want to go to a shelter because of a computer class and because she did not want to leave her belongings. Ms. Williams spoke with DH1 on September 27, and the child told her that Mayweather was having sex with her. Ms. Williams then called the abuse hot line, which began the investigation.

Harriet Allison, a nurse practitioner, examined the three younger girls. OH did not admit that she had been molested, and there were no physical signs of abuse. SH said that "daddy laid on top of me." DH2 reported that "daddy put his finger in there," pointing to her vaginal area. There were no physical findings of abuse as to DH2, but SH's vaginal opening was slightly enlarged, and she had a pale, green, and watery discharge. Ms.

Allison determined that the children were victims of abuse.

Stephanie Higgins, a DHHS supervisor in Union County, testified that appellant told her she had met Mayweather in California four years ago and that she and the children moved with him to Arkansas in November 2003, where they lived in a trailer on property owned by Mayweather's parents. Appellant also related that she knew something was going on between Mayweather and the children, because she had caught them watching dirty movies and had seen DH1 lying on top of Mayweather. Ms. Higgins testified that appellant had cause for concern, but that she did nothing to protect the children.

Ms. Higgins stated that attempts had been made to provide services to appellant, but that appellant fought every suggestion. In terms of housing, she said appellant did not understand why it was necessary to leave the trailer, the place where the abuse had occurred. Ms. Higgins said that, although Mayweather was in jail because of the abuse allegation, there was no guarantee that he would not be released on bond. She said appellant's chief concern about leaving the home was her furniture. Appellant also turned down a one-bedroom apartment that was offered to her, and she found fault with other apartment complexes that were suggested. Ms. Higgins said appellant also questioned why it was necessary for her to find a job.

Ms. Higgins testified that appellant told her she had carpal-tunnel syndrome, degenerative disc disease, mental health issues, and other maladies for which she was taking twenty-seven to thirty medications. Appellant's application for SSI had been denied,

but appellant was appealing that decision. She recommended appellant for employment at Benchmark, which provides employment to the disabled, but she said appellant had not yet applied. Ms. Higgins said appellant had obtained an order of protection against Mayweather, but she believed appellant had not wanted to take that action and that she obtained the order only because of the pressure placed on her to do so.

Ms. Higgins testified that relative placement had been explored, but that appellant had refused to name any relatives who might take the children. It was also Ms. Higgins' understanding that appellant had lost permanent custody of five of her six children in California.

Ms. Higgins further testified that appellant had known of Mayweather's past transgressions, which included the rape of a handicapped woman. Appellant mentioned that Mayweather had a "pink card," which required him to register as a sex offender. Ms. Higgins said that, despite this knowledge, appellant refused to separate herself from him because she did not want to leave her furniture. Ms. Higgins also disclosed that appellant had written two letters to Mayweather while he was in jail. Appellant wrote such things as: "I will always love you"; "I don't understand why you did these things"; "Why can't things be the way they were when we were in California?"; "The kids miss their daddy"; "You will always have a place in my heart."

Roland Ponthieux, a special agent with the Arkansas State Police, interviewed Mayweather concerning the abuse allegations. During the interview, Mayweather admitted

he had sex with DH1 five or six times since March 2004. Mayweather also said that he put baby oil on his private parts to facilitate the assaults.

Rebecca Draper was assigned as the family's service worker. She had taken appellant to apply for housing, had referred her for counseling, and had suggested employment at Benchmark, where she could work without jeopardizing her request for SSI benefits. She said appellant did not understand why she needed a job, claiming that she received grant money for taking online classes. Appellant had made no valid attempt to obtain housing, preferring instead to stay in the trailer. Ms. Draper said that this was not a proper safety plan.

Ms. Draper asked Mayweather if appellant had known that he was abusing the children. Mayweather responded affirmatively, saying appellant had called a meeting with him, his mother, and DH1 in August 2004, during which he admitted what he had been doing. He said that DH1 hugged him after he confessed, and he promised her that it would stop. Ms. Draper also saw the letters appellant had written Mayweather in jail. In them, appellant apologized to Mayweather for getting the order of protection and told him that she got the order only to get the children back. Appellant also indicated in a letter that she would help Mayweather, and she sent him a photograph of him and her. She ended the second letter by saying, "Love always, keep your head up."

Carol Garrett, a psychologist, met with the girls. DH1 told her that appellant gave her a green liquid medicine that she took at night because she got on appellant's nerves.

The other children also reported that appellant gave them medicine at night to make them sleepy. DH1 told her that Mayweather touched her all over and that he put his "weenie" between her legs. DH2 said that Mayweather had touched her privates. Together, the four girls drew a penis, with each one adding different details. Garrett said that, given the detail of the drawing, the children had more than glanced at a penis. DH2 had drawn another detailed picture that showed an anatomically correct, back view of a man. Garrett testified that this also suggested a fair amount of contact and that she had only seen such a drawing twice in her twelve years of experience. SH related that she had told appellant about the abuse and that appellant had gotten mad and slapped Mayweather and told him to stop.

A social-work assessment from Children's Hospital regarding DH1 was received into evidence. DH1 reported that the abuse had been ongoing for four years, beginning in California. She also said that Mayweather touched her sisters, but that he "did more things to me." The child said she told appellant about Mayweather touching her and that her mother "put a trap up," meaning that she put a light on the bedroom she shared with Mayweather so she could see him leave and go into the children's room. DH1 also said appellant told her that Mayweather was trying to stop. The report included a finding of suspected sexual abuse based on the child's statements and physical findings upon examination.

The court-appointed special advocate's report was introduced into evidence. It stated that appellant blamed DHHS for her situation and that DHHS had prevented her

from obtaining housing and receiving community assistance and counseling. The report also outlined several contradictions in appellant's account of recent events. Appellant claimed that Mayweather had ripped the phone from the wall to keep her from reporting the abuse, thus maintaining that she had no means with which to call the authorities or seek help. Appellant also said, however, that she had spoken by phone on a daily basis with the school counselor about suspected abuse. Appellant reported that she had confronted Mayweather about the "pink card" on September 27, the day she found the card and the day the children were taken, but appellant also showed the advocate the email sent to the school counselor dated September 11, in which she referred to the "pink card." Appellant expressed the view that Mayweather should pay severely for what he had done to "the girls," but she would then "backtrack and say just [DH1]." The secretary at the school told the advocate that appellant had telephoned her and reported that there was "semen all over the house."

Appellant testified that she was from California and had graduated high school in 2003 when she was thirty-eight years old. At present, she was taking online courses in criminal justice. She said she had a grant that pays for her housing and course work and that she would lose the grant if she dropped out. In two to four years, she would have a bachelor's degree so that she could better care for her children.

Appellant testified that she was the mother of ten children. Her first six children were fathered by Michael Walker. Nicholas Hall was the father of her daughters involved

in this appeal. In 1994, she lost custody of her first six children because of sexual abuse. Appellant testified that she regained custody of her oldest son seven years later, but that the other five children were placed in the custody of Mr. Walker's sister. She said she did not regain custody of the other children because it was said she had mental problems and could not take care of them. Appellant had not visited those children since 2000. According to appellant, she had not visited them because Mr. Walker's sister did not want her around the children after appellant hit Walker in the head with a gin bottle, causing a laceration that required thirty-two stitches to repair.

Appellant recalled that in 1992 and 1993 she had participated in alcohol rehabilitation. Appellant testified that she was diagnosed with agoraphobia in 1998. She said she "was fine now," though she still takes medication for that condition. She also said that she has a chemical imbalance, carpal tunnel syndrome, degenerative disc disease, and bursitis. Appellant testified she had been diagnosed with manic depression, and that she has black spots in her vision and trouble sleeping at night. A doctor had recently reduced the number of her medications to nineteen.

Appellant testified she began to suspect that Mayweather was abusing DH1 on September 6 when she saw the two lying "belly to belly" on the bed. Appellant testified that she did not know for sure that the child was being abused until Ms. Williams informed her on September 27. She denied that there had been a meeting with Mayweather, his mother, and the child in August that concerned the topic of sexual abuse. Appellant

recalled only that there was a discussion one time about a gas bill. She also said that she did not know anything about Mayweather's past misconduct until September 28.

Appellant further testified that she did not do anything after Ms. Williams called her on the 27th because DH1 said that Ms. Williams was taking care of everything and all that she needed to do was wait. Appellant testified that she could not call the abuse hotline because Mayweather threatened to kill her. She said that Mayweather tried to stab her on the 27th before the police came when she confronted him about the "pink card." She said she told the police about this but they did not care.

Appellant testified that she did not contact Ms. Williams with concerns about abuse, but that Ms. Williams contacted her first. Appellant said that she spoke with Ms. Williams in August only because DH1 was stealing things from other children. Appellant denied anyone suggested that she take the children to a shelter. She testified that an investigator told her she did not have to go to a shelter because Mayweather had been arrested and had made a confession. She said she was just told that the children were going to be removed from the home, and she denied telling anyone to take the children. Appellant testified that she mentioned her internet class to the authorities but that she did not speak about her furniture. Appellant said she had seen boxers and baby oil in the den, but she denied that she had seen Mayweather and the children watching dirty movies. She denied that she had slapped Mayweather or told him to stop abusing the children. She also said she had not been asked to name any of her relatives for a possible placement. Appellant testified that

it took her twenty-three days to get the order of protection because she was not helped with transportation. The lack of transportation also prevented her from applying for a job at Benchmark. She said that her applications for housing had been denied because she did not have a rental history in Arkansas of one year.

Appellant stated that she had written Mayweather in jail at Ms. Draper's suggestion. She acknowledged she wrote to him, "I'm not happy that you are in there"; that she was "cheated out of a choice which was to be with him or not"; and "who's to say what I would have chose."

Alice Mayweather, Eddie Mayweather's mother, testified that the first time she learned about her son's abuse of the children was the day they were taken into custody. She denied that there had been a meeting in August concerning that subject. She said the August meeting concerned a gas bill, and she acknowledged that Mayweather was crying, but she said she did not know why he was crying. She said she would allow appellant to stay in the trailer for free until appellant found a suitable place, no matter how long it took. Ms. Mayweather testified that she was not bonding her son out of jail, but that if he did get out of jail, she would abide by the order of protection and not allow him on the property.

After hearing the evidence, the trial court found that it did not believe appellant's testimony that she was not given the option of going to a shelter the night the children were removed from her custody. The court also found that appellant did not take sufficient steps to protect the children. The court, however, took under advisement the decision on whether

DHHS would be required to provide reunification services.

Review Hearing

At a review hearing in June 2005, it was brought up that the court had found the existence of aggravated circumstances so as to relieve DHHS from providing reunification services, but that the court's decision had not been reduced to order form. Because no written order had been entered, DHHS had been providing reunification services to appellant, which included weekly supervised visitation, counseling, and transportation services. By this time, appellant had also obtained suitable housing, and she had begun working at Benchmark on December 17, 2004. She was presently taking only twelve medications. It was said that appellant had done everything that had been asked of her.

Permanency-Planning Hearing

A permanency-planning hearing was held a month later on July 7, 2005. Rebecca Draper testified that appellant was being evicted from her home for failure to pay rent. Appellant had regularly attended visitation. Because services had been suspended, she did not know whether appellant was still employed at Benchmark or whether appellant remained in counseling. Ms. Draper recommended that appellant's parental rights be terminated because appellant had placed her children in danger and had failed to protect two sets of children. Ms. Draper opined that the provision of services would not change the fact that appellant knew the abuse was happening and that she allowed it to continue. She also testified that during visits appellant undermined the rules set by the children's

foster parents by telling the children that they did not have to do or eat what they did not want. Appellant also constantly complained about the way the children were dressed and had their hair done.

Marie Coke was SH and DH2's foster mother. She said that both children told her that they had been molested. She said DH2 had informed her on a number of occasions that she wanted to have a baby, and Ms. Coke said that the child equated having babies with having sex. Elease Hill was DH1 and OH's foster mother. She caught OH exhibiting sexually inappropriate behavior towards her five-year-old grandson.

Beverly Griggs, a supervisor at Benchmark, testified she had observed appellant and the children at the last court date. She said appellant related well with the children, that she corrected them when necessary, and that they were loving towards appellant, as she was towards them.

Court's Rulings

On August 12, 2005, the trial court entered the order formalizing its previous decision to relieve DHHS from providing reunification services. The trial court based this decision on a finding of aggravated circumstances in that further services were not likely to result in reunification. The court found, specifically, that Mayweather had raped at least two of the children and had exposed the other two children to his sexual misconduct; that appellant had reason to know that Mayweather was sexually abusing at least one of her daughters, but she did not take appropriate steps to protect the child from further abuse; that

appellant, upon being presented with proof that Mayweather had sexually abused DH1, refused to take action to protect the child and the other children from further abuse; that appellant had not taken sufficient steps to gain employment or to secure suitable and safe housing and had rejected efforts to relocate to an abuse shelter; that appellant put her interest in an internet class and maintaining possession of furnishings over protecting the children from abuse and maintaining them in her custody; that appellant was presented with the option of moving herself and her daughters from the perpetrator's home to a safe shelter or her children would be removed from her custody, and that appellant responded to this option by staying at the perpetrator's home and telling DHHS to come and get her kids.

Also on that date, the trial court entered a permanency-planning order changing the goal of the case plan to termination of appellant's parental rights. The trial court found that, although appellant had complied with the services that had been provided since November, "those services had nothing to do with the problem, which was the mindset of appellant about the sexual abuse and her failure to protect the children." The court noted that this was the second time abuse had occurred to children of appellant, and that services that had been provided did not fix her mindset.

Termination Hearing

The termination hearing was held on November 7, 2005. Eugenia Ford had taken over as case worker on July 29, 2005. Appellant was currently allowed monthly supervised visits with the children, but appellant had missed the last visitation. Appellant had not been

attending her counseling appointments. Appellant had lost her job at Benchmark, and her house had burned.

Stephanie Higgins testified that Mayweather had been sentenced to forty years in prison. She said that, after Mayweather entered his guilty plea, his parents asked appellant to move out of the trailer. Ms. Higgins said this was the only reason appellant obtained alternative housing. She testified appellant did well for a period of time, but that she had since been fired from her job and had stopped attending counseling, which had been provided by her employer. She said appellant had once been cordial, but that she had become belligerent and verbally aggressive with case workers. It was her understanding that appellant's parental rights had been terminated as to her other children in California. The trial court terminated appellant's parental rights by an order dated December 14, 2006, on grounds of aggravated circumstances and involuntary termination as to her children in California.

Appellant's Arguments

Appellant presents several arguments to support her contention that the trial court's findings are clearly erroneous. She first argues that, in finding aggravated circumstances because appellant did not leave the Mayweather home, the court failed to consider that Mayweather was arrested, jailed, and eventually sentenced to forty years in prison, such that he posed no harm to the children. She also takes issue with the trial court's overall finding of aggravated circumstances based on the determination that there was little

likelihood that providing services would result in successful reunification. The trial court's findings regarding aggravated circumstances, however, were made in connection with the disposition order relieving DHHS from providing services. Disposition orders are capable of being appealed under Rule 2(c)(3)(A) of the Arkansas Rules of Appellate Procedure - Civil. Appellant's failure to appeal from that order precludes consideration of this issue on appeal from the termination order. *Lewis v. Ark. Dep't of Human Services,* 364 Ark. 243, ___ S.W.3d ___ (2005).

In another point, appellant contests the trial court's finding in the termination order that she did not complete counseling. Although appellant points to testimony that appellant had been doing all that was asked of her, that testimony was offered at the permanency-planning hearing in reference to the state of affairs that existed at that time. At the termination hearing, there was testimony that appellant had missed counseling sessions and that she had lost her job at Benchmark through which she had been receiving counseling. We cannot say that the trial court's finding is clearly erroneous.

Appellant finally contends that the trial court's finding that her rights had been involuntarily terminated as to her first set of children is based on speculation. She contends that the only evidence regarding the case in California came from her own testimony, and that the situation she described in California was quite different from the abuse perpetrated by Mayweather. Appellant's argument ignores the testimony of Ms. Higgins at the termination hearing that appellant's rights were involuntarily terminated as to her children

in California. In addition, the pertinent provision of the referenced statute reads that the parent "had his or her parental rights involuntarily terminated as to a sibling of the child." Ark. Code Ann. § 9-27-341((b)(3). It contains no requirement that the previous termination be of the same or similar character as the case presently under consideration. The trial court's decision in this regard is not clearly erroneous.

Affirmed.

HART and MARSHALL, JJ., agree.