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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/18/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DYLAN M.,) No. 1 CA-JV 12-0076
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, KIM M., and JOSEPH R.,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD-506535

The Honorable Kirby Kongable, Judge Pro Tem

AFFIRMED

Bruce Peterson, Office of the Legal Advocate Phoenix
By Susie Garbe Todd, Deputy Legal Advocate
Guardian ad Litem for Dylan M.

Thomas C. Horne, Arizona Attorney General Mesa
By Eric Devany, Assistant Attorney General
Attorneys for Appellees

H A L L, Judge

¶1 The Guardian ad Litem for Dylan M. (Appellant) appeals the juvenile court's order granting the motion to change physical custody from Jeff Pride and DeAnne Pride (foster

mother) (collectively foster parents) to maternal grandmother Kim M. (Grandmother) and maternal grandmother's fiancé, Joseph R. For the following reasons, we affirm.

FACTUAL¹ AND PROCEDURAL BACKGROUND

¶12 Dylan was born on October 22, 2006 to Natalie M. (Mother)² and placed with foster parents by Child Protective Services (CPS) when he was three days old.³ Dylan was placed with Grandmother from February 2008 through February 2009. The case was then dismissed and Dylan was moved into Mother's physical care. Grandmother regularly visited Dylan and removed him from Mother's care in October 2009 due to concerns about Mother's ability to properly care for Dylan. On March 5, 2010, the case was reopened after Grandmother filed a dependency petition alleging that Dylan was dependent to Mother because Mother was "a danger to herself, living in an unstable

¹ We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

We note at the outset that Appellant failed to accurately cite to the record in her Opening Brief. For example, page 3 contains six consecutive, inaccurate cites to the record. We caution counsel to comply with the rules of this court, including ARCAP 13(a)(4), in the future.

² The record suggests that Father is either Christopher Warden or John Doe. Neither Warden, nor anyone else claiming to be Dylan's father, contested the dependency petition or the change of physical custody.

³ Grandmother was receiving treatment for cancer and unable to adequately care for Dylan at that time.

environment[, and] [was] unable to make sound decisions regarding herself and the welfare of her child." After Grandmother filed the dependency petition, the juvenile court removed Dylan from Grandmother's house due to concerns of domestic violence between Grandmother and Joseph and placed Dylan with foster parents.⁴ The juvenile court ordered that Dylan remain a temporary ward of the court and committed to the care, custody, and control of Arizona Department of Economic Security's (ADES), and found Dylan dependent as to Mother.

¶3 In September 2010, Southwest Human Development assessed Grandmother and Joseph in a home study in order to determine whether they would be an appropriate placement for Dylan. Southwest Human Development concluded that Grandmother and Joseph "are able to provide Dylan with a stable and safe living environment" and recommended placing Dylan in their care.

¶4 In September 2010, ADES moved for a change of physical custody of Dylan from foster parents to Grandmother.

¶5 Gene L. Parrish, Ph.D., provided both individual and joint counseling to Grandmother and Joseph for a period of three years to "broaden their perspective in dealing with difficult

⁴ The superior court granted an order of protection filed in 2009 by Joseph against Grandmother because the court found that Grandmother "committed acts of domestic violence or may commit acts of domestic violence; specifically criminal damage and assault[.]" Grandmother also petitioned for an order of protection in 2009, but later recanted the allegations in the petition.

life situations." He wrote a letter in October 2010 stating that he:

found the couple to be diligent in applying their newly acquired knowledge from their counseling sessions. They consistently utilized this information in dealing with family members and stress issues. Harmonious function of the family unit was their common goal. Throughout this time, [Dr. Parrish] noted a significant and successful progression in their abilities to achieve this goal. [Dr. Parrish's] observations of [Grandmother and Joseph] revealed a deep commitment to each other and to their family as a whole. Through perseverance, cooperation, determination, diligence, honesty, loyalty, respect, and a deep love, [Grandmother and Joseph] have demonstrated a willingness to devote themselves to family preservation. . . . It is with great enthusiasm and without any reservation that [Dr. Parrish] energetically recommend[s] [Grandmother and Joseph] for the position of [caretakers] and nurturers of their grandson, Dylan.

¶16 G. Joseph Bluth, Ph.D., conducted a psychological evaluation of Grandmother in January 2011, and reported that he was unable to recommend placing Dylan with Grandmother and Joseph "due to the history of conflict within the family and reported domestic violence." Dr. Bluth concluded that if CPS wanted to consider placement with Grandmother and Joseph, they would both need to participate in Ph.D. level counseling and other recommended services.

¶17 Richard J. Rosengard, D.O., conducted a psychiatric evaluation in March 2011 and concluded that Grandmother should work with a Ph.D. level therapist, and if she and Joseph "are more forthcoming and over a period of time the truth in her

statements are either verified or found to have been remediated, then maybe she can act as a parent." ADES withdrew its motion to change physical custody to Grandmother in April 2011.

¶8 On July 13, 2011, D.J. Gaughan, Ph.D., submitted a report stating that Grandmother and Joseph had participated in eight sessions of counseling with him after taking "it upon themselves to seek out counseling on their own." Grandmother and Joseph acknowledged a difficult period of time and "extreme stressors" in 2009, which included Mother's mental-health and behavioral problems, Grandmother's and Joseph's financial difficulties, and Grandmother's cancer diagnosis. Dr. Gaughan found that:

it does not appear at this time that [Grandmother] and [Joseph] are experiencing problems which would lead them to be in physical conflict. In fact, they do not present as having significant issues of verbal conflict regarding [Mother] and Dylan nor do they appear to have any interpersonal issues of a serious nature. This couple has, for thirteen years, maintained a close and intimate relationship with the exception of a brief period of time which is now almost two years past.

Dr. Gaughan also stated that Grandmother and Joseph "present as a very stable couple who are totally committed to each other and to Dylan's welfare." Dr. Gaughan concluded that their financial difficulties and Grandmother's health have improved and "[t]hroughout counseling sessions with this couple consistently their focus has been on providing for Dylan's welfare and both

of them present as being very sincerely committed to being the best possible grandparents (parents) to Dylan that they could possibly be."

¶9 On September 30, 2011, CPS submitted a report to the juvenile court stating its concern that the foster mother had failed to notify CPS about Dylan's behavior involving his interest in sexual matters in his foster placement, and that CPS learned of these behaviors from Dylan's therapist. CPS also noted its concern with Dylan's recent aggressive behavior, such as "hitting, kicking, and being defiant."

¶10 CPS Specialist Melissa Millspaugh sent an email to foster mother in September 2011 stating:

I met with you and [foster father] specifically to discuss the concerns the department has in your ability to provide a safe environment for Dylan. I had you sign a document implying you agreed with the "rules" provided. Specifically, I requested Dylan be supervised in your home at all times. Given the recent [sexual behavior] incident, you were not physically supervising his play with the other children in your home. A voice monitor is not sufficient supervision. So that it is clear, the department expects you to physically supervise Dylan while he is in your care, every minute he is with you. This is not only to protect Dylan, but to protect others as well.

¶11 In October 2011, Mother moved for the juvenile court to change physical custody of Dylan to a therapeutic foster home, arguing that the September 2011 CPS report demonstrated Dylan was "unsafe in his present placement and is in need of

immediate transfer to a safe placement that will allow him to stabilize, provide him with treatment and promote reunification." Joseph and Grandmother additionally filed separate motions for change of physical custody in October 2011, requesting that Dylan be placed in Grandmother's custody.

¶12 Appellant filed a written response, objecting to all motions for a change of physical custody due to the instability Dylan would experience. The Court Appointed Special Advocate, Laurann Cook, also stated that she believed Dylan should remain in his current placement with foster parents.

¶13 Elizabeth Capps-Conkle, Psy.D., conducted an assessment of bonding and best interest of Grandmother, Joseph, foster parents, and Mother in July, October, and December 2011 and submitted her findings in January 2012. Dr. Capps-Conkle noted some concern over Dylan's recent sexualized behavior that began in August 2011 after the foster parents' child relatives moved into their house, such as: Dylan grabbing foster mother's breasts and becoming "overly interested in sexual matters;" foster mother failing to inform CPS that her niece and Dylan participated in "a privacy game involving private parts," which CPS expressed concern about; Dylan's removal from his school "due to safety concerns after he asked another student to engage in privacy games with him;" and foster mother's report in September 2011 that she heard Dylan ask her niece to "to show

him her pee pee" on a baby monitor. Dr. Capps-Conkle concluded that:

With regard to attachment, Dylan has strong attachments both with [foster parents] and [Grandmother] and [Joseph]. It is of note that Dylan did not express any negative comments towards [Grandmother] or [Joseph] during the observation, while he did ask both of [the foster parents] to "not touch" him. He also expressed anger towards his foster sister when she picked him up. . . . With regard to the restraining orders in the past between [Grandmother] and [Joseph], they have shown initiative to seek couples therapy on their own and have spent significant time in working on the relationship. They both appear highly committed to one another and the relationship at this point. It is clear that [Grandmother] and [Joseph] have a deep love and affection for Dylan as well as a strong desire to raise him. . . . [I]t seems it would be in the best interests for Dylan to reside with [Grandmother] and [Joseph]. It appears he is emotionally attached to both caretakers. Furthermore, [Grandmother] is a teacher, but is willing to take a leave of absence to stay-at-home with Dylan until he is allowed to attend school again in the future. She will likely continue to provide emotionally and intellectually stimulating activities for Dylan during the day as she is able to utilize her knowledge as a Montessori teacher.

¶14 Glenn L. Moe, Ph.D., conducted a psychological evaluation of Dylan in March 2012 and concluded that "the bulk of [Dylan's] young life has been spent in the care of [foster parents] and he clearly claims them as his parents and the individuals with whom he wants to reside." Dr. Moe found that Dylan "expresse[d] a very strong disinterest in being placed with [Grandmother and Joseph]. Thus, if he is to be considered for placement with [Grandmother and Joseph], there would need to

be individual and family therapy in order to prepare him for such a move and assist his subsequent adjustment to the home of [Grandmother and Joseph] if that is pursued."

¶15 The juvenile court conducted a three-day evidentiary hearing in March and April 2012 regarding the motions for change of physical custody of Dylan. Dr. Capps-Conkle testified that she recommended it would be in Dylan's best interest to be placed with Grandmother and Joseph. She elaborated that she made that recommendation because, "[i]n general, it's positive for a child to have a familial connection for heritage and culture. Additionally, I am concerned about [Dylan's] sexual behaviors, the timing of them and how that situation was handled." She further recommended the transition take place over a period of time with overnight visits increasing in length and that all parties show support for the transition.

¶16 CPS Supervisor Karen Youngman testified that she has been the supervisor in this case since November 2006 and she did not have any safety concerns for Dylan if he were to be placed with Grandmother and Joseph. Youngman continued that Grandmother and Joseph, as requested by ADES, participated in extended counseling, attended all court meetings, and had remedied any issues they had with one another. Youngman stated she had concerns about Dylan residing with foster parents because foster mother "made it clear that she does not trust

CPS, that she just does not like to deal with CPS. . . . that she's not being totally honest with what's going on in Dylan's life or in her home[.]” Youngman further stated foster parents were not abiding by Dylan's therapist's recommendations for Dylan, and foster mother disagreed with the safety plan that CPS asked her to follow after Dylan began exhibiting inappropriate sexual behaviors. Youngman said that although the current case plan is family reunification, foster mother is not an appropriate advocate for that plan, and the case plan cannot be properly facilitated with Dylan in his current foster placement. Youngman concluded that it would be in Dylan's best interest to live with Grandmother and Joseph.

¶17 Dr. Moe testified that Dylan expressed to him Dylan wanted to remain living with foster parents and it would therefore be traumatic to remove Dylan from foster parents because he feels connected to them.

¶18 Dr. Bluth testified that he did not recommend placing Dylan with Grandmother and Joseph due to their pattern of domestic violence with one another. Dr. Bluth stated that some of his concerns were alleviated because no domestic violence incidents had occurred since 2009; Grandmother and Joseph received both Ph.D. level counseling, as recommended by Dr. Bluth, and domestic violence counseling; and Grandmother and

Joseph had completely cooperated with CPS for the entire duration of the case.

¶19 Marina Greco, a licensed professional counselor, testified that because Dylan perceived foster parents to be his parents, it would be a significant loss to him if he was removed from their home.

¶20 The juvenile court stated that both parties presented good arguments, and although it did not want to traumatize Dylan any further, it authorized the change of physical custody to Grandmother and Joseph. The juvenile court reasoned that because family reunification was the goal, it was better for Dylan to experience the move to Grandmother and Joseph now, reduce the trauma in the long-term, and create the opportunity for him to heal with his family and have a chance at living with his family. The court elaborated that living with foster parents may reduce trauma to Dylan in the short-term, not the long-term.

¶21 Appellant timely appeals and argues that the juvenile court erred by changing physical custody to Grandmother and Joseph, no reasonable evidence supported its ruling, and the court erred by refusing to admit Mother's psychological evaluation.

DISCUSSION

¶22 Juvenile courts have “substantial discretion” when placing a dependent child because its primary consideration is the child’s best interest. See *Antonio P. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008); see also Ariz. Rev. Stat. § 8-514(B) (2007) (a child shall be placed “in the least restrictive type of placement available, consistent with the needs of the child” and the order for placement preference lists grandparents as second). This court therefore reviews the juvenile court’s placement order for a dependent child for an abuse of discretion. *Antonio P.*, 218 Ariz. at 404, ¶ 8, 187 P.3d at 1117.

¶23 Appellant first argues that the juvenile court erred in applying the law because it only considered Dylan’s best interest “as a starting point” and it could have avoided the trauma to Dylan by not changing physical custody to Grandmother and Joseph. We disagree. The juvenile court stated that it considered Dylan’s best interest and what was best for Dylan in the long-term. The court concluded that because family reunification was ultimately the goal, it was better to change physical custody now and allow time for Dylan to heal and have a chance to live with family, then to indefinitely delay changing physical custody. The juvenile court therefore considered Dylan’s best interest, and although acknowledging the difficulty

of the immediate decision, ultimately concluded it was in his best interest to change placement. We discern no legal error and no abuse of discretion.

¶24 Appellant next contends that there was no reasonable evidence to support the juvenile court's ruling. Again, we disagree. "Because the juvenile court 'is in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings,' this court will not disturb the court's disposition in a dependency action unless its findings of fact were clearly erroneous and there is no reasonable evidence to support them." *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 456, ¶ 15, 224 P.3d 950, 953 (App. 2010) (citations omitted). In this case, the court was presented with conflicting evidence of whether to change Dylan's physical custody to Grandmother and Joseph. ADES submitted the following evidence in support of changing Dylan's physical custody: (1) Southwest Human Development's home study of Grandmother and Joseph and its recommendation that Dylan be placed with them; (2) Dr. Parrish's report that, after counseling both Grandmother and Joseph, he strongly recommended them as caretakers for Dylan; (3) Dr. Gaughan's report stating that after counseling Grandmother and Joseph for eight sessions, he believed Grandmother and Joseph were "a very stable couple who are totally committed to each and

to Dylan's welfare" and their prior stressors were no longer a concern; (4) CPS's concerns that: foster mother was not cooperating with CPS, Dylan began exhibiting aggressive and sexual behaviors while living in foster parents' home, and foster parents' home was unsafe for Dylan; (5) Dr. Capps-Conkle's conclusion, after conducting a bonding and best interest assessment of the parties, that it was in Dylan's best interest for him to reside with Grandmother and Joseph; and (6) CPS Supervisor Youngman's conclusion that changing physical custody would be in Dylan's best interest. We therefore conclude there was ample reasonable evidence in which to support the juvenile court's ruling.

¶25 Finally, Appellant maintains that the juvenile court erred by refusing to admit Mother's psychological evaluation as evidence at the hearing. This court will not disturb a juvenile court's ruling on the admission or exclusion of evidence unless the juvenile court clearly abused its discretion and prejudice resulted therefrom. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 11, 178 P.3d 511, 514 (App. 2008). Appellant attempted to introduce into evidence Mother's psychological evaluation, arguing it was relevant as "part of the family dynamics." ADES objected, contending that the hearing concerned changing Dylan's physical custody to Grandmother and Joseph, and not to Mother, and therefore the evaluation of Mother was

irrelevant. The court agreed and sustained the objection. We have reviewed the report. Although it portrays Mother as incapable of parenting "into the foreseeable future," we are not persuaded that the juvenile court clearly abused its discretion by excluding Mother's evaluation or that Appellant suffered prejudice. We therefore conclude that the juvenile court's exclusion of the report did not constitute reversible error.

CONCLUSION

¶26 For the foregoing reasons, we affirm the juvenile court's change of physical custody order.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
LAWRENCE F. WINTHROP, Judge