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



DIVISION ONE
FILED: 04/29/10
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TABITHA W.,) No. 1 CA-JV 09-0227
)
Appellant,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, NICHOLAS W.,) 103(G) Ariz.R.P. Juv. Ct.;
) Rule 28 ARCAP
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD16055

The Honorable Aimee L. Anderson, Judge

AFFIRMED

Gates Law Firm, L.L.C. Phoenix
By S. Marie Gates
Attorney for Appellant

Terry Goddard, Attorney General Phoenix
By David M. Osterfeld, Assistant Attorney General
Attorney for Arizona Department of Economic Security

G E M M I L L, Judge

¶1 Tabitha W. ("Tabitha") appeals the termination of her
parental rights with respect to her son, Nicholas W.

("Nicholas"). For the following reasons, we affirm.

Facts and Procedural History

¶12 On September 13, 2007, Tabitha gave birth to Reanna W. ("Reanna"). On May 5, 2009, a juvenile court ordered that the parent-child relationship between Tabitha and Reanna be terminated pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(3) (Supp. 2009). The court, in its signed order, concluded that Tabitha was unable to discharge her parental responsibilities due to mental deficiency and mental illness. The court noted in its order that Dr. Bluth, a psychologist, had evaluated Tabitha and diagnosed her with chronic mood disorder and mild mental retardation. According to Dr. Bluth, Tabitha's condition prevented her from being able to parent Reanna. The court also found that the Arizona Department of Economic Security ("ADES") had provided Tabitha with a number of services in an effort to reunify her with Reanna, but Tabitha was unable to make the progress necessary to safely parent her child.

¶13 On May 1, 2009, Tabitha gave birth to another child, Nicholas. Shortly after, ADES filed a dependency petition alleging that Tabitha was unable to parent Nicholas due to her previously described mental deficiency and mental illness. The court agreed and found that Nicholas was dependent as to Tabitha. On August 6, 2009, ADES filed a motion to sever

Tabitha's parental rights pursuant to § 8-533(B)(3) and (10).

¶4 The court held a contested severance hearing on October 20, 2009. At the hearing, the court heard testimony from Anthony Salazar, Nicholas's case manager with Child Protective Services ("CPS"). Salazar testified that he did not believe there were "services available to [CPS] that would enhance [Tabitha's] abilities to parent Nicholas." He also testified that Tabitha's parenting abilities had not changed since her parental rights to Reanna were severed.

¶5 Dr. Bluth also testified at the severance hearing. He had performed a psychological evaluation on Tabitha in May 2008 and then again in September 2009. After the September 2009 evaluation, Dr. Bluth again diagnosed Tabitha as having a mood disorder and mild mental retardation. He opined that Tabitha's mood disorder and mild mental retardation "impairs her ability to parent. She has limited knowledge with regard to parenting and development and has not been able to acquire the necessary information to be able to independently parent." He also testified that if Nicholas were left in Tabitha's care, there was a risk that she would "neglect" Nicholas. Moreover, Dr. Bluth was concerned that Nicholas would be exposed to safety risks if he were under Tabitha's care because of Tabitha's "violent behavior in the past." Dr. Bluth testified that he did not believe there were any services that ADES could offer

Tabitha that would help her progress to the point of being able to adequately parent Nicholas.

¶16 On December 7, 2009, the court issued a signed order terminating Tabitha's parental rights pursuant to § 8-533(B)(3) and (10).¹ The court concluded that Tabitha was unable to discharge her parental responsibilities because of mental illness and mental deficiency. In reaching this conclusion, the court noted that Dr. Bluth had evaluated Tabitha in May 2008 and diagnosed her as having mood disorder and mild mental retardation. It also noted that Dr. Bluth's diagnosis remained the same after he re-evaluated Tabitha in September 2009 and that Dr. Bluth did not expect Tabitha's condition to change "even with the provisions of services." In addition, the court concluded that Tabitha "had her parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause."

¶17 Tabitha timely appealed. This court has jurisdiction pursuant to A.R.S. § 8-235 (2007).

Analysis

¶18 Tabitha's sole contention on appeal is that the court erred in terminating her parental rights to Nicholas because it

¹ The identity of Nicholas's father is unknown. Accordingly, the court has severed the parental rights of any man claiming paternity of Nicholas pursuant to A.R.S. 8-533(B)(1).

did not first provide her with rehabilitative services "that would assist her in the family reunification process."

¶9 On appeal, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order 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). In order to terminate a person's right to parent her child, the juvenile court must find, by clear and convincing evidence, at least one of the statutory grounds set forth in A.R.S. § 8-533(B). *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). In this case, the court terminated Tabitha's right to parent Nicholas pursuant to § 8-533(B)(3) and (10).

¶10 Section 8-533(B)(3) provides that termination of the parent-child relationship is justified when "the parent is unable to discharge the parental responsibilities because of mental illness [or] mental deficiency . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." As an additional element of § 8-533(B)(3), the State must prove, by clear and convincing evidence, that it made reasonable efforts to provide the parent with rehabilitative services in an attempt to preserve the family or that such efforts would be futile. See *Mary Ellen C.*

v. Ariz. Dep't of Econ. Sec., 193 Ariz. 185, 192, ¶¶ 33-34, 971 P.2d 1046, 1053 (App. 1999).

¶11 Here, the State does not contend, nor does the record suggest, that Tabitha was provided with rehabilitative services with respect to Nicholas. Instead, the State asserts that there was reasonable evidence to support the court's finding that providing services to Tabitha would have been futile. While the court's severance order does not contain an express finding to this effect, a "juvenile court will be deemed to have made every finding necessary to support the judgment." *Pima County Severance Action No. S-1607*, 147 Ariz. 237, 238, 709 P.2d 871, 872 (1985). In addition, the severance order favorably refers to Dr. Bluth's testimony that Tabitha's "mental retardation will not change even with the provisions of services." Accordingly, we deem the court to have made a finding that providing services to Tabitha would have been futile; and we agree with the State that there is reasonable evidence to support such a finding.

¶12 As previously noted, Dr. Bluth and Anthony Salazar testified at the severance hearing. Dr. Bluth had performed two separate psychological evaluations on Tabitha and after each evaluation diagnosed Tabitha with mood disorder and mild mental retardation. He testified at the severance hearing that he did not believe there were any services that ADES could offer Tabitha that would help her progress to the point of being able

to adequately parent Nicholas. He also testified that Tabitha, because of her chronic conditions, could never parent a child without placing the child at risk. Salazar was Nicholas's case manager with CPS. He testified he did not believe there were "services available to [CPS] that would enhance [Tabitha's] abilities to parent Nicholas."

¶13 Based on this testimony, there was reasonable evidence to support a necessary finding that providing Tabitha with rehabilitative services would have been futile. Consequently, the court did not err in terminating Tabitha's parental rights to Nicholas pursuant to § 8-533(B)(3) and the court's severance order may be affirmed on this basis alone.

¶14 We note, additionally, that the court's severance order must also be affirmed pursuant to A.R.S. § 8-533(B)(10). The court terminated Tabitha's parental rights to Nicholas pursuant to § 8-533(B)(3) and (10). Tabitha, however, challenges only the court's order with respect to § 8-533(B)(3) and, as a consequence, she has technically waived any argument regarding § 8-533(B)(10). Therefore, because the court needed to find only one of the statutory grounds set forth in § 8-533(B), the court's order is also upheld pursuant to § 8-533(B)(10). *See Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685.

¶15 Moreover, even if we assume that Tabitha intended her

"rehabilitative services" argument to also apply to § 8-533(B)(10), our decision to affirm remains the same for the following reasons. First, it does not appear to us that § 8-533(B)(10) requires the State to prove it made reasonable efforts to provide the parent with rehabilitative services. Rather, § 8-533(B)(10) requires the State prove that "the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause." Here, the same mental illness and mental deficiency that caused the court to terminate Tabitha's parental rights to Reanna in May 2009 also caused the termination of her parental right to Nicholas in December 2009.

¶16 Second, in the event that the requirement from *Mary Ellen C.* -- that the State prove that ADES made reasonable efforts to provide rehabilitative services or that such efforts would be futile -- is applicable to a severance under § 8-533(B)(10), then for the same reasons outlined in ¶¶ 11 through 13, the record supports the implied finding by the court that such services would have been futile here.

¶17 Finally, we note that Tabitha does not challenge the juvenile court's finding that termination is in the best interest of Nicholas.

Conclusion

¶18 The juvenile court's termination of Tabitha's parental rights regarding Nicholas is affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Presiding Judge

_____/s/_____
PHILIP HALL, Judge