DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JONI E.,	)	No. 1 CA-JV 09-0106
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, V.E., C.E., B.E., C.E., S.P.[1]	)	(Not for Publication – Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. JD2007-4002

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Mohave County Appellate Defender's Office Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorney for Appellant

Terry Goddard, Arizona Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

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J O H N S E N, Judge

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[1] We amend the caption to refer to the children by their initials.

¶1 Joni E. ("Mother") appeals from the superior court's order terminating her parental rights to her children. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 V.E., Ca.E., B.E., Ch.E. and S.P. ("children") were removed from Mother's care in January 2007 because of her extensive history of drug abuse and because the children often were left unsupervised and had asked neighbors for food on occasion. The children were placed with their maternal grandmother and step-grandfather.

¶3 The Arizona Department of Economic Security ("Department") offered Mother services during the dependency, including a parent aide, counseling, drug testing, transportation, safe house, psychological evaluation, child and family team meetings and visitation. Mother participated in visitation until she moved to Texas in January 2009. She did not, however, complete her substance abuse treatment; she was closed out of one drug treatment program for noncompliance, and she did not regularly call in for drug testing. In addition, she failed to complete the services recommended in her psychological evaluation. Finally, Mother never provided any of her case managers with proof of employment, although there was

testimony that she had worked intermittently during the dependency.

¶4 Although the children were removed from the maternal grandparents' home at various times during the dependency, by the end of the trial, all five had been placed back with the maternal grandparents, and the maternal grandparents were willing to adopt them. The case manager testified that even if the maternal grandparents were unwilling to adopt, all the children were adoptable. Although the children indicated they wanted to be adopted only by family, a case manager, Marilyn Hernandez, testified that even if the children refused to be adopted, they would benefit by severance because they would not be returned to Mother. Based on statements by the children that they had been sexually abused while living with Mother, the case worker testified that the children would not be safe if they were returned to Mother.

¶5 After trial in February and March 2009, the court terminated Mother's parental rights on May 28, 2009. The court found the Department had proven two grounds for termination: History of substance abuse, pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(3) (2007), and 15 months' time in care, pursuant to A.R.S. § 8-533(B)(8)(b). The court found that the Department had diligently provided reunification services.

In addition, the court found that termination would be in the children's best interests and stated:

> Clearly these children all love their mother, however, she offers no permanence nor dedication to the critical responsibilities of being a parent.
>
> The children are adoptable by their maternal grandmother and step-grandfather. This will afford the children permanence and the mother may remain somewhat involved with her children, but most importantly, any adoptive parent will provide the necessary stability and nurturing these children require. The children also maintain their ability to remain together as a sibling group.

¶6 A signed termination order was filed on July 9, 2009. Mother timely appealed.[2] This court has jurisdiction pursuant to A.R.S. § 8-235 (2007).

DISCUSSION

A. Legal Principles.

¶7 The superior court may terminate a parent-child relationship upon finding one of the statutory grounds for termination has been met by clear and convincing evidence. A.R.S. § 8-537(B) (2007); *Kent K. v. Bobby M.*, 210 Ariz. 279, 281-82 ¶ 7, 110 P.3d 1013, 1015-16 (2005). In addition, the

[2] While Mother's notice of appeal references an unsigned minute entry, this court has jurisdiction because a later order was signed and filed. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981) ("[A] premature appeal from a minute entry order in which no appellee was prejudiced and in which a subsequent final judgment was entered over which jurisdiction may be exercised need not be dismissed.").

court must find by a preponderance of the evidence that termination would be in the child's best interests. A.R.S. § 8-533(B); *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022.

¶8 We will affirm an order terminating a parent-child relationship "unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (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." *Id.* at 280, ¶ 3, 53 P.3d at 205.

B. Issues Raised on Appeal.

¶9 Mother raises several issues on appeal. We address each in turn.

1. Case reports.

¶10 Mother argues the court erred by taking judicial notice of reports authored by case managers who did not testify at trial. The Rules of Procedure for the Juvenile Court provide that the court may "review reports prepared by the protective services worker and shall admit those reports into evidence if the worker who prepared the report is available for cross-examination." Ariz. R.P. Juv. Ct. 45(C). The court "may not rely upon any documentary reports, files or records which have not been admitted into evidence in accordance with accepted evidentiary procedures." *Maricopa County Juv. Action No. J-*

74449A, 20 Ariz. App. 249, 251, 511 P.2d 693, 695 (1973); *see also Appeal in Pima County Juv. Action No. 86192*, 151 Ariz. 359, 361, 727 P.2d 1070, 1072 (App. 1986). The superior court, however, "has broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice." *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82-83, ¶ 19, 107 P.3d 923, 928-29 (App. 2005).

¶11 At issue are Exhibits P1 and P2, reports to the court written by Department case workers dated January 25, 2007 and May 9, 2007, respectively. Assuming without deciding that the court erred by ruling it could take judicial notice of those two reports, the only prejudice Mother asserts is that the reports referred to the reasons the children were removed from her care. The asserted reason for the removal of the children from Mother's care, however, was recited in other reports authored by case worker Derek Schwery, who testified at the hearing. The court took judicial notice of the Schwery reports without objection. Schwery's reports, exhibits P-3, P-4 and P-5, state: "On January 11, 2007, CPS received a report alleging that Joni E[.] was abusing methamphetamines, people were frequently in and out of the home, the children were often left alone in the home and that they were going to neighbors asking for food."

¶12 In addition, Mother testified that the children were removed because of allegations that "there was no electricity, no means of heating the home, no food in the home, and that there was drug usage in the home." Under these circumstances, we cannot conclude Mother was prejudiced by any error resulting from the court taking judicial notice of P1 and P2.

2. Drug test results.

¶13 Mother argues the court erred by admitting a hearsay account of a positive hair follicle drug test performed in October 2008, a few months before trial, and a drug test "compliance report" for the latter part of 2008. But Mother's counsel did not object to the admission of the two exhibits at trial. "We generally do not consider objections raised for the first time on appeal." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App. 2007). Therefore, this issue was waived.

¶14 Even if we were to conclude the court erred by admitting the evidence, we would conclude that Mother was not prejudiced because other evidence established her continued drug use. Mother testified, for example, that she had used methamphetamine in March 2008. Hernandez also testified extensively to Mother's failure to comply with drug testing requirements, including her refusal to take a hair follicle test on September 9, 2008 and her sporadic calling in for random

urinalysis, which led to her missing test days. *See Lashonda M.*, 210 Ariz. at 82-83, ¶19, 107 P.3d at 928-29; *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 216, ¶ 36, 181 P.3d 1126, 1137 (App. 2008).

3. Ineffective assistance of counsel.

¶15 Mother argues her trial attorney was ineffective because she failed to object to the admission of certain evidence. A parent is entitled to effective representation in a termination hearing. A.R.S. §§ 8-824(D)(1) (Supp. 2009), -843(B)(1) (2007); *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 28–29 (1981). We have held "that no reversal of a termination order is justified by inadequacy of counsel unless, at a minimum, a parent can demonstrate that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 325, ¶ 18, 173 P.3d 1021, 1026 (2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶16 We need not reach the question of whether Mother's counsel was ineffective because we cannot conclude that Mother was prejudiced by what she contends were mistakes by her trial counsel. On appeal, Mother argues her counsel was ineffective

because she failed to object to the court taking judicial notice of the court reports and its admission of the October 2008 positive drug test and the drug compliance report. She also argues counsel was ineffective because she failed to object to hearsay testimony by the case managers pertaining to her substance abuse.

¶17 We already have noted that the court's taking judicial notice of Exhibits P1 and P2 did not prejudice Mother. Moreover, Mother herself testified to her drug use; at the trial in February 2009, Mother stated that she had used drugs nine to ten months prior, which would have been in April or May 2008. Another witness, a parent aide supervisor, testified that Mother refused to submit to a hair follicle test in Fall 2008. Dr. Daniel T. Malatesta, a psychologist, testified that based on his evaluation of Mother, he concluded she has a substance abuse disorder and that she had not demonstrated a commitment to "keep herself on a positive recovery track for maintaining a drug-free state" sufficient to permit her to regain custody of her children. Finally, although Mother complains that her counsel failed to object to the admission of the October 2008 positive drug test report, she does not argue on appeal that the report was invalid or that the Department could not have laid a proper foundation for its admission into evidence if her lawyer had objected to it at trial.

¶18 For these reasons, we cannot conclude that Mother was prejudiced by what she argues was ineffective assistance of her counsel.

4. Reunification services.

¶19 Under both of the statutory grounds found by the superior court, the Department was required to provide Mother with appropriate services before the court could sever her parental rights. A.R.S. § 8-533(B)(8); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 186–87, ¶ 1, 971 P.2d 1046, 1047–48 (App. 1999) (citation omitted). The Department has an affirmative duty "to make all reasonable efforts to preserve the family relationship." *Mary Ellen C.*, 193 Ariz. at 186, ¶ 1, 971 P.2d at 1047 (citation omitted). This includes providing a parent the time and opportunity to participate in programs "designed to improve the parent's ability to care for the child." *Id.* at 192, ¶ 37, 971 P.2d at 1053 (citation omitted).

¶20 Mother argues the Department failed to diligently provide reunification services because as of November 2008 there were no services in place and according to a January 2008 case report, Mother was in compliance with the drug testing portion of her case plan. She also argues that she was "confused about what was expected of her in the way of housing and employment." In addition, Mother contends that she had four to five case managers and up to eight different parent aides.

¶21 As noted above, however, the Department offered Mother a wide array of services, including substance-abuse assessment, substance-abuse counseling, substance-abuse treatment, random drug testing, hair follicle drug testing, parenting classes, parent-aide services, supervised visitation and transportation. The record contains evidence that the parent-aide services the Department provided included assistance with budgeting and assistance in searches for housing and work. Although Mother complains that she was not offered a housing subsidy, a case worker testified that the Department did not offer her a subsidy because she had not offered proof of employment. The evidence further showed that Mother failed to participate fully in the services that were offered to her; she did not complete her drug testing and she failed to complete her mental health services. Mother may not argue services were inadequate when she failed to take full advantage of the services that were provided. The Department is not required to provide futile rehabilitative measures. *Mary Ellen C.*, 193 Ariz. at 187, ¶ 1, 971 P.2d at 1048.

5. Best interests.

¶22 The court must find by a preponderance of the evidence that termination is in the children's best interests. A.R.S. § 8-533(B). A best-interests finding "may be established by either showing an affirmative benefit to the child by removal or

a detriment to the child by continuing in the relationship." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997). The Department "may satisfy the best interest requirement if it presents credible evidence that the child is adoptable." *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, 587, ¶ 8, 177 P.3d 327, 329 (App. 2008).

¶23 The court found that severance would be in the children's best interests because they all were adoptable by their maternal grandmother and step-grandfather and because severance and adoption would allow them to remain together as a sibling group. The children, who at the time of trial ranged in ages from 9 to 16, wanted to remain with Mother, but they also stated that if they could not be with her, they wanted to remain with family. The children's maternal grandmother was willing to adopt all of them. Hernandez testified that the children would benefit from severance because they no longer would be subjected to the unsafe lifestyle they experienced while living with Mother. On this record, we cannot conclude the court erred in finding that termination was in the children's best interests.

C. Evidence Supporting a Statutory Ground for Termination.

¶24 The court severed Mother's rights on two grounds, one of which was A.R.S. § 8-533(B)(8)(c), which provides that the court may terminate parental rights when:

> The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . .[,] the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and 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.

¶25 The children were removed from Mother's care in January 2007, and the termination order was entered in May 2009, more than two years after the children were removed. Mother admitted that she used methamphetamines as late as March 2008, and she tested positive in October 2008. Mother failed to provide any proof of employment, and the evidence was that she was unable to provide a safe home for the children. Additionally, the court heard evidence that Mother disregarded the safety plan on one of the unsupervised visits. Therefore, there was sufficient evidence to support the superior court's finding that Mother "has been unable to remedy the circumstances that cause[d] the child[ren] to be in an out-of-home placement."

¶26 Finally, Hernandez also testified that Mother was unwilling to remedy the circumstances that brought the children into the Department's care. On this evidence, we cannot conclude that it was improper for the court to find that "there is a substantial likelihood that [Mother] will not be capable of

exercising proper and effective parental care and control in the near future."

CONCLUSION

¶27 For the foregoing reasons, the superior court did not err in terminating Mother's parental rights based upon A.R.S. § 8-533(B)(8)(c) and in concluding that severance was in the children's best interests. Because evidence supports the court's termination on that ground, we need not address the substance-abuse ground for termination. *See Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JON W. THOMPSON, Judge