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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANGELA L., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, A.L., D.L., T.L., *Appellees*.

No. 1 CA-JV 14-0283
FILED 10-8-2015

Appeal from the Superior Court in Mohave County
No. L8015JD201307025
The Honorable Richard D. Lambert, Judge

AFFIRMED

COUNSEL

Law Offices of Heather C. Wellborn, P.C., Lake Havasu City
By Heather C. Wellborn
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Eric K. Knobloch
Counsel for Appellee DCS

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in
which Judge Andrew W. Gould joined. Judge Peter B. Swann dissented.

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HOWE, Judge:

¶1 Angela L. (“Mother”) appeals the juvenile court’s order terminating her parental rights to her minor children and finding that termination was in their best interests. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In May 2014, the Department of Child Safety¹ moved to terminate Mother’s and Tielman’s (“Father”) parental rights to their children—A.L., age four, D.L., age three, and T.L., age one—on grounds of history of chronic substance abuse under A.R.S. § 8-533(B)(3), time in out-of-home placement under A.R.S. § 8-533(B)(8)(b), and care in out-of-home placement under A.R.S. § 8-533(B)(11). The Department also alleged that termination would be in the children’s best interests because they would have a “permanent, stable, and drug free home with parents that [were] part of their daily lives.” The Department’s extensive history with Mother explained its decision to request termination.

1. The Department’s Extensive History with Mother

¶3 In June 2011, the Department received a report that Father had struck Mother and A.L. and pushed A.K.—Mother’s child from a previous relationship, whose biological father had been an active drug user—out of their car. The Department subsequently filed a dependency petition, alleging A.K. and A.L. dependent as to both parents. It contended that Mother was neglecting her children because of ongoing domestic violence and her failure to protect them from domestic violence. It also contended that A.K. reported specific incidents of domestic violence and that A.L.—ten months old at the time—imitated Mother’s screams, which she heard during domestic violence incidents.

¶4 The juvenile court adjudicated A.K. and A.L. dependent as to Mother based on her failure to protect them from the effects of Father’s abuse. After considering the verified dependency petition, the case manager’s report, which was admitted into evidence, and the record before it, the court found that the evidence supported the Department’s allegations. At this point, Mother had left Father, participated in

¹ The Department of Child Safety has replaced the Arizona Department of Economic Security in this matter. *See* S.B. 1001, Section 157, 51st Leg., 2nd Spec. Sess. (Ariz. 2014) (enacted). For convenience, we refer to both as “the Department.”

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reunification services, and moved in with her parents. Because of Mother's progress, on the Department's motion, the court dismissed the dependency.

¶5 Several months later, the Department received another report of domestic violence between Mother and Father. Mother had returned to Father and was attempting to take A.K., A.L., and D.L. from their grandmother's home. Their grandmother called the Department, and the Department prevented Mother from taking the children. It placed the children in their grandmother's care.

¶6 The Department petitioned for dependency again, alleging that Mother abused or neglected the children due to domestic violence with Father. It contended that Mother self-reported the "ongoing physical and verbal abuse occurring between her and [Father] while the children [were] present[]" and that the "children [could] recall and imitate the sounds and incidents of domestic violence in the home." The Department also alleged that Mother neglected the children due to her unwillingness to parent and provide a safe environment.

¶7 The juvenile court adjudicated A.K., A.L., and D.L. dependent as to Mother because she did not remove them from an abusive environment and because of her unwillingness to parent and provide them a safe environment. After considering the verified dependency petition, the case manager's report, which was admitted, and the record before it, the court found that the evidence supported the Department's allegations. In fact, in the admitted report the case manager had recommended termination of parental rights because Mother and Father's relationship was "marred by extra marital affairs, drugs, domestic violence, lies, deceit and criminal activity" and because they had "failed to established a safe and stable home" for the children.

¶8 But Mother again participated in reunification services, and a year later, the same case manager concluded that Mother was "a good mother and able to fulfill her responsibility to her children" and recommended that the Department dismiss the petition. The case manager ended her report, however, by noting that although "there [was] inherent risk within this family because of domestic violence and misuse of medications, there [was] not a sufficient safety threat that warrant[ed] the children remaining dependent." Consequently, the Department moved to dismiss the petition, and the court did so as to A.L. and D.L., returning the children to Father and Mother's care. But on Mother's parents' motion, the court appointed them as A.K.'s permanent guardians.

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¶9 In August 2013, the Department received yet another domestic violence report and was told that Mother and Father had fled Arizona with the children. This incident involved Father's attacking Mother's brother with a machete. One witness told the Department that Mother might be using drugs. The Department concluded that the incident was consistent with the family's pattern of behavior: "[P]arents relapse[d] in drugs, [which led] to domestic violence, the domestic violence [led] to endangering the children, [which led] to unemployment, [which led] to criminal activity."

¶10 The Department consequently filed a third dependency petition, alleging A.L., D.L., and T.L. dependent as to both parents. "Because of the significance of the incident [and] the extensive past of [the parents] involving substance abuse and domestic violence," the Department was concerned for the children's safety. It located them in Minnesota and obtained a pick-up order to bring them back to Arizona. When the Department took custody of the children, two of them required medical attention for serious conditions: T.L. had a severe ear infection, which made him fussy, and D.L. was suffering from a severe eczema outbreak, which caused her pain throughout the flight.

¶11 In this dependency petition, the Department alleged that Mother was neglecting her children as evidenced by her substance abuse, by her long history of domestic violence with Father in the children's presence, and by her failure to protect them. After an evidentiary hearing where the juvenile court reviewed admitted exhibits and testimony, including Mother's testimony, it adjudicated the children dependent on grounds of history of domestic violence and failure to protect, but not substance abuse because the Department's evidence was not within the timeframe of this petition. Mother and Father, although remaining in Minnesota, engaged in reunification services. They took hair-follicle drug tests, which came back negative. But Mother's and Father's psychological examinations were invalid because, in an attempt to curry favor with the Department, they were not honest.

¶12 After Mother and Father returned to Arizona because of their "criminal issues," they attended supervised visits with the children. Mother participated in domestic violence counseling, but consistently denied that Father was abusive. A few months later, however, Mother separated from Father and obtained an order of protection against him because he attacked her once again. Father subsequently violated the order and was jailed. Mother thereafter stopped attending counseling and missed nearly half of the scheduled visits with the children.

2. The Motion to Terminate Parental Rights and the Severance Hearing

¶13 Because of this extensive history with Mother, the Department moved to terminate Mother's and Father's parental rights to the children on grounds of history of chronic substance abuse, time in out-of-home placement, and care in out-of-home placement. The Department alleged that although it had offered Mother and Father rehabilitative services, including substance abuse assessment, they "only minimally engaged with those services," and "after repeated instances of non-compliance it [became] clear that the parents [were] willfully refusing to engage in the services offered."

¶14 At a pretrial conference on June 1, 2014, the State stated that it believed that Mother was using drugs. Mother volunteered to submit to a hair-follicle test that day to dispel the State's concern. The Department arranged for the test, but Mother did not take it because she had started using methamphetamine again and knew that the test would come back positive.

¶15 By July, Mother had once again reunited with Father. They agreed between themselves to enter a drug rehabilitation program. Mother spent only a week in the program, however, because Father refused to join her. She later explained that "[Father] didn't want to go to treatment, he – and so I lost – I lost hope. If he's not going to go to treatment, why should I go because it's not going to help anything." Soon after, Mother and Father were arrested and indicted for burglary, theft of means of transportation, theft, criminal damage, and possession of drug paraphernalia. Mother accepted a plea offer for her criminal offenses. Upon her release from jail, Mother submitted to a hair-follicle test on August 15, which returned a positive result for methamphetamine.

¶16 At the severance hearing on September 11, Mother's attorney indicated that Mother had filed for divorce from Father, who would be incarcerated for two to four years and who had consented to terminating his parental rights. Mother moved for a continuance in view of Father's consent and her divorce plans, but the court denied the motion. The court explained that it had "to weigh all the possible strategies and possible tactics and everything when someone makes certain moves." The court wondered, because of its knowledge of the case, whether Mother's reasons for the continuance was "a tactic where [Mother divorces Father]" and then he would "walk right back into her life and be with the [children] as a dad even though his rights have been severed and he [had] been divorced."

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¶17 The court-appointed special advocate testified that he did not think that Mother could safely parent the children, even in Father’s absence. He opined that Mother’s history showed that she could not provide stability for the children and place their needs over her own. The advocate also opined that even if Mother were separated from Father, she was at risk of entering another abusive relationship.

¶18 The case manager testified that Mother had never demonstrated the behavioral changes necessary to provide the children with a suitable environment. She did not believe that Father was the cause of all of Mother’s problems or that Mother was capable of providing stability for the children, even without Father in her life. Regarding the children, the case manager testified that A.L.’s current placement was adoptive and that D.L. and T.L. would likely be placed with Father’s parents in California. She acknowledged that separating the children was not ideal, but opined that it was better for them than being in Mother’s care. Severance would give the children stability, permanency, and the ability to grow up in an atmosphere free of domestic violence.

¶19 Mother testified that she would stay away from Father, even though she had a “heart for addicts.” She said: “I know I can change. With [him] going away and with me having a chance to stay away from him and build myself up again . . . and believe in myself again like I used to, I know I can change.” But Mother also testified to her cycle of abuse with Father: “I had tried and I tried, and each time he would go to jail I thought ‘This is it, this is it,’ but he would come back and he would smooth talk and manipulate me.”

3. The Juvenile Court’s Order

¶20 The juvenile court granted the Department’s motion. It found that the Department had proven by clear and convincing evidence that Mother’s rights to the children should be terminated on grounds of history of chronic substance abuse, time in out-of-home placement, and care in out-of-home placement. The court explained that Mother had “engaged in a pattern and cycle of tolerating her husband’s domestic violence, drug addiction and criminal behavior . . . [and] in the last few months of this case [she had] gone beyond tolerance and actually joined her husband in drug use and criminal actions.”

¶21 The court also found that the Department had proven by a preponderance of the evidence that termination was in the children’s best interests. It reasoned that Mother “had numerous chances, but she has

always . . . [and] will continue to always choose [Father] over everything else in her life.” The court explained that termination would benefit the children because they “would have a permanent, stable, drug-free and domestic-violence-free home with parents that are present in their daily lives” and that “the children’s current placement [was] the least restrictive placement available consistent with their needs.” Mother timely appealed.

DISCUSSION

¶22 Mother argues that insufficient evidence supports the juvenile court’s order terminating her parental rights and its finding that termination was in the children’s best interests. We review a juvenile court’s termination order for an abuse of discretion. *E.R. v. Dep’t of Child Safety*, 237 Ariz. 56, 58 ¶ 9, 344 P.3d 842, 844 (App. 2015). “The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 280 ¶ 4, 53 P.3d 203, 205 (App. 2002). Accordingly, we 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. *Bobby G. v. Ariz. Dep’t of Econ. Sec.*, 219 Ariz. 506, 508 ¶ 1, 200 P.3d 1003, 1005 (App. 2008). In other words, we will affirm the termination of parental rights if any of the statutory grounds is proven and if termination is in the children’s best interests. *Raymond F. v. Ariz. Dep’t of Econ. Sec.*, 224 Ariz. 373, 376 ¶ 14, 231 P.3d 377, 380 (App. 2010). The juvenile court did not abuse its discretion in terminating Mother’s parental rights and finding that termination was in the children’s best interests.

1. Statutory Ground for Termination

¶23 As relevant to our disposition of this appeal, Mother argues that insufficient evidence supports the juvenile court’s order terminating her parental rights on ground of chronic drug abuse. A parent’s right to care, custody, and control her children has long been recognized as fundamental, but that right is not absolute. *Linda V. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 76, 78 ¶ 6, 117 P.3d 795, 797 (App. 2005). The State may terminate a parent’s fundamental right to a child under statutorily enumerated conditions after following specified procedures. *Id.* Termination on the ground of chronic substance abuse requires proof that Mother was unable to discharge her parental responsibilities “because of . . . a history of chronic abuse of dangerous drugs, controlled substances or alcohol” and that “there [were] reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.” A.R.S.

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§ 8-533(B)(3). The juvenile court must find this ground by clear and convincing evidence. A.R.S. § 8-863(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 288 ¶ 41, 110 P.3d 1013, 1022 (2005).

¶24 Here, clear and convincing evidence supports the juvenile court's finding that Mother's history of chronic substance abuse prevented her from discharging her parental responsibilities and that reasonable grounds existed to believe that the condition would continue. First, the record shows that Mother had a history of chronic substance abuse. Mother testified that she acquired an addiction to methamphetamine in her early teens. Although Mother did not use methamphetamine for some years because she attended a rehabilitation program, Mother relapsed in 2014 and admitted to doing so. She even reneged on her volunteering to submit to hair-follicle testing because she knew that the results would show her positive. She entered a rehabilitation program for her addiction—only to leave after a week because Father refused to attend. When Mother finally submitted to a hair-follicle test—merely three weeks before the severance hearing—her result was positive.

¶25 Next, the record shows that Mother did not perform her “parental responsibilities” because of her substance abuse. “Parental responsibilities” means that a parent is responsible for, among other things, protecting her children and giving them good physical care and emotional security. *Maricopa Cty. Juvenile Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 185, 692 P.2d 1027, 1034 (App. 1984). The record shows that Mother was unable to protect her children or provide them emotional security. Mother did not protect A.L. from Father in 2011 when he struck the child during a fight with Mother. For other incidents of domestic violence, Mother did not protect her child emotionally because A.L. was able to imitate the screams Mother made during those incidents. The record also shows that Mother was unable to provide good physical care for the children. When Mother and Father took them to Minnesota, they returned to Arizona requiring medical attention for serious conditions: T.L. had double ear infections and D.L. was suffering from a severe eczema outbreak. Moreover, the case manager testified that Mother and Father engaged in a cycle of “relaps[ing] in drugs, [which led] to domestic violence, the domestic violence [led] to endangering the children, [which led] to unemployment, [which led] to criminal activity.” The record reveals that Mother continued this cycle through the dependency, exposing her children to domestic violence.

¶26 Finally, the record shows that reasonable grounds existed to believe that Mother's condition would continue for a prolonged and

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indeterminate period. Mother had a history with substance abusers, including Father and A.K.'s father. Because of her "heart for addicts," she had succumbed to Father's wishes and stayed with him, despite the constant incidents of domestic violence involving her children. Moreover, after years of sobriety, Mother relapsed. After she was incarcerated for several offenses, including possession of drug paraphernalia, Mother entered a drug rehabilitation program. But she left after one week because Father refused to get treatment. The juvenile court found that "this statement show[ed] [that] she wasn't committed to staying clean even for her children's sake, and she [had] embraced her husband's use of meth." Indeed, Mother's drug use need not be constant to prove chronic substance abuse; it need only be persistent or lingering. *See Raymond F.*, 224 Ariz. at 377 ¶ 16, 231 P.3d at 381 (providing "chronic" abuse as "lasting a long time, long-continued, lingering, and inveterate" and need not be constant).

¶27 More importantly, the record shows that after a pretrial conference—where the juvenile court advised, "[I]t's not too late to be reunited with your children"—Mother used methamphetamine, knowing that her parental rights were at risk. Consequently, the record supports the juvenile court's order terminating Mother's parental rights because of her history of chronic substance abuse. We need not address the other grounds. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251 ¶ 27, 995 P.2d 682, 687 (2000) (providing that if sufficient evidence supports any one of the statutory grounds upon which the juvenile court ordered severance, the appellate court need not address the claims pertaining to the other grounds).

2. The Children's Best Interests

¶28 Mother next argues that the evidence does not support the juvenile court's finding that termination was in the children's best interests. A finding of one of the statutory grounds for severance under A.R.S. § 8-533, standing alone, does not permit termination of parental rights; severance must also be in the children's best interests. A.R.S. § 8-533(B). Severance of a parent's parental rights is in the children's best interests if the Department proves that the children would either benefit from the termination or be harmed by the continuation of the parent-child relationship. *Id.* In determining whether the children would benefit, relevant factors to consider include whether the current placements are meeting the children's needs, whether there is an adoption plan in place, and whether the children are adoptable. *See Tina T. v. Dep't of Child Safety*, 236 Ariz. 295, 300 ¶ 19, 339 P.3d 1040, 1045 (App. 2014); *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, 288 ¶ 26, 257 P.3d 1162, 1168 (App. 2011).

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The juvenile court need only find by a preponderance of the evidence that termination is in the children's best interests. *Kent K.*, 210 Ariz. at 288 ¶ 41, 110 P.3d at 1022.

¶29 Here, the record supports the juvenile court's finding that termination was in the children's best interests. It shows that the children would benefit from the termination because, as the case manager opined, severance would give them stability, permanency, and the ability to grow up in a domestic violence free atmosphere. Further, A.L.'s current placement was willing to adopt her, she had bonded with them, and "she[] [had] come a long way, for them to adopt her." For the other two children, Father's parents in California were willing to adopt them and they wanted the children placed in their home. Although the case manager admitted that separating the children was not ideal, she opined that it was better for them than being in Mother's care.

¶30 Moreover, although Mother testified that she has accepted her mistakes and that she would "love, care, and provide for and protect [her] children above all else," the record reveals that the children would be harmed if their relationship with Mother continued. The court-appointed special advocate testified that Mother's history showed that she could not provide the children stability or keep them safe. Regardless of Father's whereabouts, Mother was at risk of entering another abusive relationship. Likewise, the case manager testified that she did not believe that Mother was capable of providing the children stability. In fact, Mother had not demonstrated the behavioral changes necessary to provide the children with a suitable environment. Based on her experience in this case, the case manager explained: "I don't think that she'll ever leave [Father]. He may be in jail and looking at prison time, but I truly believe that when he gets out, they'll be back together." Consequently, the record supports the juvenile court's finding that termination was in the children's best interests. Because the record supports the court's order terminating Mother's parental rights and finding that termination was in the children's best interests, the court did not abuse its discretion.²

² Our dissenting colleague finds the evidence insufficient to justify termination. The dissent makes clear that had our colleague served as the juvenile court judge in this case, he would not have found termination justified. The issue before us, however, is not whether any one of the judges on this panel would have found termination justified, but whether the juvenile court judge who actually heard the evidence and could judge the

CONCLUSION

¶31 For the foregoing reasons, we affirm.

demeanor and credibility of the witnesses abused his discretion in finding termination was justified. “In reviewing for an abuse of discretion, ‘[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason.’” *Marquez v. Ortega*, 231 Ariz. 437, 441 ¶ 14, 296 P.3d 100, 104 (App. 2013) (quoting *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985)). Considering the evidence presented at the termination hearing, the juvenile court certainly did not exceed “the bounds of reason” in finding by clear and convincing evidence that termination was justified.

In reaching the contrary conclusion, our colleague takes issue with certain statements in our recitation of the facts, but the criticisms—with respect—are not well-taken. Our colleague contends that in reciting the history of the three dependency actions against Mother, we inaccurately claim that the dependencies were based on Mother’s acts of domestic abuse and that we rely only on the allegations the Department made in the dependency petitions to support our factual statements, not on the evidence presented at the dependency hearings. *See infra* at ¶¶ 39–40, 42, 44. But our colleague misreads our decision and the record. As explained in our decision, *see supra* at ¶¶ 3–12, each of the dependency petitions was not based on any allegation that Mother herself engaged in acts of domestic violence, but on her failure to protect her children from Father’s domestic violence against Mother or her children or her failure to parent the children and provide a safe environment. In each dependency proceeding, the Department presented evidence supporting its allegations, and the juvenile court considered that evidence and found that it supported the allegations. Our factual recitation is appropriately based on the evidence. Our colleague’s contention that no evidence supports the Department’s allegations is consequently mystifying.

Our dissenting colleague also finds that the juvenile court abused its discretion in denying Mother’s motion to continue the termination hearing. *See infra* at ¶¶ 50–51. This issue is not properly before us, however, because Mother did not raise it on appeal. *See Dawson v. Withycombe*, 216 Ariz. 84, 100 ¶ 40 n.11, 163 P.3d 1034, 1050 n.11 (App. 2007) (providing that not raising an issue in the opening brief waives it on appeal).

S W A N N, Judge, dissenting:

¶32 I respectfully dissent. The court's decision permanently severs Mother's parental relationship with her young children and permanently separates siblings. There are few orders a court can enter that have more profound negative consequences, and for that reason the law requires clear and convincing evidence of the grounds for severance. My review of the record demonstrates that, while there was abundant evidence to support the termination of Father's rights, such clear and convincing evidence was lacking with respect to Mother. No evidence suggested abuse or neglect of the children or chronic substance abuse by Mother, who substantially participated in the services offered to her. Instead, much of the evidence in this case related to Father's abuse of Mother. Absent review by the Supreme Court, today's decision cements the effects of that abuse for all time.

STANDARD OF REVIEW

¶33 Our standard of review is deferential: we must accept the court's findings of fact unless they are not supported by any reasonable evidence, and we must affirm the severance order unless it is clearly erroneous. *Jesus M.*, 203 Ariz. at 280, ¶ 4. That deference is not so complete, however, as to make appellate review meaningless. We will reverse if "as a matter of law . . . no one could reasonably find the evidence supporting statutory grounds for termination to be clear and convincing." *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 95, ¶ 10 (App. 2009) (citation and alterations omitted). That is the case here. When one separates the evidence in the record concerning *Mother's* conduct from lay opinion, speculation and stereotype, the evidence was insufficient to support the juvenile court's determination that Mother's parental rights should be severed under A.R.S. § 8-533(B)(3), (8)(b), or (11).

FACTUAL BACKGROUND

¶34 Father's rights have been severed, and he is in prison. It is therefore critical to examine the record to determine what evidence exists that *Mother* has engaged in behavior similar to Father, or that she has engaged in any other behavior that warrants termination of her rights.

¶35 Mother began using methamphetamine in her youth, but achieved sobriety in 2004. Around the same time, she became pregnant by her boyfriend, an active drug user, and he committed suicide. Mother

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thereafter obtained a degree in chemical-dependency counseling and, in January 2005, gave birth to A.K. Mother and A.K. lived with Mother's mother ("Grandmother") and stepfather (collectively, "the Grandparents") until early 2009, when they moved out to reside with Mother's new boyfriend, and later husband, Father.

¶36 From the outset, Father was physically and emotionally abusive toward Mother. Starting in 2010, he had repeated contact with law enforcement arising from domestic violence incidents involving Mother; he also had extensive contact related to other crimes. Mother repeatedly left Father only to later reconcile with him, succumbing to his threats (including threats of suicide) and to her belief that his conduct stemmed from a drug addiction that she could help him overcome. The couple had their first child together, A.L., in August 2010.

¶37 In May 2011, during an altercation with Mother, Father allegedly pushed A.K. and struck A.L.; A.K. also reported that Father had previously put his bare bottom on A.K.'s face as a joke. In June 2011, the Department took A.K. and A.L. into custody, placed them with the Grandparents, and filed a dependency petition. The juvenile court adjudicated A.L. dependent as to Father based on his abuse of Mother and use of methamphetamine, and adjudicated A.K. and A.L. dependent as to Mother based on her failure to protect them from the effects of Father's abuse. Consistent with A.R.S. § 8-844(C)(1), the court evaluated the dependency petition under a preponderance-of-the-evidence standard, relying on the petition's allegations and the related CPS report.

¶38 Mother thereafter participated in various reunification services, including a hair-follicle drug test that returned a negative result. Mother left Father after he attacked her in their home, moved in with the Grandparents, and, in September 2011, gave birth to the couple's second child, D.L.

¶39 The majority acknowledges that the first dependency was terminated at the Department's request because Mother had left Father and made progress in protecting the children from Father's domestic violence. There was no finding that the first dependency was in any way related to

misconduct by Mother -- Mother was a victim of Father's acts, along with the children.³ That dependency lasted approximately eight weeks.

¶40 The majority then points to a "report" of "domestic violence between Mother and Father" arising from a contact with Grandmother. In truth, there is no evidence in the record that Mother committed an act of domestic violence in that instance -- only that there was conflict between Mother and her own mother over the continued relationship with Father. Though Grandmother's objections may have been well-intentioned and well-founded, this is no evidence of domestic violence by Mother.

¶41 The second dependency (which was again based on findings gathered from the petition and a CPS report, under a preponderance-of-the-evidence standard) ended with the Department returning the children to Mother *and* Father, who had since had their third child, T.L. Mother had successfully participated in reunification services, including domestic-violence services and urinalysis tests that showed she was not using drugs (indeed, no evidence suggested that she had used drugs in the preceding eight years). It is clear that the Department rightly had little confidence in Father at that point. But the case manager reported that while there was "inherent risk within this family because of domestic violence and misuse of medications," no safety threat warranted continued dependency because "in a two parent household, with one caregiver not using any mind altering substances, that caregiver can protect[, and Mother] is a good mother and able to fulfill her responsibility to her children." (Emphasis added.)

¶42 The majority next discusses an August 2013 incident in which Father attacked Mother's brother. Though deplorable on Father's part, the evidence (contrary to the Department's allegation) shows that the children were not present during this attack, and no evidence shows that Mother was in any way complicit in Father's violent behavior. The majority cites the Department's concern that the incident was "consistent with the family's pattern of behavior: '[P]arents relapse[d] in drugs, [which led] to domestic violence, the domestic violence [led] to endangering the children,

³ Later, in its findings of fact regarding severance, the trial court itself found that "[Mother] has been a victim of her husband's drug abuse and violence." It then found that "[h]er assertions that she loves her children more than anything else and that she's divorcing [Father] rings (sic) very hollow from this Court's perspective." Here, however, the court had the opportunity, with Father in prison and distant from Mother, to permit her full recovery from his abuse to bear fruit. It did not take that opportunity.

[which led] to unemployment, [which led] to criminal activity.’” But there was no evidence that this was “family” behavior -- there was no evidence at all that *Mother* had engaged in drug use, domestic violence or criminal activity.⁴ Again, the evidence all concerned Father’s misdeeds.

¶43 After the August 2013 incident, the Department sought a third dependency, which ultimately resulted in severance. As the majority notes, “the Department alleged that Mother was neglecting her children as evidenced by her substance abuse, by her long history of domestic violence with Father in the children’s presence, and by her failure to protect them.” To that point, however, there was no evidence that Mother had used drugs during the children’s lives -- indeed, all the evidence was to the contrary. Father’s history of perpetrating domestic violence, and Mother’s difficulty in ensuring his absence from the children’s lives, were at that point legitimate concerns. But once Father was sentenced to prison, the court should have evaluated Mother’s fitness on its own merits.

¶44 The majority then turns to the Department’s retrieval of the children from Minnesota in 2013. It notes that T.L. had a severe ear infection which made him “fussy.” It does not note that T.L. had come to Minnesota with a prescription for that infection, or that Mother had obtained the prescription for him. And while the specter of medical neglect created by the majority’s discussion might seem disturbing in the abstract, the actual fact of a one-year-old child seeming “fussy” while undergoing medical treatment for an ear infection seems entirely unremarkable to me. Similarly, the fact that two-year-old D.L. was experiencing an eczema outbreak does not, by itself, compel a finding that Mother was an inappropriate parent.

¶45 While Mother and Father remained in Minnesota, Mother’s hair-follicle test yielded a negative result. And when they returned to Arizona, Mother consistently attended scheduled visits from January 2014 (when the visits began) until the middle of May 2014 (when Mother separated from Father). Mother missed only two visits during these months (reporting ahead of time that she was ill) and one parenting-skills

⁴ The majority characterizes Mother and Father’s return to Arizona as related to “*their* ‘criminal issues.’” (Emphasis added.) But as the state’s own witnesses testified, “[t]he criminal issues were not as to [Mother],” and until the end of the third dependency “the legal issues were never ones that [Mother] was involved in throughout the history of the cases.”

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meeting (reporting ahead of time that she had a work conflict). The evidence showed that these visits went well -- the children enjoyed their time with Mother and she cared for them appropriately. Mother also consistently participated in domestic-violence counseling. Though the counseling unfortunately did not result in Mother realizing that she was a victim of Father's abuse (as the majority notes), there is no evidence that Mother failed to participate in the counseling sessions in good faith.

¶46 Against this factual background, the Department alleged that although the Department had offered Mother and Father rehabilitative services, they "only minimally engaged with those services," and "after repeated instances of non-compliance it [became] clear that the parents [were] willfully refusing to engage in the services offered." In my view, the mere assertion of allegations by the Department is an insufficient basis for severance, and the court's reliance on such allegations in the place of clear and convincing evidence amounts to clear error.⁵

¶47 In truth, the evidence clearly shows that Mother was not "chronically" abusing drugs, despite her single relapse after a decade of sobriety. And the evidence clearly shows that Mother was not neglecting the children. Indeed, the court appointed special advocate ("CASA") testified: "I hadn't really seen any evidence of neglect in the previous dependency"

¶48 Yet in March 2014, while Mother was regularly participating in services, the Department sought to change the case plan to severance and adoption, alleging that Mother had not complied with a request to sign a release-of-information form, that she had cancelled her first parenting class, and that during visits with the children she had offered them unhealthy snacks and allowed them to play outside in cold weather. The court granted the Department's request to change the case plan in April, finding that "the Attorney General's Office has asserted that neither parent [is] taking this seriously." The next month, the state sought termination, alleging minimal engagement with services, including drug testing. But it does not appear that Mother had even been required to submit to drug tests, other than the initial test that she took in Minnesota (with negative results).

⁵ With regard to domestic violence, the majority states: "Mother did not protect her child emotionally because A.L. was able to imitate the screams Mother made during those incidents." Again, there is an important difference between allegations and evidence. Though the Department did make this allegation, no evidence -- much less clear and convincing evidence -- was presented on this point at the *severance* trial.

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The state presented testimony at trial that “we weren’t having them test all the time, like they weren’t calling in randomly or anything like that. It was agreed that the hair follicle came back negative, that, you know, we might test them late down the -- down the line, you know, if there was suspicion or reason to believe that there might be usage going on, but that was determined in the beginning.” Put simply, this is a case in which the Department’s allegations did not square with the evidence at trial.

¶49 Within weeks of the Department’s motion to terminate, Mother spiraled briefly but seriously. Father committed an act of violence against her, she obtained an order of protection that Father violated, and Father was jailed. Mother also began to use drugs for the first time in a decade. In July, she committed crimes with Father; she received probation and Father was imprisoned for two to four years after pleading guilty. Mother thereafter moved in with the Grandparents, ceased using drugs, enrolled in college and counseling, began to search for housing and employment, and resumed visitation with the children.

¶50 Trial on the Department’s motion for termination took place in September 2014. Father consented to the termination of his parental rights before the trial, but Mother contested the termination of her rights. Mother moved for a 90-day continuance in view of Father’s waiver and her plans to divorce him.

¶51 Despite these circumstances, the court denied the motion for continuance. The majority notes that “[t]he court wondered, because of its knowledge of the case, whether Mother’s reasons for the continuance was ‘a tactic where [Mother divorces Father]’ and then he would ‘walk right back into her life and be with the [children] as a dad even though his rights have been severed and he [had] been divorced.’” With due regard for the deference we accord trial court decisions over trial continuances, I view this as an abuse of discretion. Decisions of this magnitude cannot properly be made on the basis of what a court “wonders” might happen years in the future. Father was the problem, and he was then imprisoned. By definition, he was in no position to “walk right back into her life.” Mother expended great effort to comply with the Department’s requirements and to participate in services until it changed the plan to severance. The Department had described her as “a good mother and able to fulfill her responsibility to her children.” Yet by denying the continuance, the court gave her no opportunity to demonstrate her fitness in the face of the most significant possible change of circumstances for the better.

ANALYSIS

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT TERMINATION UNDER A.R.S. § 8-533(B)(3).

¶52 Under A.R.S. § 8-533(B)(3), the Department was required to prove that Mother was unable to discharge her parental responsibilities because of a history of chronic abuse of dangerous drugs or controlled substances, and that there were reasonable grounds to believe that the condition would continue for a prolonged indeterminate period. The Department failed to meet this burden of proof by clear and convincing evidence.

¶53 First, the evidence was insufficient to show that Mother was a chronic drug user. Though drug abuse need not be constant to be considered chronic, it must be persistent or lingering. *Raymond F.*, 224 Ariz. at 377, ¶ 16. The evidence did not show that Mother had a chronic drug problem. Her brief relapse into drug use after a decade of sobriety cannot reasonably be characterized as chronic, or as an indication that the condition would continue indefinitely.

¶54 Second, the evidence was insufficient to show that Mother was unable to discharge her parental responsibilities. The term “parental responsibilities” is “not intended to encompass any exclusive set of factors but rather to establish a standard which permits a trial judge flexibility in considering the unique circumstances of each termination case.” *Maricopa Cnty. Juv. Action No. JS-5894*, 145 Ariz. 405, 409 (App. 1985). But in general, a parent is responsible for protecting, educating, and disciplining his or her children; for providing them with food, shelter, education, and medical care; and for giving them physical and emotional care. *JS-5209 & JS-4963*, 143 Ariz. at 185. Though D.L. and T.L. were suffering from physical ailments when the Department took custody of them in 2013, the ailments were typical of childhood, they involved no demonstrated negligence on Mother’s part, and Mother had sought medical attention for the children. Further, Mother thereafter appropriately interacted with and cared for the children during regular supervised visits, and continued to maintain what was undisputedly a loving relationship with them. Mother presented evidence, which the Department did not dispute, that she was stable at the time of the severance trial: she was living with the Grandparents, she was sober, and she was actively pursuing employment and higher education. The court’s concerns that Mother would return to Father were too speculative to justify termination in the circumstances of this case. At the time of the trial Father was jailed and awaiting a prison sentence that would

forcibly separate him from Mother for a number of years. The CASA's opinion that Mother was prone to expose the children to a different abusive relationship with an unknown person was mere speculation -- indeed, there is no indication that the CASA had any basis for this speculation apart from stereotype. In my view, this evidence should not have been admitted, much less given weight.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT TERMINATION UNDER A.R.S. § 8-533(B)(8)(b).

¶55 Under A.R.S. § 8-533(B)(8)(b), the Department was required to prove that the children were less than three years old, were being cared for in an out-of-home-placement under court order, had been in out-of-home placement for a cumulative total period of at least six months, and that Mother had substantially neglected or willfully refused to remedy the circumstances that caused them to be in out-of-home placement despite the Department's diligent efforts to provide appropriate reunification services. The Department failed to meet this burden of proof by clear and convincing evidence.

¶56 As an initial matter, A.L. turned three years old shortly before the final dependency petition was filed. On this ground alone, Mother's rights to A.L. could not be terminated under A.R.S. § 8-533(B)(8)(b). It is arguable that the fact that the children's extensive time in out-of-home placement gave Mother adequate notice that her rights to A.L. could be terminated under § 8-533(B)(8)(a), which is materially identical to subsection (B)(8)(b) except that it does not impose an age limit and requires at least nine months of out-of-home care by court order or voluntary placement. *See Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355 (App. 1994) (holding that juvenile court acted within its discretion to allow amendment to add a statutory ground that merely added a new legal theory supported by facts already alleged). But under either subsection the Department failed to prove that Mother substantially neglected or willfully refused to remedy the circumstances that caused the children to be in out-of-home placement.

¶57 The circumstance that caused the children to be in out-of-home care was Father's violence. Mother's CPS case plan stated that she should engage in services to "learn of the effects of domestic violence in a family" and "[l]earn to recognize the signs of domestic violence." The case plan further stated that Mother should "refrain from involvement in domestic violence situations" and "remove herself and her children from relationships where violence is occurring." Mother's reunification with the

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children was not, however, expressly conditioned on her discontinuation of her relationship with Father. In fact, the case plan and the Department's past actions contemplated that Mother could be reunited with her children while maintaining a relationship with Father: the Department offered reunification services to Father as well as Mother, including services designed to address his violence. And in a previous similar dependency, the Department had returned the children to the parents' joint care after they participated in services. Whether this reunification was a prudent decision by the Department is not the issue. The issue is that there is no evidence that Mother neglected the children.

¶58 Until several months before the severance hearing, Mother substantially engaged in the services offered to her. Before returning to Arizona, she submitted to drug testing, underwent a psychological evaluation, and participated in counseling. Upon her return to Arizona, she regularly participated in supervised visitation, parenting-skills meetings, and domestic-violence counseling. To be sure, the results of the counseling were not ideal -- Mother continued to deny Father's violence and drug abuse, and she reunited with Father after yet another incident of physical abuse.

¶59 Merely imperfect efforts to comply with a reunification plan do not necessarily rise to the "substantially neglected or willfully refused" standard for termination under A.R.S. § 8-533(B)(8)(b) (or (B)(8)(a)). "[T]he test focuses on the level of the parent's effort to cure the circumstances rather than the parent's success in actually doing so." *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 329, ¶ 20 (App. 2007). "[P]arents who make appreciable, good faith efforts to comply with remedial programs . . . will not be found to have substantially neglected to remedy the circumstances that caused out-of-home placement, even if they cannot completely overcome their difficulties" within the statutory time frame. *Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 576 (App. 1994) (construing previous A.R.S. § 8-533(B)(6)(a)). By contrast, last-minute endeavors that appear token and insincere will not defeat termination, *Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 468 (App. 1993), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, and even ultimate success in self-improvement may not defeat termination if efforts at compliance were sporadic, *JS-501568*, 177 Ariz. at 576-77.

¶60 On this record, the evidence did not clearly and convincingly show that Mother substantially neglected or willfully refused to remedy the circumstances that caused the children to be in out-of-home placement. To the contrary, Mother made significant and consistent efforts to comply with

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the services that were designed to help her do so, and she made significant efforts to maintain an appropriate relationship with the children. Her efforts were not perfect or continuous, but they did not clearly and convincingly constitute substantial neglect or willful refusal.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT TERMINATION UNDER A.R.S. § 8-533(B)(11).

¶61 As an initial matter, Mother's parental rights to T.L. could not have been terminated under § 8-533(B)(11) because he had not, as that statute requires, previously been ordered to out-of-home care. With regard to the remaining two children, the Department was required to prove that the children were previously cared for in an out-of-home placement under court order, were returned to Mother's care, were removed from Mother's care within eighteen months, were again being cared for in an out-of-home placement, and that Mother was currently unable to discharge her parental responsibilities despite the Department's diligent efforts to provide appropriate reunification services. For the reasons discussed above, I conclude that the Department did not satisfy this burden of proof by clear and convincing evidence.

IV. TERMINATION WAS NOT IN THE CHILDREN'S BEST INTERESTS.

¶62 The best interests determination in severance cases is an independent element that must be satisfied even when statutory grounds for severance exist. Though it often follows that termination is in the best interests of a child when such grounds exist, the conclusion is not automatic -- and the best interests determination is not merely impressionistic. Rather, to establish that termination is in a child's best interests, the Department must prove how the child would benefit from termination or be harmed by the continuation of the parent-child relationship. *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990). I find no evidence on this record that the continuation of Mother's relationship with her children, in the absence of Father, would harm them. The evidence shows instead that Mother is a "good mother and able to fulfill her responsibility to her children," that she has participated in services diligently (if imperfectly) and that she has a loving bond with her children. I also find no evidence on this record that the children will benefit from being adopted out to two different homes.

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¶63

For these reasons, I respectfully dissent.



Ruth A. Willingham · Clerk of the Court
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