

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DELLICCIA H.,) 1 CA-JV 09-0194
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, SHAE H.,) Rule 28 ARCAP)
)
Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. JD17247

The Honorable Mark H. Brain, Judge Pro Tempore

AFFIRMED

Anne M. Williams
Attorney for Appellant

Tempe

Terry Goddard, Attorney General
By Carol A. Salvati, Assistant Attorney General
Attorneys for Appellee

Phoenix

H A L L, Judge

¶1 Delliccia H. (Mother) appeals the juvenile court's order terminating her parental rights to Shae H. (Daughter), her biological daughter. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 The facts relevant to the issue raised on appeal are as follows. On the evening of September 11, 2008, a Department of Public Safety officer stopped Mother's vehicle for a traffic violation. Mother was unable to produce a driver license and, after conducting a records check, the officer discovered that Mother's driver license was suspended and there was a warrant out for her arrest. The officer placed Mother under arrest and she informed him that "she had left her two-year-old daughter home alone so that she could go to work." Soon thereafter, officers from the Glendale Police Department conducted a welfare check of Mother's home and found Daughter home alone, lying in a crib without any clothing, diaper, food, or water.

¶13 On September 17, 2008, the Arizona Department of Economic Security (ADES) filed a petition alleging that Daughter is dependent as to Mother. At the initial dependency hearing, held October 2, 2008, Mother denied the allegations of the dependency petition and the juvenile court scheduled a pretrial conference and admonished Mother that her failure to appear "may be deemed as an admission to all the facts in the petition and the Court may proceed to an adjudication of the ultimate issues."

¶14 On October 8, 2008, the juvenile court held a contested temporary custody hearing and ordered Daughter's continued

placement with the State. On the same date, Mother filed a motion requesting the appointment of a new attorney because she "could not get [her current appointed counsel] to perform his duties as expected." Mother also filed a letter with the juvenile court requesting an appeal because her attorney did "not follow[] [her] instructions as the client during court and this may have caused a ruling against [her]."

¶15 On October 30, 2008, Mother filed another letter with the juvenile court requesting the appointment of a new attorney. At the status conference held the same day, the juvenile court ordered the Office of Public Defense Services to appoint new counsel for Mother.

¶16 On December 4, 2008, Mother filed another letter with the juvenile court informing the court that she had still not been appointed new counsel. On the same date, the juvenile court held a pretrial conference. The court noted that, notwithstanding its October 30, 2008 order, new counsel had not yet been appointed to represent Mother. The court also noted that Mother had notice of the hearing but had failed to appear and she therefore "waived her rights to contest the allegations of the petition." The juvenile court then proceeded by default, received into evidence ADES' September 19, 2008 report setting forth its basis for taking

Daughter into temporary custody, and found by a preponderance of the evidence that Daughter is dependent as to Mother.

¶17 On December 16, 2008, the Office of Public Defense Services filed a notice with the juvenile court that new counsel had been appointed to represent Mother. In a minute entry filed December 31, 2008, the juvenile court discussed Mother's December 4, 2008 letter requesting new counsel and noted that counsel had since been appointed. The juvenile court also "cautioned" Mother to appear at future hearings.

¶18 On August 11, 2009, ADES filed a motion to terminate Mother's parental relationship with Daughter. On August 31, 2009, the juvenile court held a severance hearing. Mother was represented by counsel at the hearing, but Mother failed to appear. After the juvenile court found Mother failed to appear without good cause, the court proceeded with the hearing in absentia. The court took judicial notice that Mother had pled guilty to one count of child abuse, a class six undesignated felony. The State then presented evidence, through the assigned caseworker's testimony, that Daughter had been in an out-of-home placement for a period greater than nine months, that ADES had diligently offered Mother numerous services, which she refused, and that Daughter is adoptable. On cross-examination, Mother's counsel briefly

questioned the caseworker regarding her efforts to contact and communicate with Mother.

¶9 Following the presentation of evidence, the juvenile court found the State had proven that Daughter had been in an out-of-home placement for a period of at least nine months and that Mother substantially neglected or willfully refused to remedy the circumstances that caused Daughter to be in an out-of-home placement. See Ariz. Rev. Stat. (A.R.S.) § 8-533(B)(8)(a) (Supp. 2009). The court also found that severance would be in Daughter's best interest and terminated Mother's parental rights accordingly.

¶10 Mother timely filed this appeal. We have jurisdiction under A.R.S. §§ 8-235(A) (2007) and 12-120.21(A)(1) (2003) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶11 As her sole issue on appeal, Mother argues that her counsel was ineffective and that the severance judgment was therefore fundamentally unfair.¹

¹ Mother concedes that the trial court's "severance finding was supported by the facts." She contends, however, that "the process by which it was achieved was not fundamentally fair." Therefore, we do not address the juvenile court's findings of a statutory basis for severance or that severance is in Daughter's best interest.

¶12 A parent is entitled to effective representation in a termination hearing. See A.R.S. §§ 8-824(D)(1) (Supp. 2009), -843(B)(1) (2007). We assume, without deciding, that the law permits relief for ineffective assistance of counsel in severance proceedings. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 325, ¶ 17, 173 P.3d 1021, 1026 (App. 2007) ("For the purpose of this case, we need not determine whether Arizona recognizes ineffective assistance of counsel as a separate ground for relief in an appeal of a termination order or resolves an allegation of counsel's inadequacies as a due process claim."); see also *In re Santa Cruz County Juv. Dependency Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. 98, 101, 804 P.2d 827, 830 (App. 1990). Reversal of a parental-severance order is not "justified by inadequacy of counsel unless, at a minimum, [the 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.*, 217 Ariz. at 325, ¶ 18, 173 P.3d at 1026 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)).

¶13 Mother identifies several errors that she claims compromised the effectiveness of her legal representation. We need not reach the question of whether Mother's counsel was effective,

however, because we discern no prejudice to Mother from the alleged mistakes by her trial counsel.

¶14 First, Mother contends that her trial attorney erred by failing to appeal the juvenile court's dependency finding on the basis that the ruling was void because Mother was not represented by counsel at the dependency hearing. The record reflects that Mother was not represented by counsel at the dependency hearing. The record also clearly reflects that Mother failed to appear at the hearing despite the juvenile court's admonition that her failure to appear may be deemed an admission to the facts set forth in the petition and allow the court to proceed to adjudicate the issues. Based on her failure to appear, the juvenile court found Mother waived her right to contest the petition and then found Daughter dependent based solely on ADES' September 19, 2008 report.

¶15 As noted by the State, Mother had already "pled guilty to child abuse on the same factual basis" set forth in the dependency petition and "was precluded from denying the essential allegations of that criminal offense in the dependency and severance proceedings." Moreover, "there were no witnesses to cross-examine because ADES had relied exclusively on documentary evidence." Thus, even had Mother been represented by counsel at the dependency hearing, she could not have contested the underlying basis for the dependency, and would have been substantially limited in her

ability to challenge the State's report. Accordingly, Mother has failed to demonstrate a reasonable probability that the result of the severance hearing would have been different had she been represented by counsel at the dependency hearing. We further discern no prejudice from her trial attorney's decision not to appeal the dependency finding on that basis.

¶16 Next, Mother contends that her trial counsel was ineffective in two respects with regard to the April 2, 2009 Report and Review and Permanency Hearing. First, she contends her attorney erred by failing to secure her appearance, while incarcerated, either telephonically or in-person, for the hearing. Second, she argues that her counsel's representation was deficient when he failed to object to the juvenile court's scheduling of another hearing on the matter for August 11, 2009, contending that counsel should have either requested an earlier date to prevent nine months elapsing from the date Daughter was placed in out-of-home care (rendering the matter severance eligible), or that he should have requested a longer period of time to allow Mother greater opportunity to participate in services.

¶17 Mother has failed to demonstrate how her presence at the April 2, 2009 hearing would have led to a different outcome in this case. Moreover, as noted by the State, the juvenile court affirmed the reunification case plan at the April 2, 2009 hearing, affording

Mother four additional months to participate with the offered services. Mother failed to participate in services and the record does not reflect that that circumstance would have been different had the next hearing been scheduled earlier or later. Thus, we discern no prejudice to Mother from her absence at the hearing or by the next hearing's schedule date.

¶18 Finally, Mother asserts that her trial counsel's representation at the severance hearing was ineffective on two bases. First, she argues that his cross-examination of the sole witness was ineffective. Mother correctly points out that her attorney's questioning of the caseworker was quite brief. Counsel asked only ten questions, all of which pertained to the caseworker's contact with Mother and Mother's refusal to participate in services. Mother has not identified, however, any line of questioning that counsel should have pursued or suggested any deficiency in the State's evidence that counsel should have pointed out. Indeed, Mother acknowledges that the evidence presented at the hearing supported the juvenile court's termination order.

¶19 Second, Mother claims that her attorney disparaged her during his closing remarks. Mother's attorney was also quite brief in his closing argument in which he attempted to convey that the

reason Mother failed to participate in services was that she believed Daughter was unlawfully removed from her custody:

COUNSEL: Judge the only thing I would indicate is that I believe my client would like to, you know, maintain her parental rights. I've spoken to her on several occasions and one of the reasons that she never really got on board here by her own estimation is that she has several federal lawsuits pending regarding the unlawful removal of her child or at least she's alleging -

THE COURT: Her alleged unlaw - yeah.

COUNSEL: - alleging unlawful removal of the child and that she has stated several times, you know, based upon attorney advice, that would not be me, but apparently the attorney she's spoken to involved in - involved in AACP and several other federal attorneys, civil rights attorneys, that she should not, you know, cooperate or make any statements that might be contrary to her best interests regarding her federal lawsuit.

Contrary to Mother's claim, we do not interpret this as a disparaging remark. Instead, it was counsel's attempt to explain his client's refusal to participate in any services. We perceive no prejudice to Mother from this argument and Mother has not demonstrated any reasonable probability that the outcome of the severance hearing would have been different had counsel not made that closing statement.

CONCLUSION

¶20 For the foregoing reasons, we affirm the termination order.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge