IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN RE TERMINATION OF PARENTAL RIGHTS AS TO J.S.

No. 1 CA-JV 23-0043
FILED 8-31-2023

Appeal from the Superior Court in Yavapai County
No. P1300JD202100032
The Honorable Anna C. Young, Judge

AFFIRMED

COUNSEL

Law Office of Florence M. Bruemmer, P.C., Anthem
By Florence M. Bruemmer
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Dawn R. Williams
Counsel for Appellee Arizona Department of Child Safety

MEMORANDUM DECISION

Presiding Judge D. Steven Williams delivered the Court's decision, in which Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

W I L L I A M S, Judge:

¶1 Father appeals the termination of his parental rights. For the following reasons, we affirm.

BACKGROUND[1]

¶2 Father's child was born in May 2021. Two weeks after birth, Father and Mother (who is not a party to the appeal) took the child to a hospital, where he was admitted with hypothermia and a urinary tract infection.

¶3 Shortly after his hospital admission, the Arizona Department of Child Safety ("DCS") took temporary custody of the child and filed a dependency petition. Noting the family resided in a motorhome without running water or heat and citing the parents' self-reporting that they neither swaddled the child nor checked on him during the night because it was "too cold to get out of bed," DCS alleged that both parents were unwilling or unable to exercise proper and effective parental care and control.

¶4 The juvenile court found the child dependent in June 2021, when the parents waived their rights to contest the allegations. As to Father, the court found him unwilling or unable to exercise proper and effective parental care and control by neglecting to provide for the child's basic needs and by exposing the child to domestic violence (hospital security personnel removed Father from the hospital after his verbal altercation with Mother in front of the child). After finding the child eligible for enrollment with the Cherokee Nation and therefore subject to the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-63, the court affirmed both the child's status as a ward of the court and his continuing placement in the care, custody,

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[1] "On review of a termination order, we view the evidence in the light most favorable to sustaining the juvenile court's decision." *Jade K. v. Loraine K.*, 240 Ariz. 414, 415, ¶ 2 (App. 2016).

and control of DCS. The court also adopted a case plan of family reunification concurrent with severance and adoption and ordered, as relevant here, several services for Father, including individual and family counseling, domestic violence education, psychological evaluation, visitation, parent aide skills training, and transportation. Upon the request of the Cherokee Nation, the court also ordered visit coaching.

¶5 About six months after the juvenile court ordered services, DCS moved to modify visitation, seeking reduced parenting time because the child became "distressed" after parental visits. Father did not object and the court granted DCS's request. Despite the modification, the child continued to demonstrate severe dysregulation following parental visits, including vomiting and diarrhea, prompting his guardian ad litem to request suspension of all parental visitation. The court implicitly denied that request; instead, limiting parenting time to shorter, therapeutically supervised visits.

¶6 Two months later, the child's guardian ad litem again moved to suspend parenting time, explaining that the child became so "distraught" in the parents' presence that visits "had to be cut short" even though they had already been reduced to one hour. As detailed in the motion, the therapists who attended the parental visits had to consistently intervene because both parents "continue[d] to struggle mightily to provide [the child's] basic needs during parenting time." Over Father's objection, the juvenile court suspended all parental visitation.

¶7 Soon thereafter, Mother petitioned to voluntarily terminate her parental rights to the child and consented to place the child for adoption. After an evidentiary hearing, the court granted Mother's request.

¶8 In September 2022, nearly sixteen months after taking custody of the child, DCS moved to terminate Father's parental rights, alleging: (1) Father was unable to discharge his parental responsibilities because of a mental deficiency and there were reasonable grounds to believe that the condition would continue for a prolonged and indeterminate period; and (2) the child had been in an out-of-home placement pursuant to a court order for a cumulative period of at least fifteen months, Father had been unable to remedy the circumstances causing the out-of-home placement, and there was a substantial likelihood he would be unable to exercise proper and effective parental care and control in the near future. DCS further alleged that it had actively provided remedial services and rehabilitative programs to preserve the parent-child relationship and that termination of Father's parental rights served the child's best interests.

¶9 At a contested termination adjudication hearing, DCS presented testimony from several of Father's service providers as well as exhibits documenting the child's hospitalization, Father's encounters with law enforcement since DCS took the child into custody, and Father's participation in services. The psychologist who performed Father's July 2021 psychological evaluation testified that Father has a mild to moderate intellectual disability and an unspecified personality disorder with antisocial and narcissistic traits that, together, prevent him from understanding and performing the rudimentary but essential tasks of caring for a young child. Likewise, the behavioral therapist who treated Father for six months (sixteen visits) testified that Father has significant cognitive impairment, demonstrated by an inability to recall basic instructions from one visit to the next. The therapist also testified that Father has considerable difficulty in prioritizing the child's needs over his own interests and lacks "insight" as to the necessary behaviors to safely parent.

¶10 Consistent with the testimony of the psychologist and behavioral therapist, the DCS case manager testified that despite substantial direction and support, Father's inability to perform even basic parenting tasks—such as bottle-feeding and diapering—persisted. The case manager also recounted that Father repeatedly aggressively handled the child during visits, engaging in behaviors that frightened the child despite numerous admonitions from service providers. Apart from testimony concerning Father's inability to parent safely, DCS presented evidence that shortly after it moved for termination of his parental rights, Father was arrested for drug activity and subsequently tested positive for methamphetamine.

¶11 Father testified that he loves the child and wants to parent him. Father acknowledged that DCS provided him with considerable support and assistance and testified that he tried to participate in services fully. When asked whether DCS could have provided him with additional services, Father testified that increased visitation, not suspended visitation, would have improved his parenting abilities. Father also stated that he had relocated to a motel and explained that he plans to obtain more stable housing once it becomes available. On cross-examination, Father admitted that since DCS took the child into custody, Father repeatedly experienced food scarcity and, on a couple of occasions, needed DCS's assistance to obtain food. When questioned about his positive drug test and failure to submit to subsequent tests contrary to a court order, Father testified that he did not knowingly use methamphetamine and asserted that he must have been drugged.

¶12 After taking the matter under advisement, the juvenile court terminated Father's parental rights, finding DCS proved both the mental deficiency and out-of-home placement grounds. The court also found that despite DCS's active efforts, termination of the parent-child relationship was in the child's best interests.

¶13 Father timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 8-235(A), 12-2101, and Rule 601(A) of the Arizona Rules of Procedure for the Juvenile Court.

DISCUSSION

¶14 Although fundamental, a parent's right to the care, custody, and control of his child is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12 (2000). A court may terminate parental rights if it finds, by clear and convincing evidence, the existence of at least one of the statutory grounds enumerated in A.R.S. § 8-533(B), *id.* at 249, ¶ 12, and, by a preponderance of the evidence, that termination is in the child's best interests, *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). To terminate parental rights in ICWA cases, the court must also find that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 333, ¶ 3 (2009) (quoting 25 U.S.C. § 1912(d)).

¶15 We review a termination order for an abuse of discretion, *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004), and will affirm unless, as a matter of law, "no one could reasonably find the evidence [supporting a statutory ground for termination] to be clear and convincing," *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 94, ¶ 7 (App. 2009) (internal quotations omitted). Because the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts," we accept its factual findings unless no reasonable evidence supports them. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18 (App. 2009) (internal quotations omitted).

I. Statutory Ground for Termination

¶16 Father contends that DCS did not meet its burden to prove a statutory ground for termination. We first consider the child's out-of-home placement ground.

¶17 To meet its burden under the fifteen-months' out-of-home placement ground, DCS must demonstrate that: (1) the child has been in an

out-of-home placement for at least fifteen months under a court order; (2) DCS made a diligent effort to provide appropriate reunification services for the parent and child; (3) the parent was unable to remedy the circumstances causing the out-of-home placement; and (4) a substantial likelihood exists that the parent will not be capable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c). In evaluating whether DCS satisfied its evidentiary burden, we consider "those circumstances existing at the time of the severance that prevent a parent from being able to appropriately provide for his or her child[,]" *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 22 (App. 2007) (internal quotations omitted), and "the availability of reunification services to the parent and the participation of the parent in these services," *Jordan C.*, 223 Ariz. at 93, ¶ 17.

¶18 To fulfill its statutory obligation under A.R.S. § 8-533(B)(8)(c), DCS must make diligent efforts to reunify families and provide appropriate services that give parents "the time and opportunity" to "become [] effective." *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353 (App. 1994). The diligence requirement "ensures that a parent's liberty interest in raising his or her child, and the desire to correct the circumstances that are causing parental unfitness, is balanced with the effect that the passage of time without stability and permanency has on the child." *Donald W. v. Dep't of Child Safety*, 247 Ariz. 9, 22, ¶ 47 (App. 2019). While DCS "must undertake measures with a reasonable prospect of success" in reuniting a parent and child, *id.* at ¶ 46 (internal quotation omitted), it "need not provide every conceivable service," *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 37 (App. 1999) (internal quotation marks omitted).

¶19 Here, Father does not contest that the child was in an out-of-home placement pursuant to a court order for more than fifteen months. Instead, he challenges the sufficiency of the services offered by DCS, arguing that: (1) DCS failed to provide services aimed at accommodating his cognitive disability; (2) suspension of his parental visitation left him with "zero ability to improve on parenting"; and (3) DCS "failed to provide services through the entirety of the case," pointing to the discontinuance of his counseling/therapy in September 2022. Apart from challenging the adequacy of the services offered, Father also claims that by the termination adjudication hearing, his circumstances had significantly improved—citing his change in housing, continuing receipt of disability payments, contemplation of employment, and other unspecified but "meaningful factors of daily living" that he contends demonstrate his "ability to carry

out his parental duties." He argues that DCS "chose to ignore" his progress and instead "focus[ed] on minor setbacks."

¶20 In response, DCS asserts that Father waived any challenge to the adequacy of services offered by failing to object in the juvenile court. *See Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 178, ¶ 13 (App. 2014) (explaining DCS's statutory obligation to provide services "does not free a parent from the need to raise a timely objection if the parent believes services are inadequate"). Although the record reflects no objection to the court's numerous express findings that DCS made "reasonable efforts" to further the case plan, Father timely objected to the suspension of his parental visits and reasserted that objection at the termination adjudication hearing.

¶21 In any event, the evidence presented at the hearing supports the juvenile court's finding that the requirements of A.R.S. § 8-533(B)(8)(c) were met. First, DCS established that it made a diligent effort to provide appropriate reunification services to Father. Father does not contest that DCS provided the numerous services ordered by the court, including parenting classes, supervised and therapeutic visitation, parent-aide assistance, a psychological evaluation, individual and family therapy, peer-support sessions, domestic violence education, transportation, and substance-abuse testing. Instead, he argues that he "substantially participated in and took advantage of the services offered," but they were ultimately insufficient. While the record reflects Father's presence at most services, it is also replete with testimony from service providers describing his engagement as distracted and chaotic. In fact, rather than working on the case plan and resolving his obstacles to reunification, Father spent much of his time in services complaining about DCS, minimizing his own behavioral problems, blaming others, discussing his relationship with Mother, and repeatedly making unwanted advances toward numerous women in various settings. Thus, although Father largely attended the provided services, he rarely engaged in meaningful, focused participation.

¶22 Turning to his specific challenges, Father correctly notes that no services offered by DCS focused *solely* on his intellectual disability. But the uncontroverted record reflects that service providers attempted to accommodate his disability by focusing on both helping him understand the needs of a vulnerable, dependent baby and modeling/coaching appropriate caregiving. Additionally, the record reflects that service providers repeatedly offered to help Father reenroll in developmental disability services—services designed to specifically address his intellectual challenges—but he declined their assistance. Therefore, contrary to Father's

contention, the record reflects that DCS provided various services and assistance to address his intellectual deficits and improve his parenting abilities.

¶23 Father's other enumerated challenges are equally unfounded. "Although a parent should be denied the right of visitation only under extraordinary circumstances, once that right is at issue, the [juvenile] court has broad discretion." *Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 375 (App. 1994) (internal citations omitted). "This is because the trial judge is in the most favorable position to determine what is best for the child[.]" *Id*. "A court may properly restrict or terminate a parent's visitation" upon proof that visits would "endanger[] the child." *Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, 201, ¶ 11 (App. 2002).

¶24 In this case, both DCS and the child's guardian ad litem petitioned the juvenile court to restrict parental visitation, avowing that the child experienced severe distress and considerable physical dysregulation because of the visits. Initially, the court denied the guardian ad litem's request to suspend visitation; instead, reducing the frequency and duration of visits and ordering that therapists attend and facilitate Father's interactions with the child. But after the child continued to experience considerable distress despite these measures, the court suspended visitation. Being in the best position to assess the risk that the parental visits posed to the child's health, we conclude the court acted within its considerable discretion.

¶25 Contrary to Father's contention, the record does not reflect that DCS withdrew therapy and counseling services from him. Instead, as explained by Father's therapist at the termination adjudication hearing, Father announced he no longer wanted to participate in these services. Whether DCS discontinued the therapy/counseling services in September 2022 or Father declined to participate further, by that time, fifteen months had elapsed since DCS took custody of the child pursuant to a court order, satisfying the statutory requirement. *See Donald W.*, 247 Ariz. at 23, ¶ 49 ("DCS is obliged to work with the parent toward a shared goal of reunification *throughout the statutory period*.") (emphasis added).

¶26 Finally, DCS met its burden to show that Father had been unable to remedy the circumstances that caused the child to be in an out-of-home placement and that there was a substantial likelihood he would not soon be capable of exercising proper and effective parental care and control. Although Father availed himself of most of the offered services, the testifying service providers uniformly stated that his inability

to provide basic child-care persisted throughout the statutory period. Pointing to Father's failure to learn from the available services, the evaluating psychologist opined that (1) no available treatment could help Father safely care for the child, (2) providing additional services would be futile, and (3) Father's inability to care for the child safely will continue for a prolonged and indeterminate period. Likewise, the case manager testified that DCS offered Father almost every service, but he made no "progress" toward increasing his parenting capacity. And the behavioral consultant testified that despite twelve sessions, Father continued to "struggle" to take any independent action, even when guided with detailed instructions. Given these facts, the court could find that Father's inability to safely parent would likely continue.

¶27 In sum, DCS identified the conditions causing the child's out-of-home placement, provided services that had a reasonable prospect of success to remedy the circumstances throughout the fifteen-month out-of-home placement period, and made diligent efforts to help Father gain the necessary skills to parent safely. *See Donald W.*, 247 Ariz. at 23, ¶ 50. Moreover, reasonable evidence supports the juvenile court's determination that despite DCS's diligent efforts, Father was unable to remedy the circumstances causing the child's out-of-home placement and a substantial likelihood existed that he would not be able to properly care for the child in the near future. Because reasonable evidence supports the termination of Father's parental rights pursuant to A.R.S. § 8-533(B)(8)(c), we need not consider whether the evidence justified termination on the other ground found by the court. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3 (App. 2002) ("If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.").

II. Active Efforts Requirement

¶28 Father challenges the juvenile court's finding that DCS satisfied its obligations under ICWA. Specifically, he argues that DCS did not make "active efforts" to provide him with appropriate reunification services.

¶29 Apart from establishing a statutory ground for termination and that termination of parental rights is in the child's best interests, in ICWA cases, any party seeking termination of parental rights must persuade the court "that 'active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.'" *Valerie M.*,

219 Ariz. at 333, ¶ 3 (quoting 25 U.S.C. § 1912(d)). When ICWA imposes a higher standard of proof, "federal law controls over state law." *Id.* at 334, ¶ 10.

¶30 Although ICWA does not expressly define "active efforts," *S.S. v. Stephanie H.*, 241 Ariz. 419, 425, ¶ 21 (App. 2017), related federal regulations define the term as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. § 23.2. When "an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent . . . through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." *Id.* While "tailored to the facts and circumstances of the case," active efforts generally include identifying appropriate community resources and services and helping the parent obtain those resources and services, supporting regular parental visitation, and monitoring the parent's progress and participation in services. 25 C.F.R. § 23.2(2), (7), (8), and (9).

¶31 To meet its "active efforts" obligation under ICWA, a state agency "cannot simply give a parent a case plan and wait for the parent to complete the plan," *People in Interest of C.H.*, 962 N.W.2d 632, 640, ¶ 28 (S.D. 2021), or "provide a referral and leave the parent to engage with providers and complete services on [his] own," *In re Dependency of G.J.A.*, 489 P.3d 631, 643, ¶ 38 (Wash. 2021). Instead, "an agency must help the parent through the steps of the case plan and with accessing or developing the resources necessary to satisfy the case plan." *Walker E. v. Dep't of Health & Soc. Serv.*, 480 P.3d 598, 607 (Alaska 2021) (internal quotation omitted). But the "active efforts" requirement does not oblige a state agency to provide every conceivable service, only those that are "reasonable under the circumstances." *Id.*

¶32 Although Father admits that DCS provided him with numerous services, he contends they were insufficient. But apart from visitation, Father neither challenged the sufficiency of the services nor requested additional services during the dependency proceedings. A parent who does not object to the sufficiency of reunification services in the juvenile court is precluded from later challenging that finding on appeal. *See Shawanee S.*, 234 Ariz. at 178-79, ¶ 16; *see also State v. Georgeoff*, 163 Ariz. 434, 437 (1990) (explaining that "[e]ven constitutional rights may, of course, be waived"). Nonetheless, waiver aside, the record supports the juvenile court's finding that DCS made active efforts to prevent the breakup of the Indian family and that those efforts proved unsuccessful.

¶33 As noted, the record reflects that DCS offered Father a wide array of services, but his focused participation was minimal. At the contested termination adjudication hearing, service providers testified that they urged Father to apply for housing and disability services, offering to assist him with those applications, but Father put off their help. Additionally, the DCS caseworker testified that on at least ten occasions —through phone calls, emails, letters, and in-person discussions—she provided Father with instructions outlining the "steps" he needed to take to work toward reunification. She also instructed service providers to offer Father "additional . . . handholding" to ensure that he received the full benefit of the services provided.

¶34 Although the relevant federal regulation identifies supporting regular contact between a parent and child through visitation as a general "active efforts" requirement, a court may properly restrict or terminate a parent's visitation if it endangers the child. *Michael M.*, 202 Ariz. at 201, ¶ 11. Here, sufficient evidence supports the juvenile court's implicit finding that Father's visits caused the child substantial physical and emotional distress.

¶35 On this record, the juvenile court did not err in finding that DCS actively tried to provide Father with reunification services. Nothing in the record suggests that additional services would have remedied Father's inability to parent the child safely.

III. Child's Best Interests

¶36 Finally, Father asserts that terminating his parental rights was not in the child's best interests. He suggests that the juvenile court may have simply found that the child "would be 'better-off'" with the adoptive placement. He also contends that "no proper" evidence was presented regarding his bond with the child.

¶37 Once the juvenile court finds a statutory ground for termination by clear and convincing evidence, "the focus shifts to the interests of the child as distinct from those of the parent." *Kent K.*, 210 Ariz. at 285, ¶ 31. "In determining the child's best interests, the court must essentially balance the rights of an unfit parent against those of the child." *Id.* at 287, ¶ 37. "At this stage, the child's interest in obtaining a loving, stable home, or at the very least avoiding a potentially harmful relationship with a parent, deserves at least as much weight as that accorded the interest of the unfit parent in maintaining parental rights." *Id.* at 287, ¶ 37.

¶38 Considering the "child's interest in stability and security," termination of parental rights is in the child's best interests if the child will either benefit from the termination or be harmed if termination is denied. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 150, ¶¶ 12-13 (2018) (internal quotation and citation omitted). To assess a child's best interests, "the court may properly consider" the child's adoptability, the existence of a potential "adoptive placement," and "whether [the] existing placement is meeting the needs of the child." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5 (App. 1998). "When a current placement meets the child's needs and the child's prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child's best interests." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12 (2016).

¶39 Here, the record supports the juvenile court's best interests finding. Since May 2021, when he was only two weeks' old, the child has lived with his foster parents. At the termination hearing, the DCS caseworker testified that the child is thriving in the foster home and strongly bonded to his foster parents, who wish to adopt him. The caseworker also testified that the child demonstrated no attachment to Father during visits and explained that the child's episodes of significant emotional and physical dysregulation stopped once the court suspended parental visitation. Moreover, the Cherokee Nation Tribal caseworker testified that returning the child to Father's custody would "likely result in serious emotional and physical harm" to the child. On this record, sufficient evidence supports the court's finding that the termination of Father's parental rights was in the child's best interests.

CONCLUSION

¶40 For the foregoing reasons, we affirm.

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