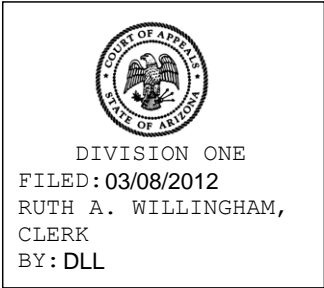


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TAMMY P.,) No. 1 CA-JV 11-0165
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, BLAISE P.,) 103(G) Ariz.R.P. Juv. Ct.;
) Rule 28 ARCAP
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD15770

The Honorable Colleen McNally, Judge

AFFIRMED

David W. Bell
Attorney for Appellant

Mesa

Thomas C. Horne, Attorney General
By Carol A. Salvati, Assistant Attorney General
Attorney for Arizona Department of Economic Security

Phoenix

G E M M I L L, Judge

¶1 Tammy P. ("Mother") appeals the juvenile court's termination of her parental rights as to her daughter, Blaise.¹

¹ In its order, the juvenile court also terminated the parental rights of the putative father, Travis M. He did not contest the severance, and he is not a party to this appeal.

For the following reasons, we affirm.

BACKGROUND

¶12 In its minute entry ordering termination of Mother's parental rights, the juvenile court issued findings of fact. We review the evidence and draw all reasonable inferences in the light most favorable to upholding these findings. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7, 225 P.3d 604, 606 (App. 2010).

¶13 At the time of Blaise's birth on April 5, 2010, Mother was incarcerated under an indictment charging her with aggravated taking the identity of another (a class three felony) and possession of drug paraphernalia (a class six felony). Blaise's birth was premature, and she suffered from heart defects, a ruptured eardrum, and speech delays. She originally came under the care of the Arizona Department of Economic Security ("ADES") due to Mother's incarceration and return to jail following her birth. On May 14, 2010, Mother pled guilty to both offenses and was sentenced to time served as well as a three-year term of probation. Upon her release from jail, Mother sporadically visited Blaise in the hospital on a supervised basis. Blaise was released from the hospital into ADES's care on July 7, 2010. On July 16, 2010, the juvenile court entered an order continuing ADES's temporary custody. In an order dated December 2, 2010, the juvenile court found Blaise

dependent and ordered ADES to provide Mother with reunification services. However, on February 3, 2011, the juvenile court changed Blaise's permanent plan to severance and adoption. ADES subsequently filed a motion to terminate the parent-child relationship on February 11, 2011.

¶4 Following a contested severance hearing, on August 16, 2011, the juvenile court found by clear and convincing evidence that Mother had substantially neglected to remedy the circumstances that caused Blaise (a child under three years old) to be cared for in an out-of-home placement for longer than six months. The court further concluded by a preponderance of the evidence that the termination of Mother's parental rights would be in the child's best interest. Accordingly, the court granted ADES's motion to terminate and severed the parent-child relationship.

¶5 Mother timely filed the instant appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235 (2007) and 12-120.21 (2003).

ANALYSIS

¶6 Mother raises two issues on appeal. First, she argues that the record does not reflect clear and convincing evidence sufficient to support the juvenile court's termination of her parental rights. Second, she contends that the State failed to make diligent efforts to provide her with appropriate services

to ensure a reasonable opportunity of reunification.

A. There Is Sufficient Evidence in the Record to Support the Juvenile Court's Termination of Mother's Parental Rights

¶17 An order terminating parental rights must be supported by clear and convincing evidence showing at least one statutory ground for severance and by a preponderance of the evidence indicating that severance is in the child's best interest. A.R.S. § 8-533(B) (Supp. 2011); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We do not reweigh the evidence on review of the juvenile court's findings, and we view the facts in a light most favorable to affirming the court's order. *Maricopa Cnty. Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12, 53 P.3d 203, 207 (App. 2002). In addition, "[w]e will not disturb the juvenile court's order severing parental rights unless [the court's] factual findings are clearly erroneous, that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶18 ADES's sole statutory basis for termination² was A.R.S.

² Shortly before the start of the contested severance hearing, ADES moved to amend its motion to terminate the parent-child relationship to include additional statutory grounds for termination. The juvenile court reasoned that granting the motion to amend would be prejudicial to the Mother absent a

§ 8-533(B)(8)(b). This section provides that severance of parental rights may be based on a determination that

[t]he 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 *willfully 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 [ADES].

Id. (emphasis added). It is undisputed that Blaise is under three years of age and that she has spent greater than six months' time in care. The sole element at issue – that of scienter – is phrased in the disjunctive, and the juvenile court found only that Mother “substantially neglected” to remedy the circumstances giving rise to Blaise’s out-of-home placement. Our appellate review is limited to determining whether the record reflects sufficient evidence for the trial court to have found that Mother “substantially neglected . . . to remedy the circumstances that cause[d] the child to be in an out-of-home

continuance. To protect the best interests of the child, the court decided to proceed without further delay, denying ADES’s motion to amend. Though ADES presented evidence at trial that might have supported additional grounds for termination, the court “considered that evidence only as it pertained to the Mother’s long history of demonstrated mental health and substance abuse problems, her instability in housing and employment, and her failure to remedy those circumstances despite repeated interventions.” No party on appeal argues that the juvenile court erred in taking that position regarding such evidence.

placement." *Id.*

¶9 During Blaise's dependency, ADES offered Mother services including psychological consultation and evaluation, Treatment Assessment Screening Center ("TASC") drug testing, TERROS substance abuse assessment and treatment, supervised visitation, transportation, and a bonding assessment. Mother failed to disclose to TERROS that she had had previous issues with drug and alcohol abuse, so TERROS did not recommend substance abuse treatment. One urinalysis test was positive for alcohol, despite a necessary behavioral change to regain custody of Blaise – as well as a condition of Mother's probation – requiring that she not drink alcohol. While one five-panel hair follicle test came back negative, Mother never completed any further TASC testing requested by ADES, including a ten-panel hair follicle test.

¶10 At trial, psychologist Dr. Kathryn Menendez testified that she conducted a formal psychological evaluation of Mother in December 2010. In this evaluation, Dr. Menendez conducted various psychological "paper-pencil" tests and behavioral surveys. Dr. Menendez concluded that Mother likely possessed drug use, trauma, and self-medication problems, antisocial traits, and cyclothymic disorder (characterized by mood shifts "from a depressed state to a hyperactive, hyper energetic state"). She further opined, based on information that Mother

fell asleep during one supervised visit with Blaise, that Mother's behavior was highly unusual and likely reflected "almost like a passive-aggressive way of not using that time or showing that [she] can counter-control that amount of time" considering "that sleeping through a visit is certainly not going to assist [Mother] in [her] goal of reunification."

¶11 Dr. Menendez determined that Mother had not taken necessary steps to remedy her substance abuse and mental health issues, and she testified that Mother had substantially neglected to do so. When asked whether Blaise would be subject to abuse or neglect if returned to Mother at the time of trial, Dr. Menendez said she "would not recommend the placement on the basis of the high degree of instability." She further testified that

the conditions that were of concern with or without the mental illness when the child was brought into care do not appear to be different. . . . We did - had hopes that those conditions would change and provided recommendations to facilitate that. And it does not appear that that was successful.

¶12 The report prepared by Dr. Menendez, accepted into evidence, corroborates the testimony given at trial. In noting "a lack of full disclosure by the client," Dr. Menendez referred Mother to doctoral-level individual counseling where she could "develop a therapeutic relationship" and "become more trusting and engaging with the therapist." The report substantiated Dr.

Menendez's trial testimony regarding Mother's potential cyclothymic disorder, antisocial traits, substance abuse history, self-medication, and past traumatization. Dr. Menendez recommended that Mother participate in doctoral-level psychotherapy, TERROS substance abuse treatment, continued urinalysis screening, and a bonding/best interests assessment with regard to Blaise. She finally noted that Mother needed time in which to establish stability in her housing and employment situation.

¶13 ADES arranged for doctoral-level psychological therapy with Dr. Celice Korsten in Tempe. Dr. Korsten's office was located at a considerable distance from Mother's residence in Sun City; however, ADES case manager Heather O'Brien testified at trial that ADES provided Mother with transportation to and from the office, which Mother simply failed to use. Despite this transportation, the existence and availability of which the juvenile court found credible, Mother only attended the initial intake session and never returned for therapy.³

¶14 Mother's second intake at TERROS resulted, as did the first, in no recommendation for substance abuse treatment. Ms. O'Brien testified that, based on Mother's history, this was not

³ See *infra* Analysis section B for further discussion of transportation to and from Dr. Korsten's office, as Mother has raised this issue as a separate basis for reversal of the juvenile court's severance order.

an appropriate recommendation and that Mother may not have been sufficiently forthcoming about the true extent of her previous drug use during this intake session.

¶15 Pursuant to Dr. Menendez's recommendation, Mother did participate in a bonding/best interests assessment with Blaise conducted by Dr. Glenn Moe. Dr. Moe reported favorably on Mother's interactions with her child during the assessment. However, Dr. Moe was concerned by Mother's appearance as disorganized and impulsive, and particularly by Mother's lack of motivation to seek help to remedy her unresolved emotional and personality issues. Based upon Mother's demonstrated antisocial personality and apparent lack of desire to improve her circumstances, Dr. Moe concluded that a case plan of severance and adoption by the existing foster family would be in Blaise's best interests.

¶16 Starting in March 2011, Mother attended visitation sessions with Blaise under the supervision of parent aide Donna Farris. Ms. Farris testified at trial that at one meeting she noticed that Mother had prominent sores on her body, making her concerned about Mother's health and wellbeing. Mother appeared not to want to seek medical attention despite Ms. Farris's entreaties that Mother needed a medical clearance before continuing with visitations with Blaise. Further, Ms. Farris described Mother as either lethargic (to the point of having

fallen asleep on the floor during one supervised visit with Blaise) or over-energetic (for example, by speaking rapidly like an auctioneer). Ms. Farris additionally testified that, during a June 1, 2011, one-to-one meeting, Mother told her she was "working for a friend at the Swap Meet helping . . . friends sell jewelry." It was Ms. Farris's view that the on-call nature of the job meant that it was not stable. Ms. Farris also testified that Mother did not have a stable housing situation.

¶17 The monthly parent-aide reports, admitted as evidence, reflect Mother's at best sporadic attendance at visits with Ms. Farris as well as those with the prior parent aide, Tammy Mitchell. From August through November of 2010, Mother attended three out of thirteen scheduled visitations and four out of fourteen scheduled one-to-one visits. From March through June of 2011, Mother attended four out of fifteen scheduled visitations and seven out of fourteen scheduled one-to-one visits.⁴ Mother's last supervised visit with Blaise was on May 6, 2011. Since June 2011, Ms. Farris has not been in regular contact with Mother due to Mother's phone being out of service. Ms. Farris testified that Mother told her that "whenever [ADES]

⁴ The record reflects that a few of these events – potentially three or four for both periods combined – were either holidays or were cancelled by the parent aide, and therefore should not be counted as a no-show by Mother. Nonetheless, the record reveals that Mother was responsible for not attending a majority of the scheduled visits.

calls, [Mother's phone] doesn't ring," a comment that Mother later testified was mere sarcasm.

¶18 Heather O'Brien, the case manager, testified at trial that ADES had provided reunification services including a TERROS referral, urinalysis screening, support of a parent aide, psychological consultation, doctoral-level psychological therapy, and transportation. She informed Mother of the steps and behavioral changes she was expected to make in order to regain custody of Blaise:

[Mother] was expected to remain sober from all substances, to bond with her child, to go to the parent aide meetings and demonstrate that she's learning from the one-on-one sessions, to attend to her mental health by following through with the recommendations, to have stable housing and stable employment that would remedy the circumstance of unstable housing and unstable employment.

Ms. O'Brien opined that Mother did not sufficiently rectify her behavior and circumstances and, indeed, substantially neglected to do so. Mother's housing situation was continually unstable, with Mother living "in eight or nine different places since Blaise has been in care" and only having lived in her newest residence (at the time of trial) for two weeks. Additionally, in Ms. O'Brien's view, Mother had failed to obtain stable employment, as a two-month-long, part-time job did not qualify as stable. Ms. O'Brien further testified that Mother's history

of substance abuse "would place Blaise at risk if she was returned to her care." Mother had not shown an interest in learning about her daughter's health issues, did not attend any of Blaise's medical appointments, and was not "equipped to meet Blaise's special needs." Ms. O'Brien concluded that Blaise would face a risk of neglect if returned to Mother and that it would be more beneficial to Blaise to have Mother's parental rights terminated.

¶19 The record as a whole indicates that Mother was aware of, and ultimately failed to comply with, ADES's reunification plan by failing to remain sober, regularly attend her scheduled visitations and one-on-one visits with the parent aide, attend psychotherapy sessions, and procure stable housing and employment. We therefore conclude that the evidence is sufficient to support the juvenile court's finding by clear and convincing evidence that Mother substantially neglected to remedy the circumstances giving rise to Blaise's out-of-home placement.

B. The Juvenile Court Did Not Err in Determining that ADES Made Diligent Efforts to Provide Mother with Services to Ensure a Reasonable Opportunity of Reunification

¶20 In addition to proving that the statutory grounds for termination exist and that the termination is in the child's best interest, ADES must also "prove by clear and convincing evidence that it had made a reasonable effort to provide

[Mother] with rehabilitative services or that such an effort would be futile." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 193, ¶ 42, 971 P.2d 1046, 1054 (App. 1999); see also A.R.S. § 8-533(D) (Supp. 2011) ("In considering the grounds for termination . . . the court shall consider the availability of reunification services to the parent and the participation of the parent in these services."). In its minute entry ordering termination, the juvenile court found that ADES made diligent efforts to provide Mother with reunification services. We will not disturb this determination absent clear error. See *Audra T.*, 194 Ariz. at 377, ¶ 2, 982 P.2d at 1291.

¶21 The sole issue Mother raises with regard to ADES's efforts to provide reunification services surrounds the doctoral-level counseling. Indeed, Mother admits that "the State made appropriate efforts in other facets of the case." Mother argues that Dr. Korsten's office was located approximately fifty miles from her residence and that her request to ADES for a doctoral-level counselor closer to her home was unfulfilled. Therefore, she argues, since the counseling was of critical importance to her reunification with Blaise, and since ADES did not make this service more conveniently available to her, ADES failed to make diligent efforts to provide reunification services.

¶122 A roundtrip of approximately one hundred miles⁵ is a considerable distance to travel for regular counseling sessions. However, the juvenile court found that "there was credible testimony presented that taxicab transportation was provided to Mother." Indeed, after noting that "PhD level counselors are kind of harder to come by than regular master's level counseling," Ms. O'Brien testified that she arranged transportation to pick Mother up from, and after the appointment, return Mother to, her grandmother's residence (which was Mother's known address at the time). Further, Dr. Menendez testified as to her belief that there were likely fewer than ten doctoral-level counselors contracted to perform services for ADES, and that ADES's provision of transportation would be a reasonable accommodation.

¶123 Mother's testimony that she "feel[s] that [ADES] did not help [her] at all" and that the taxicabs did not always show up to her home may or may not be true. But the juvenile court was under no obligation to accept Mother's version of the story when there was evidence on the record that ADES had taken steps to provide transportation. We cannot say that it was clearly erroneous for the juvenile court to have found ADES's version of the taxi services provided to be more accurate than Mother's

⁵ Ms. O'Brien puts the number closer to eighty miles, but this does not materially alter our analysis here. Either way, there is a substantial distance involved.

version. The juvenile court was within its power to conclude that ADES supplied taxi services and that Mother was not candid when she asserted otherwise.

¶24 For these reasons, the juvenile court did not err in concluding that the provision of transportation mitigated Mother's burden to travel long distances to psychotherapy sessions, and, consequently, that ADES made sufficiently diligent efforts to provide reunification services.

CONCLUSION

¶25 There is sufficient evidence on the record to support the juvenile court's factual findings and its order to terminate the parent-child relationship based on those findings. We also conclude that it was not erroneous for the juvenile court to have found that ADES made sufficiently diligent efforts in providing reunification services. We therefore affirm the severance of Mother's parental rights as to her biological daughter, Blaise.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge