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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES P.,) No. 1 CA-JV 09-0112
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, T.P.) ARCAP 28)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD 506352

The Honorable Linda A. Akers, Judge

AFFIRMED

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By Robert D. Rosanelli
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B R O W N, Judge

¶1 James P. ("Father") appeals the juvenile court's order terminating his parental rights to his minor child (the "child"). For the following reasons, we affirm.

BACKGROUND

¶2 Father and Erin P. ("Mother") are the biological parents of the child, who was born in August 2005. From that time, until she was placed in foster care in August 2006, the child lived with both Father and Mother. Between August 2005 and June 2006, Mother sought emergency medical assistance for the child at least sixteen times for apparent life-threatening episodes ("ALTEs"). In each case, Mother alleged it was necessary for her to perform cardiac stimulation in order to revive the child's breathing. Most episodes occurred when Father was at work and Mother was alone with the child. The child was eventually diagnosed with apnea and gastric reflux disease, but the ALTEs could not be medically explained.

¶3 In August 2006, the child was taken into the temporary physical custody of the Arizona Department of Economic Security ("ADES"), which then filed a dependency petition alleging that Mother was unable to parent due to physical abuse. The petition further alleged that doctors believed Mother had been suffocating the child in order to create apneic episodes which

then prompted Mother to seek medical attention. ADES also alleged that as a result of its investigations and police involvement, the case was submitted to the county attorney for possible filing of criminal charges. Finally, ADES alleged that Father was unable to parent based on his failure to protect the child.

¶14 In November 2006, based on the parents' submission on the allegation of neglect, the juvenile court adjudicated the child dependent as to both parents. The court then approved a case plan of family reunification. Consistent with the court's order, ADES offered Mother and Father various reunification services, including psychological evaluations, parent aide services, parenting classes, counseling, and therapeutic visitation. The child was initially placed in foster care and later placed with her paternal aunt and uncle. The child suffered no ALTEs after being removed from Mother's care; the pediatricians caring for the child opined that this was a strong indicator that the episodes were nonmedical.

¶15 In June 2007, Mother was arrested for child abuse based on the illness falsification incidents¹ that occurred prior to the child's removal and because she twice took the child from the emergency room without a doctor's permission. Mother was

¹ Illness falsification is also known as Munchausen's Syndrome by Proxy or Factitious Disorder by Proxy. See n.3, *infra*.

subsequently convicted of child abuse and sentenced to lifetime probation. By the terms of her probation, Mother is not permitted to have contact with the child without consent of her probation officer and she is not to have any unsupervised visitation with the child.

¶16 Although both parents initially refused to participate in psychological evaluations scheduled in January 2007 with Dr. Bursch, a psychologist engaged by ADES, Father ultimately participated in such an evaluation in September 2007, and Mother participated in December 2007. During Father's evaluation, he reported that he believed the child had grown out of previous medical problems that caused the ALTEs and it was a "tragic coincidence" that the child improved only after being removed from Mother's care. Mother denied having ever harmed the child. Dr. Bursch diagnosed Father as having Adjustment Disorder with Mixed Anxiety and Depressed Mood², and diagnosed Mother with Munchausen's Syndrome by Proxy ("MSP").³

² Adjustment Disorder with Mixed Anxiety and Depressed Mood is manifested by the development of clinically significant emotional and behavioral symptoms of anxiety and depression in response to an identifiable stressor. American Psychiatric Ass'n *Diagnostic and Statistical Manual of Mental Disorders*, DSM IV-TR, 679-80 (4th ed., tex. rev. 2000).

³ Munchausen's Syndrome by Proxy, also known as Factitious Disorder by Proxy, is manifested by the deliberate production or feigning of physical or psychological signs or symptoms in another person which is under the individual's care. Typically the victim is a young child and the perpetrator is the child's

¶17 Following the evaluations, Dr. Bursch opined that the level of risk to the child was too high to attempt reunification, and that if reunification were to occur, both Mother and Father would have to acknowledge the abuse, the harm and potential harm the abuse posed for the child, and the high risk for continued abuse. She also recommended that Mother and Father receive individual psychotherapy and opined that if meaningful therapeutic progress was not made within three months, it would be best for the child to be permanently placed or adopted. Based on Dr. Bursch's recommendation, ADES referred Father to Dr. Bluth for psychotherapy. Father participated in treatment at times between November 2006 and March 2008. During this time, Father appeared to show some improvement and told Dr. Bluth that he would protect his child "no matter what" and that if he had to he would "remove [the child] from the situation, take her away, separate from the mother." Father also participated in therapeutic supervised visitation with the child throughout the dependency proceedings under the supervision of Dr. Azzi, a licensed clinical psychologist. Further, as a result of Mother's criminal proceedings, Father and Mother physically separated but remained married.

mother. American Psychiatric Ass'n *Diagnostic and Statistical Manual of Mental Disorders*, DSM IV-TR, 781 (4th ed., tex. rev. 2000).

¶18 Nonetheless, Father allowed Mother to move back into the family home in February 2008. Shortly thereafter, Father stopped seeing Dr. Bluth because of a purported breakdown in the therapeutic relationship. Dr. Bluth concluded that Father had not made any real therapeutic progress during the course of his treatment. ADES subsequently referred Father to another therapist, Dr. Henry, who testified that he believed Father could provide a safe environment for the child but acknowledged that there may be issues that he overlooked or missed and therefore could not be one hundred percent sure.

¶19 Once back in the family home, Mother filed a motion to compel supervised visitation. ADES objected to visitation because Dr. Bursch found that Mother had made no therapeutic progress in the two and a half years after the child had been removed from Mother's care resulting in a "strong potential for psychological harm to the child and as it [was] not in [the child's] best interests." The court scheduled an evidentiary hearing to take place at the same time as the permanency hearing. In the meanwhile, Father filed a motion for change in physical custody of the child requesting that the child be returned home.

¶10 At the hearing on the motion for change in physical custody, the juvenile court heard testimony regarding visitation and admitted Dr. Bursch's report and other reports and testimony

into evidence. A week later, without ruling on Mother's request for visitation, the court ordered that the child be placed in Father's physical custody and denied ADES's motion for stay and motion for emergency hearing to clarify execution of the court's order. Less than one month later, following the hearing to consider visitation with Mother, the court vacated its prior order granting Father physical custody, denied Mother's motion for visitation, and ordered that the child remain in the physical custody of her relatives. In support of its ruling the court found:

[d]espite the fact that Father, by court order, was permitted to immediately take custody of the child, he delayed to move Mother out of the home.

The issue with Father is that he has failed to protect [the child] and may be so attached to Mother that he will not consider [the child's] best interest and give Mother access to [the child].

The court also stated it would not make any further changes to custody or visitation until the severance issue had been resolved.

¶11 ADES then petitioned for termination of Father and Mother's parental rights. The petition alleged, pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533 (Supp. 2009)⁴, that (1) Mother neglected the child or failed to protect her

⁴ We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

from neglect as evidenced by no less than sixteen ALTEs, (2) Mother abused the child or failed to protect the child by leaving the emergency room and thereby endangering the child's health, (3) Mother has been convicted of child abuse and the nature of the crime is such as to prove unfitness of Mother to have custody and control of the child, and (4) Mother suffers from MSP. ADES further alleged that (1) Father neglected the child or failed to protect the child so as to cause substantial risk of harm by refusing to acknowledge the potential and substantial risk of danger Mother presents, (2) Father abused the child or failed to protect her from abuse by awareness of ALTEs caused by Mother and refusing to acknowledge the potential harm or risk of danger presented by Mother to the child. As to both parents, the petition also alleged grounds for termination based on nine months' and fifteen months' time in care.

¶12 A ten-day severance trial was conducted. Mother did not participate in the trial, nor did her attorney, and submitted the issue of the termination of her parental rights on the evidence presented at trial by Father. On the last day of the severance trial, Father informed the court that he had filed a petition for dissolution within the prior week.

¶13 Following the trial, the court terminated both parents' parental rights to the child, explaining its findings in part as follows:

The Court finds by clear and convincing evidence that Mother and Father substantially neglected and willfully refused to remedy the circumstances that caused [the child] to be in an out-of-home placement. [The child] was removed from Mother and Father's care on June 20, 2006. ADES removed [the child] on allegations that Mother had intentionally suffocated [the child] and Father failed to protect her. At the time of trial, [the child] was three years old and had been in out-of-home placement for 32 months.

. . . .

The Court finds by clear and convincing evidence that both Mother and Father delayed services and counseling by refusing to accept that [the child] had been harmed in their care and by their noncompliance. In December 2007, Father refused to participate in further counseling with Dr. Bluth. Father did not resume counseling until almost one year later.

The Court finds by clear and convincing evidence that Mother and Father were given ample opportunity to engage in services and reunify with [the child] but failed or refused to participate or engage in treatment services.

The court also concluded that ADES had proved by a preponderance of the evidence that termination was in the child's best interest, as required by A.R.S. § 8-533(8)(B). Father timely appealed the court's severance order and we have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21 (2003), and 12-2101(B) (2003).

DISCUSSION

¶14 An order terminating parental rights must be supported by (1) clear and convincing evidence showing at least one statutory ground for severance and (2) a preponderance of the evidence establishing that severance is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We will reverse a severance order only if no reasonable evidence supports it, *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002), and we consider the facts in the light most favorable to accepting the juvenile court's findings. *Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994).

¶15 Pursuant to A.R.S. § 8-533(B)(8)(c), the juvenile court could properly sever Father's rights if (1) the child had been in out-of-home placement for fifteen months or longer; (2) Father had been unable to remedy the circumstances causing the child to be in out-of-home placement; and (3) a substantial likelihood existed that he would not be able to properly care for the child in the near future. 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 children." *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 22, 152 P.3d 1209, 1213 (App. 2007) (internal quotes

and citation omitted). To avoid severance, the parent must make more than trivial or de minimus efforts at remediation. *Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576 n.1, 869 P.2d 1224, 1229 n.1 (App. 1994).

¶16 Father does not contest that the child has been in out-of-home placement for longer than fifteen months. Rather, he contests the court's findings that he has been unable to remedy the circumstances causing the child's out-of-home placement and that he will not be able to properly care for her in the near future. Father asserts that, at a minimum, he made a good faith effort to comply with the case plan. He further asserts that ADES and the juvenile court chose to listen to only part of what he had said regarding his concern for the protection of the child. We conclude that, although Father made some efforts to participate in reunification services, there is reasonable evidence in the record to support the court's finding that Father delayed such services by refusing to accept that the child had been harmed. Thus, there is also reasonable evidence supporting the court's termination order on the grounds of fifteen months' time in care.

¶17 The child was removed from the family home because she was suffering from ALTEs; specifically, the child was suffering from periods of breathing difficulty that were later determined to have likely been caused by Mother intentionally suffocating

the child and then reviving her. During the course of the investigation and subsequent services provided by ADES, it was determined that Father was either aware of, or should have been aware of, these behaviors by Mother and did nothing to intervene. It was further determined that in order for reunification to occur, it was important that Father be able to acknowledge that Mother posed a serious safety threat to the child and that Father ensure Mother and child not have contact.

¶18 Although Father initially showed some progress by admitting the possibility that Mother caused the ALTEs and by physically separating from Mother, he ultimately refused to accept that Mother had harmed the child and posed an ongoing threat to the child's safety. Father allowed Mother to move back into the family home where she would have regular access to the child and remained steadfast in his belief that Mother did not intentionally harm the child.

¶19 In addition, even though Father participated in the services provided by ADES, the record indicates he did so reticently. Father refused to discuss the circumstances that resulted in the removal of the child, he refused to talk about the child's medical records and Dr. Bursch's findings related thereto, and would, at times, become hostile and verbally aggressive during treatment when these issues were broached. In the end, at least three treating psychologists agreed that

Father made no meaningful progress in treatment and remained unable to protect the child because he refused to believe that Mother posed a threat to the child's safety.

¶20 In sum, Father's efforts were inadequate. The child was removed from Father's home in August 2006. Father had more than two and a half years before the severance hearing to establish that he was capable of properly caring for his child by recognizing and dealing with threats to her welfare; specifically, exposure to Mother. Because Father was unable to make adequate therapeutic progress to accomplish that goal, we find sufficient evidence in the record to support the juvenile court's determination that Father has been unable to remedy the circumstances that caused out-of-home placement for more than fifteen months. We also find that Father's inability to remedy such circumstances over a protracted period of time supports the courts implicit conclusion that there is a substantial likelihood that Father will not be capable of exercising proper and effective care and control in the near future. See *Matter of Pima County Severance Action No. S-2397*, 161 Ariz. 574, 577, 780 P.2d 407, 410 (App. 1989) (concluding that best interests' finding was supported by the record and implicit in the juvenile court's severance order).

¶21 Based on our conclusion, we need not address whether the evidence supports the juvenile court's findings of severance

based on neglect or nine months' time in care. See *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205 ("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."). In addition, although Father does not challenge the juvenile court's finding that termination of his parental rights was in the child's best interests, the court's finding is amply supported by this record.

CONCLUSION

¶22 For the foregoing reasons, we affirm the court's order terminating Father's parental rights to the child.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

DONN KESSLER, Judge