

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
FILED: 04/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MEREDITH B., SCOTT B.,) No. 1 CA-JV 11-0144
)
) Appellants,) DEPARTMENT B
)
) v.) MEMORANDUM DECISION
)
) ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
) SECURITY, D.B., S.B.) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
) Appellees.)
)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015JD201000044

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Mohave County Appellate Defender Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant Meredith B.

The Brewer Law Office Show Low
By Benjamin M. Brewer
Attorneys for Appellant Scott B.

Thomas C. Horne, Arizona Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

J O H N S E N, Judge

¶1 Meredith B. ("Mother") and Scott B. ("Father") appeal the superior court's order terminating their parental rights to two of their children. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Father are the unmarried parents of eight children. In 2006, the California juvenile court severed their parental rights to the oldest three children, for reasons including mental illness and/or substance abuse that impeded their ability to parent. Mother and Father then moved to Arizona, and the couple had four more children, including D.B. and S.B. In 2010, the Arizona Department of Economic Security ("ADES") took custody of the four children after an investigation revealed Mother and Father's home was unsanitary, infested by bed bugs and a fire hazard. The children were pale, dirty and appeared to be undernourished. They also had rashes and bed-bug bites on their bodies.

¶3 The court found D.B. and S.B. dependent as to Mother and Father. The children were taken into foster care, and ADES provided the parents with mental health services through Mohave Mental Health, substance-abuse treatment, random drug testing through TASC, parenting classes and supervised visitation with the children. Mother participated in parenting classes, but Father stopped attending classes. Additionally, Mother and Father did not participate in the mental health and substance-

abuse services, and tested positive multiple times for amphetamine and high levels of methamphetamine. Mother and Father participated in supervised visits, but in November 2010, visits were suspended because of the parents' continued drug use, inappropriate behavior during the visits and the children's adverse reactions to visits. After visits were suspended, Mother and Father refused any additional drug testing.

¶4 In January 2011, Mother gave birth to the couple's eighth child, G.B., who was taken into temporary custody by Child Protective Services ("CPS"). ADES filed a petition alleging G.B. was dependent and moved for termination of Mother's and Father's parental rights regarding D.B. and S.B. At the preliminary protective hearing regarding G.B., Mother and Father told the court they wanted to represent themselves in further proceedings. The court allowed assigned counsel to withdraw, but required the parents to submit to a drug test before it would find that their waiver of counsel was knowing, intelligent and voluntary. After the parents each provided a clean drug test and the court questioned them about their decision, the court found that Mother and Father had knowingly, intelligently and voluntarily waived counsel in the matter of G.B.

¶5 Less than two weeks later, at the initial termination hearing regarding D.B. and S.B., Mother and Father told the

court they wanted to represent themselves in further proceedings. After extensive dialogue between the court and the parents regarding the rules and responsibilities of representing themselves, the court found that Mother and Father had voluntarily waived counsel. The court consolidated the dependency action of G.B. and the termination action of D.B. and S.B.

¶6 The court held a five-day trial on the dependency and termination action. Mother and Father filed a list of exhibits and witnesses, but failed to serve the list on ADES; they also failed to subpoena any witnesses prior to trial. On the second day of trial, Father revealed that he had not subpoenaed any witnesses and suggested the trial would have to be continued in order for him to do so. The court denied a continuance. By the third day of trial (more than a month later) Mother and Father had become incarcerated. Accordingly, they requested the court appoint counsel and grant them a continuance. The court appointed independent advisory counsel for Mother and Father and set a status conference. At the status conference, Mother requested that her advisory counsel represent her at trial; the court granted her request. Father's advisory counsel asked for time to prepare for trial, so the court continued the matter for seven weeks. Counsel were granted access to their clients' trial materials, which were being held in the court security

office while Mother and Father were incarcerated, and ADES provided counsel with an electronic copy of its disclosure.

¶17 On the fourth day of trial, Father requested that his advisory counsel be appointed to represent him; the court granted this request. The following day, the final day of trial, Father's counsel requested a continuance, asserting that 300 pages of Mohave Mental Health documents were missing from the disclosure she received from ADES. Counsel also contended that, because of these missing pages, she needed additional time to subpoena Mohave Mental Health employees and CPS case managers. The court denied the request, stating that even if the electronic disclosure was missing pages, Mother and Father had received hard copies of all disclosure materials and counsel had been granted access to those materials. Furthermore, the court stated it did not believe "the offers of proof [regarding witnesses counsel would subpoena] are of such significance that what doesn't already exist in this file would be significantly changed."

¶18 At the conclusion of the trial, the court found by clear and convincing evidence that termination of Mother's and Father's parental rights regarding D.B. and S.B. was appropriate under Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(2),

(B)(3), (B)(8)(a) and (B)(8)(b) (West 2012).¹ The court also found that although ADES made diligent efforts to provide appropriate reunification services, Father and Mother failed to participate in such services and failed to remedy the circumstances that caused the children to be placed out of the home. Lastly, the court found by a preponderance of the evidence that termination was in the best interests of the children.²

¶9 Father and Mother timely appealed the order of termination for D.B. and S.B. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and pursuant to A.R.S. § 8-235 (West 2012).

DISCUSSION

¶10 Mother and Father argue the superior court abused its discretion by allowing them to proceed in propria persona. Father additionally maintains that the superior court abused its discretion by denying his motion to continue and by not allowing him to cross-examine certain witnesses. Mother separately

¹ Absent material revision after the date of the events at issue, we cite a statute's current version.

² The court also found G.B. dependent as to Mother and Father. That ruling is not at issue in this appeal.

contends that there was insufficient evidence to support termination on any of the enumerated statutory grounds.³

A. The Superior Court Did Not Abuse Its Discretion by Allowing Mother and Father to Represent Themselves.

¶11 Mother and Father argue that the court violated their due process rights when it allowed them to waive their right to counsel and represent themselves during the first three days of trial. Under A.R.S. § 8-221(B) (West 2012), "If a juvenile, parent or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons unless counsel for the juvenile is waived by both the juvenile and the parent or guardian." A parent has a due-process right to counsel in a severance proceeding. *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 282-83, ¶ 14, 237 P.3d 632, 635-36 (App. 2010). A parent can waive this right if the waiver is voluntary, knowing and intelligent. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 211, ¶ 20, 181 P.3d 1126, 1132 (App. 2008). Before finding that a parent has waived his or her right to counsel, the court must advise the parent of "the dangers of self-representation, and the difficulties involved in [representing] oneself without formal legal training." *Daniel Y. v. Ariz. Dep't of Econ. Sec.*,

³ Father does not contest the statutory grounds for termination.

206 Ariz. 257, 261, ¶ 15, 77 P.3d 55, 59 (App. 2003) (quotation omitted).

¶12 The superior court in this case took great pains to advise Mother and Father of the risks and complexity of self-representation. At the time Mother and Father expressed their desire to waive counsel, each already had changed lawyers once due to conflicts with assigned counsel. Before allowing them to waive their right to counsel, the court ensured that both parents had passed drug tests and were not under the influence of any substances.

¶13 In the matter of G.B., the court questioned Mother and Father regarding their willingness and ability to comply with discovery and disclosure requirements, question and cross-examine witnesses and be held to the standard of a practicing attorney. When asked, "And you understand that the Court nor any other party may not assist you as to any issue that you bring up, and that if you are, for instance, doing it 'wrong,' that you may not find any relief?", Father answered, "I understand that." The court found that both Mother and Father knowingly, intelligently and voluntarily waived their right to counsel in the matter of G.B.

¶14 In a hearing in the matter of D.B. and S.B. a few days later, the court reminded Mother and Father that they still had representation assigned for those proceedings. When the parents

said they wanted to waive counsel in that matter as well, the court once again warned them of disclosure requirements and questioned them regarding the voluntariness of their decisions. The court also took time to explain that if they later determined that they *did* want representation, they would need to make such a request in a timely manner because the court would be reluctant to grant a last-minute continuance. In both matters, the court properly and adequately questioned and informed Mother and Father of the dangers and difficulties of self-representation. Accordingly, the court's decision to accept Mother and Father's waiver of counsel did not violate either party's due process rights.

¶15 Mother also argues that because she suffered from mental health issues, the court should have appointed a guardian ad litem ("GAL") to represent her before granting her request to waive counsel. "On the motion of any party or on its own motion, the court shall appoint a guardian ad litem if it determines that there are reasonable grounds to believe that a party to the proceeding is mentally incompetent or is otherwise in need of a guardian ad litem." A.R.S. § 8-535(F) (West 2012). While Mother has a history of mental health problems, mental illness does not mean mental incompetence. *Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, 21-22, ¶¶ 25-28, 137 P.3d 973, 977-78 (App. 2006) ("the essential question in deciding if

reasonable grounds exist to believe a parent is mentally incompetent is whether the parent is unable to understand the nature and object of the proceedings or assist in his or her defense"). Mother's behavior and testimony at trial demonstrated she was aware of the nature and object of the proceedings. Accordingly, the court did not err by failing to sua sponte appoint a GAL to represent Mother.

B. The Superior Court Did Not Abuse Its Discretion by Denying Father's Motion to Continue.

¶16 Father next argues that the court prevented him from presenting a proper case when it denied his motion to continue on the final day of trial. Father contends that the denial precluded him from calling appropriate witnesses and from effectively cross-examining the witnesses who did testify.

¶17 Father filed a witness list on March 11, 2011 but did not subpoena any witnesses prior to trial. Although Father was incarcerated in May 2011, he then had the assistance of advisory counsel to subpoena any witnesses he wished to appear at trial. By the final day of trial, June 29, 2011, neither Father nor his counsel had attempted to subpoena any of the witnesses on Father's list. Father argues his counsel discovered she was missing Mohave Mental Health documents disclosed by the State, and that the court erred by not granting a continuance so that counsel could obtain these documents, review them and subpoena

necessary witnesses.⁴ The documents were records of D.B., S.B. and G.B.'s treatment and progress after removal.

¶18 "Motions to continue are addressed to the sound discretion of the trial court and its decision will not be reversed absent a clear abuse of discretion." *Yavapai County Juv. Action No. J-9365*, 157 Ariz. 497, 499, 759 P.2d 643, 645 (App. 1988) *holding modified on other grounds by Maricopa County Juv. Action No. JS-7499*, 163 Ariz. 153, 786 P.2d 1004 (App. 1989). The denial of a motion to continue will not be reversed on appeal without a showing of prejudice. *State v. Mauro*, 159 Ariz. 186, 200, 766 P.2d 59, 73 (1988). Father argues generally that the denial of his motion to continue prejudiced him, but fails to identify *how* he was prejudiced. He does not state what additional witnesses would have testified, had they been subpoenaed to trial, how their testimony would have changed the evidence before the court or what evidence additional cross-examination would have been elicited. As a result, the superior court did not abuse its discretion in denying Father's motion to continue.

⁴ Father does not contend that he did not receive these documents, and there is no evidence that the documents were not disclosed to him.

C. The Superior Court Did Not Abuse Its Discretion by Limiting Father's Cross-Examination of Witnesses.

¶19 Father also argues the court prevented him from cross-examining witnesses in violation of Arizona Rules of Procedure for the Juvenile Court 65(C)(5). Parents have a fundamental interest in the custody and care of their children; accordingly, they have the right to participate in severance proceedings, including the right to cross-examine witnesses. *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 306, ¶ 24, 173 P.3d 463, 470 (App. 2007). Despite his argument, however, the record shows that the superior court did not preclude Father from cross-examining any of the witnesses. The court did limit cross-examination based on relevance and in order to keep questions within the bounds of matters raised on direct examination. Such limitation was within the court's sound discretion, and the court did not err by imposing these limits. See *State v. Navarro*, 132 Ariz. 340, 342, 645 P.2d 1254, 1256 (App. 1982).

D. Sufficient Evidence Existed to Support Termination of Mother's Parental Rights Under A.R.S. § 8-533(B)(8)(a) and (b).

¶20 Mother argues there was insufficient evidence to support termination of her parental rights on any of the statutory grounds enumerated by the court. In order to sever parental rights, the superior court must find at least one of

the statutory grounds in A.R.S. § 8-533(B) by clear and convincing evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). When the superior court terminates parental rights based on more than one statutory ground, we may affirm if clear and convincing evidence supports any of the grounds. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3, 53 P.3d 203, 205 (App. 2002). The superior court also must find by a preponderance of the evidence that termination is in the best interests of the child. A.R.S. § 8-533(B); *Kent K.*, 210 Ariz. at 284, ¶ 22, 110 P.3d at 1018.

¶21 As the superior court is in the best position to weigh the evidence, we will accept its findings of fact "unless no reasonable evidence supports those findings," and will affirm its order terminating parental rights "unless it is clearly erroneous." *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205.

¶22 Under § 8-533(B)(8), the court may terminate a parent-child relationship when it finds by clear and convincing evidence:

That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services 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 . . . 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.

(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.

¶23 Mother does not dispute that by the date of the termination order, the children had been in an out-of-home placement for more than nine months. She contends, however, that ADES failed to make a diligent effort to provide appropriate reunification services. Though "futile efforts are not required, ADES must 'undertake measures with a reasonable prospect of success' in reuniting the family." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 94, ¶ 20, 219 P.3d 296, 304 (App. 2009) (quoting *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 34, 971 P.2d 1046, 1053 (App. 1999)).

¶24 Substantial evidence supported the superior court's finding that ADES made diligent efforts to reunite Mother with the children. Parental visitations with Father and Mother were stopped only because of inappropriate behavior by Father,

continued drug use by both parents and the intense negative reactions of the children. ADES is not required to grant a parent visitation when it adversely affects the child. *Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 375-76, 873 P.2d 710, 713-14 (App. 1994).

¶25 In addition to visitation, ADES provided Mother and Father with mental health services, substance-abuse treatment, random drug testing and parenting classes. Although Mother participated in parenting classes, she did not participate in the mental health and substance-abuse services, and she tested positive multiple times for amphetamine and high levels of methamphetamine. At trial, Mother testified that she had never used methamphetamine, and that all of her positive drug tests were the result of over-the-counter allergy medication.

¶26 The court found by clear and convincing evidence that Mother and Father "have substantially neglected or willfully refused to remedy the circumstances that cause the children to be in an out-of-home placement including, but not limited to, the refusal to participate in reunification services offered by the Department." Mother's testimony that if the children were returned to her, she and Father would parent them the "[s]ame way [they] always have" is just one component of the strong evidence in the record that supports the court's conclusion.

¶127 The superior court further found by a preponderance of the evidence that reunification "would be a detriment to the children because the parents have a chronic history of substance abuse and mental illness, continue to abuse methamphetamine, do not recognize the children's significant developmental delays, and lack mental stability, thus depriving the children of permanency in a safe, stable, and drug-free home." The evidence supports that finding and the court's conclusion that termination of the children's relationship with Mother is in their best interests.

CONCLUSION

¶128 For the foregoing reasons, we affirm the superior court's order terminating Mother's and Father's parental rights to the two children.⁵

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Chief Judge

/s/
PETER B. SWANN, Judge

⁵ The caption in this appeal is amended to refer to the children by their initials.