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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AMELIA J.,) No. 1 CA-JV 11-0231
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103 (G) Ariz. R.P. Juv.
SECURITY, CESAR R., LISANDRA R.,) Ct.; Rule 28 ARCAP)
ANDREA R., ERICA R.,)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD16926

The Honorable Joan M. Sinclair, Judge *Pro Tem*

AFFIRMED

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Under Rule 38
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Tucson

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D O W N I E, Judge

¶1 Amelia J. ("Mother") appeals from the juvenile court's order terminating her parental rights. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother has a son, C.R., born in January 1995, and three daughters -- A.R., born in August 1999; L.R., born in January 2001; and E.R., born in March 2008 (collectively, "the girls"). C.R. has spastic quadriparetic cerebral palsy and a brain lesion. He cannot move without assistance and is wheelchair-bound, blind, deaf, and non-verbal. C.R. was born in Mexico; the girls were born in Arizona. Mother was not legally present in the United States.

¶3 In June 2008, a neighbor reported to Phoenix police that C.R. was possibly left alone in the family apartment. Around 9:00 p.m., officers found C.R. alone, lying on his back on the living room floor. A bag of crackers was near him on the floor. Officers saw C.R. feel around the floor, pick things up, and put them in his mouth. The apartment was a "mess," and the carpet around C.R. was not clean. The apartment was also hot and not air conditioned.

¶4 C.R. did not respond to the officers' presence until they touched him; he then indicated he wanted something. The officers gave C.R. a bottle of water, which "he sucked down . . . within a couple of seconds," causing him to vomit.

When C.R. appeared unable to clear his airway, officers rolled him onto his side.

¶15 An "hour or so" later, Mother and E.R. returned to the apartment. Mother told officers that she, C.A.¹, and the girls left around 7:30 p.m. without C.R. because "there wasn't enough room" in the car. Mother dropped C.A., A.R. and L.R. at the park then took E.R. with her to get keys to an apartment where the family planned to move the next day. Mother and E.R. returned to the apartment about 8:30 p.m. When Mother realized there was no milk, she again left C.R. alone. Mother told officers she did not typically leave C.R. home alone, but did so because "it was an emergency."

¶16 C.A. returned to the apartment and told officers a similar story, confirming that he also knew C.R. had been left home alone. The officers contacted Child Protective Services ("CPS"), and the four children were placed in foster care. Mother was charged with child abuse.² She was placed at an immigration detention facility ("federal facility") pending a deportation hearing and was also in the county jail for a few months.

¶17 In July 2008, the Arizona Department of Economic Security ("ADES") filed a dependency petition, alleging Mother

¹ C.A. is the father of A.R. and L.R.

² Mother pled guilty to endangerment, a class six undesignated felony and domestic violence offense.

was unable to parent due to neglect and based on her incarceration on child abuse charges. The court found the children dependent. It also stated that ADES would not offer Mother services while incarcerated, but approved a case plan for family reunification.

¶18 In June 2009, the case plan was changed to severance and adoption for the girls. ADES moved to terminate Mother's parental rights based on abuse and neglect. See Ariz. Rev. Stat. ("A.R.S.") §§ 8-201, -533(B)(2). After a trial, the juvenile court found that Mother's "conduct in leaving [C.R.] home alone for more than two hours in a hot apartment on a June evening constitute[d] abuse and neglect of a severely disabled child," but it could not find that her conduct toward C.R. "would endanger the girls in the same way" or that the girls "were in danger of abuse or neglect." The court denied the severance motion. The children remained in foster care.

¶19 In May 2010, the court affirmed a case plan of family reunification for the girls and long-term foster care for C.R. ADES informed the court that Mother had not participated in services due to her federal detention. ADES asked that it be allowed entry to the federal facility to complete a psychological evaluation and visitation. The court granted that request. The ADES case manager made referrals for services, but Mother was deported to Mexico before they could be implemented.

ADES contacted the Mexican consulate and requested a home study, psychological evaluation, and parenting classes. Mother participated in parenting classes, drug testing, and telephonic visits with the girls while in Mexico.

¶10 In September 2010, A.R. told the court that she wished to be adopted, but ADES requested additional time for Mother "to continue with services." The court affirmed the case plan of family reunification for the girls and long-term foster care for C.R. In October 2010, ADES received Mother's Mexican home study. Mother failed to tell the evaluator about her criminal conviction for endangerment or disclose why her children had been removed. Instead, the home study stated that Mother left C.R. with C.A., who was responsible for leaving C.R. home alone.

¶11 In March 2011, the court granted ADES's request to amend the case plan to severance and adoption for E.R. and C.R., and guardianship for A.R. and L.R. ADES filed a severance petition, alleging abuse and neglect as to C.R. and citing 15 months in care, the agency's diligent efforts to provide reunification services, and Mother's inability to remedy the circumstances leading to out-of-home placement as grounds for severing her rights to E.R. and C.R. See A.R.S. §§ 8-201, -533(B)(2), -533(B)(8)(c). ADES separately moved to appoint guardians for A.R. and L.R. However, the guardian ad litem ("GAL") for A.R. and L.R. moved to terminate Mother's rights to

them based on abuse and neglect and out-of-home placement for 15 months or longer. See A.R.S. §§ 8-201, -533(B)(2), -533(B)(8)(c).

¶12 A contested severance trial ensued. The court thereafter issued a 16-page ruling terminating Mother's rights to all four children. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235.

DISCUSSION

¶13 Mother contends the severance order was improper because: (1) no reunification services were offered in the federal facility and insufficient services were offered while she was jailed; (2) the case plan was designed to fail because no services were offered in the federal facility and there was no meaningful way for her to comply with the plan while in Mexico; (3) leaving C.R. alone in June 2008 was "not the type of abuse or neglect that justifies termination"; and (4) Mother received ineffective assistance of counsel.

¶14 To terminate parental rights, the court must find by clear and convincing evidence at least one statutory ground set forth in A.R.S. § 8-533 and also find that termination is in the child's best interest. *Minh T. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 76, 79, ¶ 9, 41 P.3d 614, 617 (App. 2001). We review a severance order in the light most favorable to sustaining the

decision. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 95, ¶ 10, 210 P.3d 1263, 1266 (App. 2009) (citation omitted). "[W]e will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (citations omitted).

I. Severance as to C.R.

¶15 In moving to terminate Mother's rights to C.R., ADES alleged:³

[Mother] has willfully neglected and abused [C.R.] or failed to protect [C.R.] from willful neglect and abuse so as to cause a substantial risk of harm to [C.R.'s] health or welfare. A.R.S. § 8-201(2), -533(B)(2); A.R.S. § 8-201(21), -533(B)(2). [C.R.] was left home alone for an unknown period of time. [C.R.] has significant medical issues, and is deaf and blind. When the police found him, he was lying on the floor with his head in a box, he did not have access to his wheel chair, there were food crumbs scattered around him, and the house was filthy. The other children and the babysitter reported that he had been left home alone in the past. Based upon this incident, Mother was charged with, and convicted of, a crime.

³ Because we affirm the termination order based on abuse and neglect, we need not examine whether additional grounds for severance existed as to C.R. See *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205 ("If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.").

¶16 Mother contends the "one incident" of leaving C.R. home alone "does not rise to the level of an unreasonable risk of harm to the child." We disagree and conclude that clear and convincing evidence supports the termination order based on neglect.

¶17 Neglect includes the "inability or unwillingness of a parent" to provide a child with supervision "if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(22). The record includes evidence that Mother left C.R. home alone on several occasions. Due to C.R.'s disabilities, he could not hear, move independently, or call out for help in case of an emergency. In the June 2008 incident, he was left alone for hours without air conditioning or water. The area around him was littered with objects that could choke him, and he could not clear his own airway if they did. The juvenile court found that Mother left C.R. alone in a "dangerous situation." The record amply supports this finding.⁴

¶18 Also significant is the fact Mother pled guilty to endangering C.R., a domestic violence offense that by its very nature establishes neglect at a minimum. See A.R.S.

⁴ Officers testified that Mother admitted leaving C.R. alone that night. Mother testified that the officers' testimony was incorrect and that she left C.R. in the care of C.A. C.A., however, testified it was Mother who left C.R. alone. The court found Mother's claim that C.A. left C.R. alone "not credible."

§§ 13-1201(A) ("A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury."), -1201(B) ("Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor."). Despite her guilty plea, during the severance trial, Mother denied any responsibility for the circumstances that brought her children into care and testified she would not have done anything differently. She denied making "poor choices" and believed services to help her parent her children were unnecessary.

¶19 The juvenile court concluded that C.R. "would suffer a detriment if returned to Mother" and has "significant needs that Mother cannot meet." The court was also concerned about Mother's failure to demonstrate "any insight into why the children were taken into care." It noted that Mother accepted "no responsibility" for the removal of her children. Under the circumstances presented, a reasonable trier of fact could conclude that Mother's parenting posed an unreasonable risk of harm to C.R.'s health or welfare. We therefore affirm the severance order as to C.R.⁵

⁵ Section 8-533(B)(2) does not require ADES to make diligent efforts to reunify the family. Compare A.R.S. § 8-533(B)(2) ("Evidence sufficient to justify the termination of the parent-child relationship shall include . . . [t]hat the parent has neglected or wilfully abused a child."), with -533(B)(8)(c) (when a child has been in an out-of-home placement for 15 months

II. Severance as to the Girls

¶20 When a child has been in an out-of-home placement for 15 months or longer, the court may sever the parent-child relationship if it finds that the agency has “made a diligent effort to provide appropriate reunification services.”⁶ A.R.S. § 8-533(B)(8)(c). In the case at bar, the juvenile court found that ADES “made diligent efforts to provide appropriate reunification services.” The record supports this determination.

A. Federal Facility

¶21 Within a month of learning of Mother’s immigration-based detention, ADES attempted to provide services at the federal facility. In August 2008, case manager G.H. called the facility to inquire whether ADES could offer services there or bring the children to visit Mother. G.H. was advised that ADES could not do so. Over the next few months, G.H. spoke

or longer, the responsible agency must make “a diligent effort to provide appropriate reunification services”); *Cf. James H. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 1, 2, ¶ 6, 106 P.3d 327, 328 (App. 2005) (comparing A.R.S. § 8-533(B)(4), which “imposes no explicit duty on [ADES] to provide reunification services” when termination is based on a parent’s incarceration, with -533(B)(8)). But as we discuss *infra*, the agency here made reasonable efforts at reunification.

⁶ Section 8-533(B)(8)(c) contains other requirements, but Mother challenges only the adequacy of reunification services. We therefore confine our analysis to this issue. See *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 304 n.7, 197 P.3d 758, 765 n.7 (App. 2008) (arguments not developed on appeal are deemed waived).

to Mother's assigned immigration social worker, who confirmed that ADES could not provide services at the federal facility. G.H. provided his contact information and advised that Mother could correspond with the children while detained. Mother did so, and G.H. sent her pictures of the children. The foster parents also reported that the girls were having monthly telephone calls with Mother while she was detained.

¶22 During the time when ADES could not provide services, it worked with the Mexican consulate to arrange for services in anticipation of Mother's deportation. When federal policies changed and the case plan was amended back to family reunification, the court ordered ADES to provide services at the federal facility, and ADES made the relevant referrals. However, a caseworker testified it was difficult to reach the appropriate person at the facility, and the process took months. Ultimately, Mother was deported before services could be implemented at the federal facility.

¶23 Mother asserts that ADES failed to follow its own policies, citing an agency policy applicable to parents who are incarcerated at Arizona Department of Corrections ("ADC") facilities. By its own terms, though, the policy does not apply to federal facilities, over which the state has no control. Moreover, the cited policy merely requires ADES to offer services at secure facilities "if allowable by ADC regulations."

ADES Children's Services Manual, Ch. 9, Sec. 8, <https://extranet.azdes.gov/dcyfpolicy//servicemanual.htm> (last visited June 14, 2012).

B. Jail

¶124 From approximately November 2009 to January 2010, Mother was in jail on the criminal charges. While there, she met with caseworker G.H. and had 3-4 visits and a phone call with her daughters. In December 2009, the juvenile court ordered a psychological evaluation. Mother, though, asked that the psychological evaluation not take place until after her criminal trial.⁷ By the time Mother pled guilty in March 2010, she was back in the federal facility. The record establishes that ADES made reasonable reunification efforts during the time Mother was in the jail facility.

C. Case Plan

¶125 Mother also argues the case plan was "designed to fail" and that she had no meaningful way to comply with it after being deported. Her reliance on *Jordan C. v. Arizona Department of Economic Security*, 223 Ariz. 86, 219 P.3d 296 (App. 2009), is

⁷ On appeal, Mother emphasizes the failure to perform the evaluation, arguing, "Without a psychological evaluation, [Mother] could not begin working towards reunification." Mother, though, was unwilling to submit to an evaluation while the criminal case was pending. Moreover, much as Mother asserts the evaluation was necessary for her to work toward reunification, it was also necessary for ADES to tailor appropriate services.

unavailing. In *Jordan C.*, ADES removed five children from their mother and developed a plan to transition them back over a period of time. *Id.* at 92, ¶ 15, 219 P.3d at 302. ADES later changed the case plan to severance and adoption for the two youngest children, citing their time in care as a basis for termination. *Id.* On appeal, the children argued the case plan contemplated that "reunification could not be completed without some of the children remaining in an out-of-home placement for longer than fifteen months." *Id.* at 94, ¶ 24, 219 P.3d at 304. We held that termination based on time in care was inappropriate under those circumstances because ADES "controlled the timetable" by agreeing to return the children one-by-one, each transition being dependent on the success of the previous one. *Id.* at 94, 96, ¶¶ 24, 30, 219 P.3d at 304, 306.

¶26 Unlike *Jordan C.*, in the case at bar, it was neither ADES nor the case plan that prolonged the out-of-home placements. It was Mother's incarceration on the criminal charges and detention based on her immigration status. The children obviously could not be returned to Mother while she was in custody. The juvenile court observed:

Mother fought deportation and stayed in custody a little over a year longer than if she had voluntarily agreed to deportation. This effectively made Mother unavailable for services during that period of time.

¶127 A court may consider a parent's incarceration in determining what services are reasonable in a given case. See, e.g., *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 451, ¶ 17, 153 P.3d 1074, 1080 (App. 2007) ("The court can certainly consider that incarceration will as a practical matter typically preclude all but minimal visits."). Additionally, although a parent's immigration status is not a basis for severance, "a parent's illegal status may cause or contribute to the existence of such a basis." *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 333, ¶ 40, 152 P.3d 1209, 1216 (App. 2007). Despite Mother's efforts to characterize it as such, this is simply not a case where the agency ignored its duty to make reasonable efforts at reunification.

¶128 The record also belies Mother's contention that there was no meaningful way for her to participate in services after being deported. ADES supervisor N.B. testified that the agency could have provided services in Nogales, where Mother originally resided. N.B. testified that the plan was for Mother to stay in Nogales for some period of time in order to complete services and be close to the border, where it was possible to facilitate visitation with the children. The juvenile court found:

Mother was deported to Nogales. [The caseworker] understood that Mother was going to stay there for a period of time so that she could receive services. If Mother had stayed there, CPS might have been able to

facilitate visits with the children there. [The caseworker] sent a letter to Mother in Nogales confirming that she intended to stay there at least six months to receive services and re-establish a relationship with her children.

¶129 However, Mother did not remain in Nogales. It was more difficult to coordinate services once she moved to the interior of Mexico, but even then, ADES continued to work with her and the Mexican consulate. ADES maintained contact with Mother via e-mail and phone calls, informed her of the issues that "needed to be addressed," provided her with contact information for Mexico's service agency and the Mexican consulate, met with the consulate representative, and asked the consulate to provide a psychological evaluation and home study, counseling and parenting classes.

¶130 At the request of ADES, in September 2010, the juvenile court granted Mother additional time to complete services in Mexico. The ensuing home study and psychological report, though, raised concerns about Mother's parenting abilities and emotional stability and also reflected a lack of candor regarding the removal of the children. The juvenile court was also concerned about Mother's testimony that she would not have done anything differently vis-à-vis her parenting.

¶131 Considering the totality of evidence before the juvenile court, and viewing the facts in the light most

favorable to sustaining its judgment, the record supports the court's reasonable efforts findings and its termination order as to the girls.

III. Ineffective Assistance of Counsel

¶132 We assume for the sake of argument that Mother may assert an ineffective assistance of counsel claim on appeal. She argues her attorney should have requested that services be provided at the federal facility and should have objected or appealed when the juvenile court initially ruled that no services would be offered while Mother was incarcerated.

¶133 Even accepting these claims as true, Mother has nevertheless not demonstrated that counsel's alleged ineffectiveness was "sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 325, ¶ 18, 173 P.3d 1021, 1026 (App. 2007) (citations omitted). It was not counsel's alleged inaction that caused a delay in services. Moreover, in terminating Mother's rights, the court cited a number of factors having little, if anything, to do with counsel's inaction, including concerns based on the home study, Mother's lack of candor about the removal, her failure to accept any responsibility, her testimony that she would not have done

