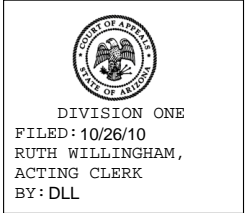


IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



BARBARA Z.) 1 CA-JV 10-0106
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Ariz. R.P. Juv. Ct.
ARIZONA DEPARTMENT OF ECONOMIC) 88(G); ARCAP 28)
SECURITY, EDWARD G., CHRISTOPHER)
K., JAYMEE K., AND JANA E K.,)
)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD11528

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Michael F. Valenzuela, Assistant Attorney
General
Attorneys for Appellee Department of Economic
Security

Denise L. Carroll, Esq. Scottsdale
Attorney for Appellant Barbara Z.

K E S S L E R, Presiding Judge

¶1 This is an appeal from the termination of Barbara Z.'s ("Mother") parental rights to Edward G., Christopher K., Jaymee K., and Janae K. ("Children").¹ On appeal, Mother argues that the

¹ The court also severed the various Fathers' parental rights. The Fathers have not appealed from that determination.

juvenile court erred when it granted the severance because the Arizona Department of Economic Security ("ADES") violated Arizona Revised Statutes ("A.R.S.") section 8-514(B) (2007) regarding Children's placement. Mother also argues that the juvenile court erred because it did not continue the trial to allow Mother's probation officer to testify about her participation in rehabilitation services.

¶12 For the reasons stated below, we conclude that the evidence was sufficient to support the termination of Mother's parental rights and Edward G.'s placement. We also conclude the court did not err when it declined to continue the trial but was willing to allow the probation officer to testify telephonically. Accordingly, we affirm the severance order as to Appellant.

FACTUAL AND PROCEDURAL HISTORY

¶13 Child Protective Services ("CPS") initially became involved in December 2007, after Mother crashed her car into another vehicle in an alleged suicide attempt and tested positive for methamphetamine at the hospital. CPS sent Dion Thomas to investigate the incident. Thomas met with Mother and five-year-old Edward G. shortly after the car accident and planned to come back to meet with 15-year-old Julie Z.,² 12-year-

² Julie Z. is not a party to these proceedings because she has turned 18 and "aged out" of the foster care system. She

old Janae K., and 11-year-old Jaymee K. because these children were at school. When Thomas returned, the family had moved and Mother could not be located until October 19, 2008 when her newborn, Christopher K., tested positive for methamphetamine.

¶14 CPS filed a dependency action in October 2008. ADES assumed care of Children on October 27, 2008 pursuant to a court order and Children were found dependent as to Mother on November 13, 2008. ADES filed a motion to terminate the relationship between Mother and Children in October 2009. In its second amended motion to terminate Mother's parent-child relationships with Children, ADES alleged three grounds for severance: (1) Mother is unable to discharge her parental responsibilities because of a history of chronic abuse of dangerous drugs and controlled substances and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period; (2) Children were in an out-of-home placement for a cumulative total period of nine months or longer pursuant to a court order and Mother has substantially neglected or wilfully refused to remedy the circumstances which caused Children to be in an out-of-home placement; and (3) Children were in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to a court order and Mother

continues to reside in the foster home with her siblings Janae K., Jaymee K., and Edward G.

has substantially neglected or wilfully refused to remedy the circumstances which caused Children to be in an out-of-home placement. A.R.S. § 8-533(B)(3), (B)(8)(a), and (B)(8)(c) (Supp. 2009).

¶15 The contested severance hearing was held on March 23, 2010 and March 24, 2010. The court simultaneously held an evidentiary hearing regarding a change in permanent custody of Edward G. Mother and her attorney were present at the hearing. ADES presented testimony from the assigned case manager, Thomas, and two licensed psychologists, Drs. James Thal and Glenn Moe. Thomas testified that Mother was not consistent in submitting urinalyses ("UAs") and did not complete TERROS Families F.I.R.S.T., a drug rehabilitation program. Although Mother completed a two-week in-patient program at Maverick House in July 2009, she did not complete the two-week outpatient program. Mother subsequently tested positive for methamphetamine in September 2009 and did not submit UAs after September 2009. Thomas also testified that Mother participated in counseling and parent aide services intermittently in 2009.

¶16 Dr. Thal evaluated Mother in March 2009 and testified that Mother admitted to having a methamphetamine addiction and to using in December 2008. Mother told Dr. Thal she had not used for approximately three months prior to the evaluation. However,

Mother tested positive for methamphetamine in February 2009.³ Dr. Thal diagnosed Mother with methamphetamine dependence, a partner relational problem, and an antisocial personality disorder. Dr. Thal testified that these conditions "would continue for a prolonged and indeterminate period of time."

¶7 Dr. Moe interviewed Mother and Children to help determine Children's best interests in July 2009. Dr. Moe testified that Mother admitted to using methamphetamine a few days before the evaluation. Dr. Moe concluded that Mother was not able to parent in the foreseeable future based on her history of dependence and her continued drug abuse.

¶8 On March 24, 2010, the final day scheduled for trial, Mother requested a continuance to allow Mother's probation officer and Access to Recovery mentor to appear and testify. Counsel for the other parties objected to a continuance and the court denied the request. The court reasoned that the witnesses were not disclosed to the other parties until Mother made the request and that a continuance would not promote Children's interest in a timely resolution of the matter. The court further reasoned that Mother knew her participation in services while on

³ Mother was required to submit UAs to demonstrate that she was abstaining from illegal drug use in accordance with the case plan for reunification beginning in October 2008. Mother did not test until January 2009 and tested positive in February 2009, April 2009, May 2009, and September 2009. Mother did not submit UAs after September 2009.

probation was going to be an issue at trial and that she could testify about her participation in those services. The court permitted the undisclosed witnesses to testify telephonically that afternoon and Mother's Access to Recovery mentor so testified.

¶9 Mother testified that she attempted to enter a drug treatment program before Christopher K. was born. She entered the New Arizona Family, Inc. treatment facility in November 2008 but left the program because she could not communicate with Children or Thomas. Mother subsequently met with Thomas and understood that she needed to complete a drug treatment program, attend weekly counseling sessions, work with a parent aide, submit UAs, and undergo a psychological evaluation in order to be reunited with Children.

¶10 Mother testified that she started the TERROS drug treatment program in January 2009 but relapsed and allowed the program to remove her so that she could enter a residential treatment facility at Maverick House in July 2009. Mother also testified she did not miss more than two supervised visits during the dependency. However, the court admitted parent aide reports that indicated visits were suspended in May 2009 because Mother was unable to provide snacks to Children during the visits. Furthermore, Mother agreed she had not complied fully with the drug testing requirement of the CPS case plan.

¶11 Mother testified she has been on supervised probation since her release from incarceration in 2005. Mother's probation officer referred her to an Access to Recovery program, which she voluntarily joined in November 2009. Her mentor, Greg B., testified telephonically that he met with Mother weekly for three months and that he believed Mother had been drug-free during the previous three and a half months. Although Greg B. believed Mother was "progressing in her sobriety," he testified that drug testing was not a part of the mentoring program.

¶12 The juvenile court granted the motion to sever Mother's parent-child relationships on all three grounds. The court found that ADES proved each allegation by clear and convincing evidence. The court held that the severance was in Children's best interest because Mother was unable to parent due to her substance abuse problem and because Children would benefit from their permanent living situations in their adoptive placements. Mother timely appealed, and we have jurisdiction pursuant to A.R.S. § 8-235 (2007).

ANALYSIS

¶13 Mother raises two issues on appeal: (1) that the juvenile court erred when it granted severance because ADES did not meet its burden in showing it complied with the law regarding relative placement; and (2) that the court erred when

it failed to continue the trial to allow Mother's probation officer to testify about her participation in services.

¶14 The State argues: (1) we lack jurisdiction regarding placement because Mother did not appeal from any previous placement order; (2) Mother lacks standing to contest placement because a severance has been granted; and (3) the court did not abuse its discretion by denying Mother's request for a continuance because Mother had no good cause for failing to disclose the witnesses, scheduling another day of trial would have been difficult, and Children required permanency. The State further argues that any possible error with respect to the denial of a continuance was harmless because the court allowed one witness to testify telephonically and Mother's testimony about her participation in probation services provided the same information sought from her probation officer.

Placement Issues

¶15 We examine the facts in the light most favorable to sustaining the juvenile court's decision and review the findings of fact in support of the severance for clear error. *E.g.*, *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 449, ¶ 12, 153 P.3d 1074, 1078 (App. 2007); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). The juvenile court's factual findings will be upheld if they are supported by reasonable evidence. *Christy C.*, 214 Ariz.

at 449, ¶ 12, 153 P.3d at 1078. Termination of the parent-child relationship will be upheld if the State proves at least one statutory ground for severance by clear and convincing evidence.⁴
Id.

¶16 We conclude we have jurisdiction to consider Edward G.'s continued placement in licensed foster care because the court consolidated the severance hearing and an evidentiary hearing regarding a motion for change in permanent custody of Edward G. *See Yavapai Cnty. Juv. Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984) ("[A]n aggrieved party may appeal an order issued pursuant to the juvenile court's periodic review of a determination of dependency or of a custodial arrangement, see A.R.S. § 8-515(C), (D)."). We do not have jurisdiction to consider the propriety of earlier placement orders pertaining to Janae K. or Jaymee K. because Mother did not appeal from those orders and did not object to that

⁴ While Mother does not appeal from the merits of the severance order on sufficiency of the evidence, we conclude that the evidence supports the severance order. ADES proved by clear and convincing evidence that Mother is "unable to discharge [her] parental responsibilities because of . . . a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." A.R.S. § 8-533(B)(3). Because sufficient evidence supports the court's decision to terminate Mother's parental rights pursuant to A.R.S. § 8-533(B)(3), we need not examine the other grounds for severance.

placement. *Id.* We will not consider Christopher K.'s placement because Mother withdrew her objection to this placement.

¶17 There is substantial evidence in the record to support the court's decision to maintain Edward G. in his foster care placement rather than award physical custody to the child's paternal step-grandfather, as urged by Mother. Although A.R.S. § 8-514(B) rates placement with a relative above placement in foster care, placement according to the statutory scheme is not mandatory. See *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 405, ¶ 12, 187 P.3d 1115, 1118 (App. 2008). Rather, a placement is appropriate if it is the "least restrictive type of placement available, consistent with the needs of the child." A.R.S. § 8-514(B) (2007). Consequently, a juvenile court has "substantial discretion when placing dependent children because the court's primary consideration in dependency cases is the best interest of the child." *Antonio P.*, 218 Ariz. at 404, ¶ 8, 187 P.3d at 1117.

¶18 Contrary to Mother's argument, there is sufficient evidence supporting the placement of Edward G. Dr. Moe conducted a best interest evaluation for Edward G. and recommended that he remain in the foster home with his three biological sisters, to whom he has a strong attachment because

he has lived with them for most of his life.⁵ Dr. Moe also testified that Edward G.'s foster mother was intent on adopting him and that Edward G. told him that if he could not live with Mother he would like to continue living with his foster mother.

¶19 Dr. Moe's recommendation was partly based on concern about Mother's proposed placement, Edward G.'s paternal step-grandfather George Wilkinson. Dr. Moe testified that Wilkinson's adult son had a criminal and drug history and spent "20 out of 30" days per month in Wilkinson's house. Dr. Moe also testified that Wilkinson's adult daughter lives with him, that she has a criminal history, and that her tendency to yell and scream caused Edward G. to experience anxiety.

¶20 Thomas testified that Edward G. considers his foster mother to be his functional mother and that staying with her is in the child's best interest because she is able to care for him and provide for all of his needs.⁶ In fact, the court admitted

⁵ Thomas explained that Edward G. was initially placed in his current foster home because that placement was willing to accept a sibling group of four and CPS wanted to maintain familial ties.

⁶ In response to why Thomas preferred Edward G.'s current placement as opposed to a placement with Wilkinson, Thomas testified

[w]hen I talk with Eddie and ask him if he enjoys the placement, does he feel safe, are his needs being met, his response is in the affirmative. He also has lived with his sisters all of his life, and they have a very significant bond, and he has also

records that showed Edward G. had experienced academic improvement while in the foster mother's care and was thriving in his environment. Thomas also testified that Wilkinson did not provide him with requested information about his daughter in order for CPS to conduct the requisite background check.

¶21 We conclude there is substantial evidence in the record to support the court's decision to maintain Edward G. in his current adoptive placement.

Denial of Continuance to Allow Probation Officer's Testimony

¶22 Mother requested a continuance on the final day of trial so that Mother's Access to Recovery mentor and probation officer could appear and testify. Counsel for Children and Children's Guardian Ad Litem opposed the continuance because it would prolong the proceedings, and Children desired resolution. The court denied the request because neither witness was disclosed until Mother made the request and because Mother should have anticipated that her participation in services would be an issue at the severance hearing. Although the court was willing to allow the witnesses to testify telephonically that day, Mother's probation officer did not appear.

spoken very kindly and affectionately toward Robert, the foster brother, so the indicators to me [say] that he is thriving in that placement.

¶123 The juvenile court did not abuse its discretion when it declined to continue the trial. Mother disclosed the probation officer as a potential witness late in the proceedings and sought to continue the hearing on the final day of trial. The court weighed the Children’s interest in resolution and permanency against Mother’s interest in presenting the probation officer’s testimony and concluded that Mother could offer the same testimony about her participation in services. Furthermore, even if the juvenile court erred in denying the request for a continuance, the error was not prejudicial because Mother did testify about her participation in probation services.

CONCLUSION

¶124 The evidence supports the order terminating Mother’s parent-child relationships with Children and maintaining Edward G.’s placement. The court did not abuse its discretion when it denied Mother’s request for a continuance and any possible error was harmless. Accordingly, we affirm the order of the juvenile court.

/s/
 DONN KESSLER, Presiding Judge

CONCURRING:

/s/
 DANIEL A. BARKER, Judge

/s/
 JON W. THOMPSON, Judge