IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANTHONY V., CHRISTINA S., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY, R.S., *Appellees*.

No. 1 CA-JV 16-0510
FILED 6-13-2017

Appeal from the Superior Court in Maricopa County
No. JD507747
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

John L. Popilek PC, Scottsdale
By John L. Popilek
Counsel for Appellant Anthony V.

Maricopa County Public Advocate, Mesa
By Suzanne W. Sanchez
Counsel for Appellant Christina S.

Arizona Attorney General's Office, Mesa
By Nicholas Chapman-Hushek
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge James P. Beene joined.

C A T T A N I, Judge:

¶1 Anthony V. ("Father") and Christina S. ("Mother") appeal the superior court's termination of their parental rights as to their child, R.S. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Father are the biological parents of R.S., born in April 2015. Mother has three children from previous relationships. Mother permanently lost custody of her two oldest children in 2009 and 2010.

¶3 In April 2014, Mother was arrested for driving a stolen vehicle and for two outstanding warrants. The Department of Child Safety ("DCS") subsequently removed Mother's two-year-old son, G.S., from her care. G.S. was found dependent as to Mother, and in June 2016, Mother's rights to G.S. were severed based on 9- and 15-months' time in care, and on substance abuse grounds. *See* Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(3), (8)(a), (c).[1]

¶4 Mother and Father began their relationship in early 2014. In September or October of that year, Mother found out she was pregnant with R.S. R.S. was born premature and diagnosed with PURA syndrome, a chromosomal disorder that delays physical development and hinders the ability to verbalize.

¶5 DCS removed R.S. upon his discharge from the hospital in June 2015. Soon thereafter, the superior court found R.S. dependent as to Mother due to substance abuse, mental health issues, and G.S.'s open dependency. The court also found R.S. dependent as to Father because of Father's substance abuse and his failure to protect R.S. from Mother's substance abuse.

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

¶6 DCS had offered Mother several services during G.S.'s dependency, including parent-aide services, parenting and domestic violence classes, a psychological evaluation, substance-abuse assessment and treatment, and drug testing. An examining psychiatrist found that Mother had symptoms consistent with multiple disorders, including major depressive disorder, cannabis use disorder, and generalized anxiety disorder. Although Mother has a medical marijuana card for back pain, the psychiatrist opined that marijuana was "a suboptimal treatment" for her condition. During G.S.'s dependency, Mother completed some services, such as individual counseling and parent-aide services. However, she failed to demonstrate sobriety despite multiple referrals for drug testing and treatment. She missed multiple scheduled drug tests, tested positive for marijuana regularly, and also had one positive test for cocaine.

¶7 Mother's inconsistent engagement with services continued after R.S. was found dependent. She was again referred for drug treatment in June 2015, but failed to complete an intake assessment. She was re-referred for substance-abuse services in March 2016 but she did not qualify for such services because she claimed she only used marijuana when medically necessary.

¶8 Mother was also referred for drug testing multiple times. But, from July 2015 to November 2016, she completed only seven of 93 required urinalysis tests, and she tested positive for THC all seven times. Although in June 2016, the superior court conditioned further parent-aide services on Mother demonstrating sobriety for 30 days, Mother never completed all her scheduled drug tests during any 30-day period after the issuance of that order.

¶9 Mother was referred for another psychological evaluation, which was completed shortly before the severance hearing. However, the results of that evaluation were not available at the time of the hearing.

¶10 Mother demonstrated erratic behavior throughout the case. She vandalized a car belonging to her mother's boyfriend, and she was involved in a domestic violence incident with her mother. She also sent threatening text messages to R.S.'s paternal grandmother, who later became R.S.'s placement, over the course of several months. R.S.'s paternal grandparents obtained an order of protection against Mother.

¶11 DCS referred Father for a substance-abuse assessment, random drug testing, a psychological evaluation, and visitation. Like Mother, Father has a medical marijuana card, and he uses medical

marijuana to treat back pain. Father completed only 20 out of 86 required urinalysis tests, and each of those tests came back positive for marijuana.

¶12 Father underwent a psychological evaluation. Despite his history of marijuana use, Father denied ever using drugs and claimed that the only medication he takes is an antihistamine. The psychologist opined that Father "clearly" needed substance-abuse classes and parenting classes and that Father would not be capable of demonstrating minimal parenting skills until he successfully completed the services offered by DCS.

¶13 After several missed appointments, Father completed a substance-abuse assessment in January 2016. Father indicated to the evaluator that he took marijuana three to six times weekly to help relax his muscles before sleeping, and he expressed a desire to stop using marijuana. The evaluator opined that Father met the criteria for mild cannabis use disorder.

¶14 DCS moved to terminate both parents' rights to R.S. In an amended motion filed in November 2016, DCS alleged the 6-, 9-, and 15-months' time-in-care grounds as to both parents, and the prior-termination ground as to Mother.

¶15 After a two-day contested severance trial, the superior court found all of the alleged grounds supported severance and that severance would be in R.S.'s best interests. Father and Mother appealed, and we have jurisdiction under A.R.S. § 8-235(A).

DISCUSSION

I. Father's Appeal.

A. Admission of Father's Psychological Evaluation.

¶16 Father argues that the court improperly admitted into evidence a psychological evaluation requested by DCS. Father argues that the evaluation should have been precluded because the psychologist was not available for cross-examination. *See* Ariz. R.P. Juv. Ct. 45(D).

¶17 We review evidentiary rulings for an abuse of discretion and resulting prejudice. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82–83, ¶ 19 (App. 2005). A court abuses its discretion if its decision is "manifestly unreasonable" or the court exercised its discretion "on untenable grounds, or for untenable reasons." *Id.* at 83, ¶ 19 (citation omitted).

¶18 Father's argument fails because he did not file a timely notice of objection to DCS's pretrial disclosure statement, which disclosed as evidence child safety worker reports and attachments, including the contested evaluation. *See* Ariz. R.P. Juv. Ct. 44(B)(2)(e), (D)(2); *Alice M. v. Dep't of Child Safety*, 237 Ariz. 70, 72–73, ¶ 9 (App. 2015). Furthermore, Rule 45(D) "does not preclude the trial court from admitting [psychological reports] as appropriate when, as here, the report is disclosed, there is no objection [to the disclosure] and the author does not testify." *Alice M.*, 237 Ariz. at 73, ¶ 10.

¶19 Moreover, any error in admitting the report was harmless. Father asserts that the report was prejudicial because the psychologist indicated that Father had initially denied using drugs. But the denial of drug use was not significant to the grounds for severance and was not referenced in the superior court's severance decision. Thus, the reference to Father's initial denial of drug use did not prejudice his case.

B. Preclusion of Father's Proposed Exhibits 17–21.

¶20 On the first day of trial, Father's counsel attempted to enter certain exhibits into evidence that had not been included in Father's pretrial disclosure statement. *See* Ariz. R.P. Juv. Ct. 44(D)(2). The court precluded these exhibits because they were not timely disclosed. *See* Ariz. R.P. Juv. Ct. 44(G). Although he concedes the exhibits were not properly disclosed, Father nonetheless argues that the superior court should have admitted them into evidence because their admission was in R.S.'s best interests. *See Hays v. Gama*, 205 Ariz. 99, 104, ¶ 23 (2003).

¶21 We need not address whether the court's evidentiary ruling was proper, however, because Father has not demonstrated how the ruling prejudiced his case. *See Lashonda M.*, 210 Ariz. at 82–83, ¶ 19. Father notes that his proffered exhibits comprised "a physician's record regarding the reason for his use of prescribed marijuana (proposed Exhibit 17), verification of employment (proposed Exhibit 18), [a] house lease[,] pertinent emails and text messages between Father and Department case managers, and bank records (proposed Exhibits 19–21)." Although Father was precluded from offering these untimely disclosed exhibits, he was able to present testimony relating to the information contained in each of the proposed exhibits. Father testified that he used medical marijuana for lumbar pain. He also testified that he was employed, that he earned enough to meet his financial obligations, and that he rented, with the possibility of future ownership, the house where he and Mother resided, with the possibility of future ownership. And he testified regarding the contents of

the relevant emails. Thus, Father was not prejudiced by preclusion of the late-disclosed exhibits.

C. Sufficiency of the Evidence.

¶22 Finally, Father argues that the superior court erred by finding statutory grounds for termination. The superior court may terminate the parent–child relationship if it finds at least one statutory ground for termination by clear and convincing evidence, and finds by a preponderance of the evidence that termination is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). When reviewing a termination order, "we view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the court's decision." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18 (App. 2009). We defer to the superior court's factual findings and will affirm the order unless clearly erroneous. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004).

¶23 The statutory severance ground of 15-months' time in care requires proof that (1) "[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer," (2) "the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement," (3) "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," and (4) DCS "has made a diligent effort to provide appropriate reunification services" to the parent. A.R.S. § 8-533(B)(8)(c).

¶24 Father does not contest that R.S. was in an out-of-home placement for 15 months or that DCS made diligent efforts to provide him services. Nor does he contest the finding that termination was in R.S.'s best interests. Father argues that the court erred because his use of medical marijuana did not justify a finding that he was unable to parent R.S. But reasonable evidence unrelated to the legality of Father's marijuana use supported the ruling.

¶25 R.S. was removed from the home in part because of Father's marijuana abuse problem and because Father was unable to protect R.S. from Mother's marijuana use while she was pregnant. Reasonable evidence supported the court's finding that Father failed to adequately remedy these concerns. Father was referred for random drug testing, but completed only 20 of 86 tests. He also put off his initial substance-abuse assessment for many months. When he finally completed that assessment, he was

diagnosed with mild cannabis use disorder. He expressed a desire to stop using marijuana, but he continued to test positive for marijuana throughout the case. Father also continued to deny that Mother had used marijuana while pregnant with R.S., despite evidence that she tested positive for THC several months after she discovered she was pregnant.

¶26 Furthermore, reasonable evidence supported the superior court's finding of a substantial likelihood that Father would be incapable of exercising proper and effective parental control in the near future. Father's psychological evaluation noted a concern that Father would not be competent to parent without complying with DCS-provided services. Although Father completed some services, he was closed out of his substance-abuse treatment program due to lack of engagement. And the case supervisor opined that Father would be unable to discharge his parental responsibilities in the foreseeable future. Although Father's medical marijuana use, standing alone, could not form the basis for terminating his parental rights, the superior court was presented with reasonable evidence (including a diagnosis of cannabis use disorder) beyond Father's legal drug use from which it could find severance warranted based on 15-months' time in care.[2]

II. Mother's Appeal.

¶27 Mother argues that the superior court erred by terminating her parental rights, asserting that the reunification services offered by DCS were both statutorily and constitutionally insufficient.

¶28 Mother's rights were severed on the 6-, 9-, and 15-months' time-in-care grounds, as well as the prior-termination ground. *See* A.R.S. § 8-533(B)(8)(a)–(c), (10). The first three grounds all expressly require that DCS make "a diligent effort to provide appropriate reunification services." A.R.S. § 8-533(B)(8). Although the prior-termination ground does not explicitly require reunification services, DCS is nonetheless constitutionally required to "ma[k]e a reasonable effort to provide . . . rehabilitative services or [prove] that such an effort would be futile." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 49, ¶ 15 (App. 2004) (quoting *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 193, ¶ 42 (App. 1999)); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (explaining that parents have a

[2] Because we affirm based on 15-months' time in care, we need not address the other grounds for severance. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3 (App. 2002).

"fundamental liberty interest . . . in the care, custody, and management of their child").[3]

¶29 DCS's constitutional obligation requires it to "provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Mary Ellen C.*, 193 Ariz. at 192, ¶ 37. However, "[DCS] need not provide 'every conceivable service'" to a parent. *Id.*

¶30 Although the court did not make an explicit finding that DCS made reasonable efforts to provide services to Mother, such a finding is implicit in its order terminating Mother's rights on the prior-termination ground. *Mary Lou C.*, 207 Ariz. at 50, ¶ 17. We will affirm an implicit finding if the record contains reasonable evidence to support it. *Id.*

¶31 The record establishes that DCS made reasonable efforts to provide appropriate services to Mother. Early in G.S.'s dependency, a psychologist recommended that DCS provide, among other things, a psychiatric evaluation and individual counseling. Mother successfully completed the individual counseling service. However, DCS did not refer Mother for further counseling because she failed to change her erratic behaviors after the closure of her initial counseling service. After she completed counseling, Mother vandalized her mother's boyfriend's car and sent threatening text messages to R.S.'s paternal grandmother.

¶32 Mother argues that DCS's failure to provide her further counseling constitutes a failure to make a reasonable effort to provide her services because that service was recommended by DCS's own expert. *See Mary Ellen C.*, 193 Ariz. at 192, ¶ 37. Here, however, given the evidence of Mother's continued erratic behavior, the court could reasonably conclude that the provision of further individual counseling would be futile.

¶33 In June 2016, DCS consulted with a psychologist about whether Mother would need further counseling. The psychologist recommended that Mother receive another psychological evaluation. At the time the referral was placed, the severance trial had already been set for November. The updated psychological evaluation was completed in October or November, but the report was unavailable at the time of the trial.

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[3] We decline DCS's invitation to re-examine the holding of *Mary Lou C.* applying this constitutional requirement to the prior-termination ground.

¶34 Mother argues that lack of the updated report is proof that DCS failed to make reasonable efforts to provide Mother with rehabilitative services. But the psychiatrist who performed Mother's initial psychiatric evaluation testified that, based on his impression of the evidence in the case, he would not change any of the diagnoses or recommendations contained in his original report. Given this testimony, as well as evidence that Mother failed to change key behaviors while her case was pending, the court could have reasonably determined that the updated psychological evaluation was unnecessary to its decision.

¶35 Throughout the case, Mother had multiple referrals for random drug testing and drug treatment, and she successfully engaged in visitation with R.S. Mother would have received parent-aide services during R.S.'s dependency if she had remained sober for 30 days, but she never took all required drug tests within any 30-day period. Thus, DCS made reasonable efforts to reunify the family in accordance with its constitutional obligations, and the court had a reasonable basis to terminate Mother's parental rights on the prior-termination ground. [4]

CONCLUSION

¶36 For the foregoing reasons, we affirm the superior court's order terminating Mother and Father's parental rights as to R.S.

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

[4] Because we affirm based on prior termination, we need not address the other statutory grounds. *See Jesus M.*, 203 Ariz. at 280, ¶ 3.