DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SAMANTHA S., ADRIAN S.,	)	No. 1 CA-JV 13-0004
	)	
Appellants,	)	DEPARTMENT C
	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication -
	)	Rule 28, Arizona Rules of
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, D.S.,	)	Civil Appellate Procedure)
	)	
Appellees.	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300JD201000072

The Honorable David L. Mackey, Judge

AFFIRMED

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Attorney for Appellant Adrian S.

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Attorneys for Appellee Arizona Department of Economic Security

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J O H N S E N, Judge

¶1 Samantha S. and Adrian S. appeal the superior court's order terminating their parental rights to their daughter, "Child."[1] We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Child was born in January 2008. In September 2009, Father was incarcerated after pleading guilty to charges of child abuse, possession of marijuana and disorderly conduct. By late 2010, Father remained incarcerated, and Mother would leave Child with Father's mother ("Grandmother") for two to three weeks a month. In November 2010, Grandmother reported to police that, based on statements by Child, she believed Mother's live-in boyfriend, Pete, had sexually molested Child.

¶3 At first, Mother did not believe that Pete had abused Child but agreed to separate from him and have Child placed outside the home for 30 days. Although Mother claimed she was separated from Pete, she acknowledged that she continued to live in his home and was driving his car.

¶4 The Department of Economic Security ("Department") filed a petition alleging Child was dependent as to both parents due to neglect. The superior court found Child dependent as to Mother based on her failure to protect Child from sexual abuse,

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[1] We have amended the caption to safeguard the identity of the juvenile pursuant to Administrative Order 2013-0001. Also, we will refer to appellants as "Mother" and "Father," respectively.

noting that Mother's continuing association with Pete gave the court "concern[] that [Mother] will continue to allow contact between [Pete] and the child." The superior court also found that Mother had neglected Child because Mother had used methamphetamine several times during the three months prior to Child's placement and had left Child with relatives for long periods of time without granting them legal authority to provide medical treatment. The superior court found Child was dependent as to Father due to his incarceration.

¶5 Child was placed with a foster family. The foster parents noted that Child presented with sexualized behaviors and used foul language to refer to other people and her toys. Child also feared the sun going down and going to bed; she would scream and cry for someone to "save" her at those times. Child could sleep only about four hours a night. During sleep, she would scream and cry, kick her legs, bend her fingers back to the point her fingers would be sore the next day and push at her crotch area while saying "stop it." After less drastic measures failed, Child was put on medication to reduce her night symptoms and allow her to sleep.

¶6 From the beginning, the Department's permanency plan was to reunify Child with Mother. Mother successfully participated in multiple reunification services, including supervised visitation; however, Mother continued to deny that

Pete had sexually abused Child. In the summer of 2011, during a best-interests assessment with licensed psychologist Dr. Glenn Moe, Mother acknowledged that Pete had sexually abused Child. Mother then was allowed unsupervised visits, which eventually were expanded to include overnight visits. In October 2011, a transition plan was developed to return Child to Mother's custody.

¶7 In August 2011, Father was released from prison. The Department expressed concern about "his lengthy criminal history involving drugs, alcohol, child endangerment, and domestic violence" and reports involving Mother's other son concerning "seriously violent and inappropriate behavior." Father was referred for a psychological evaluation and anger management classes. The Department recommended that "[b]ecause [Child] was only a year old when [Father] was incarcerated, a relationship would need to be re-established and rebuilt between the two, therefore the agency would recommend that any initial contact be therapeutic, while under the supervision of [Child]'s therapist." The Department offered a psychological evaluation and reevaluation, individual counseling, substance-abuse treatment, random urinalysis testing, parenting classes, "Social Butterfly," a chaperone class and supervised visitation. At the initial psychological evaluation, the psychologist recommended Father begin visits with Child and increase them in length once

"he is able to develop a positive relationship with her." The psychologist also recommended counseling to deal with communication and conflict resolution, ongoing parent education classes and an anger management class if indications of aggressive or impulsive behaviors emerged.

¶8 Child did not know who her Father was when she came into foster care. About the time the decision was made to transition Child back to Mother, Father began to have visits with Child, supervised by a parent aide. During visits, Father told Child that Child was going to live with him and that he was going to be her family and advised Child not to call her foster parents "mom" and "dad." On one of his first visits with Child, Father told the parent aide, "[Child] just told me . . . that Pete was at Mommy's and she saw them in bed with no pants on." The parent aide did not hear Child make the statements that Father reported. Child Protective Services ("CPS") opened an investigation to ascertain whether Mother had in fact reintroduced Child to her alleged abuser. Child also told her foster parents, her therapist and a CPS unit supervisor that Pete was at Mother's home.

¶9 The CPS investigation concluded that the allegations that Mother re-exposed Child to Pete were substantiated. Child's nightmares and sexualized behaviors increased after the alleged exposure. Her sleep patterns also regressed.

¶10 On February 22, 2012, the superior court granted the Department's request to stop Mother's visitation because she was alleged to have re-exposed Child to Pete. On March 6, 2012, the court held a review and permanency hearing. The Department requested to be relieved from providing reunification services to Mother. At the hearing, the superior court stated that it was granting the Department's request to be relieved of providing services. The subsequent minute entry, however, did not include that order; instead, the minute entry noted the Department's request and stated: "Request the Court set a hearing within 60-90 days." No hearing was set. On August 29, 2012, Mother filed a motion to reinstate reunification counseling services and visitation. The Department filed an opposition, and on September 28, 2012, the superior court denied Mother's request.

¶11 Meanwhile, Father continued to have visitation with Child until April 2012, when Child began to express anxiety about visiting him. She wet her pants after one visit and complained of stomach aches and diarrhea before other visits. The court granted the Department's motion to temporarily suspend visitation until Child met with her therapist, Renee Walden-Shea. The therapist attempted to set up telephone calls between Child and Father, but according to testimony at trial, "just the prospect of speaking to her father on the phone caused [Child]

to have nightmares for the next two nights." Phone contact was put on hold.

¶12 In April 2012, the Department moved to discontinue visitation with Father because the visits were causing the Child anxiety. The superior court modified the visitation order to only allow "therapeutic or supervised visits between the child and Father . . . based upon the therapeutic recommendations of the child's therapist." After visits were suspended, Child's behaviors stabilized, her anxiety decreased and eventually was weaned off medication. Although the case plan had been to attempt reunification with Father, based on Child's continued refusal to have contact with Father, the Department requested to change the case plan to severance and adoption.

¶13 In June 2012, Moe conducted a psychological evaluation of Child and diagnosed her with post-traumatic stress disorder, nightmare disorder, sexual abuse of a child and neglect. Moe opined that Father's statements caused Child's anxiety by undermining her sense of security and that Father was either unaware or unwilling to commit to help "reduce [Child's] anxiety and thus promote their relationship." Walden-Shea testified that Father's comments to Child undermined Child's fragile sense of security, causing her anxiety.

¶14 Father was participating in individual counseling but he discontinued the counseling in June 2012 without first

discussing it with his therapist. Although Father didn't believe he needed further counseling, the therapist testified Father was only "half way through the process." Father did not complete a chaperone class that helps parents identify sexual predators until two weeks before the termination trial. The "Social Butterfly" group is designed to "help parents learn how to read the cues of their children, to play games with them, to promote attachment and bonding." Father attended one session in its entirety. The Department scheduled a psychological re-evaluation in July 2012, but Father did not participate in it, even though he understood its importance. Father also stopped attending Child and Family Team meetings. The Department's case worker observed, "[t]he father blames CPS for the current situation, takes minimal responsibility for [Child] being in care and has been very hostile toward the Department and other team members during recent interactions."

¶15 In August 2012, the Department filed a motion to terminate Mother and Father's parental rights. The superior court terminated Mother's parent-child relationship on the basis of neglect pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(2) (West 2013).[2] The basis of the court's order with respect to Mother was neglect relating to the pre-

[2] Absent material revision after the relevant date, we cite a statute's current version.

dependency abuse Child had suffered while under her care; the court concluded it could not find by clear and convincing evidence that Mother had re-exposed Child to Pete, as had been reported in November 2011. The court terminated Father's relationship with Child pursuant to A.R.S. § 8-533(8)(c), on the basis that Child had been in an out-of-home placement for 15 months or more and Father was unable to remedy the circumstances that led to the placement and would be unable to exercise proper and effective parental care and control in the near future.

¶16 We have jurisdiction of Mother's and Father's timely appeals pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. § 8-235(A) (West 2013).

DISCUSSION

A. Standard of Review.

¶17 We review the superior court's order of termination for an abuse of discretion and will affirm if it is supported by sufficient evidence in the record, viewed in the light most favorable to sustaining the decision. *Kenneth B. v. Tina B.*, 226 Ariz. 33, 36, ¶ 12, 243 P.3d 636, 639 (App. 2010). We review *de novo* any issues of law, including the interpretation of statutes. *Id.*

B. Mother's Appeal.

1. Reunification services.

¶18 Mother does not argue that insufficient evidence supports the finding of neglect pursuant to A.R.S. § 8-533(B)(2). Instead, she argues the superior court erred in granting the termination because the Department did not make reasonable efforts to provide her with reunification services pursuant to A.R.S. § 8-846(A) (West 2013).[3] The Department responds that the court properly relieved the Department of any duty to provide services.

¶19 At the March 6, 2012, hearing, the Department orally asked the court to relieve it of the obligation to provide Mother with reunification services. As we have said, after hearing that Child had regressed after the report concerning Pete, and over Mother's objection, the court granted the Department's request on the record at the hearing, although the minute entry order for the hearing does not reflect such a ruling. On August 29, 2012, Mother filed a motion for an order requiring the Department to provide her with counseling services and to schedule visits with Child. After the Department objected, the court denied Mother's motion by a signed order entered on September 28, 2012.

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[3] A.R.S. § 8-846(A) provides: "Except as provided in subsections B and C and D of this section, if the child has been removed from the home, the court shall order the department to make reasonable efforts to provide services to the child and the child's parent."

¶20 Setting aside the parties' disagreement about whether the court at the March 6 hearing in fact relieved the Department of its obligation under A.R.S. § 8-846 to provide services to Mother, we infer from the briefing that services were by and large discontinued at that point. Accordingly, although the motion Mother made several months later to reinstate services did not cite § 8-846, the signed order denying her motion effectively was a final disposition of the matter of reunification services.

¶21 An order that "reliev[es] [the Department] of the duty to provide reunification services is a final, appealable order." *Francisco F. v. Ariz. Dep't of Econ. Sec.*, 228 Ariz. 379, 382, ¶ 8, 266 P.3d 1075, 1078 (App. 2011).[4] Failure to timely appeal a final order deprives this court of jurisdiction. *In re Pima County Juv. Action No. S-933*, 135 Ariz. 278, 279, 660 P.2d 1205, 1206 (1982). The September 28, 2012 order denying Mother's motion conclusively defined Mother's rights to reunification services and so was a final, appealable order. Because Mother did not timely appeal that order, we "lack jurisdiction to consider [Mother's] challenge to that ruling." *Francisco F.*, 228 Ariz. at 382, ¶ 8, 266 P.3d at 1078.

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[4] We are obliged to examine our own subject-matter jurisdiction *sua sponte* even when parties do not raise the issue. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 347, ¶ 7, 160 P.3d 223, 226 (App. 2007).

¶22 In the absence of jurisdiction, we may not address Mother's argument that the Department was required by due process or Arizona statute to provide services when the grounds for termination are based on neglect under A.R.S. § 8-533(B)(2) or whether the Department failed to establish grounds for ceasing services pursuant to A.R.S. § 8-846(B).

2. Best interests.

¶23 Mother also argues that the superior court erred by finding that termination of her rights was in Child's best interest.

¶24 The superior court announced its best-interests findings at the conclusion of the termination proceeding, noting that:

> the Department has established by a preponderance of the evidence that the child is adoptable. She's been now nearly two years in the potential adoptive placement's home who has struggled to normalize this child and has, in fact, been overall successful in bringing normalization to this child's life, and that is in the child's best interest to have that safety, security and normalization in an adoptive family rather than be in the unstable and unsafe environment that the parents placed her in and I find that they will continue to place her in if their parental rights are not terminated.

¶25 "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance *or* be harmed by the continuation of the relationship."

Maricopa County Juv. Action No. JS-500274, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Evidence that will support a finding that a child would benefit from the termination of parental rights includes evidence of an adoption plan or that the child is adoptable or if the "existing placement is meeting the needs of the child." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 14, 53 P.3d 203, 207 (App. 2002) (quotation omitted); *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994). "A best-interests determination need only be supported by a preponderance of the evidence." *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App. 2008).

¶26 Contrary to Mother's argument, the court's best-interests finding was based on the benefit Child would receive from being adopted, not only on the possibility that Mother might re-expose Child to Pete. *See Jesus M.*, 203 Ariz. at 282, ¶ 15, 53 P.3d at 207 (affirming best-interests finding when children were placed in "a safe, stable environment" and moving them would be devastating). Here, Moe testified that Child would benefit from having the safety and security that comes from "normalization." Walden-Shea testified that she opposed removing Child from the placement because Child had "gained a security within the foster family, a very secure attachment, and I think that if we disrupt this attachment at this time it could

lead to further relational issues," such as anxiety disorder or depression. She also testified that Child was in an adoptive placement. The foster mother said that she was willing to adopt Child and could provide for her needs. The superior court expressly referenced the stability the foster family provided Child and the potential for adoption. When, as here, sufficient evidence supports the superior court's best-interests findings, this court will affirm. *See Bobby G.*, 219 Ariz. at 511, ¶ 15, 200 P.3d at 1008.

C. Father's Appeal.

1. Collateral estoppel.

¶27 At a July 31, 2012 review and permanency hearing, the superior court stated that it "cannot find the Department has made reasonable efforts with respect to the permanency plan of reunification." The court stated that it based its finding on "the lack of visitation services and alternatives presented to provide reunification." Nevertheless, at the end of the termination hearing four months later, the superior court concluded that the Department had made diligent efforts at appropriate reunification services but that Father failed to complete or participate in them.

¶28 Father argues that after the July 31 finding by the court, issue preclusion prevented the court from making a contrary "reasonable efforts" finding at the termination hearing

because "nothing more was done to provide [Father] with the recommended service, namely, visits with the child" after the July 31 hearing. The Department argues the finding was not litigated in a "prior proceeding" and the "reasonable efforts" finding at termination was not precisely the same issue as the previous finding.[5]

¶29 Contrary to Father's contention, issue preclusion does not apply in this context because the facts necessary to establish reasonable efforts are of a nature that may change over time. And contrary to Father's argument, the only issue with respect to services was not whether Father should have been allowed visitation. The court could evaluate all of the services offered by the Department, along with other facts, including Father's response to those services, in determining whether the Department's decision to refrain from offering any particular service was reasonable.

2. The circumstances causing Child to be in an out-of-home placement.

¶30 Father contends that the only circumstances relevant to Child's out-of-home placement from his perspective were his incarceration and his consequent absence from Child's life. He argues that since he was released from prison and willing to be involved in Child's life by the time of the hearing, the

[5] Father did not submit a reply brief on appeal.

superior court erred by finding he was unable to remedy the circumstance leading to Child's out-of-home placement.

¶31 A.R.S. § 8-533(B)(8)(c) provides:

> The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to [section] 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is [a] substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

The court looks at "those circumstances existing at the time of the severance rather than at the time of the initial dependency petition." *Maricopa County Juv. Action No. JS-8441*, 175 Ariz. 463, 468, 857 P.2d 1317, 1322 (App. 1993), *abrogated on other grounds in Kent K. v. Bobby M.*, 210 Ariz. 279, 282, ¶ 22, 110 P.3d 1013, 1016 (2005).

¶32 Sufficient evidence supported the superior court's finding that Father was unable to remedy the circumstances that cause Child to be in an out-of-home placement. Father acknowledges that his "unfamiliarity with the child" is the continuing circumstance that requires Child to remain in an out-of-home placement. Father attributes that circumstance to the Department, claiming that "[t]he only impediment" to his reunification with Child was "the failure of the Department to allow ongoing visitations" and to provide family therapy. But

the Department offered Father multiple services to develop his relationship with Child, and Father did not participate in them. Father did not participate in the Social Butterfly group, expressly designed to promote bonding and attachment with the aid of Child's therapist. He failed to submit to a re-evaluation that would provide those involved in Child's life with feedback about his progress in establishing an appropriate relationship with her. After completing the parenting class, Father failed to engage in any service besides visitation. He even stopped attending the Child and Family Team meetings and only completed the chaperone class immediately before trial.

¶33 As the superior court found, the services offered by the Department would have helped Father to learn how to deal with a sexually abused child and "his minimal participation in services jeopardized his relationship with his daughter and shows that he will not be able to parent the child in the future."

¶34 Further, Father fails to recognize that his visits with Child were halted due to Child's anxiety about their visits. Walden-Shea reported that continuing visitation, under the circumstances, would not be in Child's best interest and that Child became traumatized at the mere mention of Father's name. Particularly because of Father's decision not to pursue the services designed to reduce Child's anxiety, the superior

court's finding that Father was unable to remedy the circumstance that led to Child's out-of-home placement was supported by sufficient evidence.

3. Diligent efforts to provide reunification services.

¶35 In a related argument, Father argues that the superior court's finding that the Department made a diligent effort to provide appropriate reunification services was "clearly erroneous and contrary to the substantial evidence in the record." Father again points to the cessation of visitation and that the Department did not offer him family therapy with Child.

¶36 In order for the superior court to terminate a parent-child relationship under A.R.S. § 8-533(8)(c), it must find "that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services." To fulfill this mandate, an agency must provide a parent with "programs designed to improve the parent's ability to care for the child." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 37, 971 P.2d 1046, 1053 (App. 1999) (citation omitted). However, it need not provide every conceivable service or undertake futile ones. *Id.* at ¶¶ 34, 37.

¶37 As recounted above, sufficient evidence supported the superior court's finding that the Department made diligent efforts at reunification. Father was offered numerous services but failed to participate in many of them. While Father points

again to the fact that visitation was suspended, that suspension was due to Child's anxiety. Instead of engaging in the process once this occurred, Father stopped attending team meetings, stopped attending therapy and failed to submit himself to a second psychological evaluation. Nothing in the statutes requires the Department to offer the exact services Father requested or offer other services after a parent fails to participate in the ones previously offered.

¶38 Father argues that the Department did not offer him family therapy as recommended by professionals. The Department may fail in its duty to provide reunification services when it fails to offer services recommended by professionals. *Mary Ellen C.*, 193 Ariz. at 192, ¶ 37, 971 P.2d at 1053. The Department points out that Walden-Shea testified that the plan had been to progress from Social Butterfly to family therapy with Father and Child but that the plan never unfolded because Father "did not continue to come to Social Butterfly." Walden-Shea also documented that even months after visitation with Father had stopped, the mere mention of Father's name significantly traumatized Child and so any contact, including family therapy, was not in Child's best interest. The record provides sufficient evidence to support the court's finding that the Department made diligent efforts to provide appropriate reunification services.

CONCLUSION

¶39 For the foregoing reasons, we affirm the superior court's order severing Mother's and Father's parental relationships with Child.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
RANDALL M. HOWE, Judge