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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/16/2010
RUTH WILLINGHAM,
ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VICTORIA W.,) No. 1 CA-JV 10-0057
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, JUSTIN A., AMBER A.,) Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD 9646

The Honorable Joan M. Sinclair, Judge Pro Tempore

AFFIRMED

Popilek & Jones, P.A. Scottsdale
By John L. Popilek
Attorneys for Appellant

Terry Goddard, Arizona Attorney General Phoenix
By Michael Valenzuela, Assistant Attorney General
Attorneys for Appellees

S W A N N, Judge

¶1 Victoria W. ("Mother") appeals the termination of her parental rights with respect to her two children, Justin and Amber (the "Children"). The State alleged and the trial court found that (1) Mother was unable due to mental illness to discharge her parental responsibilities; and (2) the Children had been in out-of-home placement for more than 15 months; Mother was unable to remedy the circumstances that resulted in their removal from her care; and she would not be able to rectify the situation in the near future. Additionally, the State alleged and the trial court found that (1) there were active efforts to provide remedial and rehabilitative services to prevent the dissolution of the family, and (2) returning the Children to Mother's care was likely to result in serious physical or emotional damage to them. Because we conclude there was sufficient evidence to support these findings, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Jesus R. ("Father") are the biological parents of Justin, born in November 2001, and Amber, born in September 2004.¹ Mother is a member of the White Mountain Apache Tribe, and the Children are eligible for membership.

¹ Father had no contact with the Children or with the Arizona Department of Economic Security ("DES") during the pendency of the proceedings below. The trial court terminated Father's parental rights pursuant to A.R.S. § 8-533(B)(1) (Supp. 2009), as the Children "have no relationship whatsoever with their Father." Father has not appealed that decision. This appeal is

¶13 Mother started using marijuana and alcohol when she was nine, and by the time she was fourteen, she was using methamphetamine and cocaine. She has used drugs "off and on [her] whole life." In 1993, when Mother was sixteen and living with her parents, she gave birth to her son, Blaine. Three years later, she moved to Phoenix and lived with her boyfriend while she was pregnant with twins, Katy and Melissa. But beginning in 1996, Mother experienced housing issues, and moved from shelter to shelter. She also struggled with her inability to secure and maintain steady employment.² From 1996 to 1998, Mother placed her children at the Crisis Nursery approximately 15 to 18 times. In 1998, DES filed a dependency petition, due to its concerns that Mother was unable to secure employment or provide stable housing for her children. In 2002, Mother's parental rights to her three oldest children were severed.

¶14 During the eight months before she gave birth to Justin, Mother was homeless, sometimes sleeping in alleys. Just before she had Justin, Mother moved into UMOM, a family shelter, and she and Justin stayed there for three months after his birth. After leaving UMOM, Mother left Justin with her friend Brenda. A couple of months later, Mother moved in with Justin

therefore limited to the termination of Mother's parental rights.

² Mother has not been employed since 2000.

and Brenda. But her stay with Brenda was sporadic; Mother divided her time between living at Brenda's residence, the streets, various shelters, and weekly motels.³ Justin, however, either remained at Brenda's or with the Crisis Nursery when Mother lived on the streets. This pattern continued until Mother became pregnant with Amber in the beginning of 2004. Around this same time, in January 2004, Justin was the subject of dependency proceedings. The 2004 dependency was dismissed after Mother completed substance abuse treatment services.

¶15 Mother returned to UMOM to give birth to Amber. Soon thereafter, Child Protective Services ("CPS") filed another dependency petition -- making both Justin and Amber wards of the court. Amber was permitted to remain with Mother and stayed with Mother at UMOM for two months. Justin, however, was put in out-of-home placement. After two months, Mother was asked to leave UMOM and stayed with various friends and family and in shelters; Amber went to the Crisis Nursery. Eventually, the Children were returned to Mother's care and CPS dismissed the case.

¶16 In 2005, Mother moved in with her current boyfriend, Fred. She and the Children lived in Fred's apartment for about

³ Father received SSI payments, which he used to pay for a motel for the first two weeks of the month. And for a period of six months, Father, Mother and Justin lived in an apartment; they were eventually evicted for failure to pay rent.

a year. But in March 2006, when Fred became unemployed, they were evicted from the apartment. Mother went to stay at a shelter and Fred went to live with his ex-wife for a period of two months. Mother and Fred reconciled, although they had "an up and down relationship" that included physical and verbal fights in front of the Children.

¶17 In January 2008, Mother was on drugs (crack cocaine and methamphetamine), at risk of losing her apartment, and her electricity had been shut off. Recognizing that she could not parent her children, she took them to the Crisis Nursery. When she dropped the Children off at the Crisis Nursery she was required to call in or visit on a daily basis. But because she was using drugs, she did not call for three days. Therefore, the Crisis Nursery contacted CPS, who removed the Children from Mother's care, and DES filed a dependency petition, alleging, *inter alia*, that Mother could not parent due to substance abuse, abandonment, and unstable housing. The Children remained at the Crisis Nursery until May 23, 2008, when they were placed in a foster home.⁴

⁴ The foster parent expressed an interest in adopting the Children. Additionally, DES was in contact with the adoptive parent of two of Mother's older children, Blaine and Melissa. The adoptive parent is a member of the Mohawk tribe in New York and expressed an interest in adopting the Children.

¶18 In early 2008, Mother and Fred were homeless and lived in a park for approximately two months. They then went to live with Mother's mother for a period of three months. But in October 2008, when they received an insurance settlement from a car accident that occurred two years before, they moved into an apartment. To help defray the cost of rent, they used Justin's social security payments -- although Justin was not living with them at the time. They stayed in that apartment until the settlement money ran out in March 2009. Fred and Mother then moved in with Mother's father for several months.⁵ In April 2009, Fred was approved for disability payments, which included four or five years' back pay. Fred and Mother then moved into their current two-bedroom apartment in August 2009.⁶

¶19 The dependency case was left open for approximately 18 months to give Mother an opportunity to demonstrate evidence of self-sufficiency and stability by finding and maintaining appropriate housing and securing employment. But on September 4, 2009, the court held a permanency planning hearing, and the court appointed special advocate ("CASA") and the guardian ad litem ("GAL") recommended that the case plan change to severance and adoption. DES initially requested that the case plan remain

⁵ Subsequently, Mother's father has refused to allow Mother to stay with him.

⁶ Mother was not on the lease because of bad credit and a felony conviction.

family reunification, but did not object to the GAL's motion to change the case plan. The trial court ordered the plan to be changed to severance, and the GAL subsequently filed a motion to terminate the parent-child relationship.

¶10 On January 19, 2010, a two-day contested severance hearing commenced. During the hearing, Dr. DiBacco, a psychologist and consultant for CPS, testified as to the results of his evaluation of Mother. He explained that the purpose of his evaluation was to determine her psychological status to ascertain if there were any personality dynamics that might impact her ability to parent, as well as any potential risks that she might pose to her children. During the evaluation, Mother disclosed that she was currently taking Paxil, Risperdal and Ambien, as well as participating in psychiatric services.⁷

¶11 Dr. DiBacco testified that Mother had both Axis I and Axis II diagnoses.⁸ With respect to Axis I, he diagnosed Mother with an anxiety disorder. A person with such a disorder will typically avoid situations and show unusual reactivity in situations where other people may not be as agitated. Additionally, it is very common for someone with an anxiety

⁷ Paxil is an antidepressant; Risperdal is a tranquilizer or mood stabilizer; and Ambien is a sleep aid.

⁸ Diagnoses under Axis I are generally more amenable to treatment, as many of them are "reactive conditions or time limited conditions." By contrast, diagnoses under Axis II, such as personality disorders, are chronic and do not change readily.

disorder to have difficulty functioning. Mother reported "difficulty getting along with people; paranoid; believes that people are talking about her; they're suspicious of her." Dr. DiBacco also diagnosed Mother with a depressive disorder.

¶12 With respect to Axis II, Dr. DiBacco diagnosed Mother with a personality disorder not otherwise specified. He testified, "[Not otherwise specified] captured the characteristics of her personality disorder, which is a chronic pattern of behaviors that really don't work for a person, but [is] characterized by paranoia and dependent features." He also explained that there is also a borderline aspect to Mother's disorder, which means that she is chronically unstable in a number of areas of functioning: interpersonally, vocationally, health-wise, and legally. He opined that Mother's condition is so severe, due in part to its duration, that it has compromised her ability to function.

¶13 Dr. DiBacco concluded that Mother was not able to adequately care for her children: "Her treatment is -- I hesitate to say lifelong, but it's going to be long-term treatment because of the chronicity of her behavior and the severity of it." He opined that it was likely that the Children would be neglected and harmed if they were returned to Mother's care. Further, Dr. DiBacco testified that although Mother successfully completed a drug rehabilitation program, he did not

believe that she would be able to parent in the near future even if she were to continue to participate in services. He opined that Mother "will have difficulty maintaining her own stability, sobriety, and that [has] a direct affect [sic] on her ability to parent her children, being physically and emotionally available to them when the children need her."

¶14 Mother's case manager concurred with Dr. DiBacco's assessment, and added that the Children would suffer future harm because of Mother's ongoing issues with housing and the lack of income. She testified that Mother, who was struggling to meet her own needs, would be unlikely to meet the needs of two children. The case manager opined that the central issues of the case that gave rise to the dependency proceedings remained: Mother's mental health issues and the lack of stable housing and employment.

¶15 The trial court found that DES had proved by clear and convincing evidence that (1) the Children had been in an out-of-home placement for a period of 15 months or longer and Mother was unable to remedy the circumstances that brought the Children into care; and (2) Mother was unable to discharge her parental responsibilities due to mental illness and that the condition will persist for a prolonged indeterminate period of time. Additionally, the court found by a preponderance of the evidence that it was in the Children's best interests to terminate

Mother's parental rights. The court also found beyond a reasonable doubt that (1) active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts were unsuccessful; and (2) returning the Children to Mother's custody was likely to result in serious emotional or physical damage to them. Accordingly, the trial court ordered the termination of Mother's parental rights.

¶16 Mother timely appeals. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(B).

DISCUSSION

I. STANDARD OF REVIEW

¶17 "The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). "On review, we accept the juvenile court's findings of fact in support of severance unless they are clearly erroneous." *Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994). We "will not set aside the juvenile court's findings of fact if reasonable evidence supports the findings." *Maricopa County Juv. Action*

No. JS-501904, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

II. ARIZONA LAW

A. Severance Due to Out-Of-Home Placement

¶18 "In Arizona, '[t]ermination of parental rights is governed solely by A.R.S. § 8-533.'" *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12, 995 P.2d 682, 684-85 (2000) (alteration in original) (citation omitted). The trial court must find by clear and convincing evidence at least one of the grounds for termination enumerated in A.R.S. § 8-533, *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685, and it must find by a preponderance of the evidence that termination is in the best interest of the child, *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶19 When severing parental rights on the grounds of out-of-home placement, the trial court must find that the State made a diligent effort to provide reunification services⁹ and that one of the following circumstances exists:

- (a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to § 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

⁹ The parties agree that the State did provide reunification services.

- (b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.
- (c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to § 8-806, *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.*

A.R.S. § 8-533(B)(8)(a)-(c) (emphasis added).

¶120 Mother contends that there was insufficient evidence to support the trial court's findings that (1) she was unable to remedy the problems that caused the Children to be removed from her care, and (2) there was a substantial likelihood that she would be unable to properly care for her children in the near future. We disagree.

¶121 "[P]arents who make appreciable, good faith efforts to comply with remedial programs outlined by ADES will not be found to have substantially neglected to remedy the circumstances that caused out-of-home placement, even if they cannot completely overcome their difficulties (in this case, addiction) within one year after their children are placed in the custody of the

State.” *JS-501568*, 177 Ariz. at 576, 869 P.2d at 1229. But when the parent makes only sporadic, inconsistent attempts to remedy the circumstances, a trial court may grant severance. *Id.*

¶122 Mother has made some progress in overcoming her drug addictions. Although she missed a few drug tests, all of those that she did take were negative. But issues with housing and employment remain. At the time of trial, Mother had not worked since 2000 and her employment history before then was sporadic, with her longest period of employment at four months. Without a source of income, it would be difficult for Mother to provide stable housing for her children.

¶123 Mother was able to move into a two-bedroom apartment in August 2009. But it is Fred’s disability income that provides the means to pay the rent and other expenses. And because she is not a signatory to the lease, the length of her stay is dictated by Fred, the lessee. While Mother’s relationship with Fred may be improving, it has been tumultuous in the past -- as recently as August 2009, Mother contacted her case manager and reported that because she and Fred had argued, she was leaving the apartment. In the absence of Fred’s consent, Mother has very few housing options.

¶124 Mother’s tenuous hold on housing, coupled with her lengthy history of homelessness, unemployment and lack of family

support, indicate that there is a substantial likelihood that she will be unable to provide proper housing for her children in the future. Should Fred request that she leave, Mother will have little recourse but to comply. They are not married and Fred has no legal obligation to support the Children or Mother. Mother's inability or unwillingness to find employment leaves her and the Children in a precarious position should she and Fred separate. And without family support, the evidence demonstrates that it is likely that she and the Children would become homeless. Dr. DiBacco's evaluation of Mother also indicates that Mother likely "will have difficulty maintaining her own stability, sobriety," which will adversely affect her ability to parent her children -- to be physically and emotionally available to them.

¶25 While Mother has made progress in addressing her drug addictions, "[t]ermination is not limited to those who have *completely* neglected or willfully refused to remedy such circumstances." *JS-501568*, 177 Ariz. at 576, 869 P.2d at 1229. Therefore, we conclude that there is sufficient evidence from which to find that Mother was unable to remedy the circumstances that caused her children to be removed from her care -- namely the lack of stable housing and employment. And there is

sufficient evidence that she would be unable to properly care for her children in the near future.¹⁰

B. Best Interests

¶26 To adequately protect Mother's constitutional right to the custody and control of her children, "a determination of the [Children's] best interest must include a finding as to how the [Children] would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Factors that support a finding that a child will benefit from the termination of parental rights include the "immediate availability of an adoptive placement," *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, 982 P.2d 1290, 1291 (App. 1998), "whether an existing placement is meeting the needs of the child," *id.*, and that the children are adoptable, *JS-501904*, 180 Ariz. at 352, 884 P.2d at 238.

¶27 The court found that termination of parental rights would allow the Children to be "legally free for adoption and to be cared for in stable, secure households." Two separate parents are interested in adopting the Children: the foster parent and the adoptive parent of two of the Children's older

¹⁰ Because we conclude that there is sufficient evidence to support the termination of Mother's parental rights on one of the statutory grounds enumerated in A.R.S. § 8-533(B), we need not address the claims pertaining to other grounds. See *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205.

siblings. Moreover, the court found that continuing the parental relationship would only subject the Children to more instability and neglect. These findings are supported by the Children's positive adjustments while in foster care. Initially, Justin was angry, disrespectful and uninterested. He is now "much happier and content," and has "become more affectionate." He is doing better academically and his verbal skills are improving with the assistance of speech therapy. Likewise, Amber has become less fearful and is doing well in foster care.

¶28 Because reasonable evidence supports the trial court's findings that severance and adoption were in the Children's best interest, we will not set aside the trial court's findings.

III. INDIAN CHILD WELFARE ACT

¶29 The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963 (2006), "requires a state court to make two particular findings before terminating the parental rights for an Indian child." *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 333, ¶ 3, 198 P.3d 1203, 1205 (2009). First, the court must 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." 25 U.S.C. § 1912(d). Second, there must be "a determination, supported by evidence beyond a

reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f). Because Mother does not contest that there were active efforts made to provide remedial and rehabilitative programs to prevent the breakup of the Indian family, we focus our discussion on the second finding.

¶130 Before a court may determine that an Indian child will likely suffer serious harm if returned to the custody of the parent, there must be evidence "both that [the parent's] conduct is likely to harm [the child] and that [the parent] is unlikely to change her conduct." *Stephen H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 571-72, ¶ 21, 190 P.3d 180, 185-86 (2008) (alterations in original) (citation omitted).

¶131 Here, Dr. DiBacco testified that since 1980 he has conducted evaluations of Native American families, and he has worked with several tribes, including White Mountain Apache. He opined that due to the chronic nature of Mother's disorders, which will require long-term treatment, it was likely that the Children would be neglected and harmed if they were returned to Mother's care. He also stated that because of Mother's mental health issues, she likely would continue to have difficulty functioning and maintaining stability in her life.

¶132 Mother's case manager, who has worked exclusively with Native American families for CPS in the ICWA unit, testified that there was a likelihood that the Children would suffer future harm because of Mother's ongoing issues with housing and the lack of income. She testified, "Mom can barely meet her own needs let alone try to meet the needs of two children . . . especially[] with Justin's special needs." And although she credited Mother with her attempts to change, the case manager did not believe that Mother could ultimately effectuate the changes necessary to provide a stable environment for the Children. The case manager opined that the core issues that triggered the dependency proceedings remained: the lack of housing and employment, as well as Mother's mental health issues.

¶133 In addition to the expert testimony, there was sufficient evidence to support the trial court's findings that the Children likely would suffer harm if they were returned to Mother's care, and that Mother was unlikely to change her conduct.¹¹ Mother's lengthy history with homelessness and

¹¹ Citing to *DePasquale v. Superior Court (Thrasher)*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995), Mother contends that the trial court abdicated its responsibility to make determinations independent of the expert testimony. We find no merit to this argument. In *DePasquale*, the trial court expressly stated that it "would order whatever interim custody the psychologist might recommend." *Id.* By contrast, nowhere in its detailed ten-page minute entry does the trial court in this

unemployment belies Mother's claim that the GAL failed to prove beyond a reasonable doubt that the Children would suffer harm or that Mother was unlikely to change.

¶34 We conclude that sufficient evidence exists on the record to support the decision of the juvenile court.

CONCLUSION

¶35 For the reasons stated above, we affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

SHELDON H. WEISBERG, Presiding Judge

/s/

JON W. THOMPSON, Judge

case indicate that it simply deferred to the expert testimony in reaching its conclusions.