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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TAMAR B., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, K.M., R.M., M.M., *Appellees*.

No. 1 CA-JV 16-0242
FILED 2-14-2017

Appeal from the Superior Court in Maricopa County
No. JD16708
The Honorable Daniel G. Martin, Judge

AFFIRMED

COUNSEL

Gates Law Firm LLC, Buckeye
By S. Marie Gates
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Amber E. Pershon
Counsel for Appellee DCS

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Appellant Tamar B. (“Mother”) appeals the juvenile court’s termination of her parental rights to her children KM, RM, and MM. Mother asserts that the juvenile court should have appointed a guardian ad litem (“GAL”) for her, incorrectly relied on evidence from a vacated hearing, and made insufficient findings regarding the best interests of the children. For the following reasons, we affirm the juvenile court’s ruling.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother and Markus M. (“Father”)¹ are the biological parents of KM, born February 2011, RM, born January 2012, and MM, born October 2013. The Department of Child Safety (“DCS”) removed the children from their home in November 2013 after MM was diagnosed with failure to thrive. Mother had only been feeding MM water and juice boxes, causing him to lose over eleven percent of his body weight after birth.

¶3 DCS alleged Mother had been neglecting the children due to mental illness and substance abuse. There was no food in the home for the children, and when the children were given food at the hospital, Mother took the food and ate it herself.

¶4 Mother was offered various services by DCS, including parent aide services, individual counseling, group therapy, psychological evaluations, transportation, visitation, and substance-abuse services. Mother has a history of substance abuse problems, but tested negative throughout the dependency. Mother inconsistently attended therapy, and her psychiatric evaluation indicated a high probability that the children would be subject to neglect and abuse if left in her care.

¶5 Mother was diagnosed with bipolar disorder and schizophrenia. Dr. Thal, a psychologist, testified Mother has a severe

¹ The court also terminated Father’s parental rights. Father is not a party to this appeal.

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psychiatric condition and that she has been plagued by paranoid thoughts and by voices telling her to hurt herself and others. At her evaluation, Dr. Thal observed that Mother was scattered and had difficulty with basic reasoning. He testified that unless Mother had an extremely effective co-parent, she could not meet the minimal level of parenting even while medicated. In Dr. Thal's opinion, it was likely not feasible—even with medication—for Mother to be safely left alone with the children for the time it would take “to run to the store and buy a few groceries.”

¶6 Mother only attended approximately one-third of scheduled visitations. MM returned from visits “extremely soiled, in wrong size diapers, and [with] diapers so full they have leaked down his . . . legs.” After visitations with Mother, MM had terrible temper tantrums that included violent outbursts.

¶7 The DCS case manager, LH, testified that MM's placement is adoptive and that although RM's and KM's current placement is not adoptive, DCS had identified a potential adoptive placement. LH stated that even if the adoptive placements fail, the children are otherwise adoptable.

¶8 When Mother failed to appear for the first severance hearing in February 2016, the juvenile court deemed the allegations against her admitted. Mother arrived several minutes later, and the court vacated Mother's waiver of her rights and rescheduled the hearing for May 2016. After the May hearing, the juvenile court terminated Mother's parental rights, finding the children had been in an out-of-home placement for more than fifteen months and termination was in the children's best interests.

¶9 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 8-235(A) (2014) and 12-120.21(A)(1) (2016).²

DISCUSSION

I. Standard of Review

¶10 To terminate parental rights, the juvenile court must find at least one of the statutory grounds set out in A.R.S. § 8-533(B) (2016) was proved by clear and convincing evidence. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12 (2000). It must also find DCS has shown by a

² We cite the current version of applicable statutes unless revisions material to this decision have since occurred.

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preponderance of the evidence that termination is in the best interests of the child. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). We will review the juvenile court's record in the light most favorable to sustaining the court's decision and will affirm it unless, 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) (citations and quotations omitted). We will affirm the juvenile court's severance order unless there was an abuse of discretion or the court's findings of fact were clearly erroneous. *E.R. v. Dep't of Child Safety*, 237 Ariz. 56, 58, ¶ 9 (App. 2015) (citations and quotations omitted).

II. Appointment of a Guardian Ad Litem

¶11 Mother does not specifically challenge the statutory grounds of fifteen months' time in care as a basis for severance. She argues only that the juvenile court erred by failing to sua sponte appoint a GAL for her because DCS moved to terminate her rights based partially on mental illness.³ We disagree.

¶12 On its own motion or on the motion of a party, a court shall appoint a GAL "if it determines that there are reasonable grounds to believe that a party to the proceeding is mentally incompetent or is otherwise in need of a [GAL]." A.R.S. § 8-535(F) (2016). However, Arizona law is clear that "parental rights termination statutes do not automatically require the juvenile court to appoint a GAL for a parent when [DCS] seeks termination" based on mental illness. *Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, 18, ¶ 1 (App. 2006). The juvenile court must have reasonable grounds to believe a party is mentally incompetent to require a GAL appointment. A.R.S. § 8-535(F). "Mentally ill" is not synonymous with "mentally incompetent," as the latter is a distinct legal concept. *Kelly R.*, 213 Ariz. at 21, ¶ 25. A party is mentally incompetent when she is unable to understand the nature and object of the proceedings or is unable to assist in her defense. *Id.* at 18, ¶ 1. The juvenile court is in the best position to determine a parent's mental competency to participate in termination proceedings. *Id.* at 23, ¶ 32. "We

³ Mother argues that because she was appointed a GAL when her rights to another child were severed four years ago, the juvenile court was obligated to appoint a GAL in this severance. However, the determination of whether the juvenile court had reasonable grounds to believe Mother required a GAL is limited to Mother's needs in this case, not her needs in a previous severance.

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review the juvenile court's failure to sua sponte appoint a GAL under an abuse of discretion standard." *Id.* at 22 n.6, ¶ 24 (citations omitted).

¶13 Although Mother has substantial mental health issues, the record shows she understood the proceedings and was able to assist her counsel. Mother communicated to the juvenile court and her counsel how she wanted to proceed. The juvenile court found Mother "knowingly, intelligently, and voluntarily" waived her right to contest the dependency in January 2014. At the February severance hearing, Mother instructed her counsel that she would like to proceed and contest the severance. Additionally, Mother understood the importance of the proceedings, as demonstrated by her communications with her counsel when she was late or would not appear. Mother informed her counsel she would be late to hearings in November 2014 and August 2015, and would not appear at hearings in March 2015 and April 2016.

¶14 Mother asserts her counsel "expressed concern about his ability to communicate and explain things to his client." Mother cites the following as evidence that her counsel was concerned about her competency:

Mr. Green: I haven't had reliable contact information for my client for a couple of months. I talked to her about a couple of months ago and she was expressing doubt about going forward with this. She even talked about relinquishment. But I told her . . . until you know you sign something we, you know, come to court and let me know. And I have—I lost track of her from there. In fact, the number I have for her was actually [Father's]. So, I have no good cause for her failure to appear.

However, it is clear Mother's counsel was explaining that he did not have reliable contact information for Mother, not that he was unable to make himself understood. Mother has failed to demonstrate that her problems with consistency amount to mental incompetency. We find the juvenile court did not have reasonable grounds to doubt Mother's competency and was thus under no obligation to sua sponte appoint a GAL.

III. Consideration of Evidence from Vacated Hearing

¶15 The juvenile court vacated its finding against Mother for her failure to appear at the February hearing. The juvenile court expressly stated that the exhibits admitted at the hearing would stand. Although Mother asserts that "[t]he minute entry does not indicate the hearing was

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vacated ‘in part,’ [rather i]t states that the trial was vacated,” it is clear the juvenile court only vacated the finding of waiver of rights. In fact, the minute entry states the juvenile court “vacat[ed] the Court’s findings regarding the mother’s and father’s waiver of their rights to contest the termination” and affirms the admission of the evidence. Additionally, Mother’s counsel did not object to the juvenile court’s affirming the admission of those documents at the May hearing. The juvenile court properly considered the evidence and testimony presented at the February hearing.

IV. Best Interests of the Child

¶16 Mother also asserts that the juvenile court did not make sufficient findings to support its best interests determination. We disagree.

¶17 In addition to finding statutory grounds for termination, the juvenile court must find it is in the best interest of the child to terminate parental rights. A.R.S. § 8-533(B) (2016). To establish that severance of a parent’s rights would be in a child’s best interest, “the court must find either that the child will benefit from termination of the relationship or that the child would be harmed by continuation of the parental relationship.” *James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18 (App. 1998) (citation omitted). In making this determination, the juvenile court may consider evidence that the child is adoptable or that an existing placement is meeting the needs of the child. *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19 (App. 2004) (citations omitted).

¶18 Evidence supports the juvenile court’s finding that the children would both benefit from severance and would be harmed if returned to Mother. The juvenile court expressly found that the children would be harmed by a continuation of the parental relationship. The testimony established a high probability that the children would be subject to neglect and abuse if returned to Mother, even if she was on psychiatric medications. The children’s case manager testified that adoptive placements had been identified and that the children were otherwise adoptable. Sufficient evidence supports the court’s finding that severance was in the children’s best interests.

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CONCLUSION

¶19 For the foregoing reasons, we affirm the termination of Mother's parental rights.



AMY M. WOOD • Clerk of the Court
FILED: AA