IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KIMBERLY S., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, F.S., J.S., *Appellees*.

No. 1 CA-JV 22-0090
FILED 11-1-2022

Appeal from the Superior Court in Maricopa County
No. JD531810
The Honorable Ashley V. Halvorson, Judge

AFFIRMED

COUNSEL

Maricopa County Legal Defender's Office, Phoenix
By Jamie R. Heller
Advisory Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Dawn Rachelle Williams
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Judge Randall M. Howe and Judge D. Steven Williams joined.

W E I N Z W E I G, Judge:

¶1 Kimberly S. ("Mother") appeals from the superior court's order terminating her parental rights to her two children. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother is the biological parent of Daughter, born January 2013, and Son, born December 2014. The fathers are not parties to this appeal.

¶3 Neighbors called the police in June 2018 after Daughter was found alone wandering the streets at night. Mother admitted leaving Daughter by herself on the unfenced patio. Less than a week later, Daughter and Son tried to cross a busy intersection at night. They were alone. A Department of Child Safety ("DCS") investigator visited Mother the next day. DCS learned that Mother was living with a man who had sexually abused Daughter. DCS also learned that Mother struggled with substance abuse. She admitted using methamphetamine, cocaine and heroin.

¶4 DCS secured temporary custody of the children, and petitioned to find them dependent on grounds that Mother had abused substances, neglected to protect Daughter from sexual abuse, or failed to properly supervise the children. Mother did not appear for a pretrial conference, and the superior court found the children dependent.

¶5 DCS referred Mother for substance-abuse testing and treatment, therapy and supervised visits. Mother did not remain drug-free. Almost two years into the dependency, she used fentanyl. She also tested positive for methamphetamine and amphetamines in March 2021. As a result, in April 2021, DCS moved to terminate Mother's parental rights based on chronic substance abuse and fifteen months' time-in-care. *See* A.R.S. §§ 8-533(B)(3), (8)(c). A month later, Mother again tested positive for methamphetamine.

¶6 After a two-day evidentiary hearing, the superior court terminated Mother's parental rights on the grounds alleged, recounting its decision in a 28-page minute entry. The court ultimately found that "[d]espite Mother's frequent efforts and occasional successes with substance abuse programs, and achieving very brief periods of sobriety, she has unfortunately been unable to maintain her sobriety for any meaningful period outside of a clinical setting." The court also found that DCS had established by a preponderance of the evidence that severance was in the children's best interests. This timely appeal followed. We have jurisdiction. *See* Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1).

DISCUSSION

¶7 Parents have a fundamental liberty interest in the care and custody of their children. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶ 11 (2000). But that interest is not absolute. *Id.* at 248, ¶ 12. The superior court may terminate parental rights if it finds by clear and convincing evidence a statutory ground for termination under A.R.S. § 8-533(B), and that termination is in the child's best interests by a preponderance of the evidence. *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 334, ¶ 9 (2009). Termination on grounds of alleged substance abuse or time-in-care requires a showing that DCS made reasonable and diligent efforts to reunify the family. *See* A.R.S. § 8-533(B)(8)(c); *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 453, ¶ 12 (App. 2005). We will affirm the court's termination order unless clearly erroneous, accepting the court's factual findings if reasonable evidence supports them. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3, ¶ 9 (2016).[1]

¶8 For termination based on prolonged substance abuse, DCS must offer clear and convincing evidence that Mother (1) has a "history of chronic abuse of controlled substances," (2) cannot discharge parental responsibilities because of her chronic substance abuse, and (3) "there are reasonable grounds to believe that [her] condition will continue for a prolonged and indeterminate period." *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 377, ¶ 15 (App. 2010).

¶9 The record contains ample support for the superior court's decision. Mother had abused methamphetamine since at least 2011. She tested positive for methamphetamine and amphetamines in 2018, 2019 and

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[1] Mother has not complied with ARCAP 13(a), Ariz. R.P. Juv. Ct. 106(A), but we reach the merits of her appeal because it concerns the children's best interests, *Kelly v. Kelly*, 252 Ariz. 371, 375, ¶ 18 (App. 2021).

2020. She tested positive for fentanyl and amphetamines in 2021, which was after DCS moved for termination of her parental rights. *See id.* at 379, ¶ 29 ("Father's failure to remedy . . . drug abuse[,] despite knowing the loss of his children was imminent, is evidence he has not overcome his dependence on drugs and alcohol.").

¶10 Mother counters with various arguments. First, she contends that DCS improperly removed the children in 2018. We lack jurisdiction over that argument, however, because Mother did not contest or appeal the dependency order. *See In re Appeal in Pima Cty. Juv. Action No. S-933*, 135 Ariz. 278, 279 (1982) ("The failure to file an appeal in a timely fashion deprives the appellate court of jurisdiction.").

¶11 Second, she argues her attorney was ineffective in the termination process. But she never shows how the attorney's representation created a high risk of an erroneous judgment or made a determinative difference in the outcome. *See Royce C. v. Dep't of Child Safety*, 252 Ariz. 129, 138, ¶ 26 (App. 2021). Moreover, Mother's attorney introduced evidence in the record, including character letters, completion certificates and emails. He also cross-examined DCS's witness and called Mother to testify.

¶12 Third, Mother argues that DCS "shouldn[']t have been able to get [her medical] records." But Mother never objected to DCS's request for the records, nor appealed the superior court's order to disclose them. *See Ritchie v. Krasner*, 221 Ariz. 288, 303, ¶ 51 (App. 2009) (failure to object at trial constitutes waiver). What is more, she stipulated to the admission of those exhibits at trial. *See Pulliam v. Pulliam*, 139 Ariz. 343, 345 (App. 1984) ("[S]tipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them.").

¶13 DCS also had to show that termination was in the children's best interests by a preponderance of the evidence. A.R.S. § 8-533(B); *Valerie M.*, 219 Ariz. at 334, ¶ 9. Mother argues that termination was not in the children's best interest because Son "was beaten while in DCS care." But she does not cite the record or provide any other support for her argument. Moreover, she admitted that Son was later moved to a different group home after she complained, and neither the record nor Mother's briefing reveals any instances of abuse since then. The record has ample evidence to support the court's conclusion, including that the siblings could stay

together, and that the "adoptive placement" was "meeting all of their needs."[2]

CONCLUSION

¶14 We affirm. Because we affirm on the ground of substance abuse, we need not address the time-in-care ground. *See Michael J.*, 196 Ariz. at 251, ¶ 27.

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

[2] We deny Mother's second motion to supplement the record on appeal, untimely filed on October 4, 2022. Mother asks us to consider body-camera footage and recent letters from the CASA child advocate, but these were not part of the trial record below, and we cannot consider new evidence on appeal. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990).